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Strasbourg Observers

Kurski v. Poland: Ordering politician to publish apology for defaming Polish newspaper violated Article 10

🕒 July 14, 2016 👤 Ronan Ó Fathaigh 📁 Freedom of Expression, *Kurski v. Poland*
By Ronan Ó Fathaigh

The European Court's Fourth Section has held that a successful civil action by a newspaper against a Polish politician for alleging the newspaper had an "agreement" with an oil corporation to finance the newspaper's "mass propaganda" against his political party, violated the politician's freedom of expression. The opinion in *Kurski v. Poland* (<http://hudoc.echr.coe.int/eng?i=001-164462>) dealt with the unusual, but not (<http://hudoc.echr.coe.int/eng?i=001-158467>) rare, situation when a newspaper launches defamation proceedings against a politician for damaging its reputation, and the broader issue of ordering publication of apologies.

Facts and judgment

The controversy began in May 2006, when Jacek Kurski, a Polish MP, and then member of the Law and Justice party, participated in a live television debate on the talk show *Warto rozmawiać*. During the debate, Kurski produced a copy of the Polish newspaper *Gazeta Wyborcza*, and complained about the newspaper's "frenzied attack on Law and Justice." He mentioned an article that was "full of lies," and two other articles that were "just obsessive propaganda." He then pointed to an advertisement for a large oil company, which "does not need any advertising," and it was "not about an advertisement," but was about "financing mass propaganda against Law and Justice through an agreement which has been threatened by Law and Justice."

A week after the broadcast, the newspaper's publisher launched a civil action against Kurski for damaging its reputation (under article 23 of the Polish civil code), and sought an apology and payment to charity. One year later, a Warsaw regional court upheld the newspaper's claim, holding that the politician had alleged that "*Gazeta Wyborcza* had had some kind of media/business agreement, whereby articles against Law and Justice had been published in *Gazeta Wyborcza* and financed via advertisements," and that "an accusation that a newspaper had published articles ordered by a sponsor was clearly offensive to the publisher." The regional court ordered the politician to issue an apology in the newspaper and on a broadcaster, pay 2,500 euro to a charity, and 600 euro in costs.

The case reached Poland's supreme court in 2009, which rejected the appeal. The court held that alleging "suspicious links between *Gazeta Wyborcza* and the publisher of the advertisement and the creation of fictional reasons for receiving funds from that publisher, which was all aimed at allowing

Gazeta Wyborcza to oppose Law and Justice” was more than a “simple opinion,” but a “statement of fact,” which Kurski had failed to prove. Following the supreme court’s ruling, the politician refused to comply with the order to publish an apology, and in 2010, a Warsaw district court allowed the newspaper’s publisher to publish the apology in the politician’s name, and ordered him to cover costs of publication (8,700 euro).

Kurski made an application to the European Court, claiming a violation of his Article 10 right to freedom of expression. The Court first noted that Kurski had suggested during the television debate “that the newspaper, together with a company importing crude oil, J&S S.A., were in some kind of business agreement, and that the company financed articles that were critical of the Law and Justice party.” The Court admitted that the allegations were “quite serious” for *Gazeta Wyborcza*, but “they were made against a newspaper” which had been “actively involved in a public debate.” In this regard, the Court held that “journalists and publicists like other persons actively involved in public life should display a greater degree of tolerance for criticism against them,” and “the limits of permissible criticism are much wider with regard to newspapers than in relation to a private citizen.”

The Court then turned to the Polish courts’ determination that Kurski’s statements had “included both statements of fact and value judgments,” and that he had “failed to prove the veracity of his assertions.” However, the Court stated that it was “not called upon to judge whether the applicant relied on sufficiently accurate and consistent information. Nor will it decide whether the nature and degree of the allegations he made were justified by the factual basis on which he relied.” According to the Court, that “was the task of the domestic courts,” but in “deciding such issues domestic courts should observe the standards of freedom of expression enshrined in the Convention.”

Nonetheless, the Court then held that Kurski “was clearly involved in a public debate on an important issue,” and “therefore,” the Court “is unable to accept the domestic courts’ view that the applicant was required to prove the veracity of his allegations.” The Court said “it was not justified, in the light of the Court’s case-law and in the circumstances of the case, to require the applicant to fulfil a more demanding standard than that of due diligence.” The domestic courts’ approach “effectively deprived the applicant of the protection afforded by Article 10.”

Finally, the Court examined the sanctions imposed on Kurski, and held they were “excessive” because publication of an apology “entailed considerable costs for the applicant” as the “combined total came to about eighteen times the average monthly wage” in Poland. The Court concluded that the Polish courts failed to strike a “fair balance” between the publisher’s rights and Kurski’s freedom of expression, thus resulting in a violation of Article 10. The Court awarded Kurski 12,000 euro in pecuniary damages (while Judge Egidijus Kūris alone would have made a further award for non-pecuniary damages).

Comment

From a freedom of expression perspective, and for those seeking a broader freedom to criticise public officials and public figures, this is a welcome judgment. It is always disappointing to see public figures, including newspapers and journalists, launch defamation proceedings over expression on matters of public interest. It can be argued that when the press is successful in punishing a public official for alleging a newspaper is being bankrolled by a corporation, it creates the risk that in the future a newspaper will be similarly punished for alleging a public official is being bankrolled by a corporation. In both instances, freedom of expression is curtailed. But thanks to the *Kurski* opinion, such expression on matters of public interest now has greater protection under Article 10.

Second, while the Court raises no objection in principle to ordering the publication of apologies, the Court does engage in an assessment of the financial cost in having to comply with such an order, relative to the average wage in Poland (similar to *Kasabova v. Bulgaria* (<http://hudoc.echr.coe.int>

[/eng?i=001-104539](#)), and defamation trial costs imposed on a journalist). While Kurski's actual wage as an elected official was not referred to by the Court (in contrast to *Kasabova*), this type of Article 10 analysis should at least provide protection to small newspapers, journalists, and campaign groups from the chill of being ordered to publish apologies at great expense relative to their finances.

But there is a curious feature to the *Kurski* judgment. The central aspect of the Polish courts' decision seems to have been that the allegation of an "agreement" between the oil company and the newspaper was an allegation which had to be proven. The supreme court said requiring the applicant to prove such a statement had not been excessive. Indeed the supreme court explicitly relied upon the Court's *Feldek v. Slovakia* (<http://hudoc.echr.coe.int/eng?i=001-59588>) judgment, as authority for the proposition that where "a statement amounted to a value judgment, the proportionality of the interference may depend on whether there existed a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."

The Court seemed to side-step this issue, and stated that it was "not called upon to judge whether the applicant relied on sufficiently accurate and consistent information," as this was "the task of the domestic courts." Curiously though, the Court then goes on to state that it did not accept the domestic courts' view that Kurski "was required to prove the veracity of his allegations," as it was "not justified, in light of the Court's case law" to require Kurski "to fulfil a more demanding standard than that of due diligence." However, the Court does not cite the specific "case law" it has in mind, nor does it expand upon this concept of "due diligence," which was not argued by the parties. It might have been more consistent to have instead applied the "slim factual basis" principle, which holds that expression targeting public officials or figures on a matter on public interest only requires a "slim factual basis" (see *Arbeiter v. Austria* (<http://hudoc.echr.coe.int/eng?i=001-79245>) and *Dichand v. Austria* (<http://hudoc.echr.coe.int/eng?i=001-60171>)).