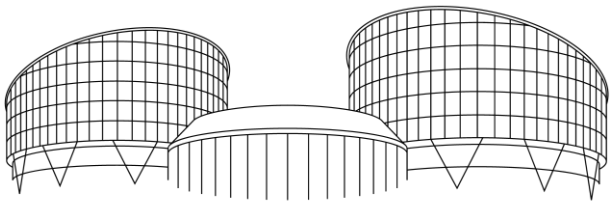

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF WEGRZYNOWSKI AND SMOLCZEWSKI v. POLAND

(Application no. 33846/07)

JUDGMENT

STRASBOURG

16 July 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Węgrzynowski and Smolczewski v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Krzysztof Wojtyczek, *judges,*
and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 25 June 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 33846/07) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Polish nationals, Mr Szymon Węgrzynowski and Mr Tadeusz Smolczewski ("the applicants"), on 7 August 2007.

2. The applicants were represented by Mr M. Lach, a lawyer practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, succeeded by Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

3. The applicants alleged that their rights to respect for their private life and reputation had been breached.

4. On 15 November 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants live in Katowice.

6. On 8 May 2002 the Warsaw Regional Court allowed the applicants' claim under Articles 23 and 24 of the Civil Code for the protection of personal rights. The court found that B.K. and A.M., journalists working for the national daily newspaper *Rzeczpospolita*, had published an article about

a number of politicians. The journalists had alleged that the applicants, who were lawyers, had made a fortune over the years by assisting in shady business deals in which these politicians were involved. The journalists had alleged that the applicants had taken advantage of their positions at the expense of the public purse by obtaining unjustified benefits from the manner in which they had carried out their professional roles as liquidators of State-owned companies in bankruptcy.

7. The court observed that the journalists had failed to contact the applicants and that their allegations were, to a large extent, based on gossip and hearsay. It noted that journalists had a right and an obligation to inform society about important issues and that they enjoyed freedom of expression, guaranteed by the Constitution. However, the authors of the article had failed to take the minimum steps necessary in order to verify the information contained in the article by at least getting in touch with the applicants and trying to obtain their comments. The allegations had not been shown to have had a plausible factual basis. The journalists had smeared the applicants' good name and reputation. The court allowed the applicants' claim in its entirety, by ordering the journalists and the editor-in-chief to pay, jointly, PLN 30,000 to a charity and to publish an apology in the newspaper.

8. The defendants appealed. On 24 April 2003 the Warsaw Court of Appeal dismissed their appeal, endorsing the findings of fact and the reasoning of the first-instance court. The obligations imposed by the courts were subsequently complied with by the defendant newspaper.

9. On 7 July 2004 the applicants sued again the newspaper under the same provisions of the Civil Code (see paragraph 6 above). They alleged that they had recently found out that the article remained accessible on the newspaper's Internet website. They submitted that the article was positioned prominently in the Google search engine and that anyone seeking information about them had very easy access to it. The article's availability on the newspaper's website, in defiance of the earlier judicial decisions, created a continuing situation enabling a large number of people to read it. The applicants' rights were thereby breached in the same way as had occurred through the publication of the original article. It rendered the protection granted by the judgments in their favour ineffective and illusory.

The applicants sought an order requiring the defendants to take down the article from the newspaper's website and publish a written apology for their rights having been breached by way of the article's continued presence on the Internet. They sought compensation in the amount of PLN 11,000 for the non-pecuniary damage.

10. In their reply to the statement of claim, the defendants submitted that the case was *res judicata*, The applicants had already obtained a judgment in their favour. Moreover, the article had been placed in the archive of the website. Readers would therefore be aware that the article had been

published in the past. The article had been published and could by no means be erased from history or, for that matter, from copies of "*Rzeczpospolita*" kept in numerous libraries and archives throughout the country. The applicants' request to have it expunged was therefore ill-founded, not only because it lacked a legal basis but also because it was absurd.

The defendants further submitted that the applicants had referred to the publication of the article on the newspaper's website in the first set of proceedings. They had therefore already been well aware that the article had been disseminated in that way. As they had failed to submit any specific claims in respect of the Internet publication in the first set of proceedings, it had to be inferred that they had not sought to have any measures taken in respect of the online version of the article and that they had been fully satisfied by their situation having been remedied in the manner ordered by the judgments given in the first set of proceedings.

11. The Warsaw Regional Court, by a judgment of 28 September 2005, dismissed the applicants' claim. It first referred to the judgments of 8 May 2002 and 24 April 2003. It noted the applicants' submission that they had discovered, a year after the latter judgment had been given, that the article was still available on the newspaper's website.

It observed that the facts of the case were not in dispute betweeen the parties. The applicants' submissions had addressed facts – namely the article's continued presence on the newspaper's website five years after the publication of the article in the newspaper – which had occurred after the judgment in the first case had been given. The gist of the legal issue to be determined by the court was whether the discovery of a new source of publication – including on the Internet – provided a factual basis for a new claim for the protection of personal rights within the meaning of the Civil Code. In the court's view, the response to such a question should be in the positive. The court was of the opinion that the discovery of a new source of publication, namely the newspaper's website, of the defamatory article had given rise to a new claim on the applicants' part. The issues involved in the case were therefore not *res judicata*.

However, in the circumstances of the case the court was of the view that the defendants' arguments had to be given an equal weight. The court referred to the constitutional guarantees of free speech and noted that preventive censorship was incompatible with the Constitution. It was the journalists' right and obligation to inform the general public of matters of public interest.

12. Adressing the three claims made by the applicants, the court stressed that removing the article from the website would have been devoid of any practical purpose and would amount to censorship and to rewriting history. Moreover, it would run counter to the principles of archiving.

The court pointed out that the applicants have already received a public apology. Allowing the applicants' claim to have a new apology published

would not offer adequate protection to the applicants. Had they sought an order in the present set of proceedings that the Internet publication be supplemented by a footnote or a link informing a reader about the judgments of 8 May 2002 and 24 April 2003, or had they asked the court to order the defendants to publish an apology on the newspaper's website, the court would have given serious consideration to such a request.

13. The court further noted that the applicants had already received compensation in the first set of the proceedings. It was further stated that if they had discovered circumstances relevant for the assessment of the case but unknown to them during the first set of the proceedings, they should have requested that the proceedings be reopened rather than bringing a new civil case before the courts.

14. The applicants appealed. They argued that the case was important in that it raised new issues which had hitherto not been addressed by judicial practice. They submitted that each new reading of the article on the newspaper's website, which was open to the general public, amounted to a new publication of that article. Traditional principles governing the archiving of various printed materials and documents in traditional archives were not the same as those applicable to the operation of a website, regardless of whether a part of it had been labelled as an "archive" or not. The term "archive" was to be understood as a set of documents which had lost their currency. The Internet was not an instrument for archiving materials, but had to be regarded as a means of communication of information on current topics. The mere fact that a part of a website was called an "archive" did not affect this in any way.

15. In so far as the first-instance court had been of the view that the publication of a printed apology would have been, in the circumstances of the present case, devoid of any practical purpose, the applicants argued that under Article 24 of the Civil Code it had been open to that court to order other measures to remedy the breach of their rights. Article 24 provided that in order to remedy an infringement of personal rights "necessary steps" could be taken, but did not specify the concrete nature of such measures. The court had unequivocally acknowledged that the impugned article had violated their rights. It had, however, limited itself to dismissing the claim. It had failed to consider, contrary to its duty, other remedial measures, including those it had expressly referred to in its judgment.

16. On 20 July 2006 the Warsaw Court of Appeal dismissed the appeal. It was of the view that it was of cardinal importance for the assessment of the case that the article had been published on the newspaper's website in December 2000. The court noted that the applicants had submitted that they had only learned of its online publication a year after the judgment given in April 2003 had become final. However, the fact that in the first set of proceedings they had failed to make a specific request for remedial measures in respect of the online publication made it impossible for the

court in the present case to examine facts which had already existed prior to that judgment. The plaintiffs could not lodge a new claim based on factual circumstances which had already existed during the previous set of proceedings. The court noted in passing that the existing online publication was not a fact which would have been impossible to establish at that time ("*nie była to tzw. okoliczność nieujawnialna*").

17. The applicants submitted an appeal on points of law, invoking their right to the effective legal protection of their personal rights, including their reputation. They reiterated that the continued availability of the article on the newspaper's website infringed their personal rights.

18. On 3 November 2006 the Warsaw Court of Appeal requested the applicants' legal representative to amend the statement of appeal's formal deficiencies by specifying whether it had been lodged on behalf of one or both of the applicants. It noted that the court fee paid in connection with the appeal had corresponded to the sum to be paid for an appeal lodged by one person only.

19. By letter of 10 November the applicants' lawyer clarified that the appeal had been lodged by the second applicant, Mr Smolczewski.

20. On 17 November 2006 the Warsaw Court of Appeal rejected the appeal in so far as it related to the first applicant, having regard to the fact that the relevant court fee had not been paid. This decision was served on the applicants' lawyer on 4 December 2006. No appeal was lodged against this decision.

21. By a decision of 7 February 2007 the Supreme Court, sitting *in camera*, refused to entertain the first applicant's cassation appeal (*odmówił przyjęcia kasacji do rozpoznania*).

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. Article 23 of the Civil Code contains a non-exhaustive list of "personal rights" (*dobra osobiste*). This provision states:

> "The personal rights of an individual, such as, in particular, health, liberty, , freedom of conscience, name or pseudonym, image, secrecy of correspondence, inviolability of the home, scientific or artistic works [] inventions and improvements, shall be protected by the civil law regardless of the protection laid down in other legal provisions."

Article 24, paragraph 1, of the Civil Code provides:

> "A person whose personal rights are at risk [of infringement] from a third party may seek an injunction, unless the activity [complained of] is lawful. In the event of infringement, [the person concerned] may also require the party who caused the infringement to take the necessary steps to redress the consequences of the infringement ... In compliance with the principles of this Code, [the person concerned] may also seek pecuniary compensation or may ask the court to award an appropriate sum for the benefit of a specific public interest."

23. Section 31 of the 1984 Press Act provides, in so far as relevant, as follows:

> "At the request of a natural or legal person or other organisational entity, the editor-in-chief of the relevant daily newspaper or magazine is under an obligation to publish, free of charge:
>
> 1. a factually based (*rzeczowe i odnoszące się do faktów*) rectification of untrue or inaccurate statements,
>
> 2. a factually based (*rzeczową*) reply to any statement which might infringe someone's personal rights."

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

24. The applicants complained that their rights to respect for their private life and reputation had been breached. They referred to Article 8 of the Convention, which in so far as relevant provides as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Alleged abuse of the right to individual petition

25. The Government were of the view that the application should be declared inadmissible because it had amounted to an abuse of the right of individual application within the meaning of Article 35 § 3 of the Convention. The applicants should have raised the issue of the Internet publication of the defamatory article in the first set of civil proceedings in order to obtain appropriate redress. They should have sought an order that the article – which had already been published on the newspaper's website at that time – be removed from it. However, they had failed to do so.

26. The Government concluded that the applicants had brought the present case before the Court with the aim of using the protection system set up by the Convention to redress their own negligence in vindicating their personal rights. As they were both lawyers, their failure to act in an appropriate manner lacked justification.

27. The applicants did not specifically address this aspect of the case.

28. The Court reiterates that an application may be rejected as abusive under Article 35 § 3 of the Convention, among other reasons, if it was knowingly based on untrue facts (see, *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X; *Popov v. Moldova* (no. 1), no. 74153/01, § 48, 18 January 2005; *Rehak v. Czech Republic* (dec.), no. 67208/01, 18 May 2004; and *Kérétchachvili v. Georgia* (dec.), no. 5667/02, 2 May 2006). Incomplete and therefore misleading information may also amount to abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information (see *Hüttner v. Germany* (dec.), no. 23130/04, 9 June 2006; *Poznanski and Others v. Germany* (dec.), no. 25101/05, 3 July 2007; *Predescu v. Romania*, no. 21447/03, §§ 25-26, 2 December 2008; and *Kowal v. Poland* (dec.), no. 2912/11, 18 September 2012).

29. The Court first observes that the Government's arguments do not concern "untrue facts". Rather, their objection is based on their own perception of the applicants' possible intentions (see, for a similar approach on the Government's part, *Antoni Lewandowski v. Poland*, no. 38459/03, § 51, 2 October 2012). The Government's argument amounts to a rephrasing of their own submissions on the merits of the present case (see paragraphs 50–51 below).

30. The Court is therefore of the view that it cannot be said that the manner in which the applicants presented their case amounts to an abuse of the right of petition.

2. The applicants' victim status

31. The Government submitted that the damage caused by the defamatory article had been effectively made good by the domestic courts' judgments of 8 May 2002 and 24 April 2003 allowing the applicants' claim and awarding them compensation (see paragraphs 6 and 8 above). In their view, these judgments had prevented the applicants from alleging another violation of their rights originating in the same factual circumstances which had already existed, and had been known to the applicants or could have easily been known to them, namely the availability of the article on the newspaper's website in December 2000.

32. The Government did not accept that the availability of the article on the newspaper's website after the judgment of 24 April 2003 had become final constituted a separate and continuing violation of the applicants' rights. The article had been published online on 2 December 2000, simultaneously with the article in the newspaper, and only once. It had never been modified afterwards. It could not therefore be accepted that there had been a new publication which could have given rise to a new violation of the applicants' rights. Therefore, the Warsaw Court of Appeal's judgment of 20 July 2006, upholding the Warsaw Regional Court's judgment of 28 September 2005, could not have had a negative effect on the

applicants' reputation, because the infringement of their rights had already been redressed by the judgments given in 2002 and 2003.

33. The applicants submitted that they had obtained redress as a result of the first set of civil proceedings concerning the publication of the article in the print edition of the newspaper, but they had not in respect of the second breach arising out of the continued presence of the same article on the newspaper's website.

34. In so far as the Government argued that the applicants could not claim to be victims in respect of the first set of civil proceedings, the Court acknowledges that this argument is correct. Their claim brought in respect of the article published in December 2000 was allowed in its entirety. Nonetheless, the substance of the present case before the Court does not relate to the first set of proceedings and their impact on the applicants' right to respect for their private life. It falls to the Court to examine the complaint that the applicants were unsuccessful in the second set of proceedings concerning the continued presence of the article on the newspaper's website. The Court notes in this connection that the domestic court refused to order that the article be removed from the newspaper's website. Hence, this objection of the Government must fail.

3. The six-month time-limit and exhaustion of domestic remedies by the first applicant, Mr Węgrzynowski

35. The Government argued that the first applicant had failed to comply with the six-month time-limit and to exhaust domestic remedies. The final decision in his case had been given by the Warsaw Court of Appeal on 17 November 2006 and served on the applicants' lawyer on 4 December 2006, more than six months before they had brought their case before the Court on 7 August 2007.

36. The applicants did not address this aspect of the case.

37. The Court notes that on 3 November 2006 the Warsaw Court of Appeal asked the applicants to clarify whether the cassation appeal against the appellate judgment had been brought before that court on behalf of one or both of the applicants. In reply, the applicants' lawyer averred that the appeal had been made on behalf of the second applicant. On 17 November 2006 the court therefore rejected the appeal in so far as it related to the first applicant. This decision was served on the applicants' lawyer on 4 December 2006.

38. Therefore, the six-month period within which to lodge an application with the Court, as defined by Article 35 § 1 of the Convention, expired on 5 June 2007, while the application was lodged with the Court on 7 August 2007. The application in respect of the first applicant must therefore be declared inadmissible for failure to comply with the six-month time-limit and, in any event, also for failure to exhaust domestic remedies as he had failed to file a cassation appeal with the Supreme Court.

39. It follows that the application, in so far as it relates to the first applicant, has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

4. Exhaustion of domestic remedies as regards the second applicant, Mr Smolczewski

40. The Government submitted that the second applicant had not exhausted all available domestic remedies. He could have applied to the domestic courts seeking an *interim* injunction (*zabezpieczenie powództwa*) under Article 730 § 1 of the Code of Civil Procedure. It had been open to him to request, for example, that a temporary footnote or a comment informing any reader about the proceedings be added to the article on the website. The Government referred to the Court's findings to the effect that such a temporary notice would "normally remove any sting from the material" (relying upon *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, § 47, ECHR 2009).

41. The Government further submitted that the second applicant should have had recourse to the rectification procedure (*sprostowanie*) provided for by Article 31 of the Press Act (see paragraph 23 above). This provision was designed to offer a person negatively affected by a press article a possibility of requesting the publisher to publish, free of charge and in a proper place and form, his or her statement addressing and rectifying the content of the original article. However, the second applicant had failed to have recourse to this remedy.

42. The second applicant disagreed with the Government's submissions.

43. Article 35 § 1 of the Convention requires that the only remedies to be exhausted are those that are available and sufficient to afford redress in respect of the breaches alleged. The purpose of Article 35 § 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, *inter alia*, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

44. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Orchowski v. Poland*, no. 17885/04, § 105, 22 October 2009, and *Norbert Sikorski v. Poland*, no. 17599/05, § 108, 22 October 2009). The development and availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case-law (*Mikolajová v. Slovakia*, no. 4479/03, § 34, 18 January 2011). A Government's arguments clearly carry more weight if relevant examples from national case-law are provided (see *Sakhnovskiy v. Russia* [GC], §§ 43-44, 2 November 2010, and *Toziczka v. Poland*, no. 29995/08, § 26, 24 July 2012).

45. Turning to the circumstances of the present case, the Court notes that the Government failed to adduce any case-law of the domestic courts or examples of the media's practice to show that a rectification request under Article 31 of the Press Act has ever been successfully used to have a defamatory article present on a newspaper's website removed from it or rectified by the addition of a reference to a judgment finding it defamatory.

As to the request to apply for an *interim* injunction referred to by the Government, the Court observes that the claim to have the impugned article removed from the newspaper's website constituted the essence of the applicant's civil claim. That claim failed. It has not therefore been convincingly demonstrated that an identical request submitted in the course of proceedings for an interim injunction and aiming at the removal of that article from the website temporarily, pending the adoption of a decision on the merits of the case, offered any reasonable prospects of success. In any event, no examples of relevant domestic practice have been adduced. This part of the Government's preliminary objection must therefore fail.

46. The Government were further of the view that the applicant had failed to have proper and diligent recourse to Articles 23 and 24 of the Civil Code, as he had failed to formulate the original civil claim properly. He could have requested the court to order the person responsible for the alleged breach to remove the online version of the article and redress its effects.

47. The Court observes that the Government reiterated the same argument when addressing the substance of the application (see paragraphs 50-51 below). The Court finds that this part of the Government's objection is a matter which goes to the merits of the case.

5. Conclusion

48. The Court notes that the application lodged by the second applicant is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

49. The second applicant submitted that his rights to respect for his private life and reputation had been breached as a result of the second set of civil proceedings. The judicial authorities had failed in their positive obligation to apply the law in a manner that would make it possible for him to obtain the effective protection of his rights under Article 8 of the Convention. These rights had been breached as a result of the continued presence on the newspaper's website of an article which had already been

found by the courts to be in violation of the applicant's rights falling within the ambit of this provision.

50. The Government submitted that although the article published on 2 December 2000 had infringed the applicant's rights, the damage caused by that violation had effectively been redressed by the judgments of 8 May 2002 and 24 April 2003 allowing their claim and awarding compensation. These judgments prevented the applicant from claiming another violation of his rights originating in the same factual circumstances which had already existed prior to these judgments and which had been known or could have easily been known to the applicant, namely the existence of the article on the newspaper's website in December 2000.

51. The fact that the article had remained on the newspaper's website after the first set of the proceedings had come to end had not amounted to a separate violation, given that it had been published simultaneously with the print edition of the newspaper. There had therefore been no "new publication" giving rise to a new breach of his rights. The applicant could have sought the rectification of the article or the publication of a footnote or an apology covering the Internet version of the article during the first set of proceedings. The applicant had been negligent in formulating his first claim.

52. The Government were of the view that accepting the approach proposed by the second applicant could lead to the newspaper being subject to ongoing liability. Anyone could bring an action against a publisher of material on the Internet whenever he or she found out about it, regardless of the date on which the contested material had been published on the relevant website. Such uncertainty would be disproportionate and could have a chilling effect on journalists and publishers. The Government referred to the case of *Times Newspapers Ltd* (cited above). The Court had held that while an aggrieved applicant must be afforded a real opportunity to assert his right to protect his reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10. In the Government's opinion, such "exceptional circumstances" had not existed in the present case.

2. The Court's assessment

53. The essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to the Court's settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to one of the legitimate aims

pursued by the authorities (see, among other authorities, *Olsson v. Sweden (No. 1)*, 24 March 1988, § 67, Series A no. 130).

54. In addition, there may also be positive obligations inherent in effective "respect" for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights, and the implementation, where appropriate, of specific measures (see, among other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and *R.R. v. Poland*, no. 27617/04, §§ 183-184, ECHR 2011 (extracts)).

55. The notion of "respect" for private life within the meaning of Article 8 of the Convention for the purposes of the State's positive obligations is not clear-cut. In view of the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, account being taken of the needs and resources of the community and of individuals. Nonetheless, Article 8, like any other provision of the Convention or its protocols, must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Armonienė v. Lithuania*, no. 36919/02, § 38, 25 November 2008, and *Biriuk v. Lithuania*, no. 23373/03, § 37, 25 November 2008).

56. In particular, in cases concerning newspaper publications, the Court has previously held that the protection of private life has to be balanced, among other things, against the freedom of expression guaranteed by Article 10 of the Convention (see *Karakó v. Hungary*, no. 39311/05, § 26, 28 April 2009; *Armonienė*, cited above, § 39; *Biriuk*, cited above, § 38; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 89 *et seq*., 7 February 2012). This interplay between Article 10 and Article 8 was highlighted by the Court on numerous occasions (see, for instance, *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI, *Karakó v. Hungary*, cited above). As a matter of principle the rights guaranteed by these provisions deserve equal respect (see *Hachette Filipacchi Associés* (*ICI PARIS*) *v. France*, no. 12268/03, § 41, 23 July 2009; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011).

57. The Court has reiterated on numerous occasions that freedom of expression constitutes one of the essential foundations of a democratic society and in that context the safeguards guaranteed to the press are particularly important. The Court has also observed that the most careful of scrutiny under Article 10 is required where measures or sanctions imposed

on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern (*Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III). Furthermore, particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive (see Timpul Info-Magazin *and Anghel v. Moldova*, no. 42864/05, § 31, 27 November 2007). At the same time the Court has observed that the press must not overstep certain bounds, particularly as regards the reputation and rights of others (see *Tammer v. Estonia*, no. 41205/98, § 62, ECHR 2001-I, and *Dalban v. Romania* [GC], no. 28114/95, § 49, ECHR 1999-VI).

58. The Court has held that the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned (see *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, no. 33014/05, § 63, ECHR 2011 (extracts)).

59. According to the case-law of the Court, Internet archives fall within the ambit of the protection afforded by Article 10 (see *Times Newspapers Ltd*, cited above, § 27). The Court stressed the substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. While the primary function of the press in a democracy is to act as a "public watchdog", it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported (see *Times Newspapers Ltd*, cited above, § 27). The maintenance of Internet archives is a critical aspect of this role.

The Court has held, in the context of an Article 10 complaint brought by a newspaper, that a requirement to publish an appropriate qualification to an article contained in an Internet archive, where it has been brought to the notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press, did not constitute a disproportionate interference with the right to freedom of expression. The Court was of the view that such an obligation in respect of an Internet archive managed by a publisher of a newspaper itself was not excessive.

The Court also noted with approval that the domestic courts had not suggested that potentially defamatory articles should be removed from archives altogether (see *Times Newspapers*, cited above, § 47).

60. Turning to the circumstances of the present case, the Court notes that it is not in dispute that that article published by *Rzeczpospolita* in December 2000 was in breach of the applicant's rights. The domestic courts expressly acknowledged that in their first two judgments. They allowed the applicant's claim on the grounds consonant with the Convention standards (see paragraphs 6-8 above). However, the instant case concerns issues arising in connection with the second set of civil proceedings where the presence of the offending article on the newspaper's website and the State's positive obligations under Article 8 of the Convention arising in this context were examined.

61. The Court observes that during the first set of the civil proceedings the applicants failed to make claims regarding the article's presence on the Internet. Therefore the courts could not adjudicate on this matter. The judgments given in the first case did not create for the applicants a legitimate expectation to have the article removed from the newspaper's website.

It should be further noted that the domestic courts found that the article had been published on the newspaper's website simultaneously with the print edition in December 2000. The applicant did not challenge this finding in his appeals. Therefore the second case against *Rzeczpospolita* brought by the applicant in 2004 concerned the same factual circumstances.

62. The Internet archive of Rzeczpospolita is a widely known legal resource for Polish lawyers and for the general public, often used and acceded to by members of legal professions. No arguments have been submitted to the Court to justify the applicant's failure to ensure that the scope of the first defamation claim encompassed the article's presence on the newspaper's website.

63. The Court observes that the Warsaw Regional Court stated in its judgment of 28 September 2005 that the case brought by the applicant was not *res judicata* (see paragraph 12 above). The applicant was therefore given an opportunity to bring his claims concerning the Internet version of the article before the courts and to have them examined in judicial proceedings incorporating a full array of procedural guarantees.

64. The Court further observes that the applicant made his claim under Articles 23 and 24 of the Civil Code. The courts accepted that the claim could be examined under these provisions and that they also applied to publications disseminated on the Internet. The Court therefore considers that it has not been demonstrated that no appropriate legal framework was in place at the relevant time and that the absence of such a framework made it impossible for the applicant to defend his rights (compare and contrast *K.U. v. Finland*, no. 2872/02, § 49, ECHR 2008).

65. The Court further notes the finding made by the Warsaw Regional Court that the article in question had been published in the print edition of the newspaper. That court expressed the view that it was not for the courts to order that the article be expunged as if it had never existed (see paragraph 12 above). The Court accepts that it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations. Furthermore, it is relevant for the assessment of the case that the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention.

66. The Court is of the view the alleged violations of rights protected under Article 8 of the Convention should be redressed by adequate remedies available under domestic law. In this respect, it is noteworthy that in the present case the Warsaw Court of Appeal observed that it would be desirable to add a comment to the article on the website informing the public of the outcome of the civil proceedings in which the courts had allowed the applicants' claim for the protection of their personal rights claim (see paragraph 12 above). The Court is therefore satisfied that the domestic courts were aware of the significance which publications available to the general public on the Internet could have for the effective protection of individual rights. In addition, the courts showed that they appreciated the value of the availability on the newspaper's website of full information about the judicial decisions concerning the article for the effective protection of the applicant's rights and reputation.

67. However, the Court emphasises that in the proceedings in the present case the applicant did not submit a specific request for the information to be rectified by means of the addition of a reference to the earlier judgments in his favour. It was neither shown nor even argued before the Court that under the applicable legal framework they could not request the court to specify the steps that they wished to be taken in respect of the internet publication with a view to securing the effective protection of their reputation (compare and contrast with *K.U. v. Finland*, referred to above, where no such possibility was available to the applicant).

68. Taking into account all the circumstances of the present case, the Court accepts that the State complied with its obligation to strike a balance between the rights guaranteed by Article 10 and, on the other hand, Article 8 of the Convention. A limitation on freedom of expression for the sake of the applicant's reputation in the circumstances of the present case would have been disproportionate under Article 10 of the Convention (see *Karakó v. Hungary*, no. 39311/05, § 28, 28 April 2009).

69. The Court therefore upholds the Government's preliminary objection.

70. Having regard to the circumstances of the case seen as a whole, the Court finds that there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible in respect of the second applicant and inadmissible as to the remainder;

2. *Joins* to the merits the Government's preliminary objection concerning exhaustion of domestic remedies in respect of the second applicant;

3. *Holds* that there has been no violation of Article 8 of the Convention and, in consequence, *upholds* the Government's above-mentioned preliminary objection.

Done in English, and notified in writing on 16 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President