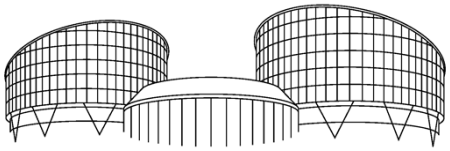

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ROGALSKI v. POLAND

(Application no. 5420/16)

JUDGMENT

Art 10 • Freedom of expression • Unjustified disciplinary sanctioning of lawyer for unethical conduct for notifying a commission of a criminal offence by a prosecutor without a proper basis in fact, moderation, proportionality and caution • Disciplinary courts' failure to give relevant and sufficient reasons for decision • Margin of appreciation overstepped

STRASBOURG

23 March 2023

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 Rogalski v. Poland,

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

Marko Bošnjak*, President*,
Péter Paczolay,
Krzysztof Wojtyczek,
Alena Poláčková,
Erik Wennerström,
Ioannis Ktistakis,
Davor Derenčinović*, judges*,
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 5420/16) 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 a Polish national, Mr Rafał Rogalski ("the applicant"), on 16 January 2016;

the decision to give notice of the application to the Polish Government ("the Government");

the parties' observations;

Having deliberated in private on 14 February 2023,

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

INTRODUCTION

1. The case concerns disciplinary proceedings against the applicant, who was fined for unethical conduct for notifying a commission of a criminal offence by a prosecutor without a proper basis in fact, moderation, proportionality and caution.

THE FACTS

2. The applicant was born in 1976 and lives in Warsaw. He was represented by Ms M. Gniady, a lawyer practising in Warsaw.

3. The Polish Government ("the Government") were represented by their Agent, Mr J. Sobczak of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

5. On 20 January 2011 the applicant, who is a lawyer, lodged, on behalf of his client company, a formal notification of a crime that contained the following statement:

> "... the data exists to sufficiently justify a suspicion that [prosecutor M. P.] [full name of the prosecutor and his service], had committed an offence of bribe taking by means of accepting a bribe from unknown persons who were probably employees of [a company mentioned by name], that is to say, an offence under Article 228 § 1 of the Criminal Code".

6. In the document, the applicant explained that the offence in question had been committed in connection with an investigation into allegations of forging contracts to the detriment of his client which was ongoing at that time. In particular, the applicant alleged that the requests for evidence which he had filed in the course of the above-mentioned investigation had not been examined promptly, that other shortcomings had occurred, and overall, that the investigation in question had "prematurely and unjustifiably" been discontinued on the grounds that there was insufficient evidence to justify the suspicion that a crime had been committed, while no expert reports had been obtained by the prosecutor. The applicant was of the view that the only explanation for such an "irrational decision" to discontinue the investigation was that M.P., who was the prosecutor in charge of the investigation in question, had been bribed. The notification did not contain any details regarding the persons who had allegedly offered the bribe to the prosecutor, other than the name of the company where they were supposedly employed.

7. On 28 January 2011 the Warsaw-Centre District Prosecutor refused to open an inquiry into the above allegations. In the reasoning of the decision, the prosecutor stated that the applicant had not adduced a single piece of evidence nor indicated any factual circumstance substantiating the allegations of bribery. No interlocutory appeal was lodged against that decision.

8. On 11 May 2011 the Warsaw Regional Prosecutor notified the Dean of the Warsaw Regional Bar Council (*Okręgowa Rada Adwokacka)* of the applicant's criminal complaint for the purpose of establishing whether or not the applicant, being a lawyer, had infringed the rules of professional ethics.

9. On 23 November 2012 the disciplinary officer (*rzecznik dyscyplinarny*) of the Warsaw Bar Association charged the applicant with a failure to act with moderation (*umiar*) when making, in his professional capacity, a criminal complaint without "reasonable suspicion**s**" (*nie mając ku temu uzasadnionych podejrzeń*).

10. On 23 November 2012 the applicant was heard by the disciplinary officer. The applicant reiterated information from his criminal complaint and further explained that prosecutor M.P. had closed the investigation regarding forged documents without obtaining any report from a forensic document examiner. The representative of the applicant's client had asked that a criminal complaint be lodged as he was convinced that prosecutor M.P. had been bribed. During the hearing, the applicant did not provide any other information in respect of the circumstances in which the bribe had been offered or taken. He submitted that, to discuss the corruption suspicion, he had accompanied his client during a couple of meetings with the unspecified officers of the Central Anticorruption Bureau (*Centralne Biuro Antykorupcyjne,* "CAB"). The applicant did not indicate any specific or approximate dates of those meetings. The first meeting had, in his submission, taken place during the term of office of the named former chief of the bureau. The other one was to have taken place under the new chief.

The applicant submitted that the CBA's agents had expressed interest in the information that M.P. had taken bribes.

11. On 13 November 2013 the Disciplinary Court of the Warsaw Bar Association (*Sąd Dyscyplinarny Izby Adwokackiej* – "the Disciplinary Court"), after hearing the applicant and his client, and referring to the above-mentioned complaint, found the applicant guilty of making, in his professional capacity, a criminal complaint without "any evidence whatsoever or any objectively verifiable circumstances that could justify the suspicion formulated by the applicant". That action was in breach section 80 of the Bar Act, in conjunction with paragraphs 14 and 17 of the Lawyer's Code of Professional Ethics (see paragraphs 18-22 below).

12. In particular, the Disciplinary Court analysed the language, the content, and context of the criminal complaint. It referred to the submissions of the applicant's client, made first, during the criminal investigation into the alleged bribe-taking and then, directly before the Disciplinary Court. That witness had denied that he had seen or heard of M.P. taking a bribe, or that he had discussed any such incident when he had met with the CAB. The witness also said that he "did not go as far as to suspect that any money from the fund [created by their adversary in the trial] was given to the prosecutors" or that he "would never in [his] life say that M.P. had taken any money." The witness could not remember if he had specifically instructed the applicant to file the criminal complaint in question, but he confirmed that the lawyer had surely not acted against his will. The Disciplinary Court also referred to the submissions made by the applicant in so far as he could not indicate the exact dates of his meetings with the CAB, other than placing them in 2009 and 2010, or provide the names of the CAB's agents. The Disciplinary Court analysed the sequence of the relevant events, such as the term of office of the CAB's chief, the period when the investigation regarding forged documents was on-going, and the date when M.P. had approved its discontinuation. Based on all the above-mentioned material, the Disciplinary Court concluded that the applicant's version of events had not been corroborated.

13. The Disciplinary Court further observed that a lawyer's freedom of expression was distinct from the constitutional understanding of that right in that it was restricted to protect third parties from unjustified, excessive and unnecessary attacks on their own rights. The applicant had been undoubtedly responsible for filing the complaint in question and thus had been under a professional duty to act with moderation (*umiar*), proportionality (*współmierność*) and caution (*oględność*) within the meaning of paragraph 17 of the Lawyer's Code of Professional Ethics (see paragraph 22 below). Accordingly, lawyers had to avoid making unsubstantiated complaints; they had to indicate sources of information relied on and use the conditional tense in formulating their allegations. The court considered that the language used by the applicant in his complaint had clearly been contrary to those principles and derogatory to the dignity of M.P. and the prosecutor's office as a whole.

14. The court fined the applicant in the amount equivalent to twenty basic professional contributions to the bar association. In the applicant's calculation that was not contested by the Government, the fine in question corresponds to 2,400 Polish zlotys ((PLN), approximately 535 euros (EUR)). The court also banned the applicant from being a professional tutor for one year.

15. On 27 September 2014 the High Disciplinary Court of the Bar (*Wyższy Sąd Dyscyplinarny Adwokatury* – "the High Disciplinary Court") upheld that decision. It essentially stressed that a lawyer, irrespective of his or her client's expectations, should diligently abide by professional ethics in pursuit of a greater general interest.

16. On 8 July 2015 the Criminal Chamber of the Supreme Court (*Sąd Najwyższy*) dismissed a cassation appeal lodged by the applicant as manifestly ill-founded.

17. On 10 October 2016 the applicant was charged PLN 1,000 (approximately EUR 220) for the costs of the above-mentioned disciplinary proceedings.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW

A. Professional responsibility of practising lawyers

18. Under the Polish law, pursuant to Section 8 (1) of the Bar Act of 26 May 1982 (*Prawo o adwokaturze*), a lawyer, while practising his or her professions, enjoys freedom of expression within the limits specified by the tasks of the bar and the provisions of law. In particular, any abuse of this freedom constituting an insult or defamation of a party, the party's attorney or defence lawyer or other participants in the proceedings, will lead to disciplinary action.

19. The professional responsibility of practising lawyers is set out in section 80 of the Bar Act, which provides that lawyers are subject to disciplinary action for, *inter alia*, conduct in breach of the law, professional ethics or dignity of the profession. Section 81 lists the disciplinary sanctions which may be imposed as a result of such proceedings. They include: a warning, reprimand, fine, suspension of professional activities for three months to five years or disbarment. A reprimand and fine may be accompanied by a ban on acting as a professional tutor for one to five years.

20. The conduct of lawyers is further regulated by the Advocate's Code of Professional Ethics (*Zbiór Zasad Etyki Adwokackiej i Godności Zawodu (Kodeks Etyki Adwokackiej)*), which was adopted on 10 October 1998 by the Supreme Bar Council (*Naczelna Rada Adwokacka*) and entered into force on 1 December 1998. This code of ethics places advocates under a duty to, among others, protect the dignity of the profession (paragraph 1.3). A breach

of the dignity of the legal profession is defined as conduct which could, *inter alia*, undermine confidence in the profession (paragraph 1.2).

21. Paragraph 14 provides that advocates are responsible for the form and content of the pleadings drafted by them.

22. Paragraphs 15 and 17 read, insofar as relevant, as follows:

> "15. An advocate is not responsible for the veracity of the facts provided to him by his or her client, [he or she should], however, act with moderation in describing circumstances that are drastic or little probable.
>
> ...
>
> 17. An advocate, having his or her freedom of expression guaranteed in the conduct of his or her professional activities, should act with moderation and caution when making statements ... towards a court and state authorities ... so as not to infringe the dignity of the profession."

B. Reporting and investigation of criminal offences

23. Pursuant to Article 304 of the Code of Criminal Procedure (*Kodeks postępowania karnego*), everyone "who has learnt" that a criminal offence prosecuted *ex officio* has been committed, has a civic duty (*obowiązek społeczny*) to report such an offence to the prosecutor or to the police.

24. Pursuant to Article 303 of the Code, an investigation shall be instituted, either *ex officio* or upon a notification of a crime, if there is "a reasonable suspicion" (*uzasadnione podejrzenie*) that a criminal offence has been committed.

II. INTERNATIONAL MATERIAL

A. The United Nations Convention Against Corruption

25. The United Nations Convention Against Corruption was adopted by the General Assembly by resolution no. 58/4 of 31 October 2003 and has been in force since 14 December 2005. It was ratified by Poland on 15 September 2006. Its provisions regulate, among other things, the participation of society in the prevention of and the fight against corruption as well as the protection of reporting persons. The relevant provisions read as follows:

> **Article 13 Participation of society**
>
> "1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;

(b) Ensuring that the public has effective access to information;

(c) Undertaking public information activities that contribute to nontolerance of corruption, as well as public education programmes, including school and university curricula;

(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:

(i) For respect of the rights or reputations of others; ..."

Article 33. Protection of reporting persons

"Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."

B. The Council of Europe's Criminal Law Convention on Corruption

26. The Council of Europe's Criminal Law Convention on Corruption (ETS No. 173) of 27 January 1999 was ratified by Poland in 2002 and it entered into force in respect of this country on 1 April 2003. Its Article 22, concerning the protection of collaborators of justice and witnesses, reads as follows:

"Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

a those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;

b witnesses who give testimony concerning these offences."

C. The Council of Europe's Civil Law Convention on Corruption

27. The Council of Europe's Civil Law Convention on Corruption (ETS No. 174) of 4 November 1999 was ratified by Poland in 2002 and it entered into force in respect of this country on 1 November 2003. Article 9 of this Convention concerns the protection of employees and reads as follows:

"Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

28. The applicant primarily complained that his right to freedom of expression had unlawfully and unjustifiably been restricted in that the domestic courts had found him at fault for filing what they considered to be an unsubstantiated criminal complaint. The applicant also complained, invoking Article 6 of the Convention, that his right to a fair trial had been breached in that two of the judges of the High Disciplinary Court could have been biased and his requests for evidence had been unfairly rejected.

29. The Court, being the master of characterisation to be given in law to the facts of the case, considers that all the above-described elements of these complaints fall to be cumulatively examined under Article 10 of the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018).

Article 10 of the Convention, in so far as relevant, reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ....
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, ..., or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

30. The Government raised a preliminary objection regarding the exhaustion of domestic remedies because the applicant had not filed a constitutional complaint to challenge the compliance of the applicable provisions of the Bar Act and the Lawyers' Code of Professional Ethics with freedom of expression. The Government argued that the availability of such a remedy in the applicant's case was confirmed by the Constitutional Court's judgment of 23 April 2008 (case no. SK 16/07), declaring the unconstitutionality of a provision of the Code of Medical Ethics – an act of the same category as the Lawyers' Code of Professional Ethics. The Government also argued that the constitutional remedy was effective, because having obtained a judgment declaring the unconstitutionality of the law that was at the basis of his disciplinary punishment, the applicant would have been entitled to seek compensation pursuant to Article 417^1 of the Civil Code.

31. The applicant questioned the applicability of the constitutional remedy to his case. In his opinion, the Lawyers' Code of Professional Ethics was not a legal act within the meaning of Article 188 of the Constitution, and, as such, it could not be challenged before the Constitutional Court.

32. The Court reiterates that it has already held that a constitutional complaint in Poland is an effective remedy for the purposes of Article 35 § 1 of the Convention only in a situation in which the alleged violation of constitutional rights and freedoms has resulted from the application of a legal provision which can reasonably be questioned as unconstitutional. Furthermore, such a provision must constitute the legal basis for the individual decision in respect of which the violation is alleged. Thus, the constitutional complaint procedure cannot serve as an effective remedy if the alleged violation has resulted only from the erroneous application or interpretation of a statutory provision which, in its content, is not unconstitutional (see *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, § 198, 7 May 2021).

33. In the present case, the alleged violation originated in the decisions of the domestic disciplinary authorities that found the applicant in breach of professional ethics regulated by the Lawyers' Code of Professional Ethics. The applicant's complaint with the Court is not that the regulation in question was unconstitutional, but rather that, on the merits, he had in fact acted with the required moderation, proportionality, and caution, that is to say, in compliance with professional ethics. The Court points to the established case-law of the Constitutional Court, which provides that constitutional complaints based solely on an allegedly erroneous interpretation of a legal provision are excluded from its jurisdiction unless an applicant contests a provision as understood in well-established and long-standing case law of the courts; as a result, such a complaint cannot be deemed an effective remedy within the meaning of Article 35 § 1 of the Convention. The domestic courts refused to interpret the domestic provisions as requested by the applicant in the circumstances of the case. Therefore, a constitutional complaint cannot be regarded as an effective remedy in the applicant's case (see *Y v. Poland*, no. 74131/14, § 52, 17 February 2022, with further references).

34. For these reasons, the Government's objection of non-exhaustion of domestic remedies must be dismissed.

35. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

36. The applicant argued that the disciplinary punishment he had received was unlawful, unjustified and disproportionate. He also claimed that the impugned proceedings were marked with shortcomings.

37. The Government argued that the interference with the applicant's freedom of expression was lawful, justified and proportionate. While, as a

lawyer, the applicant ought to have acted with caution, his impugned statements were groundless and defamatory.

2. The Court's assessment

38. The principles regarding professional practice and Article 10 are set out in, *inter alia*, *Nikula v. Finland* (no. 31611/96, §§ 44-46, ECHR 2002-II; see also *Steur v. the Netherlands*, no. 39657/98, §§ 27-46, ECHR 2003-XI).

39. The Court reiterates that the special status of lawyers, in turn, gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein (see *Schöpfer v. Switzerland*, judgment of 20 May 1998, Reports of Judgments and Decisions 1998-III, pp. 1052-53, §§ 29-30, with further references; and *Schmidt v. Austria*, no. 513/05, § 42, 17 July 2008, with further references).

40. The Court also notes that the Council of Europe's Criminal Law Convention on Corruption (see paragraph 26 above) describes corruption as "threaten[ing] the rule of law, democracy and human rights, undermin[ing] good governance, fairness and social justice, distort[ing] competition, hinder[ing] economic development and endanger[ing] the stability of democratic institutions and the moral foundations of society" (Preamble). That Convention, which has been ratified by Poland, requires that State Parties provide effective and appropriate protection for those who report the criminal offence of corruption (Article 22 (a)). Likewise, pursuant to the United Nations Convention Against Corruption (see paragraph 25 above), Signatory States must ensure protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning corruption (Article 33). The Convention has widely been ratified, including by Poland.

41. In the present case, the disciplinary decision finding the applicant at fault and imposing a fine on him for unethical conduct, namely for filing a criminal complaint alleging the commission of a criminal offence by a prosecutor without a proper basis in fact, moderation, proportionality or caution, constituted an interference with his rights guaranteed by Article 10 of the Convention.

42. In the light of the domestic legal framework described above (see paragraphs 18-22), the Court finds that, contrary to the applicant's argument, the interference was prescribed by law in that the the requirement for lawyers to formulate their expressions with moderation, proportionality and caution complements the provisions of the Bar Act regulating the exercise of freedom of expression and the disciplinary liability of lawyers.

43. The Court also observes that while freedom of expression is applicable also to lawyers, the usual rules of conduct imposed on members of the Bar – as intermediaries between the public and the courts – particularly as regards "dignity, honour or integrity" or "respect for the fair administration of justice", contribute to the protection of the judiciary from gratuitous and unfounded attacks (see *Bono v. France*, no. 29024/11, § 45, 15 December 2015). In the light of this, the Court finds that the impugned interference aimed at contributing to the proper administration of justice (see, *mutatis mutandis*, *Morice v. France* [GC], no. 29369/10, §§ 128-31 and 143, ECHR 2015; *Bagirov v. Azerbaijan*, nos. 81024/12 and 28198/15, § 75, 25 June 2020; and contrast *Raichinov v. Bulgaria*, no. 47579/99, § 45, 20 April 2006). In this context, it is to be noted that the Advocate's Code of Professional Ethics, which was relied upon in the impugned disciplinary proceedings against the applicant, provides that advocates, having their freedom of expression guaranteed in the conduct of their professional activities, should act with moderation and caution when making their statements towards state authorities, so as to protect the dignity of the profession (see paragraphs 1.3 and 17 of that code cited in paragraphs 20 and 22 above).

44. It remains to be examined whether the interference was "necessary in a democratic society". This requires the Court to ascertain whether it was proportionate to the legitimate aim pursued and whether the grounds given by the domestic authorities were relevant and sufficient.

45. In the present case, the applicant received a disciplinary sanction for filing, on behalf of his client, a criminal complaint alleging the commission of a criminal offence by a prosecutor without a proper basis in fact, moderation, proportionality or caution (see paragraphs 12 and 13 above). In this sense, the domestic court condemned the applicant for accepting the instructions from his client when the accusations of bribery made against M.P. were, according to the district prosecutor, not supported by any evidence or the indication of any factual circumstance (see paragraph 7 above), and for formulating his accusations in strong terms (see paragraph 5 above). As a result, the applicant was fined and temporarily banned from being a professional tutor (see paragraph 14 above).

46. The Court observes that the limits of acceptable criticism may, in some circumstances, be wider with regard to civil servants exercising their powers than in relation to private individuals (see *Nikula*, cited above, § 48). In the instant case, the criticism took the form of a formal criminal denunciation that prosecutor M.P. had accepted bribes, committing a serious offence in office.

47. The applicant did not engage in any personal attacks against M.P. or refer to any of his personal qualities (contrast, *mutatis mutandis*, *Mikhaylova v. Ukraine*, no. 10644/08, § 89, 6 March 2018). Nor did he make his allegations publicly (see, *mutatis mutandis*, *Zakharov v. Russia*,

no. 14881/03, § 23, 5 October 2006). Instead, the applicant followed a procedure for a notification of a crime (see point (a) of the Council of Europe's Criminal Law Convention on Corruption, cited in paragraph 26 above). The Court observes that where, as in the present case, the allegations are contained in a formal notification addressed to the competent superior public official (district prosecutor), it is only in the most exceptional circumstances that recourse to criminal or disciplinary proceedings against the person filing such a notification can be justified within the meaning of Article 10 of the Convention (see, for example, *Grigoriades v. Greece*, 25 November 1997, § 47, *Reports of Judgments and Decisions* 1997-VII; *Kazakov v. Russia*, no. 1758/02, § 29, 18 December 2008; *Zakharov*, cited above, § 23; and *Sofranschi v. Moldova*, no. 34690/05, § 33, 21 December 2010). In the present case, in the eyes of the authorities, the applicant infringed the principle of good administration of justice by filing a criminal complaint without a reasonable suspicion (see paragraphs 9 and 11 above). The Court, however, has not been presented with any evidence which would indicate any malicious intent on the part of the applicant or with any other element that could be considered as exceptional circumstances justifying the recourse to disciplinary proceedings.

48. Furthermore, the Court reiterates that it is one of the precepts of the rule of law that the citizens should be able to notify competent State officials about the conduct of civil servants which to them appears irregular or unlawful (see *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 82, 27 June 2017; *Zakharov*, cited above, § 26 and *Lešník*, cited above, § 55; see also Article 13 of the United Nations Convention Against Corruption, cited in paragraph 25 above).

49. The Court observes that under Polish law everyone who has learnt that a criminal offence prosecuted *ex officio* has been committed, has a civic duty to report such an offence (see paragraph 23 above). Moreover, advocates are not responsible for the veracity of the facts submitted to them by their clients (see paragraph 22 above). It appears that the applicant acted on the instruction or at least with the knowledge and consent of his client, even though the latter subsequently denied having any knowledge that would allow him to formulate the accusation in question (see paragraph 12 above).

50. In the present case, the disciplinary authorities considered that the applicant had failed to indicate any circumstances to substantiate the accusation he had made. In the Court's view, however, the offence alleged by the applicant, on behalf of his client, was not completely devoid of any argument supporting his version of events (see paragraphs 5, 6 and 10 above; contrast, *mutatis mutandis*, *Schmidt*, cited above, § 41, and *Peruzzi v. Italy*, no. 39294/09, § 60, 30 June 2015; and contrast *L.P. and Carvalho*, § 70; *Čeferin*, § 63; and *Steur*, § 41, all cited above). The Court accepts the applicant's argument that it is in the nature of passive bribery allegations that people reporting such acts do not have access to evidence of the offence

unless they have tried to offer a bribe or witnessed such an event. While the information about the meetings with the CAB was imprecise and turned out to be uncorroborated (see paragraph 12 above), the applicant also indicated the employees of a certain company that he had named as the likely persons who had offered the bribe (see paragraphs 5 and 6 above). As to the original criminal investigation concerning the applicant's client, the Court finds that prima facie doubt indeed existed as to why it had been closed on the grounds that there had been insufficient evidence to justify the suspicion that a crime had been committed, if no expert report had been obtained by the prosecutor (see paragraph 6 above). Lastly, the applicant's notification of corruption was considered by the authorities for eight days only before it was decided not to investigate the matter (see paragraphs 5 and 7 above). This leaves a certain room for doubt as to whether the authorities had closely verified the circumstantial evidence provided by the applicant. In view of these elements, it cannot be said that the applicant failed to substantiate, to the extent permitted by the circumstances, that the information he disclosed was accurate and reliable (contrast, *mutatis mutandis*, *Gawlik, cited above,* § 78).

51. Furthermore, while the Bar Association is an independent professional association of lawyers, the Court takes issue with the fact that the disciplinary proceedings against the applicant were triggered upon a notification by a superior prosecutor and his bringing to light of the applicant's notification of a crime which was of a non-public nature (paragraph 8 above).

52. In assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV). In this regard, the Court notes that the applicant was fined and that the amount of the fine was not excessive; it was not the most lenient but also not the harshest sanction for professional misconduct (see paragraph 16 above). On the other hand, as the applicant submitted, as a result of the disciplinary proceedings, his professional reputation had suffered greatly, he had lost his commitment to work as a lawyer and his legal practice had been affected financially as funds had been diverted to the disciplinary proceedings. Moreover, he was for one year barred from being a professional tutor.

53. In light of the above considerations, the Court finds that the disciplinary authorities did not give relevant and sufficient reasons for their decision and went beyond their margin of appreciation when finding the applicant at fault and imposing a fine on him for unethical conduct (see, *mutatis mutandis*, *Peruzzi,* § 66; *Schmidt*, § 44; *Kincses*, § 43, all cited above; and *Wingerter v. Germany* (dec.), no. 43718/98, 21 March 2002).

54. That conclusion, in and of itself, allows the Court to conclude that there has been a violation of Article 10 of the Convention.

55. In the particular circumstances of the case, it is therefore not necessary to examine additionally the fairness of the impugned disciplinary proceedings

and the question of procedural guarantees afforded to the applicant (compare with *Kyprianou v. Cyprus* [GC], no. 73797/01, § 171, ECHR 2005-XIII, and *Radobuljac*, cited above, § 67).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

57. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage and 2,400 Polish zlotys ((PLN), approximately EUR 535) in respect of pecuniary damage. The latter amount corresponds to the fine imposed on the applicant by the disciplinary authorties.

58. The Government submitted that these claims were excessive and not actually incurred by the applicant.

59. The Court awards the applicant EUR 535 in respect of pecuniary damage. It further considers that he must have suffered non-pecuniary damage on account of the violation found. Ruling on an equitable basis, it awards the applicant EUR 9,750 under this head, plus any tax that may be chargeable.

B. Costs and expenses

60. The applicant also claimed PLN 2,476 in respect of the costs charged by the domestic courts, and expenses incurred before the Court. Of this sum, PLN 1,000 (approximately EUR 220) corresponded to the costs charged by the disciplinary authorities and PLN 1,476 (approximately EUR 330) for translation of documents for the purpose of the proceedings before this Court. The applicant submitted an invoice for the translation in question.

61. The Government submitted that the costs claimed had not actually been incurred.

62. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 550 covering costs under all heads, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by 5 votes to 2, that there has been a violation of Article 10 of the Convention;

3. *Holds*, by 5 votes to 2,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 535 (five hundred and thirty-five euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 9,750 (nine thousand seven hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 550 (five hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 23 March 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Marko Bošnjak President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion is annexed to this judgment:

Joint dissenting opinion of Judge Wojtyczek and Judge Poláčková.

M.B.
R.D.

JOINT DISSENTING OPINION OF JUDGES WOJTYCZEK AND POLÁČKOVÁ

1. With all due respect to the majority we do not share their view that Article 10 has been violated in the instant case.

2. In this case, the applicant, acting as "advocate" (one of the regulated legal professions in Poland) for a client, lodged a criminal complaint alleging corruption. The primary basis for the allegation was the irrationality of measures taken by the prosecuting authorities in a criminal case. The public prosecutor and later the relevant disciplinary tribunals concluded that the complaint lacked supporting evidence. The public prosecutor refused to open an inquiry, a decision which the applicant's client appears to have accepted in so far as no appeal was lodged against the refusal. The lodging of the unsubstantiated complaint was subsequently held to be a breach of professional ethics. As a result, the applicant was sanctioned by the Disciplinary Court of the Warsaw Bar Association (that is to say, by the members of his own profession) for professional misconduct.

We note in this context that the "authorities" to which the judgment refers and which it holds responsible for a violation of the Convention are professional bodies independent of the State. Specifically, the violation of the Convention is said to have been committed by the professional bodies of the Polish Bar.

We also observe that the prosecuting authorities reacted in a very predictable manner to the complaint received, given that it was based solely on the subjective belief of the applicant's client. On top of that, the document sent by the applicant increased the prosecuting authorities' workload, whereas it is difficult to see any real benefit that he obtained for his client by sending it.

3. The applicant complained to the Court of a breach of Article 10. Of particular note in this regard is that the speech at issue was that of an advocate acting for his client. The protection which Article 10 extends to advocates acting on behalf of their clients exists first and foremost to serve the interests of those clients. Advocates' freedom of speech is therefore limited in that they are bound by the interests of their clients and by the instructions those clients give. An advocate representing a client is speaking on behalf of that client and for the purpose of effectively defending the client's – not his or her own – interests. Moreover, advocates' clients are entitled to legal services of a certain quality and may reasonably expect the statements contained in documents lodged on their behalf to be supported by a modicum of evidence or argument. The fact that advocates provide services in the form of speech

does not exempt them from scrutiny to ensure their compliance with professional standards. The balancing of values under Article 10, as it applies to advocates' speech, must take these considerations into account and must be tailored accordingly.

4. The instant case also concerns the right of certain qualified independent service professions, known in some jurisdictions as the "liberal professions", to self-government and self-regulation. Such professions are entitled to regulate their members' conduct and the quality of the services they provide. In particular, the liberal professions are in principle entitled to determine what amounts to proper professional conduct and what does not. They have the task of ensuring the adequate quality of the services provided. Even if the right of such professions to self-government is not itself protected by the Convention, the various public values underlying it have to be taken into account in the assessment of the Convention compatibility of measures interfering with Convention rights.

This case reveals the diversity of traditions and approaches which subsists in the domain of professional self-regulation. The majority's conclusion implies that an advocate who reports a criminal offence without adducing a modicum of evidence to substantiate his allegations is acting within the rules, so to speak, of the legal game. The bodies of the Polish Bar, conversely, regarded such behaviour as foul play and hence as a breach of professional ethics. In our view, this diversity of traditions and approaches in Europe is a source of enrichment and should be taken into account in the application of the Convention.

5. Any criminal complaint must be based on a modicum of evidence that the offence reported was actually committed. In the case of *Wojczuk v. Poland* (no. 52969/13, 9 December 2021) the Court expressed the following view, to which we fully subscribe:

> "97. The Court does not lose from sight the fact that calumnious denunciations to the competent authorities may result in investigating measures and may have very serious detrimental effects for the persons concerned, causing unnecessary stress and anxiety. Moreover, calumnious denunciations mean that the competent investigating or audit authorities can use more limited resources for the purposes of investigating or auditing other irregularities in the functioning of public authorities."

Similarly, criminal complaints which are not sufficiently substantiated may have detrimental effects for the persons concerned and may put needless strain on the already limited resources available to prosecuting authorities.

The majority express the following views at paragraphs 47 and 50:

> "... The Court observes that where, as in the present case, the allegations are contained in a formal notification addressed to the competent superior public official (district prosecutor), it is only in the most exceptional circumstances that recourse to criminal or disciplinary proceedings against the person filing such a notification can be justified within the meaning of Article 10 of the Convention (see, for example, *Grigoriades*

> *v. Greece*, 25 November 1997, § 47, *Reports of Judgments and Decisions* 1997-VII; *Kazakov v. Russia*, no. 1758/02, § 29, 18 December 2008; *Zakharov*, cited above, § 23; and *Sofranschi v. Moldova*, no. 34690/05, § 33, 21 December 2010). ...
>
> ... it cannot be said that the applicant failed to substantiate, to the extent permitted by the circumstances, that the information he disclosed was accurate and reliable (contrast, *mutatis mutandis*, *Gawlik*, cited above, § 78)."

We observe in this regard that the phrase "the most exceptional circumstances" does not appear in any of the previous judgments referred to by the majority. To put a finer point on it, the existing case-law neither applies nor implies a "the most exceptional circumstances" test. This is a new standard created *ad hoc* and unsupported by the existing case-law. The approach adopted departs from existing case-law and considerably lowers the evidential threshold to be met by a professional legal representative seeking to report a criminal offence on behalf of his or her client. Such an approach may contribute to the development of a culture of suspicion and distrust, typical of undemocratic regimes.

Moreover, in asking whether the applicant "failed to substantiate, to the extent permitted by the circumstances, that the information he disclosed was accurate and reliable", the majority devise a disclosure-based test which does not seem germane to the reporting of a criminal offence – a completely different situation. The applicant did not disclose any information.

6. The majority rightly observe at paragraph 50 that "under Polish law everyone who has learnt that a criminal offence prosecuted *ex officio* has been committed, has a civic duty to report such an offence". We would like to stress that, under the letter of Article 304, paragraph 1, of the Code of Criminal Procedure, this civic duty arises in a situation where a person "knows" that a criminal offence has been committed, not in a situation where a person only vaguely suspects that a criminal offence may have been committed. A degree of subjective knowledge of facts and circumstances which make out a criminal offence is, in our opinion, a pre-condition. The applicant in the present case did not "learn" or "know" that an offence had been committed.

7. Our conclusion, for the reasons explained above, is that the legal professional bodies in Poland did not overstep the margin of appreciation afforded to them under Article 10 in the instant case.