



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

THIRD SECTION

**CASE OF ROSENZWEIG AND BONDED WAREHOUSES LTD.
v. POLAND**

(Application no. 51728/99)

JUDGMENT

STRASBOURG

28 July 2005

FINAL

30/11/2005

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Rosenzweig and Bonded Warehouses Ltd. v. Poland,

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

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr L. CAFLISCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mr V. ZAGREBELSKY,

Mr L. GARLICKI,

Mrs A. GYULUMYAN, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 5 July 2005,

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

PROCEDURE

1. The case originated in an application (no. 51728/99) 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

2. The first applicant, Bronisław Rosenzweig, is a German national, who was born in 1941 and lives in Berlin. The second applicant is “Bonded Warehouses Ltd”, a public company he owned. The applicants are represented before the Court by Mr K.-H. Schmitz, a lawyer practising in Berlin, and Mr W. Szaj, a lawyer practising in Poznań. The Polish Government (“the Government”) were represented by their Agents, Mr Krzysztof Drzewicki, and, subsequently, Mr Jakub Wołasiewicz of the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that their right to the peaceful enjoyment of his possessions guaranteed by Article 1 of Protocol No. 1 to the Convention had been breached.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 2 September 2004, the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

8. The first applicant, Bronisław Rosenzweig, is a German national, who was born in 1941 and lives in Berlin. The second applicant is “Bonded Warehouses Ltd”, a public company.

9. On 18 February 1994 the Main Customs Office granted a licence to run a bonded warehouse in Słubice to the applicant company “International Bonded Warehouses Ltd.”.

10. On 29 May 1995 the German customs office at Frankfurt/Oder stated in writing that the German customs authorities had no objections to the operation of the applicant company.

11. On 1 June 1995 a further permit was given for exporting merchandise via the border crossing in Słubice by the Director of the local Customs Office in Słubice.

12. The applicant submitted that it had been repeatedly suggested that the company should pay various bribes to the customs officials if it wished to continue its operation undisturbed. The Government did not respond to this submission.

13. By a letter of 22 November 1995 the Director of the local Duty Office in Słubice stated that from 27 November 1995 on he would revoke the permit of 1 June 1995 for exporting merchandise via the Słubice border crossing. It was argued that the permit of 1 June 1995 was not in conformity with an agreement with the Federal Republic of Germany regarding the border crossings and trans-border movements of goods and persons.

14. On 27 November 1995 the customs officers ordered that the headquarters of the applicant company be closed and affixed official seals on its door, preventing it thereby from conducting further business. On the same day the applicant company complained to the Main Customs Office, submitting that there were no legal grounds on which the permit should be revoked and that the letter of 22 November 1995 was not an administrative decision, which made it impossible to lodge a formal appeal against it.

15. In a letter of 21 December 1995 the applicant company reiterated its complaint and stressed that the director of the Słubice Customs Office had failed, despite the company's repeated requests, to give any legal basis for the revocation of the permit. It was argued that the revocation of the permit breached economic freedom as guaranteed by the Constitution, and clearly infringed the terms of a valid licence which the company had received from the Main Customs Office in February 1994.

16. On 9 February 1996 the applicant company lodged a complaint under Article 17 of the Supreme Administrative Court's Act about the Main Customs Office's failure to give a decision following the appeal of 27 November 1995. It was submitted that the company had a valid permit given under the provisions of customs law. However, the company's operation had been *de facto* rendered impossible by the letter of 22 November 1995 as it could not run the warehouse if it was not allowed to export merchandise.

17. In reaction to this complaint, on 14 February 1996 the Main Customs Office informed the applicant company that the permit of 1 June 1995 was of a temporary character. It was to remain valid only until a bridge in nearby Świeck was to be constructed. After the construction of this bridge had been terminated, the border crossing in Słubice was to be used only for small trans-border movement of goods and persons. This was to be understood as allowing for crossing of the border by persons, but taking merchandise out of the country via this crossing did not fall within the ambit of the notion of the "small trans-border movement of goods and persons" and therefore the permit of 1 June 1995 had to be revoked under Article 21 of the Customs Law.

18. The applicant company appealed, submitting that the revocation of the exporting permit would practically mean that the company had to stop its business operation, carried out under the valid licence of February 1994.

On 21 August 1996 the applicant company and the Director of the Legal Department of the Main Customs Office concluded a settlement to the effect that the applicant company would withdraw the appeal it had lodged with the Supreme Administrative Court against the position taken by the Office in its letter of 14 February 1996 and the President of the Office would set aside the decision of the Director of the Słubice Customs Office of 22 November 1995.

19. On 21 December 1996 the Main Customs Office set the decision of 22 November 1995 aside and ordered that the question be re-examined by the Director of the Słubice Customs Office.

20. By a letter of 31 January 1997 the German customs office at Frankfurt/Oder confirmed that the German customs authorities had no legal objections whatsoever against the operation of the applicant company.

21. On 28 May 1997 the Rzepin Customs Office revoked the permit for exporting merchandise by the applicant company via Słubice, stating that the Słubice border crossing was under Polish law designed only for the so-called "small trans-border movement of goods and persons" and that, therefore, no merchandise could be exported via this crossing.

22. The applicant company appealed.

23. On 20 August 1997 the Main Customs Office quashed the decision of 28 May 1997 and discontinued the proceedings, considering that the impugned decision had been in breach of applicable provisions of

procedural law since it had not been given in any of the types of proceedings on the merits provided for by the Code of Administrative Procedure.

24. The applicant company requested that the legal meaning of this decision be interpreted. It emphasised that it was important for it to have clarified whether the original permit of 1 June 1995 was still valid. This, on the plain meaning of the text of this decision, was unclear.

25. In an interpretative decision of 23 September 1997 the Main Customs Office explained that the fact that the decision of 28 May 1997 had been set aside was to be understood in such a way as to mean that the legal situation existing before this decision had been given still obtained.

26. The applicant company requested that this issue be re-examined, asking whether the quashing of the decision of 28 May 1997, revoking the permit of 1 June 1995, was to mean that this permit was still valid.

27. In a decision of 14 November 1997 the Main Customs Office held that the purpose of the decision of 23 September 1997 was not to decide whether the permit of 1 June 1995 was still valid. It upheld the decision of 23 September 1997.

28. The applicant company appealed to the Supreme Administrative Court, arguing that the decisions of the Main Customs Office lacked clarity. The Office had set aside the revocation of the permit, but did not confirm whether the original permit was valid. Therefore it was impossible to establish what was the actual legal situation of the company as far as the validity of its permits was concerned. The applicant company emphasised that it was *de facto* treated by the customs authorities as if the export permit of June 1995 had been effectively revoked.

29. In a judgment of 2 April 1998 the Supreme Administrative Court quashed the decisions of 23 September and 14 November 1997. The court found that the decision of 23 September lacked clarity in that it did not allow the applicant company to elucidate the fundamental uncertainty as to the legal consequence of this decision. Neither were these doubts dispelled by the decision of 14 November in which the Main Customs Office had failed to explain what was the legal situation of the applicants' permit to run their business, and in particular, whether it could still rely on the permit of 1 June 1995.

30. By a decision of 5 June 1998 the Main Customs Office stated that the decision of 20 August 1998 was to be understood in such a way that the applicant's rights stemming from the decision of 1 June 1995 remained intact.

31. On 20 June 1998 the Main Customs Office instituted proceedings in order to have the licence to run the warehouse of 18 February 1994 set aside, considering that the applicant company had not been conducting its business for a period longer than three months, without having informed the competent authorities thereof, as required by law.

32. On 30 November 1998 the Main Customs Office set aside the 1994 licence to run the warehouse, having found that after 20 August 1997 the applicant company had ceased its business activities. Under the provisions of the Customs Code, the customs authorities were obliged to withdraw the licence to run the bonded warehouse if the company enjoying such licence was not exercising it for a period longer than three months.

33. The applicant company appealed. It argued *inter alia* that it could not have run the warehouse after 20 August 1997, given that the Słubice Customs Office had withdrawn its permit for exporting merchandise by the applicant company via Słubice, which had made it impossible to continue its business operation.

34. On 5 March 1999 the Main Customs Office, having re-examined the case, discontinued the appellate proceedings. The office observed that the applicant was wrong in confusing the proceedings regarding the validity of the June 1995 permit with the present proceedings, in which it was the validity of the earlier licence, granted in 1994, which was at issue. The validity of the 1994 licence had not been questioned in the previous proceedings and therefore there were no grounds on which to accept that the applicant was prevented to run its business.

35. It further noted that the proceedings had to be discontinued since on 1 January 1998 a new Customs Code had entered into force. It provided that various customs licences issued under the old Customs Act were to remain valid for twelve months, during which companies having such licences could lodge new requests to have new licences issued. The applicant company had not submitted such request and the validity of its 1994 licence had consequently expired on 31 December 1999. Therefore the proceedings would not serve any purpose and should be discontinued.

36. The applicant company appealed. It argued, *inter alia*, that when giving the contested decision, the Main Customs Office had breached the law in that it entirely failed to take into consideration all circumstances relating to the proceedings concerning the withdrawal of the permit to export. These proceedings, which had lasted from August 1997 until June 1998, had rendered it impossible for the company to continue its business operation. Therefore it was unreasonable to revoke the 1994 licence on the ground that the company had ceased its business activities.

37. On 5 November 1999 the Supreme Administrative Court quashed the decision of 5 March 1999 as not being in compliance with law. It considered that the Main Customs Office had incorrectly held that the proceedings had become devoid of purpose. At the time when they had been instituted, i.e. on 20 June 1998, the applicant company's licence was still valid. It therefore had a legal interest in clarifying its legal situation and to confirm whether it was still authorised to run its business.

38. On 23 March 2000 the Main Customs Office, having regard to the judgment of 5 November 1999, set aside the decision of 30 November 1998, revoking the 1994 licence to run the warehouse.

39. The applicant company did not resume its operations afterwards. The first applicant submitted that as a result of the withdrawal of the permit and the licence to run the company, described above, it was impossible for him as the principal shareholder and, likewise, for the applicant company, to resume their business operations. It is the withdrawal of those decisions authorising the company to run its business which constitute the basis of the applicant's claims of pecuniary damage under Article 41 of the Convention. The Government did not respond to this argument.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

40. The applicants complained that their right to the peaceful enjoyment of their property was infringed in that the customs authorities withdrew valid administrative decisions allowing them to run their business. They relied on Article 1 of Protocol No. 1, which read:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. The parties' submissions

41. The Government argued that the state was entitled to enact laws and to give administrative decisions necessary in order to control the flow of merchandise into its territory. The decisions given in the present case had therefore pursued the general interest. As to the proportionality of the interference, they first argued that the applicants' business activities had involved storing of goods which were entering the territory of the state and leaving it. Moreover, the authorities had been under an obligation to supervise whether the applicants' business activities were in accordance with international agreements entered into by Poland. The lack of any

control whatsoever performed by the customs authorities could have led to substantial losses in the state budget.

42. They concluded that the control over the applicants' business activities had not only been necessary, but also in accordance with the most vital general interest of the state. It had been open to the applicants to challenge the lawfulness of decisions given in their case before the Supreme Administrative Court and they had availed themselves of this possibility.

43. The applicant submitted that the domestic authorities had relied, when revoking the permit on 22 November 1995, on the alleged lack of conformity of that permit with the agreement with the Federal Republic of Germany regarding the trans-border movement of goods and persons. However, the German authorities had later confirmed, by a letter of 31 January 1997, that they had no legal objections to the operation of the applicant company.

44. The applicants further submitted that the customs authorities had failed to give a formal decision revoking the June 1995 permit, but had only sent a "letter" to the applicants to this effect. This had by itself been in breach of applicable procedural provisions of Polish administrative law as it should have been done in the form of a proper administrative decision against which an appeal would be available. This shortcoming had made it difficult for the applicants to pursue normal appeal procedure provided for by administrative law. The withdrawal of the permit had been unjustified, because no legal changes of such a nature as to make the withdrawal necessary had been introduced between June 1995 when the permit was granted and November 1995 when it was revoked. After November 1995 the applicants could not run the business activity and had not had access to their property as on 22 November 1995 the warehouse had been sealed by the customs authorities.

45. The applicants emphasised that the Supreme Administrative Court which had twice examined the company's appeals against the decisions given in the case at both occasions found the challenged decisions unlawful and quashed them by its judgments of 2 April 1998 and 5 November 1999.

46. The applicants argued that they did not challenge the state's power to apply laws and issue authorisation for certain kinds of business activities. However, in their case it had never been argued or shown by the domestic authorities, competent to supervise the applicants' business operation that it had been in breach of any provision of Polish law or of international law. It had not therefore been shown that the measures complained of were proportionate to the aim sought, as no causal link whatsoever had been demonstrated between any acts of the applicants' and the decisions that obliged them to discontinue their business activities.

47. The applicants emphasised that they had been conducting their business operation for a very short period. As a result of the revocation of the licences previously granted to them, they had therefore incurred serious

losses. The investment that the first applicant made into the company had never been recovered. As a result of the measures taken in the present case the company had not developed its full business potential and had failed to bring income which could reasonably be expected when the original permit of June 1995 had been granted.

B. The Court's assessment

48. The Court reiterates that Article 1 of Protocol No. 1 contains three distinct rules (see, among other authorities, *Belvedere Alberghiera S.r.l. v. Italy*, no. 31524/96, § 51, ECHR 2000-VI).

An interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole. The requisite balance will not be found if the person concerned has had to bear an individual and excessive burden (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, pp. 26 and 28, §§ 69 and 73). In other words, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, for instance, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A. no. 98, p. 34, § 50).

49. In the light of the Court's case-law, the withdrawal of valid permits to run a business is an interference with the right to the peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No. 1. It constitutes a measure of control of the use of property, which falls to be examined under the second paragraph of Article 1 of Protocol No. 1 (see, for instance, *Tre Traktörer Aktiebolag v. Sweden* judgment of 7 July 1989, Series A no. 159, § 55).

50. The Court observes that the withdrawal of the June 1995 licence and the ensuing proceedings in which the validity of that permit was re-examined several times made it impossible for the applicants to continue their business operation. The Court further notes that later on a new set of proceedings was instituted in which authorities revoked the licence granted to the applicants in 1994.

51. The Court notes that the Government have failed to acknowledge that there has been an interference with the applicants' rights guaranteed by Article 1 of Protocol No. 1. However, it notes that they argued that the series administrative decisions complained of had been in the public interest and proportionate to the aims sought by the authorities. It can therefore be implied that the Government implicitly recognised that there had been interference. Moreover, the Court considers, having regard to the circumstances of the case as a whole, and in particular to the impact that

these decisions had on the applicants' ability to run their business, that there has been interference with the applicants' right protected under Article 1 of Protocol No. 1

52. The Court further recalls in this connection that an essential condition for an interference to be deemed compatible with Article 1 of Protocol No. 1 is that it should be lawful (see, among other authorities, *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, pp. 19-20, § 42).

53. The Court notes in this connection that the lawfulness of the decisions which negatively affected the applicants' ability to continue their business operation was subjected to judicial review by the Supreme Administrative Court. On two occasions when the applicants' appeals were examined by that court, it found that the decisions under appeal were not in conformity with applicable laws (paragraphs 28 and 37 above).

54. The Court is of the view that these judgments of the Supreme Administrative Court are not by themselves sufficient for a finding that all measures taken in the case failed to satisfy this requirement. This is so because these findings of that court concerned only certain decisions given in the case, while a whole series of various measures was adopted in respect of the applicants. Nevertheless, the criticism expressed by the Supreme Administrative Court of the way in which lower administrative instances had handled the applicants' case is, in the Court's view and in the light of the circumstances of the case seen as a whole, a factor relevant for the assessment of the compatibility of the measures taken in respect of the applicants with the requirements of Article 1 of Protocol No. 1.

55. As to the proportionality of the interference complained of, the Court first observes that the Government's submissions are quite succinct. They argued, *inter alia*, that the control over the applicants' business activities was not only necessary, but also in accordance with the most vital general interests of the state. The applicants' business activities involved storage of goods, which were entering and/or leaving the territory of Poland. Consequently, the lack of any control whatsoever performed by the customs authorities could have led to substantial losses in the state budget (paragraphs 40-41 above).

56. The Court is, obviously, in agreement with the argument that the State Parties to the Convention are entitled to exercise control over the movement of goods into and out of the country with a view to, *inter alia*, securing income from relevant customs duties. However, the Court fails to be convinced by the argument that in the present case the only alternative available to the authorities would be, on the one hand, a "total lack of control" referred to by the Government, and, on the other hand, the measures taken in respect of the applicants. The Court stresses that these measures consisted in a complete withdrawal of the licences to run the company, which prevented it from continuing its operation. In this respect,

the Court observes that no explanation has been provided as to why the form of control adopted in the case was the harshest one possible under domestic law, i.e. the withdrawal of the licence. The Court further notes that the July 1995 permit was revoked in November 1995, barely five months after it had been granted.

57. Importantly, the Court notes that in the present case no case-specific circumstances were adduced to justify the control measures adopted by the authorities in respect of the first applicant and his company. In particular, no argument has been presented to show the proportionality of these measures to the aim ostensibly sought by the authorities.

58. It is also noted that on 14 February 1996, when explaining the withdrawal of the 1 June 1995 permit, the Main Customs Office informed the applicants that it was of a temporary character. However, never before had the customs authorities stated that that permit was temporary.

59. The Court further observes that in December 1996 the withdrawal of that permit was set aside. However, merely five months later the same permit was revoked again. In August 1997 the Main Customs Office set this decision aside. Subsequently, the applicants sought to have the legal meaning of that decision clarified. Ultimately, the Supreme Administrative Court quashed the decisions given in these interpretative proceedings, considering that they were unlawful in that the authorities failed to explain therein whether the applicants could continue their operation on the basis of the original permit of 1 June 1995 or not.

60. Acting on the basis of that judgment, on 5 June 1998 the customs authorities confirmed that the applicants' rights stemming from the export permit remained intact. However, as soon as on 20 June 1998 the Main Customs Office instituted fresh proceedings in order to have the February 1994 licence to run the warehouse set aside. It was stated that the licence had to be revoked as the applicant company had not been operating its business for a period longer than three months, without having informed the competent customs authorities thereof as required by law.

61. Given that the customs authorities themselves had previously withdrawn the company's permit for exporting merchandise, and it was precisely this withdrawal which had made it impossible for the applicants to continue their business operation, the Court is of the view that this reasoning of the Main Customs Office is open to criticism. The Court also notes that ultimately the Supreme Administrative Court again quashed the decision under which the licence to operate the warehouse was revoked, considering it unlawful.

62. Lastly, the Court notes that the authorities have not argued or shown, either in the domestic decisions or before the Court, that the business operation of the applicant company had ever disclosed any misconduct which would cast doubt on its lawfulness. Neither has it been argued or shown that there had been any suspicions on the part of the domestic

authorities that the applicants' operations were in any way dishonest, or that they had been involved in any attempts of customs tax evasion. Such arguments would have been capable of lending credibility to the Government's view that the revoking of licences served the public interest, but they had not been advanced. In the Court's opinion this absence of any wrongdoing on the part of the applicants established by the domestic authorities cannot but have incidence on the overall assessment whether the measures complained of met the requirements of the standards laid down by Article 1 of Protocol No. 1.

63. In the light of these shortcomings with which the proceedings and the decisions concerning the licence were flawed for which no plausible reasons have been given by the respondent Government, the Court is of the view that it has not been shown that the authorities followed any genuine and consistent policy considerations when revoking and changing their decisions concerning the applicants' business operation.

64. Accordingly, there has been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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.”

66. The applicants sought compensation for pecuniary damage. They argued that such compensation should cover lost net profit that they would have been able to make had the company been able to continue its business operation; price of goods destroyed, outlays borne for the conversion of the building they had rented for the company, furniture, computer equipment with software and other technical equipment and amounts owed in rent due to the lessor of the building. They argued that compensation to be paid should also cover statutory interest on damage they had suffered as fixed by applicable Polish laws in force at the material time.

67. The first applicant claimed just satisfaction in respect of non-pecuniary damage he had suffered as a result of the withdrawal of licences for his company's operation, which caused him to have serious health problems leading to a permanent health loss.

68. In total, the applicants claimed just satisfaction in the amount of EUR 11,501,435.

69. The applicants also claimed EUR 89,000 as reimbursement of costs incurred in the domestic authorities and in the proceedings before the Court.

70. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the respondent State and the applicant (Rule 75 § 1). The Court allows the parties six months in which to reach such agreement.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
2. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision;
accordingly,
 - (a) *reserves* the said question;
 - (b) *invites* the Government and the applicant to submit, within six months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 28 July 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President