

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

FOURTH SECTION

CASE OF REMUSZKO v. POLAND

(Application no. 1562/10)

JUDGMENT

STRASBOURG

16 July 2013

FINAL

16/10/2013

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



In the case of Remuszko v. Poland,

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

Ineta Ziemele, *President,*
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Krzysztof Wojtyczek,
Faris Vehabović, *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. 1562/10) 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, Stanisław Remuszko ("the applicant"), on 22 December 2009.

2. 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 applicant complained about a refusal to publish paid advertisements for his book by a newspaper. He relied on Article 10 of the Convention.

4. On 12 April 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 applicant was born in 1948 and lives in Warsaw.

A. Background to the case

6. In 1999 the applicant, who is a journalist, published a book entitled "Gazeta Wyborcza. Beginnings and Beyond" (*Gazeta Wyborcza. Początki i okolice*). The book relates, in an unfavourable light, the story of the founding of *Gazeta Wyborcza*, one of the best known Polish daily newspapers with a nationwide distribution. The newspaper was founded in 1989 in the wake of the so-called Round Table talks between the communist government and the heads of the then democratic opposition which ultimately led to the first semi-free elections in Poland since 1945 and to the ultimate dismantling of the communist regime by the end of 1989.

7. The second edition of the applicant's book was published in 2003. No reviews of the book were published in the press.

8. Subsequently, the applicant requested seven daily and weekly newspapers to publish an identical paid advertisement for the book. The text of the proposed advertisement reads as follows:

> "It does not make for pleasant reading for [the editor-in-chief] of *Gazeta Wyborcza*, friends. The truth about *Gazeta Wyborcza*. Previously unseen documents and new witnesses. Stanisław Remuszko, a former journalist [at the newspaper], today working freelance, has written the first ever book in Poland, Europe and the world about *Gazeta Wyborcza* and its background. Do you have the faintest idea where the wealth of *Gazeta Wyborcza* comes from? Information available at www.remuszko.pl."

9. All the newspapers (*Nasz Dziennik, Wprost, Metropol, Newsweek, Polityka* and *Rzeczpospolita*) refused to publish the advertisement. *Gazeta Polska* was the first to agree to publish it and they signed a contract with the applicant. However, shortly afterwards the editor changed his mind, refused publication and reimbursed the money paid by the applicant.

10. On 12 June 2003 the applicant lodged seven identical claims with the Warsaw Regional Court against the newspapers. He requested that the court order the defendant newspapers to publish the advertisements. The applicant referred to section 36 of the Press Act 1984 (see paragraph 34 below), arguing that nothing in the advertisement as proposed could reasonably be construed as being in breach of the law or third parties' personal rights, or contrary to the editorial policy of the defendants, unless they considered that their editorial policy included a duty to protect the interests of *Gazeta Wyborcza*, its editor-in-chief and publisher. The applicant referred to Article 54 of the Constitution and to section 1 of the Press Act.

11. The Warsaw Regional Court, by judgments dated 23 January 2004, 11 May 2005, 26 May 2005, 28 January 2004 and 28 March 2006 dismissed his actions against *Nasz Dziennik, Wprost, Metropol, Newsweek* and *Polityka* respectively.

12. The applicant appealed.

13. By judgments of 14 December 2005 and 23 June 2006 the Warsaw Court of Appeal allowed his appeals and ordered the defendant newspapers *Wprost* and *Metropol* to publish the advertisement concerned. No appeal was lodged against those judgments.

14. During the appellate proceedings against *Nasz Dziennik* the Warsaw Court of Appeal decided on 15 October 2004 to make use of Article 391 § 1 of the Code of Civil Procedure and put a legal question to the Supreme Court concerning the interpretation of Article 36 of the Press Act. The Supreme Court refused to reply to this question by way of a decision of 14 October 2004 (CZP 67/05) (see "Relevant domestic law and practice" below).

15. On 7 March 2005 the Warsaw Court of Appeal rejected the applicant's appeal against *Newsweek* on formal grounds (failure to pay the court fee).

16. By a judgment of 25 April 2006 the Warsaw Court of Appeal dismissed the applicant's appeal against *Polityka*.

17. By a judgment of 13 July 2004 the Warsaw Regional Court allowed the claim against *Gazeta Polska*. The editors appealed. The parties settled the case before the Court of Appeal. The applicant submits that ultimately the advertisement was not published.

B. The proceedings against *Rzeczpospolita*

18. The present case concerns the proceedings against *Rzeczpospolita* and its editor-in-chief.

19. By a judgment of 30 March 2004 the Warsaw Regional Court dismissed the applicant's claim. It referred to section 36 of the Press Act, noting that the only requirements that paid advertisements to be published in the press had to comply with were the laws and principles of social co-existence (*zasady współżycia społecznego*). The editors of *Rzeczpospolita* had been aware of the content of the book. Publishing the advertisement could have been regarded as endorsing that content, which, in turn, could have been seen as breaching the personal rights of third parties. This could have given rise to civil liability on their part. Not only were the editors allowed to refuse publication of an advertisement in breach of third parties' rights; they were even obliged to do so.

20. The applicant appealed, referring to his right to freedom of expression. He also argued that the first-instance court had failed to provide any explanation as to why and how the advertisement breached third parties' rights.

21. The Warsaw Court of Appeal, by a judgment of 4 November 2004, allowed his appeal and remitted the case for re-examination. The court first held that publication of advertisements was not covered by freedom of expression.

22. It further accepted the applicant's argument about the lower court's failure to give adequate reasons for its judgment. That court had held that the text of the advertisement was in breach of the law and third parties' personal rights without adducing any arguments or reasons for that view. The court further observed that the lower court had made its assessment with reference to the content of the book concerned. This was not correct as under section 36 of the Press Act lawfulness and/or respect for third parties' personal rights had to be examined with reference to the content of the advertisement only, and not of the advertised service or the merchandise. The content of the book was irrelevant in the case at hand.

23. By a judgment of 30 January 2007 the Warsaw Regional Court dismissed the applicant's claim. The court was of the view that the advertisement was incompatible with the newspaper's editorial profile. It further reiterated that the publication of the advertisement could have been understood as an endorsement of the applicant's views expressed in the book. This circumstance alone was sufficient to justify the refusal to publish the advertisement. Moreover, *Rzeczpospolita* and *Gazeta Wyborcza* were competitors in the press market. The publication of the advertisement could have given rise to a suspicion that the editors of the former were trying to denigrate the latter in the eyes of the public. Further, the editors were not obliged by law to endorse the dissemination of views and statements which they did not accept.

24. The court concluded that the advertisement did not meet the requirements laid down by section 36 of the Press Act.

25. The court further stated, referring to the views expressed by the Supreme Court in its judgments of 18 January 2007 given in other cases brought by the applicant and concerning refusals to publish the same advertisement (see paragraph 30 below), that the principle of commercial and contractual freedom dictated that a publisher was not under a legal obligation to publish all advertisements submitted to it because it did not have a monopoly on the market.

26. The applicant appealed, reiterating his earlier arguments. He expressly relied on Article 10 of the Convention.

27. On 7 February 2008 the Warsaw Court of Appeal dismissed his appeal, essentially endorsing the view expressed by the Regional Court.

28. The applicant's lawyer submitted a cassation appeal against that judgment to the Supreme Court, relying on the right to freedom of expression guaranteed by the Constitution and by Article 10 of the Convention.

29. By a judgment of 26 March 2009, served on the applicant on 24 June 2009, the Supreme Court dismissed the cassation appeal.

30. The court referred to its judgments given in other cases initiated by the applicant: CZP 67/05 (the *Nasz Dziennik* case – in which it refused to answer a legal question, see paragraph 35 below; I CSK 351/06 and 376/06

(the *Polityka* case). It observed that the press market was governed by business and commercial freedom. It resulted therefrom that publishers of newspapers could not be held to be obliged to publish all advertisements simply at the request of clients. The court referred to the Court's judgment in the case of *Appleby and Others v. the United Kingdom*, no. 44306/98, ECHR 2003-VII. It shared the Court's view that the principles governing the exercise of the freedom of expression were also applicable to commercial speech. However, it did not necessarily result therefrom that in horizontal relations this freedom could not be limited in compliance with the constitutional principle of proportionality.

31. Whereas it was true that section 36 paragraph 4 of the Press Act could not be said to be fully consistent with other provisions of that Act, it could validly be relied on by publishers wishing to refuse the publication of an advertisement if they were of the view that the advertisement as proposed was not compatible with the newspaper's profile.

32. The Supreme Court concluded that the contested judgment was ultimately in conformity with the law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

33. Article 54 of the Constitution provides:

> "1. Freedom to express opinions, and to acquire and disseminate information shall be ensured to everyone.
>
> 2. Preventive censorship of means of social communication and licensing of the press shall be prohibited."

Article 31 of the Constitution reads:

> "1. Freedom of the person shall receive legal protection.
>
> 2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.
>
> 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

34. Section 36 of the Press Act 1984 reads as follows:

> "1. The press may publish paid advertisements and notices.
>
> 2. Press advertisements shall not be in breach of the laws or of the principles of social co-existence.
>
> 3. Advertisements shall be put in such a form as to make it clear that they are not to be identified with the editorial content.

> 4. The publisher and editor shall have the right to refuse the publication of an advertisement if its content or form is incompatible with the editorial profile or character of the newspaper."

35. In a decision of 14 October 2004 (CZP 67/05) the Supreme Court examined a legal question submitted to it by the Warsaw Court of Appeal in the applicant's case against *Nasz Dziennik*. In its request the Court of Appeal summarised the difficulties arising in connection with the interpretation of section 36 of the Press Act. On the one hand, section 36 provided, in paragraph 1, that newspaper publishers had a right to publish advertisements. This formulation suggested that they were free to decide on the choice of advertisement to be published.

36. On the other hand, the provisions of paragraphs 2 and 4 of that section, in so far as they defined situations where a publisher could refuse to publish an advertisement, suggested that such refusal was possible only where that advertisement as proposed failed to meet the requirements laid down in those provisions. Otherwise, publishers were obliged under the provisions to publish an advertisement as long as it had been duly paid for. This conclusion was further strengthened by the fact that under paragraph 2 of section 44 of the Act publishers did not bear any legal responsibility for the content of paid advertisements.

37. The Court of Appeal noted in its question that the freedom of expression of the person trying to place an advertisement had to be weighed against the publisher's commercial freedom. It further observed that if decisive weight was given to the publisher's freedom to choose the advertisements to be published, a form of unlimited control of content by private commercial entities could result, comparable to preventive censorship.

38. The Supreme Court endorsed the reasoning of the requesting court that section 36 of the Press Act could, and indeed did, give rise to discrepancies in its judicial interpretation. A literal interpretation *a contrario* indicated that a refusal to publish an advertisement was justified only when one of the four conditions laid down in paragraphs 2 and 4 was not fulfilled. Had the legislator accepted that publishers were completely free in deciding whether to publish an advertisement or to refuse its publication, it would have been redundant to list the requirements that an advertisement had to comply with in order to be published. Hence, the majority of legal writers were of the view, which was apparently also shared by the requesting Court of Appeal, that this provision of the Press Act limited the publisher's freedom in respect of commercial advertisements.

39. The Supreme Court expressed the view that it was difficult to accept such an opinion. It observed that many arguments could be adduced in support of a contrary opinion. However, in the circumstances of the case it was not necessary for that court to give a reply to the legal question posed by the Court of Appeal as such a reply was not necessary for a decision on

the merits of the case. The outcome of the case pending before the Court of Appeal hinged only on that court's assessment of whether the advertisement as proposed was in breach of the applicable law, not on the clarification of the scope of the publisher's duty to publish a paid advertisement.

40. The Supreme Court made similar observations as to the interpretation of section 36 of the Press Act in its two judgments given on 18 January 2007 concerning the applicant's cases (I CSK 351/6 and 376/06). The applicant's claim to have the advertisement published was rejected in both cases.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

41. The applicant complained that the refusal to publish a paid advertisement by *Rzeczpospolita* which was subsequently upheld by the courts breached his right to freedom of expression as protected by Article 10 of the Convention, which 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 and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

1. Exhaustion of domestic remedies

42. The Government argued that the applicant had failed to exhaust domestic remedies in that he had not availed himself of a constitutional complaint. In their view, he should have challenged section 36 §§ 2 and 4 of the Press Act as to its compatibility with the Constitution.

43. The applicant disagreed. He submitted that a constitutional complaint was not a proper remedy in his case. There were no grounds on which to contest the constitutionality of the provisions concerned. It was merely their interpretation by the courts in his case which he contested.

44. The Court has held on numerous occasions that in Poland a constitutional complaint is an effective remedy for the purposes of Article 35 § 1 of the Convention where the alleged violation of the Convention results from the direct application of a legal provision considered by the complainant to be unconstitutional (see, among other authorities, *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003).

45. Turning to the circumstances of the instant case, the Court notes that the alleged violation originated in the judicial interpretation of section 36 of the Press Act. The Court points to the established jurisprudence of the Constitutional Court, which provides that constitutional complaints based solely on an allegedly wrong interpretation of a legal provision are excluded from its jurisdiction; as a result, such a complaint cannot be deemed an effective remedy within the meaning of Article 35 § 1 of the Convention. It is precisely such an interpretation and divergences in that interpretation which lie at the core of the present case. Therefore the constitutional complaint cannot be regarded as an effective remedy in the applicant's case (see, among many other authorities, *Palusiński v. Poland* (dec.), no. 62414/00, ECHR 2006-...; *Ciesielczyk v. Poland*, no. 12484/05, § 28, 26 June 2012; and *Sosinowska v. Poland*, no. 10247/09, § 55, 18 October 2011).

46. For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

2. Alleged incompatibility ratione personae *with the provisions of the Convention*

47. The Government further argued that the application should be declared incompatible *ratione personae* because it concerned horizontal relations between private parties.

48. The applicant submitted that the refusal to publish the advertisement for his book had been endorsed by the courts acting in the name of the State and that therefore the State had to be held responsible for the content of the judgments and for the outcome of the proceedings.

49. The Court observes that this objection is a matter which goes to the merits of the case and will be addressed as a question of substance.

3. The applicant's victim status

50**.** The Government further argued that the applicant could not claim to be the victim of a breach of the Convention because he had not been negatively affected by the decisions complained of. He had launched his own website on the Internet and had been able, despite the publishers' refusals to publish the paid advertisements, to disseminate information about his book and to sell it. It appeared from information he had made

available on that website that the third edition of the book had already sold out by 2010.

51. The Court reiterates that it falls firstly to the national authorities to redress any violation of the Convention. A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, *inter alia*, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Scordino v. Italy* (no. 1) [GC], no. 36813/97, § 180, ECHR 2006-V; and *Ladent v. Poland*, no. 11036/03, § 36, 18 March 2008). The notion of "victim" is to be interpreted autonomously (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 35, ECHR 2004-III). Importantly, it does not imply the existence of prejudice (*Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII).

52. In the present case no domestic decision was ever given which was designed for and capable of alleviating the negative impact on the applicant's rights of the decisions complained of. Since his situation has not been remedied in any way, this objection of the Government must be dismissed.

4. Lack of significant disadvantage

53. The Government further submitted that the applicant had not suffered a significant disadvantage because he had not been negatively affected by the decisions complained of. He had been able to advertise his book on the Internet and to sell it.

54. The Court is of the view that this argument amounts to a mere rephrasing of the submissions which the Government made with regard to the applicant's victim status (see paragraph 51 above).

55. This objection must therefore also be dismissed.

5. Conclusion

56. The Court notes that the application 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. Applicability of Article 10 of the Convention

57. The Government acknowledged that advertisements and other forms of commercial expression may fall within the scope of Article 10 of the Convention. However, this provision was not applicable to the

circumstances of the present case because it concerned a dispute between private parties, whereas the rights and freedoms enshrined in the Convention were of a vertical nature, in that they concerned relations between the State and individuals.

58. The applicant disagreed. He was of the view that Article 10 was applicable to the circumstances of the case.

59. The Court has held on a number of occasions that this provision is applicable to advertising and commercial speech (see *Casado Coca v. Spain*, 24 February 1994, § 35-36, Series A no. 285-A; and *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 26, Series A no. 165). It fails to see grounds on which to hold otherwise in the present case.

60. The Court reiterates that it is in the first place for the national authorities, and in particular the courts of first instance and appeal, to construe and apply the domestic law (see, for example, *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 61, ECHR 2003-V; *Slivenko v. Latvia* [GC], no. 48321/99, § 105, ECHR 2003-X; and *Włoch v. Poland*, no. 27785/95, § 110, ECHR 2000-XI). However, this does not exempt the State from its general obligation under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention". The responsibility of a State may then be engaged as a result of not observing its obligation to enact domestic legislation or of applying existing domestic legislation in a manner incompatible with the Convention standards.

61. The Court reiterates the key importance of freedom of expression as one of the preconditions for a functioning democracy. The Court also reminds the pre-eminent role of the press in a State governed by the rule of law (for example, *Goodwin v. the United Kingdom*, 27 March 1996, § 39, Reports 1996-II). The case-law of Court has stressed on numerous occasions the function of the press as purveyor of information and public watchdog. The press plays a special role in imparting information and ideas on political issues just as on those in other areas of public interest. Freedom of the press affords among others the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. (*Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, § 43).

62. Genuine, effective exercise of the freedom of expression does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals see *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000; and *Wojtas-Kaleta v. Poland*, no. 20436/02, § 43, 16 July 2009, concerning the obligation on the State to protect freedom of expression in the employment context; or *Appleby and Others v. the United Kingdom*, no. 44306/98, ECHR 2003-VI, where the Court examined the scope of the State's positive

obligations in the regulation of the effective exercise of the freedom of expression in horizontal relations between private parties). Positive measures of protection may be required especially vis-à-vis journalists and newspapers (see *Özgür Gündem v. Turkey*, no. 23144/93, §§ 42-46, ECHR 2000-III, where the Turkish State was found to be under a positive obligation to take investigative and protective measures where a pro-PKK newspaper and its journalists and staff had been the victims of a campaign of violence and intimidation.

63. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, *inter alia*, *Özgür Gündem v. Turkey*, cited above, § 43, and *Frăsilă and Ciocîrlan v. Romania*, no. 25329/03, § 55, 10 May 2012). The boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition (see *Verein gegen Tierfabriken Schweiz* (VgT) v. Switzerland (no. 2) [GC], no. 32772/02, § 82, ECHR 2009). In both situations – whether the obligations are positive or negative – the State enjoys a certain margin of appreciation (see, for example, *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 50, ECHR 2012 (extracts)).

64. The breadth of such a margin of appreciation varies depending on a number of factors, among which the type of speech at issue is of particular importance. Whilst there is little scope under Article 10 § 2 of the Convention for restrictions on political speech (see, among many other authorities, *Sokołowski v. Poland*, no. 75955/01, § 41, 29 March 2005, and *Kaperzyński v. Poland*, no. 43206/07, § 64, 3 April 2012), a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion (see *Murphy v. Ireland*, no. 44179/98, § 67, ECHR 2003-IX (extracts), and *Mouvement raëlien suisse v. Switzerland* [GC], cited above, § 61). It is especially relevant for the assessment of the present case that the States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, cited above, § 33, Series A no. 165, and *Casado Coca v. Spain*, cited above, § 50, Series A no. 285-A).

65. In the determination of the existence and scope of the positive obligations of the State arising under Article 10 of the Convention, the Court has had regard to the subject matter of the case, to its capacity to

contribute to the public debate, to the nature and scope of restrictions imposed on the exercise of freedom of expression, and to the availability of alternative means by which that liberty could be exercised, as well as to the weight to be given to the competing rights of other persons or of the general public (see *Appleby and Others*, cited above, §§ 42-43 and 47-49).

2. Compliance with Article 10 of the Convention

(a) The parties' submissions

66. The Government submitted that in the event that the Court was minded to find Article 10 applicable to the case, the State's authorities would be responsible only in respect of their positive obligations arising under that provision and not for any direct interference with the applicant's rights. In the present case these obligations had been fully complied with. In the Polish legal system all individuals were free to express their views. Private parties were free to create and shape their relations in compliance with the principle of freedom of economic activity that governed commercial relations in the free market in a democratic society.

67. The Government considered that the measures taken in the present case had served the legitimate aim of protection of the rights of others, namely the publishers of the newspapers concerned.

68. As to the lawfulness of the restrictions imposed on the applicant, the Government stressed that they had a legal basis in section 36 §§ 2 and 4 of the Press Act. The domestic courts, when examining the newspaper's refusal to publish the advertisement, had examined its legal grounds. They had found that the refusal was in compliance with the said provision, given that the proposed advertisement was incompatible with the newspaper's editorial profile.

69. The Government further opined that the difficulties in the interpretation of this provision referred to in the Supreme Court's decision of 2005 and judgments of 2007 had had no impact on the lawfulness of the refusal in the present case. Those difficulties had arisen essentially because prior to the cases brought before the courts by the applicant there had been no judicial practice concerning the interpretation to be given to section 36 of the Press Act. The applicant's cases were the first occasion for the domestic courts to examine what balance should be struck between, on the one hand, the economic freedom of newspaper publishers and, on the other, private parties' freedom of expression in the context of information of a commercial nature. This absence of relevant judgments had resulted in doubts as to whether publishers were obliged to accede to each and every request to publish a paid advertisement in a newspaper or had a right to refuse to do so. The Supreme Court had developed its jurisprudence in this matter solely on the basis of the cases brought by the applicant. That

case-law should be regarded as established and would serve in the future as a basis for decisions in further cases of the same kind.

70. They further argued that the applicant should have known that publishers were allowed to refuse to publish an advertisement subject to the requirements that it was contrary to the law or the principles of social co-existence, or incompatible with a publication's editorial profile. These requirements had never been doubted, either by legal scholarship or the judiciary. *Rzeczpospolita's* refusal to publish the applicant's advertisement had been based on two of these requirements, namely inconsistency with the editorial profile and the character of the newspaper. The Government concluded that the relevant law was formulated with sufficient precision for the applicant to foresee the consequences of his actions, namely that the publication of his advertisement could be refused on legal grounds.

71. As to the issue of necessity in a democratic society, the Government argued that it was essential to balance the applicant's freedom of expression against the freedom of expression of the press and the publishers' freedom of economic activity. The refusal of the newspaper *Rzeczpospolita* to publish the applicant's advertisement had not prevented him from either advertising or selling his book. There had been other easily accessible means of informing the public about his product, such as Internet advertising, setting up his own Internet website, launching an Internet blog, signing up with social networks, printing and distributing leaflets and posters, organising meetings with the public, or launching his own newspaper or other publication. Hence, the general public had been informed of the book despite the refusal to publish the applicant's advertisement.

72. The Government submitted that the reasons given by the courts in the present case had been relevant and sufficient. They had found that the proposed advertisement was incompatible with *Rzeczpospolita*'s editorial profile as a serious newspaper dealing with legal, economic and social issues, and which was politically neutral and objective, conveying information in a proper and respectful manner and avoiding the publication of scandalous and sensationalist texts. The courts had observed that the advertisement concerned the editor-in-chief and the publisher of a rival newspaper. Publishing the advert could have created the impression that *Rzeczpospolita* shared the author's views and could thus have called its objectivity into question.

73. The Government further asserted that publishing the advertisement would have been not only contrary to the law but also in breach of professional ethics. The courts had further been of the view that imposing on the newspaper the obligation to publish it would also have infringed the publisher's right to decide on its editorial content.

74. The Government concluded that the measures complained of had been justified by a pressing social need and were proportionate and therefore compatible with the requirements of Article 10 of the Convention.

75. The applicant submitted that the refusal to publish a paid advertisement by *Rzeczpospolita*, which had subsequently been endorsed by the courts, had breached his right to freedom of expression guaranteed by Article 10 of the Convention. His book concerned issues of public concern and interest, given that *Gazeta Wyborcza* was a powerful newspaper which played an important role in shaping the political views and attitudes of its numerous readers. The book aimed to present the general public with significant facts concerning the manner in which that newspaper had been created and how it had risen to its position of significance and power. No reviews of his book had ever been published in the printed media. The applicant was of the view that this was most likely to be because the book had been embarrassing for the publishers of *Gazeta Wyborcza*, who had been sufficiently feared and respected to be able to prevent anything hostile to it being published in the press. For an effective exercise of the freedom of expression and for a genuine political debate among citizens it was important that views and facts ignored or silenced by the mainstream media would be allowed to see the light of day. The applicant had been prevented from publishing the advertisement in *Rzeczpospolita* and also in a number of other newspapers. The fact that he had been silenced in that way breached both the Constitution and the Convention.

(b) The Court's assessment

76. The applicant complains that the refusal to publish a paid advertisement by *Rzeczpospolita*, breached his right to the freedom of expression guaranteed by Article 10 of the Convention. The Court observes that the applicant could not publish an advertisement in the *Rzeczpospolita* newspaper, owned by a limited liability company, as the publisher refused to publish that advertisement. Subsequently, the civil courts examined the applicant's claim for a decision ordering that newspaper to publish the advertisement. The courts found against him.

The Court notes at the outset that the application concerns the outcome of a dispute between two private parties. In the domestic proceedings the applicant argued that the newspaper was under a positive obligation to publish a paid advertisement. The newspaper publisher relied on its freedom from external interference in the exercise of its freedom of expression and the courts endorsed this position. The Court is of the view that in such a situation the right invoked by the applicant has to be interpreted and applied with due consideration for the rights of the press protected under Article 10 of the Convention.

77. The Court has previously examined cases involving access to particular venues or forums for the purposes of exercising the freedom of

expression. It has held that, notwithstanding the importance of that freedom, Article 10 does not bestow any freedom of forum for the exercise of that right as regards entry to private property, or even, necessarily, to all publicly owned property (see *Appleby and Others*, cited above). The same finding was reiterated in *Berladir and Others v. Russia*, no. 34202/06, § 58, 10 July 2012, *mutatis mutandis*. In the examination of such cases the Court took into consideration whether the bar on access to a given forum had the effect of preventing any effective exercise of freedom of expression. The instant case, however, concerns not a private venue, but a media whose fundamental freedom of expression is protected under Convention.

78. The Court has examined a number of cases concerning restrictions on advertisement in television (see *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22 April 2013). In those cases the applicants were prevented from having their advertisements broadcast by a general prohibition imposed on certain types of political speech. The Court considered that a prohibition of an advertisement by way of a general measure could be justified under Article 10 of the Convention (see *Animal Defenders International*, cited above, § 106). The instant case differs from the above mentioned in that the general rules examined so far by the Court in its case-law affected directly not only the potential advertisers but also the broadcasters. In the present case the refusal to publish the advertisement sought by the applicant did not result from a general ban on broadcasting specific types of commercial speech but from a decision by the newspaper's publisher.

79. The Court has already held that privately owned newspapers must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals or even by their own staff reporters and journalists. The State's obligation to ensure the individual's freedom of expression does not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions (see, mutatis mutandis, *Murphy v. Ireland*, no. 44179/98, § 61, 10 July 2003; *Saliyev v. Russia*, no. 35016/03, § 52, 21 October 2010). In the Court's view these principles apply also to the publication of advertisements. An effective exercise of the freedom of the press presupposes the right of the newspapers to establish and apply their own policies in respect of the content of advertisements. It also necessitates that the press enjoys freedom to determine its commercial policy in this respect and to choose those with whom it deals.

80. In the present case it has not been argued, let alone shown, that the applicant had any difficulties in publishing his book or that the authorities tried in any way to prevent or dissuade him from publishing it, or that, more generally, the media market in Poland was not pluralistic.

81. The Court accepts that the issues examined in that book may contribute to a debate about the mission of the press in Polish society. The analysis of the political and institutional origins of a national newspaper, the financial dealings of its publisher and analysis and comment about that newspaper's functioning and role in society were topics of public interest. However, the character of the issues explored by that book does not detract from the fact that the paid advertisements proposed by the applicant were essentially aimed at promoting the distribution and sales of his book. Hence, they were primarily designed to further the applicant's commercial interests.

82. At no point was the applicant prevented from disseminating information about the book by any means he wished. Indeed, he created his own Internet website, through which he informed the general public about the book, its content and its potential significance for the public debate.

83. In the present case the applicant had recourse to civil proceedings. He requested the courts to order that newspaper to publish a paid advertisement for his book. The domestic courts examined his case under the provisions of the Press Act 1984. Hence, the domestic law provided an effective procedural framework within which the applicant could seek to have the substantive issues involved in his case determined by judicial authorities.

84. The courts were well aware of the difficulties arising in the interpretation of the relevant provisions of the Press Act 1984. They were of the view that the crux of the case lay in the necessity to adjudicate on conflicting interests and rights: the applicant's right to disseminate ideas on the one hand and the constitutionally and internationally guaranteed rights and freedoms of the publisher, such as the right to freedom of expression and freedom of commercial activity on the other. As to whether the domestic courts correctly applied those provisions, the Court reiterates that the application and interpretation of the domestic law fall primarily within the competency of the domestic authorities, which are, in the nature of things, particularly well placed to settle the issues arising in this connection (compare, *inter alia, Barthold v. Germany*, 25 March 1985, § 48, Series A no. 90).

The Warsaw Regional Court, in its judgment of 30 January 2007, had regard to the publisher's freedom to shape the newspaper's editorial profile. Subsequently, the Court of Appeal, in its judgment of 7 January 2008, essentially shared that view. Ultimately, the Supreme Court, when examining the applicant's cassation appeal, observed that the press was governed by commercial freedom. It was of the opinion that publishers could not be held to be obliged to publish paid advertisements simply at the request of their clients. That court was of the view that the principles governing free speech were also applicable to commercial speech. The Supreme Court referred to its own judgments given in other cases brought before it by the applicant. It noted that the freedom of expression could be

restricted in compliance with the principle of proportionality enshrined in the Constitution.

85. The Court is therefore satisfied that the courts carefully weighed the applicant's interests against the legitimate rights of the publishers, such as their own freedom of expression and economic freedom (compare and contrast *Khurshid Mustafa and Tarzibachi v. Sweden*, no. 23883/06, § 48, 16 December 2008, where no such exercise was performed). In addition, the Supreme Court was aware of the human rights issues arising in the case and had recourse to the Court's interpretation of the positive obligations arising in connection with the freedom of expression in the case of *Appleby v. the United Kingdom*. Furthermore, the Supreme Court had regard to the principle of proportionality enshrined in Article 31 of the Constitution, which covered all situations in which the exercise of individual rights was restricted. Hence, the Court accepts that the analysis made by the domestic courts was fully compatible with the Convention standards.

86. The Court agrees with the analysis of the case carried out by the domestic courts. It finds that their conclusion that, in a pluralistic media market press, publishers should not be obliged to carry advertisements proposed by private parties is compatible with the freedom of expression standards under the Convention.

87. Having regard to the circumstances of the case seen as a whole, the Court is of the view that the State has not failed to comply with its obligation to secure to the applicant the freedom of expression guaranteed by Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

88. The applicant complained that his rights guaranteed in Article 6 § 1 were violated. He drew attention to the fact that the decisions of the Polish courts in several similar lawsuits he brought against different newspapers were inconsistent.

89. Article 6 § 1, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

90. The Government reiterated that prior to the applicant's cases there had been no similar cases brought to the attention of the Polish courts. Consequently, no judicial practice could have been created as regards the existence and scope of a newspaper's obligations to publish paid advertisements. The Supreme Court examined a number of cases brought before it by the applicant and, in a number of decisions given between 2005 and 2009, consolidated its approach to the interpretation of section 36 of the

Press Act 1984. It properly balanced the interests and freedoms involved in these cases, weighing the publisher's freedom of expression and freedom of economic activity against the right to freedom of expression of the person wishing to publish paid advertisements in the printed media.

91. The applicant did not comment on the Government's submissions.

B. The Court's assessment

92. In its recent Grand Chamber judgment in the case of *Nejdet Şahin and Perihan Şahin v. Turkey* ([GC], no. 13279/05, 20 October 2011), the Court reiterated the main principles applicable in cases concerning the issue of conflicting court decisions (§§ 49-58). These may be summarised as follows.

(i) It is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). Likewise, it is not its function, save in the event of evident arbitrariness, to compare different decisions of national courts, even if given in apparently similar proceedings, as the independence of those courts must be respected (see *Ādamsons v. Latvia*, no. 3669/03, § 118, 24 June 2008).

(ii) The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see *Santos Pinto v. Portugal*, no. 39005/04, § 41, 20 May 2008, and *Tudor Tudor,* cited above, § 29).

(iii) The criteria that guide the Court's assessment of the conditions in which conflicting decisions of different domestic courts ruling at final instance are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of the domestic courts, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see *Iordan Iordanov and Others*, cited above, §§ 49-50; see also *Beian (no. 1)*, cited above, §§ 34-40; *Ştefan and Ştef v. Romania*, nos. 24428/03 and 26977/03, §§ 33-36, 27 January 2009; *Schwarzkopf and Taussik*, cited above, 2 December 2008; *Tudor Tudor*, cited above, § 31; *Ştefănică and Others*, cited above, § 36; and *Teresa Kowalczyk v. Poland*, no. 23987/05, § 43, 11 October 2011).

(iv) The Court's assessment has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (see, amongst

other authorities, *Beian (no. 1)*, cited above, § 39; *Iordan Iordanov and Others*, cited above, § 47; and *Ştefănică and Others*, cited above, § 31);

(v) The principle of legal certainty guarantees, *inter alia*, a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see *Paduraru v. Romania*, § 98, no. 63252/00, ECHR 2005-XII (extracts); *Vinčić and Others v. Serbia*, nos. 44698/06 and others, § 56, 1 December 2009; and *Ştefănică and Others*, cited above, § 38).

(vi) However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see *Unédic v. France*, no. 20153/04, § 74, 18 December 2008). Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see *Atanasovski v. "the Former Yugoslav Republic of Macedonia"*, no. 36815/03, § 38, 14 January 2010).

93. Turning to the present case, the Court notes that the applicant argued that his separate cases concerning his claim to have identical advertisements about his book published had been decided differently.

94. Firstly, the Court notes that the applicant lodged seven identical claims against the publishers of various newspapers with the Warsaw Regional Court. That court, by judgments dated 23 January 2004, 11 May 2005, 26 May 2005, 28 January 2004 and 28 March 2006, dismissed his actions against *Nasz Dziennik, Wprost, Metropol, Newsweek* and *Polityka* respectively. Having regard to the uniformity of those decisions, it cannot be said that there were discrepancies in that court's approach to identical cases. Following the applicant's appeal, the Warsaw Court of Appeal ordered two of the defendant newspapers, *Wprost* and *Metropol*, to publish the advertisement concerned. Those judgments became final as no cassation appeals against them were lodged by the publishers with the Supreme Court. That court was not therefore given an opportunity to pronounce on the issues involved in them.

The Court further notes that the appeal against the publisher of *Newsweek* was rejected on formal grounds. That case is therefore of no relevance for the assessment of the present complaint.

95. The Court further notes noted that the Warsaw Court of Appeal, when examining the applicant's appeal against the publishers of *Nasz Dziennik*, noted that the interpretation of section 36 of the Press Act 1984 could give rise to difficulties. It described those difficulties in detail in the legal question concerning Article 391 § 1 of the Code of Civil Procedure which it decided to submit to the Supreme Court (see paragraphs 35-37

above). The Court is therefore satisfied that under the provisions of the Polish civil procedure there was a mechanism available to the courts for the purposes of clarifying major interpretation difficulties and harmonising the judicial approach to those difficulties by way of a decision of the highest judicial authority, and that that mechanism was resorted to in the present case. Hence, the criteria relied on by the Court when dealing with inconsistencies in judicial practice were thereby complied with (see *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, § 49-50). It is true that ultimately the Supreme Court refused to answer that question. However, as it was of the view that such an answer was not necessary for the purposes of that case, it cannot be said to have been unjustified.

The Court of Appeal noted in its question that the freedom of expression of the person trying to place an advertisement had to be weighed against the publisher's commercial freedom. It further observed that if decisive weight was given to the publisher's freedom as to the choice of advertisements to be published, a form of unlimited control of content by private commercial entities could result, to preventive censorship.

96. Moreover, there was no arbitrariness in the decisions given in the present case. The applicant's concerns arising in connection with his right to freedom of expression in the context of his case against the *Rzeczpospolita* newspaper were examined in depth at three levels of jurisdiction, including the Supreme Court. That court accepted the applicant's cassation appeal for an examination on the merits, a decision given only in respect of cases raising important legal issues. It is also significant that the Supreme Court in the present case relied on its own analysis of the issues involved in the interpretation of Article 36 made in the applicant's previous cases (III 67/05, I CSK 351/06, I CSK 376/06, referred to above). It therefore sought thereby to ensure uniformity in its approach in similar cases. Finally, the applicant's cases which serve as a background to the present case, and which were brought before the Supreme Court by way of cassation appeals, were decided on the merits in the same manner as the applicant's claim to have the advertisements published and were ultimately dismissed (the cases against *Nasz Dziennik* I CSK 351/06 and *Polityka* I CSK 376/06).

97. The Court further notes the Government's argument that the decisions concerning the existence of an obligation on newspaper publishers to publish each and every paid advertisement proposed to them was very few and that practically all of them had been given in the applicant's cases (see paragraph 90 above). It cannot therefore be said that that there were "profound and long standing differences" in the case-law, or that distinct strands of jurisprudence had developed, leading to similar cases being decided differently (compare and contrast *Iordan Iordanov and Others v. Bulgaria*, referred to above).

98. In such circumstances, it cannot be said that there were differences in the relevant case-law that had resulted in judicial uncertainty.

99. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE UNREASONABLE LENGTH OF THE PROCEEDINGS

100. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement within the meaning of Article 6 § 1 of the Convention.

101. However, the Court notes that the applicant failed to lodge a complaint about the breach of the right to a trial within a reasonable time under the Law of 17 June 2004 on complaints about a breach of the right to an investigation conducted and supervised by a Prosecutor and to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki*) (see *Charzyński v. Poland* (dec.) no. 15212/03, 1 March 2005).

102. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

IV. OTHER ALLEGED VIOLATION OF THE CONVENTION

103. The applicant further complained under Article 6 of the Convention, alleging unfairness of the civil proceedings against him in that the Supreme Court had failed to address his arguments properly.

104. The Court finds that the facts of the case do not disclose any appearance of a violation of the Convention. It follows that these complaints are manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 10 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 10 of the Convention.

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