

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

FOURTH SECTION

DECISION

Application no. 42801/07
Jarosław SROKA
against Poland

The European Court of Human Rights (Fourth Section), sitting on 6 March 2012 as a Chamber composed of:

David Thór Björgvinsson, *President,*
Lech Garlicki,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 1 October 2007,

Having regard to the declaration submitted by the respondent Government on 1 September 2011 requesting the Court to strike the application out of the list of cases and the applicant's reply to that declaration,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Jarosław Sroka, is a Polish national who was born in 1969 and lives in Warsaw. His application was lodged on 1 October 2007. He was represented before the Court by Mr A. Bodnar from the Helsinki Foundation of Human Rights. The Polish Government ("the Government")

were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. The article and its correction

On 16 July 2004, in the weekend edition of the *Puls Biznesu* ("Business Pulse"), a daily newspaper, an article entitled *"Śląskie Stopy"* was published. It was written by the applicant. It described the privatisation process of the Łaziska Smelting Plant ("the Smelting Plant"), which had been bought by the limited liability company GEMI. According to the article, there were many questions regarding the lawfulness of the privatisation. The applicant suggested in the article that several contracts had been signed. The buyer of the company paid 18,500,000 Polish zlotys (PLN) for the shares but at the same time it acquired the debts of the company worth over PLN 83,000,000. The article further alleged that GEMI had bought coal at reduced, export prices.

On 27 July 2004 a lawyer from GEMI sent a letter to the applicant demanding that he publish the following correction of untrue statements that had been made in the article of 16 July 2004:

> "With reference to the article *Śląskie Stopy* published in the *Puls Biznesu* of 16 July 2004, I hereby correct the untrue statements made therein:
>
> It is not true that GEMI entered into a contract with Upper Silesia Electroenergetic Plant *(Górnosląski Zakład Eklektroenergetyczny – GZE)*, on the understanding that GEMI would acquire the outstanding debts owed by GZE to the Smelting Plant.
>
> It is not true that GZE transferred to GEMI debts of PLN 83,100,000 originally owed to the Smelting Plant.
>
> It is not true that GEMI took over the pledge securing the contract with the Smelting Plant because the Smelting Plant had not fulfilled its payment obligations towards GEMI; it is likewise not true that the Smelting Plant did not pay its debts to GEMI,..."

The correction went on to list eight further statements appearing in the article which the company considered to be untrue. Each sentence began with the same words: "It is not true that..."

On 20 August 2004 the applicant, in accordance with the relevant provisions of the Press Act, replied to the lawyer in writing, refusing to publish the correction requested. He submitted, relying on documents or on conversations with witnesses, that the statements made in the article were true.

2. Criminal proceedings against the applicant

On an unspecified date lawyers for both GEMI and the Smelting Plant notified the police that an offence had been committed.

On 24 June 2005 the applicant was interviewed by the police as a suspect.

On 27 July 2005 a bill of indictment against the applicant was lodged with the Warsaw District Court. The applicant was charged with an offence provided for in section 46 of the Press Act, namely refusal to publish a correction of untrue or inaccurate statements.

On 9 August 2005 the applicant's lawyer lodged a request with the Warsaw District Court asking for the criminal proceedings to be discontinued. He claimed that the applicant's omission had not constituted an offence.

On 25 October 2006 the Warsaw District Court found the applicant guilty of having committed the offence with which he had been charged and sentenced him to a fine of PLN 3,000. The court found that the text of the correction had been consistent with the requirements laid down in section 31 of the Press Act and therefore the applicant had had no right to refuse its publication.

On 12 December 2006 the applicant's lawyer appealed.

On 5 March 2007 the Warsaw Regional Court, finding that the first-instance court had properly and exhaustively examined the circumstances of the case, upheld the judgment at issue.

A cassation appeal was not available to the parties to the proceedings.

On 19 March 2007 the applicant's lawyer asked the Ombudsman to lodge a cassation appeal on his behalf.

On 14 June 2007 the Ombudsman refused, finding no grounds on which to grant the applicant's lawyer's request.

However, on 7 September 2007 the Ombudsman applied to the Constitutional Court and requested the court to hold that the provision providing for criminal liability for the refusal to publish a correction was inconsistent with the relevant provisions of the Constitution. As emerges from the reasoning of the Ombudsman's request, it was based to a large extent on the facts of the present case.

On 1 December 2010 the Constitutional Court gave judgment (see below, relevant domestic law and practice).

3. Civil proceedings against the applicant for the protection of personal rights

The members of the management boards of GEMI and the Smelting Plant also instituted civil proceedings against the applicant and the author of the article for the protection of personal rights. In their claim of 15 July 2005, the plaintiffs sought a finding of a violation of their personal

rights, an order to publish a correction of untrue statements and the payment of PLN 20,000 to charity.

On 30 January 2007 the Warsaw Regional Court dismissed the claim. The court found that the plaintiffs had failed to prove that the defendants had infringed their personal rights by publishing the article concerned.

It appears that no appeal was lodged against the first-instance judgment.

B. Relevant domestic law and practice

1. Right of correction/reply

The relevant provisions concerning the correction of information in the press and other media are contained in the Press Act (*Prawo prasowe)* of 26 January 1984.

Section 31 provides, in so far as relevant, as follows:

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

Section 32 provides, in so far as relevant, as follows:

> "...Without the consent of the claimant, it is forbidden to shorten or make any other amendments to the correction or reply which would weaken its significance or alter the intentions of the author. The correction may not be commented upon in the same edition or broadcast..."

Section 33 provides, in so far as relevant, as follows:

> "1. The editor-in-chief is under an obligation to refuse publication of the correction or reply if:
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> 1) it does not fulfil the requirements laid down in section 31;
>
> ...
>
> 3. The editor-in-chief, when refusing to publish a correction or reply, shall, without undue delay, send the claimant written notification of the refusal and the reasons for it. If the refusal is based on reasons referred to in sub-section (1), the editor-in-chief shall indicate those parts which cannot be published; the seven-day time-limit for producing an amended correction or reply starts running again from the day on which the refusal and its justification were delivered. The editor cannot refuse to publish a correction or reply which has been amended in accordance with his or her indications."

Section 46 provides for the following penal provision:

> **"**Whosoever, in breach of the statutory obligation, refuses to publish a correction or reply, as referred to in section 31, or who publishes such a correction or reply contrary

> to the conditions laid down in this Act, shall be subject to a fine or a restriction of liberty."

The question of the objective decision on the final text of the correction was the subject of a Supreme Court judgment of 5 August 2003 (III KK 13/03). The Supreme Court said:

> "Correction within the meaning of section 31 of the Press Act of 26 January 1984 provides the person concerned with an opportunity to present his or her version of events. With the requirement that the correction be based on fact, the legislator allows the person concerned to present to the public the way in which he or she received those facts. It follows that the correction, by its very nature, aims to present the subjective point of view of the person concerned."

The Polish Constitutional Court also had an opportunity to deal with the matter of correction under the Press Act. In a judgment of 5 May 2004 (P2/03), the Constitutional Court found section 46 of the Press Act, which penalises a breach of the ban on commenting on the correction in the same edition or broadcast, to be incompatible with the relevant provisions of the Constitution. The court found that this penal provision was not precise enough to provide for criminal responsibility. In the same judgment the court made a general remark about the imprecise and unclear definitions of the concepts of "correction" and "reply" in the Polish Press Act.

On 7 September 2007 the Ombudsman lodged a request with the Constitutional Court to declare section 46 read in conjunction with sections 31 and 32 of the Press Act inconsistent with Articles 2 and 42 of the Constitution.

On 1 December 2010 the Constitutional Court gave judgment and held that section 46 § 1, sections 31 and 32 § 1 of the Press Act were incompatible with Article 46 of the Constitution. It pointed to the lack of precision in the manner in which criminal offences punishable under those provisions were defined. It further held that as a result of the judgment those provisions were to lose their binding force no later than eighteen months after the judgment was to be officially published. Until that time, they should be applied by the courts (K 41/07).

2. Re-opening of domestic proceedings

Article 540 § 3 of the Code of Criminal Proceedings allows for the re-opening of domestic proceedings if "such a need results from a decision *(rozstrzygnięcie)* of an international body acting on the basis of an international agreement ratified by the Republic of Poland.

COMPLAINT

The applicant complained that his criminal conviction amounted to a disproportionate interference with his right to freedom of expression as defined in 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."

THE LAW

By letter dated 1 September 2011 the Government informed the Court that they proposed to make a unilateral declaration with a view to resolving the issue raised by the application. They further requested the Court to strike out the application in accordance with Article 37 of the Convention.

The declaration provided as follows:

> "The Government hereby wishes to express – by way of the unilateral declaration – their acknowledgement of the fact that there has been an interference with the applicant's right to freedom of expression, in particular his right to receive and impart information, within the meaning of Article 10 § 1 of the Convention. Consequently, the Government are prepared to pay the applicant PLN 18,000 as just satisfaction, which they consider to be reasonable in the light of the Court's case-law.
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> ...
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> The sum referred to above, which is to cover any pecuniary and non-pecuniary damage as well as costs and expenses, will be free of any taxes that may be applicable. It will be payable within three months from the date of notification of the decision taken by the Court pursuant to Article 37 § 1 of the European Convention on Human Rights. In the event of failure to pay this sum within the said three-month period, the Government undertake to pay simple interest on it, from expiry of that period until settlement , at a rate equal to the marginal lending rate of the European Central Bank during the default periods plus three percentage points.
>
> ...
>
> (...) The Government's unilateral declaration contains an unconditional acknowledgement of the fact that there has been an interference with the applicant's right to freedom of expression, in particular his right to receive and impart information, within the meaning of Article 10 § 1 of the Convention.

> Eventually, the Court takes into consideration the manner in which the Government intend to provide redress to the applicant. As transpires from the Government's unilateral declaration the Government accepted paying to the applicant as just satisfaction the sum of PLN 18,000 in the event of the Court's striking the case out of its list.
>
> Consequently, the Government are of the opinion that the circumstances of the above application may lead to the conclusion set out in sub-paragraph (c) of Article 37 § 1 of the Convention, thus it is no longer justified to continue the examination of the application in the light of the Government's unilateral declaration."

In a letter of 30 September 2011 the applicant's representative informed the Court that the applicant opposed the striking out of the case. He referred primarily to the precedential nature of the case. He further pointed to the fact that the applicant's main objective was not to receive just satisfaction from the Government. Rather, with the help of the Court's judgment finding a violation of Article 10 of the Convention, he wished to use it to request the re-opening of the proceedings before the Polish courts. The applicant's representative expressed the view that according to the relevant provision of the Polish Code of Criminal Proceedings, the re-opening of a case on the basis of the Court's decision striking a case out of its list of cases following the Government's unilateral declaration would not be possible.

The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified, under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

> "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

It also recalls that in certain circumstances, it may strike out an application under Article 37 § 1(c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued.

To this end, the Court will examine carefully the declaration in the light of the principles emerging from its case-law, in particular the *Tahsin Acar* judgment (*Tahsin Acar v. Turkey*, [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI); *WAZA Spółka z o.o. v. Poland* (dec.) no. 11602/02, 26 June 2007; and *Sulwińska v. Poland* (dec.) no. 28953/03).

The Court notes that the Government's unilateral declaration, in addition to the obligation to pay compensation to the applicant – which sum the Court finds consistent with its Article 41 awards in similar cases - contains an unconditional acknowledgement that the criminal conviction of the applicant for refusing to publish a correction was a violation of Article 10 of the Convention.

The Court further notes that Article 540 § 3 of the Polish Code of Criminal Proceedings allows for the re-opening of domestic proceedings if "such a need results from a decision *(rozstrzygnięcie)* of an international body acting on the basis of an international agreement ratified by the Republic of Poland". This provision does not expressly limit the possibility of re-opening domestic proceedings to "judgments" (compare and contrast *Hakimi v. Belgium,* no. 665/08, 29 June 2010; and *Kessler v. Switzerland,* no. 10577/04, 25 January 2011).

With that in mind, the Court understands that the applicant, if he so requests, can seek the re-opening of the domestic proceedings. It notes in this connection that the applicant, following his unjustified prosecution and conviction, has a criminal record with all the implications which that has for his professional and private life. There is also the matter of the fine imposed on him.

In light of the above considerations, and in particular given the fact that – according to the wording of the relevant provisions of the Polish Code of Criminal Proceedings - the applicant may seek re-opening of the domestic proceedings on the basis of the Court's decision, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the application (Article 37 § 1 *in fine*).

In view of the above, it is appropriate to strike the case out of the list.

For these reasons, the Court unanimously

Takes note of the terms of the respondent Government's declaration and of the modalities for ensuring compliance with the undertakings referred to therein;

Decides to strike the application out of its list of cases in accordance with Article 37 § 1 (c) of the Convention.

Fatoş Aracı
Deputy Registrar

David Thór Björgvinsson
President