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

FORMER FIRST SECTION

CASE OF GAWĘDA v. POLAND

(Application no. 26229/95)

JUDGMENT

STRASBOURG

14 March 2002

In the case of Gawęda v. Poland,

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

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr GAUKUR JÖRUNDSSON,
Mr J. MAKARCZYK,
Mr R. TÜRMEN,
Mr J. CASADEVALL,
Mr B . ZUPANČIČ, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 21 February 2002;

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

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), by the European Commission of Human Rights ("the Commission") on 17 May 1999 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. The case originated in an application (no. 26229/95) against the Republic of Poland lodged with the Commission under former Article 25 of the Convention by a Polish national, Józef Gawęda ("the applicant"), on 30 January 1994.

3. The applicant alleged, in particular, that the Polish courts had refused to register the titles of two periodicals, preventing him thereby from publishing them.

4. The Commission declared the application partly admissible on 15 January 1996. In its report of 4 December 1998 (former Article 31 of the Convention), it expressed, by twenty-five votes to one, the opinion that there had been a violation of Article 10 of the Convention [*Note by the Registry*. The report is obtainable from the Registry].

5. The applicant was represented before the Court by Mr W. Grzyb, a lawyer practising in Żywiec. The Polish Government ("the Government") were represented by their Agent, Mr K. Drzewicki, from the Ministry of Foreign Affairs. On 31 March 1999 a panel of the Grand Chamber determined that the case should be decided by one of the Sections of the Court (Rule 100 § 1 of the Rules of Court). It was thereupon assigned to the First Section. Within that Section, the Chamber that would consider the case

(Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. On 9 September 1993 the Bielsko-Biała Regional Court dismissed the applicant's request for registration of the title of a periodical, *The Social and Political Monthly – A European Moral Tribunal* (*Miesięcznik społeczno-polityczny, europejski sąd moralny*) to be published in Kęty. The court considered that in accordance with the Press Act and the Ordinance of the Minister of Justice on the registration of periodicals, the name of a periodical should be relevant to its contents. The name as proposed by the applicant would suggest that a European institution had been established in Kęty, which was untrue and would be misleading to prospective buyers. Moreover, the proposed title would be disproportionate to the periodical's actual importance and readership as it was hardly conceivable that a periodical of a European dimension could be published in Kęty. The court went on to state:

> "... the applicant stubbornly applies for registration of periodicals the titles of which would suggest the existence in Kęty of an institution of international character (such as the European Moral Tribunal or the World Tribunal of Morality), and when requested by the court to change the titles he declares that he will not do so."

7. On 17 December 1993 the Katowice Court of Appeal dismissed an appeal by the applicant against this decision. The court stated, *inter alia*, that in the proceedings before the first-instance court the applicant had been requested to change the proposed title by deleting the term "European Moral Tribunal", but he had refused to do so.

8. Subsequently, the applicant made a number of further applications for the registration of periodicals. He succeeded in obtaining four registrations.

9. On 6 May 1994 the Minister of Justice refused to grant leave for an extraordinary appeal against the decision of 17 December 1993, finding that it was in accordance with the law.

10. On 17 February 1994 the Bielsko-Biała Regional Court dismissed a new request by the applicant for registration of a periodical, *Germany – A thousand-year-old enemy of Poland*. The court noted that at a hearing on 17 February 1994 the applicant, when requested to change the proposed title so as to remove its negative character, had refused to do so. The court considered that registration of the periodical with the proposed title would

be harmful to Polish-German reconciliation and detrimental to good cross-border relations.

11. The applicant appealed against this decision, submitting that it was incomprehensible and amounted to censorship.

12. On 12 April 1994 the Katowice Court of Appeal upheld the contested decision. The court observed that the title, as proposed by the applicant, suggested that the proposed periodical would concentrate unduly on negative aspects of Polish-German relations. The court considered that such a title would be in conflict with reality in that it would give an unbalanced picture of the relevant facts. The court further considered that the lower court had been justified in refusing registration on the ground that the title would be detrimental to Polish-German reconciliation and to good relations between Poland and Germany.

II. RELEVANT DOMESTIC LAW

13. Section 20 of the Press Act of 26 January 1984 requires registration of a press title by the regional court as a prerequisite for publication of a periodical. A request for registration should contain the proposed title, the editor's address, the name of the editor-in-chief and other personal data, the name and address of the publishing house and information on how often the periodical would be published. The decision on registration is to be taken within thirty days of the date on which the request has been filed with the court. The court must refuse registration if the request does not contain the required information or if the proposed title would prejudice a right to protection of the title of any existing periodical. Section 45 of the Press Act provides that a person who publishes a periodical without the required registration is liable to a fine.

14. Section 23(a) of the Press Act authorises the Minister of Justice to issue an ordinance specifying the manner in which the press register should be run.

15. Section 5 of the Ordinance of the Minister of Justice on the registration of periodicals, as applicable at the material time, provided that registration was not possible if it would be "inconsistent with the regulations in force and with the real state of affairs" ("*niezgodny z przepisami prawa lub z istniejącym stanem rzecz*").

16. On 1 November 1997 the ordinance was amended in that section 5 was deleted.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

17. The applicant complained that the refusal to register the titles of two periodicals amounted to a breach of Article 10 of the Convention, which reads:

> "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. Arguments before the Court

18. The Government first declared their profound conviction that freedom of expression constituted one of the principal foundations of a democratic society. Therefore any restrictions imposed in this respect had to be narrowly interpreted and their necessity had to be convincingly established.

19. The Government agreed that in the present case the refusals to register the titles of periodicals amounted to an interference with the applicant's rights under Article 10 of the Convention. As to the compatibility of this interference with the restrictions laid down by the second paragraph of that Article in that it should be "prescribed by law", the Government disagreed with the conclusion of the Commission that the domestic law at issue, the Press Act and the ordinance, had not been formulated with sufficient precision for the applicant to be able to regulate his conduct. In their view, the legislation in question was clear, comprehensible, precise and accessible.

20. It was further emphasised that the system for the registration of periodicals as provided for by the law applicable at the material time was of a judicial character. The provisions of both the Act and the ordinance had been, in the process of registration of periodicals, construed and applied by

higher courts of law. Such a system had been put in place to ensure that, even if difficulties of interpretation arose, such problems were to be solved by independent and impartial courts. The Government referred in that connection to the case-law of the Court to the effect that the role of adjudication was vested in the courts precisely to dissipate such interpretational doubts (see *Cantoni v. France*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1628, § 32). The Government further recalled that a legal rule would pass the quality test when it was "sufficiently clear in the large majority of cases" (ibid.). They argued that the case-law of the Polish courts in most registration cases had not given rise to any particular interpretation problems.

21. Furthermore, in the Government's submission, the legislation in question allowed every person to regulate his or her conduct and thus to foresee its consequences. In the present case, the applicant had himself demonstrated that the domestic legislation was clear enough for him, as shown by the fact that he had successfully instituted registration proceedings many times. Consequently, it had to be acknowledged that the applicant had adequate and operational knowledge of the applicable laws.

22. They further relied on the principle repeatedly reiterated by the Court that the law had to be of such clarity that the party to the proceedings "... must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable" (*Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III). In the present case, the law in question and the applicant's experience allowed him to regulate his conduct to a much higher degree than that attained in *Rekvényi*.

23. The Government further referred to section 5 of the ordinance, according to which registration of a publication could not be allowed if such registration was not in conformity with the regulations in force. They maintained that the law should be seen as a complex set of rules of a general character. Precise and clear formulation of legal provisions should not necessarily be achieved by excessively casuistic regulations. Whenever legislation required something to be in conformity with legal "regulations in force", this was to be construed to mean that any potentially applicable legal rule was at stake. The courts were perfectly capable of identifying the rules which had to be taken into consideration in an individual case. Therefore no reference to particular regulations was necessary in the present case.

24. They acknowledged that certain difficulties of interpretation might arise in the case of the second condition for registration set forth in section 5 of the ordinance. This condition was that registration could be refused if it would be "inconsistent with the real state of affairs". That was why the Government had repealed section 5 of the ordinance, in order to avoid potential misinterpretations.

25. However, they stressed that in judicial registration proceedings it was a normal role of the courts to examine whether facts relied on by the claimant were true. This was a typical feature of all registration procedures concerning, for instance, births, deaths and marriages, and also associations, trade unions and political parties. Such registration procedures normally required the parties concerned to submit specific information, the truthfulness of which was subject to verification by a registration organ. Legal restrictions applied in the course of registration procedures could be justified, as in the case of the registration of names, in the public interest (see, *mutatis mutandis*, *Stjerna v. Finland*, judgment of 25 November 1994, Series A no. 299-B, p. 61, § 39).

26. Lastly, the Government emphasised that the applicant could have published his periodicals if he had modified the proposed titles. Consequently, the refusals to register the titles had not amounted to restriction of the freedom of expression or to censorship. It was mainly a question of technical registration of periodicals, not a prohibition on disseminating or imparting specific ideas. The Government asserted that in all periodicals registered by the applicant he could and did exercise his freedom of expression as an author and as a publisher. Nor did the registration procedure amount to "licensing" within the meaning of the third sentence of Article 10 § 1 of the Convention.

27. In conclusion, the Government submitted that the system for the registration of periodicals under Polish law as it stood at the material time was not in irreconcilable conflict with the requirements of Article 10 of the Convention. In the Government's view, the refusal to register the applicant's periodicals was not only prescribed by law, but also necessary in a democratic society for the prevention of disorder or crime, for the protection of health and for the protection of the reputation or rights of others. However, the Court notes that no further arguments were developed in support of that submission.

28. The applicant submitted that the refusals to register the titles of the periodicals, *Germany – A thousand-year-old enemy of Poland* and *The Social and Political Monthly – A European Moral Tribunal* by the Bielsko-Biała Regional Court and the Katowice Court of Appeal had undoubtedly violated Article 10 of the Convention. The decisions of the courts were in contravention of the Polish Constitution in so far as it guaranteed freedom of expression and also in breach of the applicable provisions of Polish law.

29. According to the Press Act, the titles of periodicals and the information specified in section 20 of the Act had to be entered in a register at a regional court having territorial jurisdiction. Section 5 of the ordinance of the Minister of Justice, issued on 9 July 1990 by virtue of authorisation contained in section 23(a) of the Press Act, provided that registration had to be refused if it was not in conformity with the regulations in force or was in conflict with reality. The applicant emphasised that the wording of this

provision overstepped the limits of the authorisation that the Press Act gave to the minister to regulate, by way of an ordinance, the manner in which the press register should be run. It was also worth mentioning that section 5 had been repealed after the events examined in the present case.

30. The applicant argued that, even at the time when section 5 of the ordinance was still in force, all the judicial decisions under scrutiny by the Court in the present case had in any event contravened the relevant Polish regulations because the courts had dismissed the requests for registration of the titles on the ground that they were in conflict with reality. However, as regards the periodical *The Social and Political Monthly – A European Moral Tribunal*, it could not reasonably be determined whether this title, which was of a literary and metaphorical character, was or was not "inconsistent with the real state of affairs" within the meaning of section 5 of the ordinance. If it were to be accepted that an examination of a press title from this angle was permissible, it would lead to absurd consequences, for instance that periodicals such as *Der Spiegel* or *The Sun* could not be published for the reason that in fact their authors did not write about "a mirror" or "the sun". As regards the other title, *Germany – A thousand-year-old enemy of Poland*, it also had the character of a metaphor, and consequently it would be impossible to determine whether it corresponded to reality. This title constituted a value judgment rather than a statement of fact and its aim was to encourage thought and provoke a debate relating to Polish-German relations.

31. In sum, the applicant submitted that the contested decisions clearly violated Article 10 of the Convention.

B. The Court's assessment

1. General principles

32. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 41). Although freedom of expression may be subject to exceptions, these must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see The Observer *and* The Guardian *v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, p. 30, § 59).

33. Subject to paragraph 2 of Article 10, freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, judgment of 7 December

1976, Series A no. 24, p. 23, § 49, and *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 26, § 37).

34. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-34, § 37). Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 28, § 63, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III). Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, p. 25, § 57). Journalistic freedom in particular also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38, and *Thoma v. Luxembourg*, no. 38432/97, §§ 43-45, ECHR 2001-III)

35. Lastly, the Court reiterates that Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications. However, the dangers inherent in prior restraints are such that they call for the most careful scrutiny (see The Observer *and* The Guardian, cited above, p. 30, § 60).

2. Application of these principles to the instant case

36. The Court first observes that under Polish law the court's refusal to register the title of a periodical amounts to prohibiting its publication.

37. Consequently, the Court considers that the refusals of registration complained of amounted to an interference with the applicant's rights guaranteed by Article 10 of the Convention. Such an interference gives rise to a breach of this provision unless it can be shown that it was "prescribed by law", pursued one or more legitimate aims as defined in paragraph 2 and was "necessary in a democratic society".

38. It must first be ascertained whether the restriction complained of was "prescribed by law".

39. The Court observes that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given

action may entail (see, for example, *Rekvényi*, cited above, § 34, and *Feldek v. Slovakia*, no. 29032/95, § 56, ECHR 2001-VIII).

40. The Court considers that, although Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications (see paragraph 35 above), the relevant law must provide a clear indication of the circumstances when such restraints are permissible and, *a fortiori*, when the consequences of the restraint are to block publication of a periodical completely, as in the present case. This is so because of the potential threat that such prior restraints, by their very nature, pose to the freedom of expression guaranteed by Article 10.

41. In the present case, the system for the registration of periodicals is governed by the Press Act of 1984. Under section 20 of that Act, a court can refuse registration only if it establishes that the request for registration does not contain various information concerning the prospective periodical or if it finds that it would infringe the right to protection of the titles of any existing periodicals. Section 5 of the Ordinance on the registration of periodicals, as applicable at the material time, provided that registration was not permissible if it would be inconsistent with the regulations in force or "with the real state of affairs".

42. The courts, when refusing the applicant's request to have the two periodicals registered, relied essentially on section 5 of the ordinance in so far as it required that the registration be refused if it would be "inconsistent with the real state of affairs". In its decision of 9 September 1993 the Bielsko-Biała Regional Court refused registration considering that the proposed title would suggest that a European institution had been established in Kęty, which was clearly not true. On 17 February 1994, in its further decision under scrutiny in the present case, the court considered that the registration of a periodical entitled *Germany – A thousand-year-old enemy of Poland* would be inconsistent with the real state of affairs in that it unduly concentrated on negative aspects of Polish-German relations and thus gave an unbalanced picture of the facts.

43. As is clear from the above, the courts in the present case inferred from the notion "inconsistent with the real state of affairs" contained in section 5 of the ordinance a power to refuse registration where they considered that a title did not satisfy the test of truth, i.e. that the proposed titles of the periodicals conveyed an essentially false picture. While the terms used in this limb were ambiguous and lacked the clarity that one would expect in a legal provision of this nature, they suggested at most that registration could be refused where the request for registration did not conform to the technical details specified by section 20 of the Press Act. To go further, as the courts did in the present case, and require of the title of a magazine that it embody truthful information, is, firstly, inappropriate from the standpoint of freedom of the press. The title of a periodical is not a statement as such, since its function is essentially to identify the given

periodical on the press market for its actual and prospective readers. Secondly, such interpretation would require a legislative provision which clearly authorised it. In short, the interpretation given by the courts introduced new criteria, which could not be foreseen on the basis of the text specifying situations in which the registration of a title could be refused.

44. The Court also notes the Government's argument that a legal provision may pass the quality test if it is sufficiently clear in most of the cases determined by the domestic bodies. They further argued that the case-law of the Polish courts in most registration cases had not given rise to any particular interpretation problems.

45. However, the task of the Court is only to assess the circumstances of the individual case before it. It is observed that previous interpretations of this provision had not provided a basis for the approach adopted by the courts in the present case. Moreover, in the Court's view, the fact that the case-law of the Polish courts regarding the registration of publications did not show that the provisions at issue were particularly difficult to interpret only highlights the lack of foreseeability of the interpretation given by the courts in the present case.

46. Lastly, the Court notes the Government's argument that the special merit of the system for the registration of periodicals established by the Press Act was that it was of a judicial character (see paragraph 20 above). Therefore the task of registering periodicals was entrusted to independent tribunals.

47. The Court acknowledges that the judicial character of the system of registration is a valuable safeguard of freedom of the press. However, the decisions given by the national courts in this area must also conform to the principles of Article 10. The Court observes that in the present case this in itself did not prevent the courts from imposing a prior restraint on the printed media which entailed a ban on publication of entire periodicals on the basis of their titles.

48. The Court concludes that the law applicable in the present case was not formulated with sufficient precision to enable the applicant to regulate his conduct. Therefore, the manner in which restrictions were imposed on the applicant's exercise of his freedom of expression was not “prescribed by law” within the meaning of Article 10 § 2 of the Convention.

49. In the light of the above considerations the Court does not consider it necessary to examine whether the other requirements laid down by paragraph 2 of Article 10 of the Convention were satisfied. The Court also notes in this respect that, in any event, the Government did not develop their arguments in support of their conclusion that in the present case these requirements had been met (see paragraph 27 above).

50. Accordingly, the Court concludes that there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

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

A. Damage

52. The applicant submitted that in 1993 he had already had wide experience as a newspaper publisher. In the years from 1992 to 1994, two publishing companies he had been in charge of, Faktor and Gawęda, carried out market research, leading to the conclusion that up to 80% of those questioned had been willing to buy the non-registered periodicals. He had also intended in the periodicals to promote other press titles published or planned to be published by the applicant. He had planned a circulation of 400,000 copies of each magazine per month and expected a future profit of 4,000,000 euros (EUR). The applicant claimed just satisfaction amounting to 10% of the sum estimated as his future profits, i.e. EUR 400,000.

53. The Government submitted that the applicant's claims were grossly excessive and that the damage sustained by the applicant, if any, should be assessed in the light of the relevant case-law of the Court in its cases against Poland, regard being had to the national economic realities, in particular the purchasing power of the gross minimum salary.

54. The Court observes that the applicant's claim for pecuniary damage is based on alleged lost business opportunities. It cannot speculate on the amount of profit the applicant might have derived from publishing the periodicals that were not registered. It further notes the impossibility of quantifying precisely, on the basis of the arguments submitted by the applicant in support of his just satisfaction claim, the loss of profit sustained in this respect.

However, the Court does not rule out that the applicant may have suffered some loss of opportunity which must be taken into consideration (*Öztürk v. Turkey* [GC], no. 22479/93, § 80, ECHR 1999-VI). Assessing it on an equitable basis and in the light of all the information in its possession, the Court awards the applicant compensation of 10,000 zlotys (PLN) under this head.

B. Costs and expenses

55. The applicant sought the reimbursement of legal costs incurred in the proceedings in the sum of PLN 30,000.

56. The Government requested the Court to award legal costs and expenses only in so far as they had been actually and necessarily incurred and were reasonable as to quantum. They relied in that connection on *Zimmermann and Steiner v. Switzerland* (judgment of 13 July 1983, Series A no. 66, p. 35, § 36).

57. The Court, ruling on an equitable basis, awards the applicant the sum of PLN 6,000, together with any value-added tax that may be payable.

C. Default interest

58. According to the information available to the Court, the statutory rate of interest applicable in Poland at the date of adoption of the present judgment is 20 % per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 § 1 of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) PLN 10,000 (ten thousand zlotys) in respect of non-pecuniary damage;
      (ii) PLN 6,000 (six thousand zlotys) in respect of costs and expenses;
      (iii) any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 20 % shall be payable from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 March 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President