European Court of Human Rights (Application no. 1562/10)

Remuszko v. Poland

WRITTEN COMMENTS

BY

THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

19 September 2011

I. INTRODUCTION

1. These written comments are submitted by the Helsinki Foundation for Human Rights (hereinafter referred to as **"HFHR"**) with its seat in Warsaw, Poland at 11 Zgoda pursuant to the leave granted to HFHR by Mr Soren Nielsen, the President of the Chamber of the European Court of Human Rights (hereinafter referred to as the "Court"), under Rule 44 § 2 of the Rules of the Court.

2. These comments are limited only to the points of law, including questions of interpretation of the Convention as well as questions of Polish law and practice concerning right to access to public information. These submissions do not include any comments on the facts of the case of *Remuszko v. Poland* (Application No. 1562/10). The focus of the opinion is set on the general principles involved in the case.

II. INTEREST OF THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

3. HFHR is a non-governmental organization established in 1989 by members of the Helsinki Committee in Poland, in order to promote human rights and rule of law in Poland as well as to contribute to the development of an open society in Poland. One of the activities of the HFHR

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includes legal actions undertaken in the public interest, including the representation of parties and preparation of legal submissions to national and international courts and tribunals, particularly within the framework of the Strategic Litigation Programme. The aim of such submissions is to influence the process of changing laws and practices that we find contrary to human rights.

4. Since its establishment, the HFHR has been promoting the standards of the European Convention on Human Rights (hereinafter referred to as the "**Convention**"). This refers also to the guarantees of Art. 10 of the Convention. The case of *Remuszko v. Poland* is of key importance to the HFHR, as it concerns the infringement of the right to ***make opinions known*** as one of the aspect of the right to freedom of expression that includes freedom to hold opinions and to receive and impart information.

III. GENERAL OVERVIEW OF THE PROBLEM OF HORIZONTAL APPLICATION OF HUMAN RIGHTS

5. Case of *Remuszko v. Poland* is an interesting example of restriction of the freedom of speech, but not in vertical relations (by the state-related entities), but in horizontal relations – by other private individuals and entities. Private law is based on the freedom of contract. It means that everyone is free in entering into contractual relations. Freedom of contractual relations is fundamental for commercial freedom. Private law is marked by equality of contracting parties. However, the conflict may appear when constitutional principles or rights may have impact on contractual freedom. Such situation usually appears in discrimination cases, which are typical example of horizontal application of human rights. However, also in freedom of speech cases problems of horizontal application of human rights may appear – e.g. in the context of advertising market or press distribution – managed usually by private entities.

6. The German Constitutional Court in the case "Lüth"[1] clarified the applicability of the indirect horizontal effect of human rights to secure the right of freedom of speech. Erich Lüth requested in an open press letter everybody to boycott the latest movie of Veit Harlan, who was known for his work during the National Socialism in particular "Jud Süß". The foundation of "Drittwirkung" was laid down in the following words:
"It is equally true, however, that the Basic Law is not a value neutral document. Its section on basic rights establishes an objective order of values, and this strongly reinforces the effective power of basic rights. This value system, which centers upon dignity of the human person developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law (public and private). It serves as a yardstick for measuring and assessing all actions in the area of legislation, public administration, and adjudication. Thus it is clear that basic rights influence (the development of) private law. Every provision of private law must be compatible with the system of values,

[1] Facts of the case in German: http://www.jurakopf.de/liste-ausbildungsrelevanter-urteile/offentliches-recht/bverfge-7-198-luth-entscheidung/. See also comment on horizontal application of human rights in Germany:
http://www.germanlawjournal.com/index.php?pageID=11&artID=241

and every such provision must be interpreted in this spirit".[2] The German Constitutional Court was the first one who had to face the horizontal effect of human rights to render a justified and appropriate decision.

7. One may claim that similar reasoning may be attributed to the operation of the horizontal protection of human rights in Polish law. In general, human rights, as enshrined in the Polish Constitution, do not have direct impact on decisions in private sector. However, values expressed therein "radiate" into private system and thus influence (or restrict) freedom of economic activity or contractual freedom. It is especially visible when there is a direct legal norm, which provides a legal basis for making a balance between constitutional rights as contractual freedom. As an example, typical provisions requiring horizontal application of human rights provisions are those concerning counteracting anti-discrimination (e.g. Chapter IIa Labour Code provisions, Act of 3 December 2010 on implementation of selected provisions of the EU law on equal treatment). Second example is Article 36 of the Press Law, which was referred to in *Remuszko v. Poland* case.

IV. DOCTRINE AND PRACTICE UNDER ARTICLE 36 OF THE PRESS LAW

8. Article 36 of the Press Act 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. Adverts 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 are incompatible with the editorial profile or character of the newspaper.

9. Article 36 para. 1 of the Press Act should be construed as giving an option to the press, as part of its commercial freedom, to decide whether it wants to publish advertisements as such or not. The State therefore does not impose on the press an obligation to offer a part of its print space (and in the case of electronic media – a part of its broadcasting time) to advertisements.

10. However, whenever the press (and more broadly, the media) freely decides to publish advertisements, it must follow up the rules and requirements set forth in law provisions, especially paragraphs 2-4 of Article 36 of the Press Act.

11. According to the provisions of paragraph 2 of Article 36 of the Press Act, it is the publisher's part, to verify whether the content of the offered advertisement is compliant with the laws and principles of social co-existence. It had been noticed in Polish jurisprudence, that the *"[d]uties regarding the verification and selection of announcements and advertisements*

[2] Translation according to: András Sajó and Renáta Uitz; The constitution in private relations: Expanding constitutionalism, Article of Matej Avbelj, p. 146.

by the publisher for their compliance with the requirements resulting form of Paragraph 2 of Article 36 if the Press Act cannot be summarized in a comprehensive directory. They must be customized to the type of advertisement or announcement, its subject and form. The more sensitive and debatable subject is announced […] the higher criteria should apply to due diligence in checking of the resulting material by the publisher" (see: judgment of the Supreme Court of 8 January 2004, I CK 40/03).

12. Article 36 para. 4 of the Press Act is of special importance in the context of commercial freedom. It offers the press an excuse not to publish a particular advertisement in case it considers contents contrary to the newspaper's editorial profile or character. In consequence, e.g. a Catholic daily will not have to publish an advertisement in favour of a pro-abortion (pro-choice) policy or the use of contraceptives. Paragraph 4 of Article 36 of the Press Act strikes an adequate balance between interests of the publisher (protection of its editorial identify) and the subject seeking publication of advertisement (freedom to communicate). If none of the exceptions enumerated in Paragraphs 2-4 of Article 36 of the Press Act applies, the press is obliged to publish the given advertisement. This interpretation was confirmed by the Supreme Court in a decision of 14 October 2005 (CZP 67/05). The Supreme Court, in response to a legal question presented by a Court of Appeals, held that:
„[p]ublisher or editor may not refuse to publish an advert or a notice, except in cases set out in Article 36 par. 2 and 4. In this area freedom of contract does not apply but the obligation of contracting imposed on the publisher (editor)". [In original: *„Wydawca lub redaktor nie mogą odmówić umieszczenia reklamy lub ogłoszenia, poza przypadkami określonymi w art. 36 ust. 2 i 4. W tym obszarze nie obowiązuje więc zasada swobody zawierania umów lecz obowiązek kontraktowania nałożony na wydawcę (redaktora)"*].

13. The view presented in the abovementioned decision of the Supreme Court was supported by the argumentation stating that:
"literal interpretation supported by inference (...), a contrario, in fact seems to justify the conclusion that the denial of publication of a notice or advertising, may occur only in four cases referred to in Article 36 paragraphs. 2 and 4" [of the Press Act]. The view presented in the decision of 14 October 2005 was also broadly shared by legal writers (see e.g. J. Sobczak, *Ustawa prawo prasowe. Komentarz*, Warszawa 1999, p. 344).

14. The court decisions taken in the case of Mr. Remuszko in two judgements given on 18 January 2007 by the Supreme Court (I CSK 351/6 and 376/06) have overruled the previous interpretation and the corresponding case law. In the judgment I CSK 351/6 The Supreme Court ruled that:
"[f]reedom of expression cannot constitute sufficient grounds for deriving a contracting obligation under the Article 36 of the Press Act. The freedom of private entities to which the obligation of contracting would be addressed, opposes the adoption of such an obligation", and pointed out that *"[p]ublisher and editor in chief of the journal are not required to publish notices and advertisements. When the denial is discriminatory (such as for the ideological or political reasons) should be justified by the prerequisite of contradiction of the publication of the notice or advertisement with the program line or the character of the publication"*. In the other judgment of the Supreme Court of 18 January 2007 issued on grounds of Paragraph 4 of

Article 36 of the Press Act, it was also held that the publisher or editor in chief are not obliged to publish notices or commercials (I CSK 376/06).

15. The abovementioned judgments issued in the case of Mr. Remuszko not only have introduced a new interpretation of Article 36 of the Press Act, radically departing from the previous case law in violation of the legality requirement, but they have also resulted in creation of a legal standard that gives a publisher a free hand, as allegedly part of his commercial freedom, to decide on whether to publish an advert or to refuse it.

16. The judgments of 18 January 2007 provoked divergent assessments, presented in the Polish law doctrine. In concurring opinions it was claimed that it is forbidden to derive any obligation to publish notices and advertisements by the press, neither from the press's role of information, freedom its economic activities or from certain customs and methods of operation, as the obligation to publish certain contents applies only official (public) announcements (see e.g. Izabela Dobosz, *Glosa do Wyroku Sądu Najwyższego z dnia 18 stycznia 2007 r., I CSK 376/06*, Orzecznictwo Sądów Polskich nr 4/2008, pp. 291-296). On the other hand, it was held that *"[l]iteral interpretation of Article 36 of the Press Act provides a clear answer that the circle of reasons to refuse the inclusion of advertising is limited, although the general principles of law and purely factual situations allow to expand the directory in the specific facts. Closer analysis, however, recognizes that the restriction provided for in Paragraph 4 of Article 36 if the Press law, it is not too restrictive, and even - in extreme cases - allows the editors to construct their program line co to avoid problems with the posting of unwanted ads"*(see Grzegorz J. Pacek, *Glosa do Wyroku Sądu Najwyższego z dnia 18 stycznia 2007 r., I CSK 376/06, Możliwość odmowy publikowania płatnych ogłoszeń i reklam przez wydawcę,* Glosa n4 4/2007, pp. 78-92). What is more, the views of law doctrine regarding the limited (four-case) grounds of denial of the advertisement's publication where also presented upon the judgments of 18 January 2007 (see e.g. J. Sobczak, *Ustawa prawo prasowe. Komentarz*, Warszawa 2008, p. 797).

17. In consequence, the approach presented in the Supreme Court judgments in cases of Mr. Remuszko does not take into account all interests of those seeking publication of advertisements and exempts entirely from the State's control decisions of publishers. In consequence, the State does not fulfil its positive obligation of making its internal legal order compatible with the Convention. In this particular case, it does not establish safeguards of interests of both publishers and advertisers.

VI. OTHER EXAMPLES OF PROBLEMS WITH HORIZONTAL APPLICATION OF HUMAN RIGHTS IN POLAND

18. *Remuszko* case is one of a few cases that happened in Poland in last years concerning horizontal application of human rights in the context of freedom of speech. It seems that as long as standards are not established such cases will present challenge for debate and decision-makers, including courts. There were some interesting examples in Poland of challenges presented because of conflict between freedom of speech and contractual freedom.

Therefore, the opinion provided by the Court in Remuszko case may have a significant impact on approach of courts (as well as private enterpreneurs) in any similar cases in future:

Refusal to advertise Campaign Against Homophobia[3]

19. At the end of 2007, the Campaign Against Homophobia prepared a campaign entitled 'You are not alone'. The main idea of the campaign was to put up posters in different public places presenting homosexual 'everymen', thus indicating the general problem of discrimination. Every poster included a slogan indicating a profession and the fact that somebody exercising this profession is a homosexual (e.g. 'I am a dentist. I am a lesbian'). This slogan was followed by a name (e.g. Anna) and the place of residence. In the middle of the poster there was a picture of the given person exercising this profession, where the face was not recognisable. At the bottom of the poster, there was another slogan e.g. 'We are more than 6,000 in Toruń' (different numbers in different cities). However, the organisers were unable to implement this campaign with full effectiveness. In Toruń, the public transport company informally let them know that it would not work with the campaign. Furthermore, one of the outdoor advertising firms also refused to place posters on their pillars and billboards. This situation was reported in media with great criticism of such refusal. Following this, the outdoor advertising company tried to change its position, but by that time the advocacy campaign had already ended.

20. In 2008 and 2009 another cases of limiting access to goods and services for LGBT organisations were reported. The Campaign Against Homophobia was unable to implement the action of promoting their activities as an NGO because of the refusal of the private company in Wrocław to print their posters. Furthermore, the organisers of the Festival 'Culture for Tolerance' in Kraków were informed by the employee of a private printing house, that the pictures for the exhibition devoted to the Argentinian lesbians, will not be printed as they violate his religious beliefs and his worldview. The owner of the printing house stated that he respects the refusal of his employee although he personally would accept such order. Finally the owner refunded the organisers the costs of the order. It is worth to note, that the pictures did not contain any shocking or controversial symbols or contents, they only presented graffiti found by the author on the walls in Argentinian cities, with the slogans such as 'Heterosexuality is not obligatory'.[4]

Refusal to promote book by Robert Biedroń

21. Robert Biedroń, leader of the Campaign Against Homophobia, was refused the right to promote his book *"Tęczowy elementarz"* [Rainbow Elementary], describing basic issues on homosexuality in Poland, in Empik, one of the largest chains of bookstores in Poland. He was not able to have meetings with readers as an author. In the official reply, the PR manager of the network claimed that 'the strategy of communication of the firm includes supporting only such titles which do not violate somebody's reputation or religious beliefs', and that 'such

[3] Description of cases concerning refusal for LGBT organizations to place advertisements was copied from reports prepared by the Helsinki Foundation for Human Rights for the EU Fundamental Rights Agency.
[4] Press information of 04.04.2009, http://cjg.gazeta.pl/cjg_krakow/1,91645,6465568,Lesbijki__Tego_wam_nie_wydrukujemy.html

meetings may also result in objections by customers who are in the bookstore at that time, and the topic of discussion may shock or offend somebody's feelings'.

Advertisements of Radio Eska Rock

22. Another example of denying the access to advertisement took place in Rzeszów, where the public transport company refused to place the posters of Radio 'Eska Rock', as they showed two male popular TV and Radio presenters laying together in bed. The company stated that the content of the advertisement may promote homosexuality. The Director of the public transport company in Rzeszów stated that he has no prejudice towards homosexuals but a public company is not allowed to promote them as it may harm public morals and company's reputation. Finally the posters were placed on the public buses in a censored version.[5]

Refusal to place commercial of 'Gazeta Polska Codzienne' in the Polish public television

23. During recent political campaign in connection with the parliamentary elections, another incident on restricting access to advertising happened. Polish public television (Telewizja Polska S.A.) refused to advertise new daily entitled "Gazeta Polska Codziennie". Telewizja Polska S.A. claimed that commercials prepared by this daily are of political nature and are strongly connected with the electoral campaign. Also two other TV companies restricted placement of those commercials. Polsat referred to similar argument, while TVN claimed that it does not have free commercial time.

24. "Gazeta Polska Codziennie" as well as many organizations protested against the ban. Also the Helsinki Foundation for Human Rights issued a statement criticizing the position of Telewizja Polska S.A. The debate concerning this refusal of advertising leads to following conclusions:

- there is a high risk that the entity having monopoly (or significant position) in a given area of advertising may abuse its position and restrict access to a certain market (both commercial market and marketplace of ideas);
- there are no sufficient standards as regards refusal decisions. In this particular case Telewizja Polska S.A. referred to provisions of the Electoral Code (which is generally binding law) and the Code of Ethics in Advertising. However, the Electoral Code does not contain provisions that refer directly to advertising by commercial entities (and not political parties). Second, Code of Ethics in Advertising is very general in nature and may be subject to over-interpretation;
- control exercised by courts may be illusory, because issuance of decision imposing an obligation to advertise usually takes significant time. In the meantime value of advertised information or product may decrease, which constitutes an effective restriction on freedom of speech.

Refusal by RUCH S.A. to distribute "Wprost Przeciwnie" weekly

[5] Press information of 12.06.2008, http://miasta.gazeta.pl/rzeszow/1,34962,5307554,Cenzura_wedlug_MPK.html?skad

25. *"Wprost Przeciwnie"* (*Straight Opposite')* is a weekly opinion magazine, published under the editorship of Jan Piński and created mostly by former journalists of a competitive magazine *"Wprost" ('Straight').* Market entry for the magazine was planned on 19 September 2011. Despite the similarity of titles, *"Wprost przeciwnie"* was legally registered by the District Court of Warsaw in the Register of Journals and Magazines. Thus, the Court took a stand that the registration of the new magazine does not disrupt the protection of the rights to the name of an existing press title (Section 21 *a contrario* of *The Press Act*). RUCH S.A. is the biggest press distribution entrepreneur in Poland, with approx. 40% share in the home market. The dominant position of RUCH S.A. company makes press publishers to some extend dependent on it. In spite of legal registration, RUCH S.A. refused to distribute *"Wprost Przeciwnie"* with its distribution network. Company's decision was motivated by the argument, that releasing *'Wprost Przeciwnie'* leads to the risk of the breach of exclusive rights belonging to *"Wprost"* publisher (who possesses the registered trade mark 'WPROST'). Other entrepreneurs providing press distribution did not undertake similar decisions. Nevertheless, due to the significant share of RUCH S.A. company in home market," *Wprost przeciwnie"* publisher decided to delay its release for one week (up to 26th September 2011). Subsequently, he also decided to change magazine's title to *"Wręcz przeciwnie"* (*'Just Opposite').* Interestingly, "Wprost" did not manage to obtain a court decision restricting sale of "Wprost przeciwnie" in connection with alleged possibility of infringing its trademark rights. According to information obtained by the Helsinki Foundation for Human Rights decision on refusing to distribute "Wprost przeciwnie" was made by RUCH S.A. itself, without court authorization.

'Manifa' demonstration advertisement in public transport

26. 'Manifa' is an annual demonstration organized on Women Day (8th March) by feminist groups in Warsaw and other Polish cities. In 2009 special posters were prepared to promote the demonstration. Warsaw public transport enterprise (*Zakład Transportu Miejskiego, "ZTM"*) refused, however, to place feminist posters in its vehicles (buses, trams and underground trains). According to ZTM the content of advertisements is controversial and thus has a negative influence on passengers' emotions. One of the posters was presenting a slogan 'Bishop is not a God' while the other 'We want health, not prayers'. 'Public transport vehicles are not a proper place for opinions exchange or artistic provocation' – stated ZTM. 'Posters are not offensive for anyone. They just induce to thinking' – claimed organizers of demonstration. Eventually demonstration took place without prior advertisement in ZTM vehicles' advertising space.[6] Feminist groups did not decide to appeal the case to the court and resigned from pursuing any legal actions, despite strong arguments in their favor.

VI. CONCLUSIONS

27. In the opinion of the Helsinki Foundation for Human Rights the case of *Remuszko v. Poland* requires the careful consideration by the Court of standards concerning relationship between publisher and advertiser to give proper effect to positive obligations under Article 10

[6] Source: http://warszawa.gazeta.pl/warszawa/1,34889,6296954,ZTM_nie_chce_reklamowac_Manify.html http://kobiety-kobietom.com/feminizm/index.php?dzial=FEM-Manifa09

of the Convention. In our opinion judgments of the Supreme Court pre-dating judgments in the *Remuszko* case, provide for better standard of balance between competing values (contractual freedom vs. right to communicate and advertise). In particular we would like to refer to interpretation that if none of exceptions enumerated in paragraphs 2-4 of Article 36 of the Press Act applies, the press is obliged to publish a given advertisement.

28. *Remuszko v. Poland* is one of the few cases pending before the Court that addresses a question of horizontal application of human rights. Such cases present more and more important challenge for domestic practice and adjudication by court, both in Poland and in other Council of Europe standards. Similar cases from Poland, which did not reach so high court instances as Remuszko case, show how important this problem is for human rights' protection and how many disputes and controversies it provokes. Therefore, there is a substantial need for establishment of clear criteria how to balance contractual freedom with right to communicate (and advertise) ideas or products, especially if such ideas or products aim to provoke public discussion and are promoted sold only for profit.

On behalf of the Helsinki Foundation for Human Rights,

Dr Adam Bodnar

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