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

**CASE OF JANOWSKI v. POLAND**

**(Application no. 25716/94)**

JUDGMENT

STRASBOURG

21 January 1999

**In the case of Janowski v. Poland,**

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr C.L. ROZAKIS,
Sir Nicolas BRATZA,
Mr M. PELLONPÄÄ,
Mr B. CONFORTI,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 18 November 1998 and 14 January 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the Polish Government ("the Government") on 26 February 1998, by a Polish national, Mr Józef Janowski ("the applicant"), on 27 February 1998 and by the European Commission of Human Rights ("the Commission") on 16 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 25716/94) against the Republic of Poland lodged with the Commission under former Article 25 by the applicant on 25 January 1994.

The Government's application referred to former Article 48; the applicant's application to the Court referred to former Article 48 as amended by Protocol No. 9[2], which Poland had ratified; the Commission's

*Notes by the Registry*

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

request referred to former Articles 44 and 48 and to the declaration whereby Poland recognised the compulsory jurisdiction of the Court (former Article 46). The object of the applications and of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of former Rules of Court B[1], the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 31). The lawyer was given leave by Mr R. Bernhardt, the President of the Court at the time, to use the Polish language (former Rule 28 § 3).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 13 July and 7 August 1998 respectively. On 15 September 1998 the Delegate of the Commission submitted written observations.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr J. Makarczyk, the judge elected in respect of Poland (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm and Mr C.L. Rozakis, the Vice-Presidents of the Court, and Sir Nicolas Bratza and Mr M. Pellonpää, Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 § 3). The other members appointed to complete the Grand Chamber were Mr B. Conforti, Mr A. Pastor Ridruejo, Mr G. Bonello, Mr P. Kūris, Mrs V. Strážnická, Mr C. Bîrsan, Mr M. Fischbach, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka and Mr R. Maruste (Rule 24 § 3 and Rule 100 § 4). Subsequently Mr R. Türmen, substitute judge, replaced Mrs Strážnická who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

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*Notes by the Registry*

1. Protocol No. 9 came into force on 1 October 1994 and was repealed by Protocol No. 11.

1. Rules of Court B, which came into force on 2 October 1994, applied until 31 October 1998 to all cases concerning States bound by Protocol No. 9.

5. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr M.A. Nowicki, to take part in the proceedings before the Grand Chamber.

6. In accordance with the President's decision, a hearing, at which the applicant was present, took place in public in the Human Rights Building, Strasbourg, on 18 November 1998.

There appeared before the Court:

(a) *for the Government*
Mr K. DRZEWICKI, Professor of Public International Law, *Agent*,
Ms E. CHAŁUBIŃSKA, Judge on secondment
to the Ministry of Justice, *Counsel*,
Mr A. KALIŃSKI, Office of the Agent,
Mr M. ŁUCZKA, Deputy to the Permanent Representative
of Poland to the Council of Europe,
Ms M. DĘBSKA, Office of the Agent, *Advisers*;

(b) *for the applicant*
Mrs B. BANASIK, of the Łódź Bar, *Counsel*;

(c) *for the Commission*
Mr M.A. NOWICKI, *Delegate*,
Ms M.-T. SCHOEPFER, *Secretary to the Commission.*

The Court heard addresses by Mr Nowicki, Mrs Banasik and Mr Drzewicki.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1937. He is a journalist and lives in Zduńska Wola, Poland.

8. According to the applicant, on 2 September 1992 he noticed two municipal guards who were ordering street vendors to leave a square in Zduńska Wola where selling was allegedly not authorised by the municipal authorities and to move their makeshift stands to a nearby market-place. The Government maintain however that the guards, who were acting on sanitary and traffic considerations, merely requested the vendors to move to a nearby market-place. The applicant further submits that he intervened, informing the guards that their actions had no legal basis and infringed the laws

guaranteeing freedom in the economic field. He pointed out that the municipal authorities had not passed any resolution which would allow the guards to clear the square. The applicant observed that the guards were apparently acting only on the basis of verbal instructions from the mayor and urged the vendors to stay. The exchange between the applicant and the guards was witnessed by a group of bystanders.

9. Subsequently, on an unspecified date, the Zduńska Wola district prosecutor (*Prokurator Rejonowy*) instituted criminal proceedings against the applicant. On 5 January 1993 the district prosecutor lodged a bill of indictment with the Zduńska Wola District Court (*Sąd Rejonowy*). The applicant was charged with having insulted municipal guards while they were carrying out their duties and with having acted with flagrant contempt for legal order, an offence specified in Article 236 of the Criminal Code read together with Article 59 § 1.

10. On 29 April 1993 the District Court convicted the applicant under Article 236 of the Criminal Code of verbally insulting two municipal guards. It held that the offence was an act of hooliganism within the meaning of Article 59 § 1 of the Criminal Code. The applicant was sentenced to eight months' imprisonment suspended for two years and a fine of 1,500,000 old zlotys (PLZ). He was also ordered to pay the sum of PLZ 400,000 to charitable institutions and court costs of PLZ 346,000.

11. On an unspecified date the applicant filed an appeal against this judgment, submitting that his conviction was based on insufficient evidence. He pointed out that the District Court had failed to establish precisely what defamatory words had been used and had only found that the applicant had called the guards "ignorant". This word should not have been regarded as an insult but as an acceptable criticism of public servants. The applicant further contended that the trial court had wrongly applied the law since, contrary to its findings, it was evident that his acts had not involved any act of hooliganism as he had only intended to protect street vendors from illegal actions of the municipal guards.

12. On 29 September 1993 the Sieradz Regional Court (*Sąd Wojewódzki*) quashed the part of the contested judgment relating to the sentence of imprisonment and the order to pay PLZ 400,000 to charitable institutions. However, it upheld the fine of PLZ 1,500,000 and reduced the court costs to the sum of PLZ 150,000. The Regional Court was of the opinion that the trial court had wrongly considered that the offence at issue had been hooligan in nature as the applicant's motive had been to defend street vendors against the acts of the municipal guards which he had considered illegal. Therefore the applicant had not acted as he did without any justifiable motive, which was a prerequisite for finding that the offence was an act of hooliganism.

13. Furthermore, the Regional Court agreed with the applicant that the Zduńska Wola municipal council had not passed any resolution prohibiting

the sale of merchandise on the streets and that no public notice to this effect had been posted at the material place and time. Therefore, there were no grounds for the trial court's finding that the applicant had demonstrated flagrant contempt for legal order.

14. Finally, the Regional Court observed that the judgment had not mentioned the abusive words used by the applicant. Nevertheless, it considered that there was sufficient evidence in the case file to conclude that the applicant had in fact insulted the guards by calling them "oafs" and "dumb" ("*ćwoki*" and "*głupki*"). These words were widely considered to be offensive and by using them the applicant had exceeded the limits of freedom of expression. The court found that the resulting conviction was rightly imposed under Article 236 of the Criminal Code whose object was to ensure that civil servants were not hindered in carrying out their duties.

## II. RELEVANT DOMESTIC LAW

15. At the relevant time the legislation provided as follows:

Article 236 of the Criminal Code:

> "Anyone who insults a civil servant ... during and in connection with the carrying out of his official duties is liable to up to two years' imprisonment, to restriction of personal liberty or to a fine."

> *"Kto znieważa funkcjonariusza publicznego ... podczas i w związku z pełnieniem obowiązków służbowych, podlega karze pozbawienia wolności do lat 2, ograniczenia wolności albo grzywny."*

Article 59 § 1 of the Criminal Code:

> "If a perpetrator has committed a premeditated offence of a hooligan nature, the court shall impose a sentence of imprisonment not lower than one and a half times the minimum sentence provided ..."

> *"Jeżeli sprawca dopuścił się umyślnego występku o charakterze chuligańskim, sąd wymierza karę pozbawienia wolności nie niższą od dolnego zagrożenia zwiększonego o połowę ..."*

Article 120 § 14 of the Criminal Code provided that an offence should be regarded as being of a hooligan nature if the perpetrator acted in public, without any justifiable motive or with an obviously unjustified one, thus demonstrating flagrant contempt for legal order.

# PROCEEDINGS BEFORE THE COMMISSION

16. Mr Janowski applied to the Commission on 25 January 1994. He relied on Article 6 of the Convention, complaining that the Zduńska Wola District Court had refused to grant him legal aid and hear two defence witnesses and had produced minutes which did not reflect statements made by witnesses and the applicant during the hearing. He also complained under Article 10 that his conviction violated his right to freedom of expression.

17. The Commission declared the application (no. 25716/94) admissible on 27 November 1996 with the exception of the applicant's complaints under Article 6. In its report of 3 December 1997 (former Article 31 of the Convention), it expressed by eight votes to seven the opinion that there had been a violation of Article 10. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

# FINAL SUBMISSIONS TO THE COURT

18. The applicant in his memorial requested the Court to find that the facts of the case disclosed violations of Articles 3, 6, 7 § 1 and 10 of the Convention and to award him just satisfaction under former Article 50 (now Article 41).

The Government for their part requested the Court to find that Article 10 had not been violated in the present case.

# THE LAW

## I. SCOPE OF THE CASE

19. In his memorial to the Court the applicant raised several complaints under Articles 3, 6, 7 § 1 and 10 of the Convention. The Court observes that only the applicant's complaint under Article 10 that his conviction violated his right to freedom of expression was declared admissible by the Commission (see paragraphs 16-17 above).

20. The Court is therefore required to examine only the applicant's complaint under Article 10 (see, *mutatis mutandis*, the McGinley and Egan

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

v. the United Kingdom judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1354-55, §§ 68-70).

## II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. Mr Janowski submitted that his conviction for insulting the municipal guards had infringed his right to freedom of expression as guaranteed by Article 10 of the Convention, which provides:

> "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 Commission agreed with the applicant's arguments, whereas the Government contended that the facts of the case disclosed no breach of Article 10.

### A. Existence of an interference

22. The participants in the proceedings were agreed that the applicant's conviction amounted to an interference with the exercise of his right to freedom of expression. The Court sees no cause to conclude otherwise.

23. An interference contravenes Article 10 unless it is "prescribed by law", pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is "necessary in a democratic society" for achieving such an aim or aims.

### B. "Prescribed by law"

24. The Court considers, and indeed this was not disputed before it, that the interference was "prescribed by law", the applicant's conviction having been based on Article 236 of the Criminal Code (see paragraphs 14 and 15 above).

### C. Legitimate aim

25. The Commission, referring to the judgment of the appeal court, which explained that the purpose of the applicant's conviction was to ensure that civil servants were not hindered in carrying out their duties, considered that the interference pursued the legitimate aim of the prevention of disorder (see paragraph 14 above). The Government agreed that the prevention of disorder was one of the legitimate aims pursued by the national authorities, but in addition pleaded the protection of the reputation and the rights of the municipal guards as the second legitimate aim.

26. Having regard to the particular circumstances of the case and to the reasoning of the appeal court's judgment, the Court considers that the conviction of the applicant was intended to pursue the legitimate aim of the prevention of disorder. The interference complained of therefore pursued a legitimate aim under Article 10 § 2.

### D. "Necessary in a democratic society"

#### *1. Arguments before the Court*

27. The applicant submitted that his conviction for insulting the municipal guards did not constitute a necessary interference under paragraph 2 of Article 10. He pointed out that he had not intended to insult the guards but merely wanted to convey a message concerning the unlawfulness of their actions. Although the form of his message was strongly disapproving of the guards, the words he used should be considered appropriate. Furthermore, as the guards had acted unlawfully, they could not enjoy any special protection against criticism.

Finally, the applicant claimed that, since he was a journalist, his conviction was widely considered as an attempt by the authorities to restore censorship and constituted discouragement of the expression of criticism in future.

28. The Commission considered that civil servants acting in an official capacity were, like politicians, subject to the wider limits of acceptable criticism. If they acted without a legal basis they should expect criticism from citizens and must accept that it may sometimes be harsh or expressed in a strong form. The applicant might have offended the guards by calling them "oafs" and "dumb". However, in the particular circumstances of the case, namely the fact that he had spontaneously reacted to unjustified actions by the guards out of genuine civic considerations and expressed his criticism in the course of a heated exchange, he had not overstepped the limits of acceptable criticism. Furthermore, the Commission pointed out that the national authorities had convicted the applicant solely on the basis of the insulting meaning of the two words used by him without taking into account the situation which had provoked his reaction. It concluded that, as the applicant's conviction was not proportionate to the legitimate aim pursued and was not necessary in a democratic society, there had been a violation of Article 10.

The Delegate of the Commission added that in a democratic society citizens should be allowed to react to the conduct of civil servants even if their reactions were not justified and took controversial forms. Moreover, law-enforcement officers should be indifferent to offensive verbal responses to their actions since they constituted a part of their professional risk.

29. The Government disagreed with the Commission's opinion that civil servants acting in an official capacity were, like politicians, subject to the wider limits of acceptable criticism. Although they should be open to close scrutiny and criticism, they should at the same time enjoy protection against destructive attacks in order to be able to carry out their duties effectively. The Government further contested the Commission's conclusion concerning the unlawfulness of the actions of the municipal guards, claiming that the latter had a right to instruct the street vendors to leave a square since they had acted on sanitary and traffic considerations (see paragraph 8 above). The criticism expressed by the applicant could not enjoy wider limits for it was not articulated through the media and was not a part of public debate on important issues. As the penalty imposed on the applicant had been proportionate to the aims pursued, the Government concluded by requesting the Court to find that there had been no violation of Article 10.

*2. The Court's assessment*

**(a) General principles**

30. The Court reiterates the fundamental principles which emerge from its judgments relating to Article 10:

(i) 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. Subject to paragraph 2, it 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". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see the following judgments: Handyside v. the

United Kingdom, 7 December 1976, Series A no. 24, p. 23, § 49; Lingens v. Austria, 8 July 1986, Series A no. 103, p. 26, § 41; and Jersild v. Denmark, 23 September 1994, Series A no. 298, p. 23, § 31).

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see the above-mentioned Lingens judgment, p. 25, § 39).

(iii) In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see the above-mentioned Lingens judgment, pp. 25-26, § 40, and the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149, p. 12, § 28). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see the above-mentioned Jersild judgment, p. 24, § 31).

**(b) Application of the above principles to the instant case**

31. Turning to the facts of the present case, the Court's task is to determine whether, in all the circumstances, the restriction on Mr Janowski's freedom of expression answered a "pressing social need" and was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities in justification of it were "relevant and sufficient".

32. In this connection the Court notes that the applicant was convicted of insulting the municipal guards by calling them "oafs" and "dumb" during an incident which took place in a square. It was witnessed by bystanders and concerned the actions of municipal guards who insisted that street vendors trading in the square move to another venue (see paragraph 8 above). The applicant's remarks did not therefore form part of an open discussion of matters of public concern; neither did they involve the issue of freedom of the press since the applicant, although a journalist by profession, clearly acted as a private individual on this occasion. The Court further observes

that the applicant's conviction was based on his utterance of the two words which were judged to be insulting by both trial and appeal courts, not the fact that he had expressed opinions critical of the guards or alleged that their actions were unlawful (see paragraphs 10 and 14 above).

In these circumstances the Court is not persuaded by the applicant's contention that his conviction was widely considered as an attempt by the authorities to restore censorship and constituted discouragement of the expression of criticism in future (see paragraph 27 above).

33. The Court also notes the Commission's reasoning that civil servants acting in an official capacity are, like politicians, subject to the wider limits of acceptable criticism (see paragraph 28 above). Admittedly those limits may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions (cf. the Oberschlick v. Austria (no. 2) judgment of 1 July 1997, *Reports* 1997-IV, p. 1275, § 29).

What is more, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty. In the present case the requirements of such protection do not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context (see paragraph 32 above; and cf. the above-mentioned Lingens judgment, p. 26, § 42 *in fine*).

34. In the Court's view, the reasons prompting the applicant's conviction were relevant ones in terms of the legitimate aim pursued. It is true that the applicant resorted to abusive language out of genuine concern for the well-being of fellow citizens in the course of a heated discussion. This language was directed at law-enforcement officers who were trained how to respond to it. However, he insulted the guards in a public place, in front of a group of bystanders, while they were carrying out their duties. The actions of the guards, even though they were not based on the explicit regulations of the municipal council but on sanitary and traffic considerations, did not warrant resort to offensive and abusive verbal attacks (see paragraph 8 above). Consequently, even if there were some circumstances arguing the other way, sufficient grounds existed for the decision ultimately arrived at by the national courts.

**(c) Conclusion**

35. Having regard to the foregoing, the Court is satisfied that the reasons adduced by the national authorities were "relevant and sufficient" for the purposes of paragraph 2 of Article 10. The Court further finds that, in the particular circumstances of the instant case, the resultant interference was proportionate to the legitimate aim pursued. In this connection, it is noteworthy that the applicant's sentence was substantially reduced on appeal and, most significantly, his prison sentence was quashed by the Sieradz Regional Court (see paragraph 12 above). In sum, it cannot be said that the national authorities overstepped the margin of appreciation available to them in assessing the necessity of the contested measure.

There has consequently been no breach of Article 10 of the Convention.

## FOR THESE REASONS, THE COURT

*Holds* by twelve votes to five that there has been no breach of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 January 1999.

Luzius WILDHABER
President

Michele DE SALVIA
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

(a) dissenting opinion of Mr Wildhaber;
(b) dissenting opinion of Sir Nicolas Bratza joined by Mr Rozakis;
(c) dissenting opinion of Mr Bonello;
(d) dissenting opinion of Mr Casadevall.

L.W.

M. de S.

# DISSENTING OPINION OF JUDGE WILDHABER

In my view, no "pressing social need" justified, in the circumstances of the case, the fine imposed on the applicant. Since the applicant used only two moderately insulting words, in a spontaneous and lively discussion, to defend a position which was legally correct and in which he had no immediate personal interest, it was not "necessary in a democratic society" to fine him in order to "prevent disorder".

# DISSENTING OPINION OF JUDGE Sir Nicolas BRATZA JOINED BY JUDGE ROZAKIS

I regret that I am unable to agree with the majority of the Court that there has been no violation of Article 10 in the present case.

In reaching this conclusion, the majority have placed emphasis on the margin of appreciation to be afforded to the domestic courts: it is their view that, in finding that the words used by the applicant to describe the municipal guards ("*ćwoki*" and "*głupki*") were insulting within the meaning of Article 236 of the Criminal Code and in convicting and sentencing the applicant for a breach of that provision, the Sieradz Regional Court did not exceed the permissible margin and that in consequence the applicant's conviction was justified under paragraph 2 of Article 10.

In my view this is to take too narrow an approach to the issues under Article 10. The real difficulty in the case seems to me to arise from the sweepingly broad and unqualified terms of Article 236 itself. The Article makes it an offence punishable with imprisonment for anyone to insult a civil servant during and in connection with the carrying out of his official duties. As I understand it, the Article allows no discretion to the domestic court other than to convict a defendant once it finds that insults have been addressed to a civil servant when carrying out his official duties. In particular, it appears that the court is neither required nor free to examine the circumstances in which insulting words were used, or whether the use of the words could be justified, or whether the conduct of the civil servant provoked the insulting words or whether the use of the words in any way hindered the civil servant in the performance of his official duties. In this regard, I note the Government's submission that, in determining whether an offence is committed under Article 236, "it is irrelevant or indifferent whether a civil servant was substantially right or wrong in undertaking a specific action within his official duties ..., it is sufficient to establish that a civil servant was insulted during the carrying out of his/her official duties". This is in marked contrast to the provisions of Austrian law which were examined by the Court in the case of Oberschlick v. Austria (no. 2) (judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV), where a defence was available to a person using insulting language to another if the insults were provoked and resulted from the understandable indignation of the person concerned.

I am prepared, with some hesitation, to agree that the application of the Article to the applicant in the present case served a legitimate aim for the purposes of Article 10 § 2, namely "the prevention of disorder," even in the absence of any evidence that the use of the two words did, or was likely to, provoke any disorder. I cannot, on the other hand, accept the Government's submission that the prosecution of the applicant served the further legitimate

aim of "the protection of the ... rights of others": this submission flies in the face of the judgment of the Regional Court, which specifically held that the purpose of Article 236 was not to protect the personal dignity of civil servants, but to ensure that they were not hindered in carrying out their tasks.

More importantly, I am quite unable to accept that the application of this provision in the present case was necessary in a democratic society to achieve any legitimate aim: the use of the Article to prosecute, convict and fine the applicant was in my view neither a response to a pressing social need, nor proportionate to any legitimate aim served.

In reaching this view, I place particular reliance on the following factors of the case.

(1) There is clear evidence that the two words of insult were used in the course of what the Commission accurately described as a "lively exchange" between the applicant and the municipal guards. This exchange was equally clearly provoked by what the applicant saw as an abuse of authority by the guards in requiring stall holders to leave the square and move their stalls to a nearby market-place. While the Government dispute that the municipal guards were acting unlawfully in so doing, it is indisputable that, as the Regional Court found, the applicant correctly considered that there had been no resolution of the municipal council prohibiting the selling of merchandise on the streets and that no public notice to this effect had been posted at the material time and place. The applicant was, in these circumstances, amply justified in exercising his freedom of expression in remonstrating with the municipal guards. The fact that, in the course of doing so, he used two insulting words which evidently reflected his sense of frustration with the attitude of the guards, could not in my view justify his prosecution. As the majority of the Commission correctly pointed out, even though the language used by the applicant may be considered exaggerated, it did not amount to a deliberate and gratuitous personal attack on the guards.

(2) The majority of the Court place emphasis on the fact that the applicant's remarks did not form part of an open discussion of matters of public concern. I cannot agree. While it is true that the discussion in the present case concerned only the applicant and the municipal guards and while the subject matter of the discussion may not have been of major significance, it concerned nevertheless what was perceived by the applicant as an abuse or excess of authority on the part of public officials and to this

extent was in my view clearly a matter of public concern which merited the protection of Article 10.

(3) There is nothing to suggest that the use of the two words of insult was in any way calculated to cause public disorder or to hinder the guards in the performance of what they considered to be their proper functions. It is possible that their confrontation with the applicant might have served as a hindrance and might have proved a public embarrassment for the guards. But the applicant was expressly acquitted of the offence of "hooliganism" by the Regional Court and there is nothing in the judgment of the Regional Court to indicate that the use of the two words of themselves had any impact on the performance by the guards of their official functions.

(4) The fine imposed on the applicant was by no means insignificant. The Government assert that the fine was modest. On the other hand, they also accept that it was the approximate equivalent of one month's unemployment benefit, which cannot in my mind be regarded as a proportionate response to the offence of which the applicant was convicted.

In my view, the application of the blunt instrument of Article 236 of the Criminal Code in the circumstances of the present case to prosecute, convict and sentence the applicant amounted to an unjustified interference with the applicant's rights under Article 10 of the Convention.

# DISSENTING OPINION OF JUDGE BONELLO

I regret I am unable to concur with the majority.

Satisfactory evidence has been produced in this case that the municipal guards of Zduńska Wola were acting in excess of their powers when they dispersed some street vendors from an area in which the selling of merchandise was not prohibited by a resolution of the municipal council[1]. The applicant remonstrated with the guards against this abuse of power. In the process he resorted to language which can reasonably be qualified as offensive.

That moment in time saw a confrontation between two excesses: on the one hand, the guards, who were exceeding the limits of their authority; on the other, the applicant, who was exceeding the limits of permissible criticism.

The Court agrees that the criminal prosecution of the applicant and his subsequent conviction for insulting a civil servant (in terms of Article 236 of the Polish Criminal Code) constituted an interference with his right to freedom of expression. That Article gives special protection to public officers who are carrying out their official duties. An interference with the enjoyment of a fundamental right would, of course, be justified in terms of Article 10 § 2 if it were prescribed by law and shown to be necessary in a democratic society.

The basic tests for establishing the necessity of interferences with freedom of expression in a democratic society are whether the intrusion corresponds to a pressing social need and whether it is proportionate to the legitimate aim pursued by the authorities.

I fail to discern any urgent social exigency in condemning those who attempt to prevent abuses, even through immoderate disapproval. The State has a greater necessity to silence those who usurp power than those who raise their voices when power is usurped. In this case I am aware of one manifestly pressing social need: that of curbing illegitimate excess of authority.

I find no difficulty at all with a legal regime that affords special protection to public officers in the discharge of their duties. I harbour, on the other hand, scruples in endorsing the protection of public officers in the course of an abuse of power.

The balancing which, in my view, this case called upon the Court to carry out, was between a violation of the law committed by the guardians of the law, and a violation of the law committed by an irascible do-gooder. A proper equilibrium had to be calibrated between sheltering those who were

1. See the judgment of the 29 September 1993 of the Sieradz Regional Court and paragraph 23 of the report of the Commission.

abusing public order, and those who, exceeding the limits of permissible speech, abused the abusers of the law.

The municipal guards, by exceeding the limits of their lawful authority, had placed themselves squarely on the wrong side of the rule of law. From the position of an outlaw, they are invoking the protection of the law. The condition of their illegality preceded, in time, and surpassed, in magnitude, that of the applicant. In approving the punishment of Mr Janowski, the Court broadcast a signal that it deems the verbal intemperance of a choleric to be more open to disapproval than the infringement of the rule of law by those who are assigned to defend it.

I wonder what the Court would have found had the applicant insulted the guards while witnessing accidentally the torture of a third person. Would the Court have said that the guards were carrying out their official duties and were therefore entitled to special protection? The difference between torture and any other official abuse is only one of degree, not of substance.

I ask whether it is necessary, in a democratic society, to retain the umbrella of law over government agents when they are exceeding their authority. I have only minimal hesitations with the answer. Polish case-law on Article 236 of the Criminal Code seems to afford equal protection to public officers in the course of their duties and to public officers who are abusing their functions[1]. If that is really the case, it is a system that has advanced along quaint avenues towards even-handedness. A regime which considers the verbal impertinence of an individual more reprehensible than illicit excesses by public officers is one that has, in my view, pulled the scale of values inside out.

I fully endorse the necessity of maintaining the authority of the State and enhancing that of its agents. But authority, in democracy, no longer parachutes from heaven; it is born from consensus, nurtured in acceptance and fulfilled by concurrence. Respect for authority has to be deserved; it is hardly earned by looking down on the law. There can be negligible reverence for authority, when its claims are conceived in arrogance and propped by misconduct.

1. See the memorial of the Government of 7 August 1998, §§ 22-29.

# DISSENTING OPINION OF JUDGE CASADEVALL

(*Translation*)

1. The majority of the Grand Chamber found no violation in the present case. I regret that I am unable to agree.

2. Certainly the case is not a very serious one. However, the context in which the incident took place and the judgment at first instance of 29 April 1993 in which the Zduńska Wola District Court sentenced the applicant, for an act of hooliganism, to eight months' imprisonment, suspended, and a fine (which judgment was quashed on 29 September 1993 by the Regional Court) reveal a rather disturbing state of mind.

3. In my opinion, the Court should have adopted a rather more balanced approach to its assessment of the facts, taking into account the applicant's spontaneous reaction to the municipal guards' arbitrary and unjustified intervention, the fact that he was right from the legal point of view[1] and the nature of the words spoken to the public officials on the spur of the moment. I do not approve of terms such as "oafs" or "dumb", but I consider, like the majority of the Commission, that the applicant, in the very special circumstances of the case, did not overstep the limits of acceptable criticism of the municipal guards. They, being responsible for maintaining public order, had a duty to act in accordance with the law.

4. The Government's argument concerning the objective nature of the offence as defined in Article 236 of the Polish Criminal Code (which made it a kind of strict-liability offence) is not acceptable. They asserted that in order to establish whether the offence of insult has been committed "*it is irrelevant ... whether a civil servant was substantively right or wrong in undertaking a specific action within his official duties*"[2]. In the Oberschlick case, with regard to use of the word "idiot" (*Trottel*) in an article published by a journalist in the magazine *Forum* to describe a politician, the Austrian court held that, as the word itself was insulting, its mere use was enough to justify the conviction. The Court disagreed, observing:

> "[The Court] wishes to point out in this connection that the judicial decisions challenged before it must be considered in the light of the case as a whole, including the applicant's article and the circumstances in which it was written."[3]

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1. The Sieradz Regional Court, in its judgment, noted that there was no legal provision prohibiting trading on the public highway at the place where the incident took place, nor had any notice to that effect been put up there (Commission's report, paragraph 42).

2. Paragraphs 25-26 of the Government's memorial.

3. Oberschlick v. Austria (no. 2) judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1275, §§ 30 and 31.

The same analysis is required in the present case, namely an assessment of the words spoken by Mr Janowski in the conditions and circumstances of the incident with the municipal guards.

5. No one has denied that the applicant's conviction constituted interference with the exercise of his right to freedom of expression. Thus, as Mr Janowski was eventually convicted of insulting civil servants, an offence under the Criminal Code[1], the interference was "prescribed by law" and was aimed at preventing disorder or protecting the rights of others, but it remains to be seen whether it was really necessary in a democratic society.

As stated in paragraph 33 of the judgment, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may prove necessary to protect them from offensive verbal attacks when on duty. That is quite right. But it is still necessary, and is the least one might expect, for those civil servants to act in accordance with the law. Arbitrary conduct cannot be protected.

6. The Court's judgments relating to Article 10, from Handyside to Lingens and on to Vogt, lay down the fundamental principles regarding the criterion of necessity, which are reproduced in paragraph 30 of the present judgment: the adjective "necessary" implying "pressing social need", the margin of appreciation for determining whether such a need exists, the proportionality of the interference and the existence of "relevant and sufficient" reasons.

7. In the present case, can it be maintained that the applicant's conviction on account of a banal discussion with the municipal guards, when – in spite of the fact that a few of the remarks he made were unfortunately chosen – he was right about the substantive legal point at issue, met a "pressing social need" within the meaning of the Court's case-law? In my opinion it cannot.

I accordingly conclude that there has been a violation of Article 10 of the Convention.

1. Article 236 of the Polish Criminal Code.