IN THE DISTRICT COURT OF WARSAW

CASE XXIV C 276/19

Telewizja Polska SA
in Warsaw

Plaintiff

vs.

Prof. Wojciech Sadurski

Defendant

EXPERT OPINION

of ARTICLE 19: Global Campaign For Free Expression

ARTICLE 19: Global Campaign for Free Expression
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I. Introduction

1. The expert opinion is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation that protects and promotes freedom of expression and information worldwide, including in Poland. Its aim is to inform the District Court of Warsaw about international and regional standards on freedom of expression that can be applied in the present case. These include, in particular, standards under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the European Convention on Human Rights (European Convention), both of which Poland signed and ratified. As a result, Poland is not only bound by the respective provisions of as a matter of international law but is also obliged to give effect to them through national legislation and practice. The Expert Opinion also includes review of comparative jurisprudence and best practices around the world in the respective issues.

II. Interest of ARTICLE 19

2. ARTICLE 19 is well-recognized international human rights organization, with international office in London and several regional offices. It takes its name and mandate from Article 19 of the Universal Declaration of Human Rights which guarantees the right to freedom of opinion and expression and campaigns against censorship in all its forms around the world. ARTICLE 19 frequently submits written comments/amicus curiae to international and regional courts as well as to courts in national jurisdictions in cases that raise issues touching on the international guarantee of freedom of expression. Over the years, ARTICLE 19 has produced a number of standard-setting documents and policy briefs based on international and comparative law and best practice on freedom of expression issues, including on protection of reputation.[1]

3. ARTICLE 19 welcomes the opportunity to provide the expert opinion in this case under Article 63 in connection with Article 61 § 1 in connection with art. 13 § 2 Act of 17 November 1964 of Civil Procedure (Journal of law [Dz. U.] 2019.1460 from 2019.08.05).

III.Issues addressed

4. This case concerns the scope of the right to freedom of expression and the limits on political speech and protection of reputation of media outlets. We understand that the defendant in the case, Professor Sadurski is a highly respected professor of law at the universities of Sydney and Warsaw who frequently publishes political opinions on his personal blog and Twitter account. He is known as an active and public commentator of the political and human rights situation in Poland. The case was initiated as a result of his tweet of 16 January 2019, in which he stated that the Mayor of Gdańsk, Paweł Adamowicz, was murdered after he was

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[1] ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, 2017, available at https://bit.ly/333fXKk.

criticised by “governmental media” and that no opposition politician or believer in democracy should enter the premises of the “Goebbelsian media”. However, the Expert Opinion does not address the facts or merits of the case.

5. ARTICLE 19 recalls that under international and regional human rights law, the right to freedom of expression is not an absolute right and may be legitimately restricted by the State in certain circumstances. A three-part test sets out the conditions against which any proposed restriction must be scrutinised and these requirements also apply to online content:[2]
   - The restriction must be provided by law: thus, it must have a basis in law, which is publicly available and accessible, and formulated with sufficient precision to enable citizens to regulate that conduct accordingly.[3]

   - The restriction must pursue a legitimate aim, of those that are exhaustively enumerated in Article 10 para 2 of the European Convention and Article 19 para 3 of the ICCPR, namely: national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, and/or the protection of the reputation or rights of others. Article 10 para 2 of the European Convention also provides that preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary, is a legitimate aim.

   - The restriction must be necessary in a democratic society, meaning that it must be necessary and proportionate. This requires an assessment of whether the proposed limitation responds to a “pressing social need” and whether the measure is the least restriction method of achieving the objective.

6. As a party to the ICCPR and the European Convention, the courts in Poland must subject any interference to freedom of information to this test. Further, given the legal issues involved in the case, ARTICLE 19 submits that the Provincial Court of Warsaw should consider international and comparative standards on:
   - Protection of political speech under international and regional human rights standards;

   - The extent in which opinions and exaggerated language, including those on social media, are protected under international and regional standards on freedom of expression.

   - The extent to which statements on matters of public concern are entitled to protection.

IV.Arguments

Protection of political speech

[2] C.f. e.g. UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 43.

[3] Ibid., paras 24-25. See also European Court of Human Rights (European Court), The Sunday Times v United Kingdom, App. No. 6538/74, 26 April 1979, para 49.

7. ARTICLE 19 recalls that the critical importance of freedom of expression with respect to political speech is well-established by the European Court of Human Rights (European Court). The European Court has repeatedly stated that political speech "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."[4] It has stressed that "the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech."[5] The European Court has further affirmed that "there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on matters of public interest."[6]

8. Similarly, the Human Rights Committee has also stated that "communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."[7]

9. In sum, international and European freedom of expression standards have clearly asserted that any restriction imposed upon the exercise of free expression in a political debate is subject to review on the grounds that it inhibits the right to free expression. Additionally, any restriction upon free expression in this context requires a compelling justification, because the right of free expression has significant weight in any assessment of the proportionality of a restriction. This is true due to the public interest in political discourse, and how integral the free exchange of ideas is for public participation in democratic politics.

Defense of an opinion

10. It is well established under European and international law that opinions are entitled to enhanced protection under the guarantee of the right to freedom of expression. Courts around the world, international and national, regularly distinguish between opinions and statements of fact, allowing far greater latitude in relation to the former. ARTICLE 19 takes the view that statements of opinion should never attract liability under defamation law;[8] at a minimum, such statements should benefit from enhanced protection.

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[4] European Court, Janowski v Poland, App. No. 25716/94, 21 January 1999, para 30.

[5] European Court, Feldek v Slovakia, App. No. 29032/95, 12 July 2001, para 83.

[6] European Court, Sürek and Özdemir v Turkey, App. No. 23927/94, App. No. 24277/94, 8 July 1999, para 60.

[7] UN Human Rights Committee, General Comment 25, UN Doc CCPR/C/21/Rev.1/Add/7 (1996) para 25.

[8] ARTICLE 19, Defining Defamation, op.cit., Principle 10.

11. For example, in Lingens v. Austria, the European Court held that value-judgments must be carefully distinguished from assertions of fact. In that case, the Court noted that the journalist was covering political issues that were of immense public interest to Austrians and that censuring the articles would deter other journalists from contributing to public discussion. The Court emphasised that

    > [A] careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof... As regards value-judgments, this requirement [to prove truth] is impossible of fulfilment and it infringes freedom of opinion itself.[9]

12. ARTICLE 19 also notes that courts have interpreted the term "opinion" very liberally and allowed the defence of opinion to be defeated only where it is clear that the defendant did not actually hold the views expressed. In Sokolowski v Poland, the European Court had to consider a statement to the effect that a local municipal councillor was "tak[ing] away" money from the local townspeople by electing himself to a paid position on a local election committee.[10] Finding that the statement constituted protected expression of opinion rather than a factual assertion, the Court held that "a serious of accusation of theft cannot...be justifiably read into such a statement."[11]

13. Further, in Feldek v. Slovakia, the European Court held that the use by the applicant of the phrase "fascist past" should not be understood as factual statement that a person had participated in activities propagating fascist ideals. It explained that the term was a wide one, capable of encompassing different notions as to its content and significance, one of which was that the person participated as a member in a fascist organisation. On this basis, the value-judgment that that person had a 'fascist past' could fairly be made.[12]

14. ARTICLE 19 also notes that in some cases of expression of opinions, strong words and harsh criticism are perhaps even to be expected, especially in matters of public controversy or public interest. The European Court recognised this in a number of cases; for instance:

    - In Thorgeirson v Iceland, police officers were characterised as "beasts in uniform," "individuals reduced to a mental age of a new-born child as a result of strangle-holds that policemen and bouncers learn and use with brutal spontaneity" and the police was criticised for "bullying, forgery, unlawful actions, superstitions, rashness and ineptitude." The European Court found that such language was permissible given that it was situated in a broader debate about police reform.[13]

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[9] European Court, Lingens v. Austria, App. No. 9815/82, 8 July 1986, para 46.

[10] European Court, Sokolowski v. Poland, 29 March 2005, App. No. 75955/01, para 48.

[11] Ibid.

[12] Feldek v. Slovakia, op.cit.

[13] Thorgeirson v. Iceland, op. cit., paras 14-15.

- In Renaud v. France, a chairman of the local association of residents opposing the construction project and the webmaster of the Internet site of the association criticised public officials and politicians. The European Court found that when a debate relates to an emotive subject, such as the daily life of the local residents and their housing facilities, politicians must show a special tolerance towards criticism and they have to accept oral or written outbursts.[14]

- In the Jerusalem case, the European Court held that two Austrian associations were "active in a field of public concern, namely drug policy" and "participated in public discussions on this matter." "Since the associations were active in this manner in the public domain, they ought to have shown a higher degree of tolerance to criticism when opponents considered their aims as well as to the means employed in that debate."[15]

15. The European Court has not gone quite so far as to accord opinions absolute latitude, holding that freedom to express value judgements is not entirely unfettered. In practice, however, the European Court allows a considerable degree of leeway to statements of opinion. Thus, in Kurski v Poland, the Court held that because the individual was involved in a public debate on an important issue, it was therefore inappropriate to require him to "prove the veracity of his allegations", or require him to "fulfil a more demanding standard than that of due diligence."[16] Furthermore, the Court accorded him broad latitude to "a certain degree of hyperbole in his statements."[17]

16. Earlier, in Dichand and others v. Austria, the European Court stressed that the discussion was on a matter of important public concern and recalled:

> It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.[18]

17. ARTICLE 19 submits that the short and informal style of criticism is particularly relevant to expression on social media. As the European Court emphasised in Tamiz v. the United Kingdom

> [An] attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life … This threshold test is important: as...the reality is that millions of

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[14] European Court, Renaud v. France, App. No. 13290/07, 25 February 2010, para 40.

[15] European Court, Jerusalem v Austria, App. No. 26958/95, 27 February 2001.

[16] European Court Kurski v. Poland, App. No. 26115/10, 5 October 2016, para 56.

[17] Ibid., para 54.

[18] European Court, Dichand and Others v. Austria, App. No. 29271/95, 26 February 2002, paras 51-52.

> Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage to another person's reputation.[19]

In this case, the European Court found that although the applicant's statements were "undoubtedly offensive, for the large part they were little more than "vulgar abuse" of a kind – albeit belonging to a low register of style – which is common in communication on many Internet portals" and allegations levied "would, in the context in which they were written, likely be understood by readers as conjecture which should not be taken seriously."[20]

18. In an analogous fashion to the cases above, the statements challenged in the present case should not be understood as factual assertions of misconduct or illegality. In ARTICLE 19's view, they should be understood as expressions of opinion by Professor Sadurski concerning certain media outlets in the country. Moreover, the challenged statements in this case are also a variety of political rhetoric, a form of speech for which international and national courts have demonstrated a wide degree of tolerance. It also seems clear that Professor Sadurski made these statements honestly, in the sense that they really are his views, as opposed to a gratuitous attack on the plaintiff.

Statements on matters of public concern

19. It is well-established under international law that statements on matters of public concern deserve enhanced protection due to the key role they play in safeguarding democracy and the overall public interest. Courts around the world, international and national, are assiduous in protecting statements on the matters of public concern. The need for enhanced protection for statements on matters of public interest has been also explicitly recognised in the specific context of defamation laws by the United Nations Special Rapporteur on Freedom of Opinion and Expression (UN Special Rapporteur), who stated that "defamation laws should reflect the importance of open debate about matters of public concern."[21]

20. As the jurisprudence from the European Court demonstrates, a broad range of comments attract enhanced protection for being on matters of public concern. The activities of a public service media (and equally of any major commercial media outlet) are a matter of public concern. For example, the European Court did not hesitate to find that enhanced freedom of expression considerations were very much in play in relation to McDonald's, the multinational fast food restaurant

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[19] European Court, Tamiz v the United Kingdom, App. No. 3877/14, 19 September 2017, para 80.

[20] Ibid., para 81.

[21] Promotion and protection of the right to freedom of opinion and expression, 18 January 2000, E/CN.4/2000/63, para 52.

chain, holding that criticism of its environmental and labour policies fell squarely within the scope of the enhanced protection for statements on matters of public concern.[22]

21. Moreover, given that it is the promotion of public debate on matters of public concern which is the touchstone here, everyone who furthers such debate should receive the same enhanced protection, including Professor Sadurski, a highly respected academic and social commentator. As the European Court stated in a case involving McDonalds:

> The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.[23]

22. ARTICLE 19 submits that these standards should be considered by the Court in the present case. Here, the gist of the challenged statements relates to discussion of the practices of the public service broadcaster (a major media outlet) in the country and its independence from the government; and as such, a matter of public concern. These challenged statements are part of an ongoing public debate in Poland about the independence of the public service broadcaster and its practices. Regardless of one's views on the challenged statements, the point is to allow this very discussion to occur.

V. Conclusions

[22] European Court, Steel and Morris v. United Kingdom, 15 February 2005, App. No. 68416/01, para 88.

[23] Ibid., para 89.

23. Freedom of expression has been recognised as a basic precondition for a functional democracy, and indeed human progress and development. The free flow of information and ideas is essential and there is little scope under Article 19 para 3 of the ICCPR and Article 10 para 2 of the European Convention for restrictions on political speech, on expression of opinion or on debate on questions of public interest.

24. The challenged statements in this case fall comfortably into the class of statements considered to be opinions by international and many national courts, which benefit from a high degree of protection under the guarantee of freedom of expression. They represent Professor Sadurski's personal views on the nature of public service broadcaster in Poland and its independence, a matter of public concern. It also appears that Professor Sadurski honestly holds these opinions. As such, these statements would be protected against defamation liability under international law and by many national courts.

25. ARTICLE 19 believes that a finding against Professor Sadurski in this case would represent a very serious setback for freedom of expression in Poland. It would send a signal to all would-be critics of powerful social actors, such as a public service broadcaster, that any criticism they dare to publish places them at risk of liability. The consequence is likely to be a serious chilling effect on freedom of expression, to the detriment of the Polish public as a whole. A finding in favour of Professor Sadursk, on the other hand, would send a clear signal, both within Poland and around the world, that the country's commitment to democracy and human rights remains strong, and that its powerful social actors must learn to tolerate the degree of criticism warranted by the important role they play in society.

26. This is the opinion of ARTICLE 19, submitted by the undersigned, and is subject to the decision of this Court.

Thomas Hughes
Executive Director
ARTICLE 19