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# REPORT

on the request for waiver of the immunity of Marek Siwiec  
(2009/2067(IMM))

Committee on Legal Affairs

Rapporteur: Diana Wallis

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## PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

### on the request for waiver of the immunity of Marek Siwiec (2009/2067(IMM))

*The European Parliament,*

- having regard to the request for waiver of the immunity of Marek Siwiec, forwarded by the Polish Prosecutor-General on 27 September 2006, and announced in plenary sitting on 10 April 2008,
- having heard Marek Siwiec in accordance with Rule 7(3) of its Rules of Procedure,
- having regard to Article 10 of the Protocol of 8 April 1965 on the Privileges and Immunities of the European Communities, and Article 6(2) of the Act of 20 September 1976 concerning the election of the members of the European Parliament by direct universal suffrage,
- having regard to the judgments of 12 May 1964 and 10 July 1986<sup>1</sup> of the Court of Justice of the European Communities,
- having regard to Article 105 of the Constitution of the Republic of Poland of 2 April 1997,
- having regard to Article 7b(1) of the Polish Law of 9 May 1996 on the performance of the mandate of deputy or senator,
- having regard to Rules 6(2) and 7 of its Rules of Procedure,
- having regard to the report of the Committee on Legal Affairs (A7-0030/2009),

A. whereas a private prosecution has been brought against Marek Siwiec,

B. whereas it appears from the timing of the prosecution during an electoral campaign three years after the alleged offences were committed, and from the overtly political aims of the private individual bringing the prosecution, as evidenced in particular by documents presented by that individual himself to the President of Parliament and by the fact that he claims to be acting on behalf of citizens who object in general terms to Mr Siwiec's carrying out a public activity, that the bringing of the criminal proceedings in question constitutes a *fumus persecutionis*, inasmuch as there are serious reasons to believe that the charges against Mr Siwiec have been brought by a political opponent with the principal aim of undermining his activity as a Member of the European Parliament,

1. Decides not to waive the immunity of Marek Siwiec;
2. Instructs its President to forward this decision, and the report of the committee responsible, immediately to the appropriate authority of the Republic of Poland.

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<sup>1</sup> Case 101/63 *Wagner v Fohrmann and Krier* [1964] ECR 195 and Case 149/85 *Wybot v Faure and others* [1986] ECR 2391.

## EXPLANATORY STATEMENT

The request of a Polish citizen, Mr Jerzy Pietrowicz represented by attorney Jerzy Pomin, for the waiver of the parliamentary immunity of Mr Marek Siwiec was transmitted to Parliament by the Polish Prosecutor-General on 27 September 2006. The Committee on Legal Affairs had to first decide on the admissibility of a request coming from a private person (in this case acting as a subsidiary prosecutor). On the basis of the committee's deliberations and additional information provided by the Polish authorities, the Chairman of the Legal Affairs Committee informed the President of Parliament on 31 March 2008 that the request should be considered admissible.

On 5 May 2008, the President of Parliament forwarded the request to the Legal Affairs Committee for consideration. In view of other difficulties in connection with the immunity of Members of Parliament elected in Poland, the consideration of Mr Siwiec's immunity by the Legal Affairs Committee was suspended until after adoption of a report on parliamentary immunity in Poland. A resolution based on this report (A6-0205/2009) was adopted by Parliament on 24 April 2009<sup>1</sup>.

Mr Marek Siwiec was re-elected as Member of Parliament on 9 June 2009.

### The facts

On 17 September 1997 (four days before the parliamentary elections in Poland were won by the centre-right parties) Marek Siwiec (at that time Chairman of the National Security Council<sup>2</sup>) arrived with President Aleksander Kwaśniewski at Ostrzeszów by helicopter and upon leaving the aircraft made the sign of the cross and then kissed the ground (gestures commonly associated with the late Pope John Paul II).

Three years later, during the presidential elections of 8 October 2000, Marian Krzaklewski (a right-wing candidate) used a recording of the events at Ostrzeszów in a party-political broadcast on a public television station (he subsequently obtained less than 16% of the votes in the first and final round, while Aleksander Kwaśniewski was elected for a second term with more than 50% of the vote).

On 31 October 2000 Jerzy Pietrowicz and other private persons informed the Prosecutor's Office for the first time that Mr Siwiec had insulted a foreign Head of State (an intentional offence according to Art. 136(3) of the Polish Penal Code) and offended their personal religious feelings (an offence under Art. 196 of the Polish Penal Code).

On 9 April 2004 the District Prosecutor in Ostrzeszów finally closed the investigations, having found that there were not the necessary grounds to bring public charges against Mr Siwiec. In September 2004, the Regional Prosecutor in Kalisz upheld this decision.

On 13 October 2004, in accordance with the Polish Code of Criminal Procedure, Mr Pietrowicz (as the injured party) initiated his own private prosecution through the District Court in Ostrzeszów.

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<sup>1</sup> P6\_TA(2009)0316, not yet published in the Official Journal.

<sup>2</sup> Rada Bezpieczeństwa Narodowego

Following an exchange of letters between Mr Pietrowicz and President Borell, which made it clear that the request should in this case be transmitted by the Polish Prosecutor-General, the request for a waiver of Mr Siwiec's immunity was correctly transmitted by a letter dated 27 September 2006.

## **The law**

Mr Siwiec has been charged under the following provision of the Polish Penal Code:

### *Article 196<sup>1</sup>*

*Who offends other person's religious feelings, by defiling an object of religious adoration or a place of public worship, shall be sentenced to a fine, restriction of personal freedom or imprisonment for up to 2 years.*

The following provisions relating to parliamentary immunity are relevant:

### *Protocol on privileges and immunities of the European Communities*

#### *Article 10*

*During the sessions of the European Parliament, its members shall enjoy:*

*(a) in the territory of their own State, the immunities accorded to members of their parliament;*

*(b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.*

*Immunity shall likewise apply to members while they are travelling to and from the place of meeting of the European Parliament.*

*Immunity cannot be claimed when a member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its members.*

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<sup>1</sup> Artykuł 196. Kto obraża uczucia religijne innych osób, znieważając publicznie przedmiot czci religijnej lub miejsce przeznaczone do publicznego wykonywania obrzędów religijnych, podlega grzywnie, karze ograniczenia wolności albo pozbawienia wolności do lat 2.

Given that the offences of which Mr Siwiec stands accused took place in Poland, the proceedings are taking place in Poland and Mr Siwiec is a Polish MEP, he enjoys "the immunities accorded to members of [the Polish] parliament".

Parliamentary immunity in Poland is governed by Article 105 of the Constitution:

*Article 105<sup>1</sup>*

- 1. A Deputy shall not be held liable for activities performed within the scope of a Deputy's mandate during the term thereof nor following expiry thereof. Regarding such activities, a Deputy can only be held liable before the Sejm and, in a case where he has infringed the rights of third parties, he may only be proceeded against before a court with the consent of the Sejm.*
- 2. From the day of announcement of the results of the elections until the day of the expiry of his mandate, a Deputy shall not be subjected to criminal liability without the consent of the Sejm.*
- 3. Criminal proceedings instituted against a person before the day of his election as Deputy, shall be suspended at the request of the Sejm until the time of expiry of the mandate. In such instance, the statute of limitation with respect to criminal proceedings shall be extended for the equivalent time.*
- 4. A Deputy may consent to be brought to criminal liability. In such instance, the provisions of paras. 2 and 3 shall not apply.*
- 5. A Deputy shall be neither detained nor arrested without the consent of the Sejm, except for cases in flagrante delicto and in which his detention is necessary for securing the proper course of proceedings. Any such detention shall be immediately communicated to the Marshal of the Sejm, who may order an immediate release of the Deputy.*
- 6. Detailed principles of and procedures for bringing Deputies to criminal liability shall be specified by statute.*

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<sup>1</sup> *Artykuł 105*

- 1. Poseł nie może być pociągnięty do odpowiedzialności za swoją działalność wchodzącą w zakres sprawowania mandatu poselskiego ani w czasie jego trwania, ani po jego wygaśnięciu. Za taką działalność poseł odpowiada wyłącznie przed Sejmem, a w przypadku naruszenia praw osób trzecich może być pociągnięty do odpowiedzialności sądowej tylko za zgodą Sejmu.*
- 2. Od dnia ogłoszenia wyników wyborów do dnia wygaśnięcia mandatu poseł nie może być pociągnięty bez zgody Sejmu do odpowiedzialności karnej.*
- 3. Postępowanie karne wszczęte wobec osoby przed dniem wyboru jej na posła ulega na żądanie Sejmu zawieszeniu do czasu wygaśnięcia mandatu. W takim przypadku ulega również zawieszeniu na ten czas bieg przedawnienia w postępowaniu karnym.*
- 4. Poseł może wyrazić zgodę na pociągnięcie go do odpowiedzialności karnej. W takim przypadku nie stosuje się przepisów ust. 2 i 3.*
- 5. Poseł nie może być zatrzymany lub aresztowany bez zgody Sejmu, z wyjątkiem ujęcia go na gorącym uczynku przestępstwa i jeżeli jego zatrzymanie jest niezbędne do zapewnienia prawidłowego toku postępowania. O zatrzymaniu niezwłocznie powiadamia się Marszałka Sejmu, który może nakazać natychmiastowe zwolnienie zatrzymanego.*
- 6. Szczegółowe zasady pociągania posłów do odpowiedzialności karnej oraz tryb postępowania określa ustawa.*

For present purposes the relevant paragraph of this article is paragraph 2.

Detailed principles and procedures as provided for in Article 105(6) of the Constitution have been enacted in the Law of 9 May 1996 on the performance of the mandate of deputy or senator (OJ No 221/2003, item 2199, as amended). Article 7b(1) of this Law, which is of particular relevance to this report, read as follows:

*Article 7b*<sup>1</sup>

1. *The application for authorisation to bring criminal proceedings against a deputy or senator in the event of an offence subject to public prosecution shall be made through the intermediary of the Polish Prosecutor-General.*

## **General principles**

Over the years, certain general principles have emerged from Parliament's deliberations in response to requests for the waiver of immunity of its Members. They were given recognition in the resolution adopted at the sitting of 10 March 1987<sup>2</sup> on the basis of Mr Donnez's report (A2-121/86).

It seems useful to call to mind the principles that are of relevance to this report, while stressing the need for decisions on waiver of immunity to have a sound legal basis so that they are not influenced by considerations relating to the political affiliation or the nationality of the Member concerned.

### A. Purpose of parliamentary immunity

Parliamentary immunity is not a Member's personal privilege, but a guarantee of the independence of Parliament and its Members in relation to other authorities. On the basis of this principle, the date on which the alleged deeds took place is of no importance and may be either prior or subsequent to the election of the Member, since protection of Parliament through its Members is the sole consideration.

### B. Time limit on immunity

The Court of Justice has twice been consulted on the interpretation of the phrase 'during the sessions of the European Parliament', which appears in Article 10 of the PPI.

From the two judgments of the Court (Case 101/63 *Wagner v Fohrmann and Krier* [1964] ECR 397 and Case 149/85 *Wybot v Faure* [1986] ECR 2403), it may be inferred that Parliament holds an annual session during which its Members, even

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<sup>1</sup> *Artykuł 7b*

1. *Wniosek o wyrażenie zgody na pociągnięcie posła lub senatora do odpowiedzialności karnej w sprawie o przestępstwo ścigane z oskarżenia publicznego składa się za pośrednictwem Ministra Sprawiedliwości – Prokuratora Generalnego.*

<sup>2</sup> OJ C 99, 13.4.1987, p. 44.

during the periods when the session is interrupted, enjoy the immunity provided for in the PPI.

Furthermore, it stems from the very purpose of parliamentary immunity that the latter remains effective throughout a Member's term of office and covers the commencement of the proceedings, preparatory inquiries, measures for the execution of pre-existing judgments, appeals or applications for judgments to be set aside.

C. Independent nature of European parliamentary immunity compared with national parliamentary immunity

The fact that Article 10, first paragraph, section (a), of the PPI refers to the immunities accorded to members of national parliaments does not mean that the Parliament cannot create its own rules which constitute a species of 'case law'. As regards the waiver of immunity, such immunity, which is identical for Members of a given nationality in their national parliament and in the European Parliament, must not be confused with the waiver thereof, which is a prerogative of each individual parliament. Those rules, which are derived from decisions adopted in respect of requests for waiver of immunity, create a consistent notion of European parliamentary immunity which, in general terms, is independent of the various national parliamentary procedures. If this were not the case the disparities between members of one and the same parliament would be accentuated on the basis of their nationality.

Through application of these principles, a constant factor has emerged in Parliament's decisions, which has become a basic criterion in its response to each request for waiver of immunity. Immunity is not waived in any case where a Member is accused of actions that come under the heading of political activity.

This criterion has been complemented by other considerations which may militate either for or against waiver of immunity. These include:

- the existence of *fumus persecutionis*, i.e. the suspicion that criminal proceedings have been brought with the intention of undermining the political activity of the Member concerned,
- the particularly serious nature of the charges.

### **Further considerations**

Before the official transmission by the Polish Prosecutor-General, Mr Pietrowicz sent his request for waiver of Mr Siwiec's immunity directly to the President of Parliament in a letter dated 16 March 2005. The argument set forth in this letter consisted inter alia of 'background' information, portraying Mr Siwiec as member of a larger group attacking certain catholic media in Poland.

In another letter sent directly to the President of Parliament (dated 27 March 2007), Mr Pietrowicz inquired about the Parliament's deliberations concerning his request (which by this time had already been properly transmitted by Polish authorities), and claimed that Mr Siwiec



used to be a defender of the stalinist-communist ideology and later became a liberal in a dubious way.

At the hearing held before the committee on 28 May 2008, Mr Siwiec stated that he had apologised for his behaviour in Ostrzeszów on numerous occasions and referred to his private correspondence with the Vatican which indicated that its Head of State (i.e. the late Pope) did not feel offended by this 'joke'.

Mr Siwiec also presented copies of three additional documents signed by Mr Pietrowicz:

1. A statement dated 29 May 2004 of two organisations represented by Mr Pietrowicz (the Committee for the protection of the rights and religious freedoms of persons practising faith<sup>1</sup> and the Association of Salesian Co-workers<sup>2</sup>) in which a reference is made to his contestation (on behalf of these two organisations) of the Ostrzeszów District Prosecutor's decision of 9 April 2004 to close the investigations into Mr Siwiec; Mr Siwiec himself was asked not to stand for election to the European Parliament; and those eligible to vote in the elections were called upon to act against the election of Mr Siwiec to Parliament.
2. An election protest, submitted on 25 June 2004 to the National Electoral Committee<sup>3</sup>, again by Mr Pietrowicz on behalf of the two organisations mentioned above, in which (by reference to the same action contesting the District Prosecutor's decision to close investigations) they claimed that the election of Mr Siwiec to the European Parliament was invalid.
3. A letter to the Regional Court in Poznań dated 18 October 2006, in which Mr Pietrowicz asks for clarification of deadlines applicable to contest the decision of 5 October 2006 by which the District Court in Poznań closed the proceedings in view of the parliamentary immunity of Mr Siwiec. In this letter Mr Pietrowicz three times makes an imprecise reference to 'RED SATAN' as being responsible for the procedural mistake made by the Court.

Indeed, the District Court in Poznań did close the proceedings on 5 October 2006, but that decision was later overruled by the Regional Court in Poznań on the basis that the application for waiver of Mr Siwiec's immunity had eventually been made.

## Final analysis

The question to be answered is whether the charges brought against Mr Siwiec might be intended to undermine his political activity as a Member, which would constitute a *fumus persecutionis* and warrant Parliament's refusing to waive his immunity.

Although the Public Prosecutor in Ostrzeszów decided to close the investigation, having failed to find the necessary grounds for bringing public charges, it was still open to Mr Pietrowicz to pursue an action as a private individual on the basis of his own subjective perception that he had been "offended" (or legally injured) by the behaviour of Mr Siwiec. Thus he had the right to initiate proceedings against Mr Siwiec. It is then a matter for the

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<sup>1</sup> Komitet Obrony Praw i Uczuć Religijnych Ludzi Wierzących i Praktykujących

<sup>2</sup> Stowarzyszenie Współpracowników Salezjańskich

<sup>3</sup> Państwowa Komisja Wyborcza

Polish court to decide whether the events that took place on 17 September 1997 fulfil the criteria of the crime as provided for in Art. 196 of the Polish Penal Code (the court would of course also have to consider in the first place whether the period of limitation for the offence had already expired).

However, taking into account many specific aspects of this case (i.e. the use of a video recording of the event in Ostrzeszów during an electoral campaign three years after it happened and the explicit political aims of Mr Pietrowicz in his actions against Mr Siwiec, which appeared to be first and foremost to prevent his election to the European Parliament, and also the fact that Mr Pietrowicz claims to act on behalf of those Polish citizens who object to the public activity of Mr Siwiec in general), there are serious reasons to believe that Mr Pietrowicz's charges have to be categorised as *fumus persecutionis*.

Consequently, it is considered that the parliamentary immunity of Mr Marek Siwiec should not be waived.

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	5.10.2009
<b>Result of final vote</b>	+: 12 -: 0 0: 0
<b>Members present for the final vote</b>	Luigi Berlinguer, Marielle Gallo, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Alexandra Thein, Diana Wallis, Cecilia Wikström, Tadeusz Zwiefka
<b>Substitute(s) present for the final vote</b>	Paolo Bartolozzi, Edvard Kožušník, Eva Lichtenberger