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REPORT

on the request for waiver of the immunity of Vladimír Železný
(2004/2173(IMM))

Committee on Legal Affairs

Rapporteur: Maria Berger

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PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

on the request for waiver of the immunity of Vladimír Železný (2004/2173(IMM))

The European Parliament,

- having regard to the request for waiver of the immunity of Vladimír Železný, forwarded by the Prague Metropolitan Court on 30 August 2004, and announced in plenary sitting on 13 September 2004,
 - having heard Vladimír Železný in accordance with Rule 7(3) of its Rules of Procedure, who requested that his parliamentary immunity not be waived,
 - 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 1986¹ of the Court of Justice of the European Communities,
 - having regard to Article 27 of the Constitution of the Czech Republic,
 - having regard to Rules 6(2) and 7 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A6-0289/2005),
1. Decides to waive the immunity of Vladimír Železný, subject to the condition that such waiver shall apply solely to the prosecution proceedings in hand and that, until such time as a final sentence is passed in those proceedings, Vladimír Železný shall be immune from any form of detention or remand or any other measure which might prevent him from performing the duties attaching to his mandate as a Member of the European Parliament;
 2. Instructs its President to forward this decision and the report of the committee responsible to the appropriate authority of the Czech Republic.

¹ 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

I. BACKGROUND

At the sitting of 13 September 2004, the President of Parliament informed the House that he had received a letter from the Prague Metropolitan Court for the waiver of the parliamentary immunity on Vladimir Zelezný. In accordance with Rule 6(2) of the Rules of Procedure, the President referred the request to the Committee on Legal Affairs.

The application (*suplicatoire*) was submitted by Dr Dusan Paske, Presiding Judge in the Prague Metropolitan Court to the President of Parliament. Pursuant to Rule 7 (7) the Committee on Legal Affairs considered that the Prague Metropolitan Judge is the appropriate authority to submit the application.

The Court is requesting the waiver on parliamentary immunity of Dr Zelezný on the grounds that he is liable to criminal proceedings under Section 148 (1) and (4) of the Penal Code of the Czech Republic for persistent evasion of taxes, duties and other compulsory payments, on the basis of an indictment submitted by the Prague Public prosecutor on 8 March 2004. The Court requests Parliament's consent for the continuation of the criminal proceedings conducted under file number 46 T 5/2004 of the Metropolitan Court of Prague.

The Court stresses that Dr Zelezný has remained at liberty during the above-mentioned criminal proceedings as there are no grounds for his imprisonment and nothing prevents him from continuing to perform his duties as a parliamentarian.

In the application, the acting judge points out that Dr Zelezný was a senator of the Parliament of the Czech Republic before his election to the EP and that the Senate waived his immunity at its sitting of 23 January 2003.

Pursuant to Rule 7 (3) of the Rules of Procedure Dr. Zelezný was heard by the Committee on Legal Affairs. At this hearing Dr Zelezný informed the committee of his views about the situation at his country with respect to him. He also delivered a written declaration translated into English with numerous annexes and exhibits.

Dr. Zelezný has acknowledged that, when he was Senator, a request to waive his parliamentary immunity had been presented by the police and that he asked the Senate to waive his immunity in the hope that it would accelerate the investigation procedure. The Senate waived the parliamentary immunity of Dr Zelezný apparently for the same or similar acts as those considered in connection with the present request.

When he appeared before the Committee, Dr Zelezný claimed that he has been a victim of political harassment and public intimidation for the last six years. He also mentioned two other cases that the police are currently investigating. Dr. Zelezný asserts that the three cases are linked (the two other cases are dealt with in two other reports).

In his written presentation to the Committee, Dr. Zelezný pointed out that the police

investigation on him has been purposely protracted for years and years to keep opponents away from fair political competition. Dr. Zelezný also claims that the cases against him are groundless and artificially perpetuated with a view to damaging his political career.

The Minister of Justice, in reply to the questions submitted by the Committee on Legal Affairs, responded to most of the observations made by Dr. Zelezný, stating its conviction that the bodies active in criminal proceedings conducted against Dr. Zelezný have acted in accordance with the law and have in no way been influenced by the Government or by its Members.

II. PARLIAMENTARY IMMUNITY OF MEMBERS OF THE EUROPEAN PARLIAMENT: TEXTS AND PRINCIPLES

1. Article 10 of the Protocol of the Privileges and Immunities of the European Communities⁽¹⁾, annexed to the Treaty establishing a Single Council and a Single Commission of the European Communities⁽²⁾, which incorporates the provisions of Article 9 of each of the protocols annexed to the Treaties establishing the ECSC, the EEC and the EAEC, reads as follows:

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 States, 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.

2. The charges brought against Dr Vladimír Železný, a Czech MEP, relate to events that took place within the territory of the Czech Republic. Dr Železný therefore enjoys the same immunities as those granted to Members of the Czech Parliament, as based on Article 26 of the Czech Constitution.
3. The procedure to be followed by the European Parliament is laid down in Rules 6 and 7 of the Rules of Procedure.

⁽¹⁾ See also Article 9 of this Protocol: 'Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.'

⁽²⁾ Referred to in Article 4(2) of the Act concerning the election of representatives of the European Parliament by direct universal suffrage of 20 September 1976.

4. Ever since its Members have been elected by direct suffrage, Parliament has responded to applications for the parliamentary immunity of its Members to be waived. Certain general principles have emerged from Parliament's deliberations; these were given recognition in the resolution adopted at the sitting of 10 March 1987⁽¹⁾
5. It seems useful to remind the principles that are applicable to the case under consideration, stressing the need for decisions on waivers of immunity to have a sound legal basis so that they are not influenced by considerations relating to political affiliation and even 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 to 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 Protocol on the Privileges and Immunities of the European Communities.

From the two judgements of the Court (Wagner v Fohrmann and Krier of 12 May 1964, 101/63, ECR 1964, p. 397, and Wybot v Faure of 10 July 1986, 149/85, ECR 1986, p. 2403), it may be inferred that Parliament holds an annual session during which its Members, even during the periods when the session is interrupted, enjoy the immunity provided for in the above Protocol.

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 judgements, appeals or applications for judgments to be set aside.

⁽¹⁾ OJ No C 99, 13.4.1987, p. 44

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

The fact that Article 10, first paragraph, section (a), of the Protocol refers to the immunities accorded to members of national parliaments does not mean that the European Parliament cannot create its own rules which, in some way, constitute 'case law'. As regards the waiver of parliamentary 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. These rules, which are derived from decisions adopted in respect of applications for immunity to be waived, 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.

6. 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. Along with this criterion, there are further considerations that militate for or against waiver of immunity such as fumus persecutionis, i.e. the presumption that criminal proceedings have been brought with the intention of causing the Member political damage (for instance, proceedings based on anonymous accusations, requests made a long time after the alleged facts, etc.), and charges of a particularly serious nature.

III GROUNDS FOR THE PROPOSAL FOR A DECISION

1. Article 9 of the PPI obviously does not apply in this case. Absolute immunity, or inviolability provisions, apply only "to opinions or votes cast by (Members) in the performance of their duties". Although it is possible to conceive of circumstances in which Article 9 might apply to a Member in his own country (delegation or meeting of one of EP's committees, group meeting, etc), the facts and alleged criminal offences put forward by the Czech authorities cannot be considered as falling under the scope of this article.
2. Consequently, Article 10(a), of the Protocol must apply to the facts set in part I of this explanatory statement. It provides that *during the sessions of the European Parliament, its Members shall enjoy....in the territory of their own State, the immunities accorded to members of their parliamen.*
3. Under Article 27 (2) of the Czech Constitution:

(2) No Deputy or Senator may be criminally prosecuted for statements made in the Chamber of Deputies or in the Senate, or in their bodies. A Deputy or a Senator shall be subject only to the disciplinary jurisdiction of the chamber of which he or she is

member.

This article is very clear in saying that it is up to the appropriate chamber to waive the immunity of a deputy or a senator before he or she may be criminally prosecuted. The criminal prosecution seems to include police investigations and the Chamber is not bound by any limitation with a view to granting or granting not immunity.

4. In the case of Dr Zelezný it is clear from the information provided by the Czech Senate that that Chamber gave its consent to the criminal prosecution of Senator Zelezný for acts which are the same that now are described in the application of the Prague Court.

The fact of that the Senate has already waived Dr Zelezný immunity is, in accordance with Article 10 (a) of the IPP, a patent indication that he does not enjoy parliamentary immunity in the territory of his own state. This could be enough for the European Parliament to waive the immunity of one of its Members (provided that he or she is not protected by Article 9 of the IPP).

5. Nevertheless and as pointed out in Part II. C, even though the members of the national parliament (here the Czech parliament) and Members of the European Parliament from the Member State in question enjoy the same immunities (or none, as it is the case for MEPs from UK), whether to waive the immunity at a particular case depends on the European Parliament.

In Dr Zelezný's declares that his prosecution in this case (and in the two other cases) is politically motivated.

The European Parliament has to look into these allegations and decide whether there is or there is not evidence of *fumus persecutionis* on this case. This is the key issue here.

6. As has been declared many times by Parliament, *immunity is not waived where the suspicion exists that the prosecution is based on the intention to prejudice the Member's political activities.* The non existence of any *fumus* is *conditio sine qua non* for waiving immunity. as mentioned in Part II C.

Who is supposed to assert the suspicion of *fumus*? The obvious answer is Parliament, and before Parliament, its competent committee.

How can such a conviction be arrived at with a certain degree of assurance?

The persuasion of the Members of the committee, in doubtful, unclear cases, is always an intimate belief that, nevertheless, has to be founded on the soundest possible facts.

By the way of examples, in past legislatures, the competent committee has taken into consideration the following factors:

- the anonymous character of the denunciation, complaint or accusation¹ ;

¹ Doc. 1-321/81

- the deferred submission of the accusation in relation to the date of the alleged acts¹;
- an apparent link between the date of the accusation or denunciation and the Member's election to Parliament²;
- the fact that legal proceedings were brought against the Member alone when more than one person could be considered liable or responsible³;
- cases where the accusation was evidently unfounded (for instance, where it concerned decisions for which the Member was not responsible or where no evidence existed of his involvement in the reputed action) or there was an obvious aim to penalise the Member for his political activities⁴.

7. Throughout the fifth legislature, the practice in the Committee on Legal Affairs and the Internal Market followed these guidelines, enriching them when necessary.

Parliament decided not to waive the immunity in eight cases where the suspicion of *fumus persecutionis* was fully considered or was an important element of the decision. Sometimes it was not strongly evidenced.

These cases were the following: BRIE (A5-0151/00), PASCUA (A5-0032/02) and MARCHIANI (A5-0033/02), KORAKAS (A5-0245/02 et A5-0420/03), COHN-BENDIT (A5-246/03) and MARCHIANI (A5-0422/03 et A5-0423/03). In a total of eight cases the committee considered that *animus persecutionis* was present to different degrees.

In most cases Parliament found perturbation of a political activity (BRIE), abusive elements in the prosecution process and the conduct of the prosecutor (MARCHIANI cases), or the consideration that the Member was judicially attacked *because* he was a MEP (KORACAS case).

8. Dr Zelezný's case is of a certain intricacy because of the complex nature of the crimes of which stands accused, mostly related to supposed evasion of taxes and other duties. The committee has to weigh, on one hand, the suspicion cast by the Member on the accusations brought against him by the Czech authorities, and, on the other hand, the fact that the Senate has already waived his immunity in the same case and all the satisfactory responses and assurances furnished by the Minister of Justice, which has fully collaborated with the Committee on Legal Affairs.
9. Nevertheless, there are certain aspects to the case, as pointed out by Dr Zelezný (some disproportionate reaction from the police on his arrest, the rather obscure situation of other main accused, Mr Novotný, certain police harassment and the length of the proceedings), that have demanded a thorough exam by the committee, but, as said above, the response from the Senate and the explanations from the Minister of Justice

¹ A3-0021/93, A3-0169/93, A5-246/03

² Doc-1-321/81

³ A2-0090/88, A5-246/03

⁴ A3-0247/90, A3-0076/92, A3-0077/92

make the rapporteur inclined to advise Parliament to waive the immunity of Dr Zelezný.

Moreover, none of the criteria set out in point 6 and 7 of this explanatory statement has been clearly established in the present case, which makes it very difficult to appreciate whether there is a *fumus persecutionis*.

10. It is in the interest of Parliament to use the *fumus* principle very carefully so it is not seen as a privilege of the parliamentarian but a guarantee of Parliament's independence. In this complex case it might be in Parliament interest to allow Dr Zelezný to defend himself in the cases brought against him.

But, also, and given the convoluted nature of the case, it might be necessary for Parliament to secure the situation of Dr Zelezný so that the proceedings against him do not perturb his work as an MEP.

- 11 The Judge has stated that "Dr Zelezný remains at liberty and there is no ground for his imprisonment, and nothing prevents him from continuing to perform his duties". It does not seem that the nature of the counts brought against him would need such a precautionary measures.

With a view to ensure that his work as a parliamentarian is not perturbed during the proceedings brought against him, Parliament may use the right exceptionally granted by Rule 7 (4) of the Rules of Procedure.

It has to be absolutely clear that this precludes any form of detention or any other measure which prevents the Member from performing his duties as a parliamentarian but only until final judgment is given by the Court. It means that once final judgment is passed in this case, Dr Zelesný will have to face it in the same way as any other citizen without there be any need to request again the waive of his immunity.

The effect of Rule 7 (4) is that immunity is waived and so the proceedings may go on, but no measure hampering the Member from performing his duties is allowed until the final sentence is passed. Final sentence also covers any appeal until all avenues of appeal are exhausted.

IV CONCLUSION

In the light of the above considerations, pursuant Rule 7(1) and (2) of the Rules of Procedure, after having considered the arguments for and against waiving immunity, the JURI recommends that the EP waive Mr Vladimir Zelezný's parliamentary immunity, subject to the condition that the waiver of immunity shall apply solely to the prosecution proceedings and that, until such time as final sentence is given, Dr Zelesný must be immune from any form of detention or remand or any other measure which prevents him from performing the duties attaching to his mandate as a Member of the European Parliament.

PROCEDURE

Title	Request for waiver of the immunity of Vladimír Železný				
Procedure number	2004/2173(IMM)				
Request for waiver from	Prague Metropolitan Court				
Date of request	30.8.2004				
Date announced in plenary	13.9.2004				
Committee responsible	JURI				
Date announced in plenary	13.9.2004				
Basis in Rules of Procedure	Rules 6(2) and 7				
Rapporteur	Maria Berger				
Date appointed	7.10.2004				
Previous rapporteur					
Discussed in committee	7.10.2004	25.11.2004	14.9.2005	5.10.2005	6.10.2005
Date adopted	6.10.2005				
Result of final vote	for:	17			
	against:	1			
	abstentions:	0			
Members present for the final vote	Maria Berger, Bert Doorn, Monica Frassoni, Giuseppe Gargani, Kurt Lechner, Klaus-Heiner Lehne, Hans-Peter Mayer, Aloyzas Sakalas, Francesco Enrico Speroni, Daniel Stroj, Andrzej Jan Szejna, Diana Wallis, Rainer Wieland, Nicola Zingaretti, Jaroslav Zvěřina				
Substitutes present for the final vote	Nicole Fontaine, Toine Manders, Manuel Medina Ortega				
Substitutes under Rule 178(2) present for the final vote					
Date tabled – A6	10.10.2005	A6-0289/2005			