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REPORT

on the request for defence of the immunity and privileges of Andrzej Pęczak,
former Member of the European Parliament
(2005/2128(IMM))

Committee on Legal Affairs

Rapporteur: Maria Berger

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PROPOSAL FOR A EUROPEAN PARLIAMENT DECISION

on the request for defence of the immunity and privileges of Andrzej Pęczak, former Member of the European Parliament (2005/2128(IMM))

The European Parliament,

- having regard to the request by Andrzej Pęczak for defence of his immunity in connection with the criminal proceedings brought against him before the District Court in Łódź, Poland, on 18 April 2005, announced in plenary sitting on 25 May 2005,
 - having regard to Articles 8, 9 and 10 of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965, and Article 6(2) of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976,
 - 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 Rules 6(3) and 7 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A6-0330/2005),
- A. whereas Andrzej Pęczak was elected to the Polish Parliament (Sejm) on 23 September 2001; whereas after the signature of the Accession Treaty on 16 April 2003 he became an Observer; whereas he was a Member of the European Parliament from 1 May 2004 until 19 July 2004; whereas his term of office in the Polish Parliament expired on 19 October 2005,
- B. whereas Andrzej Pęczak complains that the Polish Public Prosecutor's office has violated the law in its proceedings and that the District Court's decisions on his detention and arrest as well as the subsequent extensions of the provisional arrest are politically motivated,
- C. whereas Andrzej Pęczak complains that those criminal proceedings brought against him are in breach of the presumption of innocence and that the conditions of his detention and arrest limit his ability to defend himself,
- D. whereas Andrzej Pęczak complains that the procedure by which the Sejm waived his immunity was "legally invalid" and based on publications in the media, and that his motions for action sent to various persons (such as the Ombudsman) had no effect,
- E. whereas, on basis of the information obtained, Andrzej Pęczak is not protected by parliamentary immunity in respect of any of the claims which have been drawn to the

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

attention of the President of the European Parliament,

1. Decides not to defend the immunity and privileges of Andrzej Pęczak;

EXPLANATORY STATEMENT

I. Facts of the case

1. Andrzej Pęczak was elected Member of the Polish Parliament (Sejm) on 23 September 2001 from the list of Sojusz Lewicy Demokratycznej (Left Democratic Alliance party - SLD). Having been delegated by the Sejm as an Observer to the European Parliament after the signature of the Accession Treaty on 16 April 2003, Mr Pęczak became a Member of the EP for the period from 1 May 2004 to 19 July, when the first sitting of the Parliament elected in June 2004 took place. From then on he was a Member of Polish Parliament until 19 October 2005, when the first sitting of newly elected Sejm took place.

On 22 October 2004, the Public Appeal Prosecutor in Łódź applied for the waiver of the immunity of Mr Pęczak and the request was transmitted to the Sejm by the General Prosecutor on 27 October 2004. The Polish Parliament decided to agree to Mr Pęczak's arrest on 19 November 2004, following which the criminal proceedings were brought against him before the District Court in Łódź.

2. According to Mr Pęczak's letter, the Polish Public Prosecutor's office violated the law by sending the first request to waive his immunity in June 2004 only to the Polish Parliament Marshal, and not to the European Parliament as well. That request had no further effect.

Moreover, Mr Pęczak considers, that "the Public Prosecutor did not have the right to apply for [his] provisional arrest to be approved, as, under Polish law, such a measure can be decided exclusively by the competent court". With regard to the District Court's decisions on his detention and arrest as well as the subsequent extensions of his provisional arrest, he complains about the politically motivated influence of the Prosecutor's office over the Court, resulting in the breach of the presumption of innocence.

Mr Pęczak also claims that the conditions of his detention and arrest intentionally limit his ability to defend himself, and that the example of his case (including a two-month period waiting for a blood test to be made on medical grounds) puts into question the fundamental rights of an ordinary Polish citizen.

Finally, he maintains that he is unaware of the reasons for the extension of his arrest, as the Public Prosecutor's office applied for its extension on the grounds of a "strong intention to present new charges". Mr Pęczak has not informed the European Parliament of the charges brought against him, referring only in general terms to the pre-election¹ "ostentatious show of principle in the fight against corruption".

3. Mr Pęczak claims that the simplified procedure by which the Sejm waived his immunity was "legally invalid". Moreover, he considers that its decision was influenced by the 'public verdict' based on mass media publishing certain "unsubstantiated evidence" from the inquiry.

¹ The parliamentary elections in Poland took place on 25 September 2005 and the Presidential elections on 9 and 23 October 2005.

Mr Pęczak insists that because the Sejm's decision was not included in the Prosecutor's application file sent to the District Court, the latter's approval of detention and arrest were illegal. He complains also about the Regional Court's decision to uphold the ruling, regardless of the fact that it discovered that the Prosecutor's office had supplied the relevant documents only 33 days after the detention.

Finally, he states that neither the guarantees offered by public figures (*no names mentioned in his letter*), nor the letters sent to the Marshal of the Sejm and the Ombudsman, have had any effect for his case.

In conclusion, Mr Pęczak asks for the defence of his parliamentary immunity in order that he may not be prosecuted. Otherwise he claims not to be able to "exercise [his] right to be presumed innocent" and defend himself in the criminal proceedings.

II. Procedure

1. The relevant provisions of the Rules of Procedure are Rules 6 and 6a, in particular Rule 6(1) and (3):

1. In the exercise of its powers in respect of privileges and immunities, Parliament shall seek primarily to uphold its integrity as a democratic legislative assembly and to secure the independence of its Members in the performance of their duties.

3. Any request addressed to the President by a Member or a former Member to defend privileges and immunities shall be announced in Parliament and referred to the committee responsible.'

2. As the President of Parliament considered that Andrzej Pęczak had opened the procedure for defending his immunity, as laid down in the above-mentioned Rules, the request was announced in Parliament.
3. The formal requirements have therefore been met for the matter to be referred to the Committee on Legal Affairs.

III. Applicable provisions

1. Articles 8, 9 and 10 of the Protocol on the privileges and immunities of the European Communities (PPI)¹

¹ The protocols annexed to the original Treaties form part of primary Community law and have the same legal status as the Treaties themselves. The judgment in a case concerning the liability of Community officials for property tax made clear that a breach of the provisions of the PPI represented a breach of the obligations arising out of the Treaties (judgment of 24 February 1988, *Commission v Belgium*, Case 260/86, ECR. 966).

Those articles read as follows:

Article 8

No administrative or other restriction shall be imposed on the free movement of Members of the European Parliament travelling to or from the place of meeting of the European Parliament.

Members of the European Parliament shall, in respect of customs and exchange control, be accorded:

- a) by their own government, the same facilities as those accorded to senior officials travelling abroad on temporary official missions;*
- b) by the government of other Member States, the same facilities as those accorded to representatives of foreign governments on temporary official missions.*

Article 9

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.

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.

2. In order to assess the possible infringement of the PPI, it is useful to call to mind two pertinent facts:

a) It is not possible to say that the charges brought against Mr Pęczak, which are at the origin of his detention and provisional arrest, refer to opinions expressed or votes cast in the performance of his duties as a MEP (May - July 2004). Mr Pęczak does not claim that in his letter. The information available suggest that the proceedings concern corruption practices in the period before the time when he was Member of the European Parliament. According to various media reports, Mr Pęczak is charged with

receiving in April 2004 up to 500 000 PLN (125 000€ being the value of a luxury Mercedes car placed at his disposal) for arranging certain outcomes in the privatisation process of the Polish energy sector.

b) The Polish Parliament (Sejm) adopted the decision to waive Mr Pęczak's immunity on 19 November 2004 in response to an application from the Public Prosecutor's office issued on 22 October 2004 and transmitted to the Sejm on October 27th. At that time Mr Pęczak was not a Member of the European Parliament.

3. It is appropriate to consider how the above-mentioned facts and allegations square with the privileges and immunities granted by Chapter III, Articles 8 to 10 b) of the PPI:

1) Article 8, first paragraph grants MEPs the privilege of free movement (in respect of customs and exchange control) when travelling to or from the place of meeting of the European Parliament. This protection is granted only to Members during the period of their mandate and not afterwards. The letter of Mr Pęczak does not claim this privilege and it is, in any event, clearly not applicable.

2) Article 9 grants inviolability to Members *in respect of opinions expressed or votes cast by them in the performance of their duties*. This protection extends beyond the duration of the mandate but always within the restricted scope expressed by the plain language of the Article. What is protected is Member's opinions or votes in Parliament, even when they are not physically within the premises of the House, but always when they are acting entirely as parliamentarians. Mr Pęczak makes no reference to any of the indicated areas of activity protected, although he mentions some documents of his parliamentary work in the Sejm and NATO Assembly being seized by the Public Prosecutor's office as evidence. Article 9 is therefore not applicable to Mr. Pęczak.

3) Article 10 declares that *[d]uring 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...*

As it can clearly be established, the criminal proceeding against Mr Pęczak in Poland, setting aside his reference to the Prosecutor's application in June 2004, took place after he was a Member of the EP. Moreover, the Polish parliament (of which he was Member since 1997, elected for his second term in 2001) has waived his national parliamentary immunity in accordance with the Polish Constitution (Art. 105 par. 1) and its Rules of Procedure. Doubts about the legality of the proceedings before the District Court should be resolved by the Polish judiciary within the available legal means. They are, in any case, beyond the possible scope of action to be taken by the European Parliament.

Mr Pęczak claimed that there is a political motivation of the charges brought against him (*fumus persecutionis*). As he is no longer a Member of the European Parliament, his allegation of being politically prosecuted cannot be examined by the Committee on Legal Affairs. It belongs to the Polish Courts to evaluate it and, ultimately, judge it.

Moreover, it is difficult to imagine Article 10 being applicable to former Members of Parliament. No case-law exists for this situation. When a Member ceases to be an MEP, it is possible that he needs to be defended from an attack against him for an opinion or a vote in Parliament (that is why Rule 6§3 provides for that situation) but it is difficult to extend the protection beyond Article 9 of the Protocol. Article 8 and 10 seem to be limited by the jurisprudence of the Court of Justice and the case-law of the Committee on Legal Affairs to active Members of Parliament during parliamentary sessions.

IV. Conclusion

On the basis of the above considerations and pursuant to Article 6(3) of the Rules of Procedure, after considering the reasons for and against defending the former Member's immunity, the Committee on Legal Affairs recommends that the European Parliament should not defend the parliamentary immunity of Andrzej Pęczak.

PROCEDURE

Title	Request for defence of the immunity and privileges of Andrzej Pęczak		
Procedure number	2005/2128(IMM)		
Request for defence of immunity			
from	Andrzej Pęczak		
Date of request	18.4.2005		
Date announced in plenary	25.5.2005		
Committee responsible	JURI		
Date announced in plenary	25.5.2005		
Basis in Rules of Procedure	Rules 6(3) and 7		
Rapporteur	Maria Berger		
Date appointed	15.6.2005		
Previous rapporteur			
Discussed in committee	13.7.2005	14.9.2005	
Date adopted	21.11.2005		
Result of final vote	for:	13	
	against:	0	
	abstentions:	0	
Members present for the final vote	Maria Berger, Bert Doorn, Giuseppe Gargani, Kurt Lechner, Klaus-Heiner Lehne, Aloyzas Sakalas, Nicola Zingaretti, Tadeusz Zwiefka		
Substitutes present for the final vote	Jean-Paul Gauzès, Eva Lichtenberger, Manuel Medina Ortega, Marie Panayotopoulos-Cassiotou, Michel Rocard		
Substitutes under Rule 178(2) present for the final vote			
Date tabled – A6	22.11.2005	A6-0330/2005	