

Warsaw, 4 December 2003

The Minister of Culture

Attorney Tomasz Zasacki  
from the Law Office of  
Wardyński & Partners  
Al. Ujazdowskie 10  
00-478 Warsaw  
representing Martha Nierenberg

### MOTION

On the basis of art. 127 §3 and art. 129 §2 of the Administrative Procedure Code, I turn to you with a motion for renewed review of a case concerning the issue of a permit for permanent export of a painting by Gustave Courbet entitled "Landscape from the Area of Ornans." The Minister of Culture on 14 November 2003 issued a decision, OOZP/W/220/03, in this matter, which I received on 24 November 2003.

### JUSTIFICATION

The Act on Protection of Monuments and Care for Historical Relics of 23 July 2003 took effect on 17 November (Journal of Laws, no. 162, pos. 1568) and the hitherto binding Act on the Protection of Cultural Assets of 15 February 1962 ceased to apply. In accordance with art. 139 of the Act on Protection of Monuments and Care for Historical Relics, the provisions of this law govern all related matters initiated and not concluded with a final decision. This means that the Minister of Culture, in again reviewing a case should actually start anew due to the change of law and ceased effect of the 1962 Act, which in a justification of new law submitted by the Chairman of the Council of Ministers to the Sejm Speaker, was described as follows: "*the current Act dated 15 February 1962 on the protection of cultural assets has been binding for the past 40 years in generally perceived to be anachronistic.*"<sup>1</sup>

I underscore at the outset that the painting by Gustave Courbet entitled "Landscape from the Area of Ornans" was part of a collection in Budapest of Baron Mór Lipot Herzog, who was the grandfather of Martha Nierenberg. This collection was considered to be the finest private collection of art in Hungary. The painting "Landscape from the Area of Ornans" together with the entire collection was confiscated in 1943 as Jewish property on the basis of regulations governing the confiscation of any valuable assets held by Jews, and subsequently shipped from Hungary most likely at the order of Adolf Eichmann.

In 1945, this painting was found in Austria and secured on the territory of the Fischhorn castle in the vicinity of Zell am See, where it was accidentally included in artwork plundered from Poland. It was transferred in 1946 together with this artwork to the National Museum in Warsaw. Since 1946, this painting has been part of the inventory of the National Museum in Warsaw. It constitutes a part of Jewish property plundered during World War II and full ownership should be assumed by its rightful owner, Martha Nierenberg, who would thus recover lost family art. This case bears a vitally important aspect, which is historic justice

---

<sup>1</sup> Publication no. 624, Warsaw, 14 June 2002

toward persons and items surviving the Holocaust. I have no doubt that this aspect will be seriously considered during review of the case.

The fact that the painting is found on the territory of Poland is a historical coincidence. It is not a work by a Polish artist or any artist associated with Polish culture. Baron Herzog and his relatives being a family of Hungarian Jews had no ties to Poland and no one from this family ever resided in Poland. This painting does not depict the Polish countryside, but the vicinity of Ornans in France. The National Museum in Warsaw did not exhibit this work, which is currently found in storage. The painting is not present in the public consciousness as having any connection whatsoever with Poland. It can be stated that the painting by Gustave Courbet entitled "Landscape from the Area of Ornans" is in transit to its rightful owner, whereas Poland is merely a transit point in this journey.

Art. 51 of the Act on Protection of Monuments and Care for Historical Relics states that relics may be permanently exported abroad if their export does not harm the cultural heritage. In relation to the 1962 law, a significant change concerning the export of artwork abroad has taken place. Namely, a past exception is now a rule, whereby historical relics may be exported. A relevant administrative body, however, must analyze whether the export of a relic constitutes a loss to cultural heritage. The term "cultural heritage" has not been defined in the law and for this reason is subject to interpretation by the body reviewing a case. It should be understood that legislators have placed the burden upon the reviewing body to analyze the effects of artwork export on the cultural heritage. This means the Polish heritage since Polish authorities applying Polish law protect Polish heritage.

Stanisław Ossowski writes about cultural heritage in the following manner: "Generally, when referring to the cultural heritage of a social group, e.g. nation, not only the so-called personal culture of individuals is taken into account (...) but also, and perhaps above all, the group of works such as art, scientific works, technical achievements, settlements, institutions. Such subjects are transferred from generation to generation and, to a great extent, the culture of a social group ensures its continuity on their basis, in particular the culture of societies with a highly developed structure. (...) What does the transfer among generations of such subjects as tools and machines, buildings, sculpture, literary and scientific works, or laws rest upon? Certainly, not only on spatial operations. A copy of Beniowski is not tied to the Polish cultural heritage only because it is held within reach of persons from the Polish nation, just like the Wawel castle is not for this reason. It is tied because it is an object of specific experiences stemming from our complicated disposition, which we inherited from other members of our group that we will likely transmit together with or without other attributes to our successors."<sup>2</sup>

The inherited cultural connection of a society with a given item or work decides whether it is an element of cultural heritage. Ossowski further states, "cultural heritage that enables us to appropriately react to Pan Tadeusz is obviously very complex: it involves the ability to read and understand the Polish language, know certain historical facts and literary conventions as well as various emotional dispositions. In addition, a special complicated role is played by the attitude of Pan Tadeusz himself."<sup>3</sup>

---

<sup>2</sup> Stanisław Ossowski, Social Ties and Blood Heritage, Volume III, State Scientific Publishing House, Warsaw, 1966, pp. 64-69

<sup>3</sup> Stanisław Ossowski, *Ibid.*

In continuing this thought, the author specifies this attitude as being the function composed of the conviction that Pan Tadeusz is a subject of great value having specific importance to the social group to which we belong, a book that should be read with the approach that is given to a national epic. Ossowski continues to add that the cultural heritage of a Polish intelligentsia member includes a specific posture of Faust, but that this differs from Pan Tadeusz. "these differences stem both from the content of Faust and Pan Tadeusz as well as from the fact that Pan Tadeusz is a work to which the Polish nation claims the right of "cultural ownership," whereas Faust is a foreign work."<sup>4</sup> In the end, Ossowski states that "Faust is the "cultural property" of the German nation, just like Pan Tadeusz is the "cultural property" of the Polish nation." Ossowski similarly refers to the work of Mickiewicz and Copernicus by applying to them the meaning "These are 'our' artists" and differently evaluates Beethoven and Shakespeare.

In understanding cultural heritage in this manner, it is evident that the painting by Gustave Courbet entitled "Landscape from the Area of Ornans" cannot be treated as cultural heritage protected by the Act on Protection of Monuments and Care for Historical Relics. The above presented lack of any connection with Poland, both actual, material, emotional or symbolic, results in the inability of any Polish social tie to be historically transferred through this painting. The fact that the painting was never exhibited is important from this standpoint. It is not part of Polish achievements, never existed in social circulation and does not belong to any institution in Polish tradition or history. In the context of the Act's provisions, no claim of "loss" can be made since the permit sought by Martha Nierenberg does not concern cultural heritage protected by law.

The question should thus be posed how Polish authorities would assess the position of a third country, to which a painting by Józef Chełmoński or Jacek Malczewski plundered by Nazis from the National Museum in Warsaw was accidentally sent, if that country's authorities refused export on grounds of "loss to the cultural heritage."

In this context it should be noted that the decision of the Minister of Culture of 14 november 2003, no. OZP/W/220/03, denying export of the painting contains no justification other than simple reference to the 1962 law. This is a violation of art. 107 §3 of the Administrative Procedure Code, which specifies the necessary elements that a proper justification should contain. It should also be noted that the justification of an administrative decision should be even more exhaustive if a matter rests on arbitrary resolution by an administrative body. Both art. 41 item 2 of the 1962 law as well as art. 51 item 1 of the currently binding law provide for an administrative body to decide first on loss to national culture followed by loss to cultural heritage. Such an evaluation should be free, but not arbitrary. The recipient of a decision has the right to know all elements leading to the issue of a specific resolution. The need to prepare a full and internally consistent justification particularly affects a decision with negative effect upon a party and based on administrative resolution. Otherwise, a party being merely informed that its arguments have not been recognized has no ability to polemicise with an administrative body if no justification exists. "Decisions left to administrative resolution require a rather broader justification than those undertaken under conditions of statutory constraint."<sup>5</sup>

---

<sup>4</sup> Stanisław Ossowski, Ibid.

<sup>5</sup> B. Adamiak and J. Borkowski, Administrative Procedure Code, Commentary, C.H. Beck, Warsaw, p. 479

In conclusion, I allow myself to recall that in my motion dated 28 October 2003 I indicated that Martha Nierenberg is seeking to recover the painting with the assistance of the Art Recovery Committee affiliated with the World Jewish Congress and the World Jewish Restitution Organization. This committee undertakes and supports actions in numerous countries for the purpose of recovering art plundered during World War II to its rightful owners. Its efforts have led lately to the discovery in Russia and the Czech Republic of archives from the Jewish Theological Seminary in Wrocław. The committee is currently supporting efforts by Polish authorities to have the archives returned to Wrocław. This matter is well underway and the return of the archives to Poland should be expected.

Attorney Tomasz Zasacki

cc. Copy

Q:\ND3\Klienci\CAC126001\MIN. OF CULTURE - motion 04 12 2003.doc