



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF ZAWADKA v. POLAND

(Application no. 48542/99)

JUDGMENT

STRASBOURG

23 June 2005

FINAL

12/10/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Zawadka v. Poland,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr L. CAFLISCH,

Mr C. BÎRSAN,

Mrs M. TSATSA-NIKOLOVSKA,

Mr L. GARLICKI,

Mr E. MYJER, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 2 June 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 48542/99) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Henryk Zawadka (“the applicant”), on 17 December 1998.

2. The Polish Government (“the Government”) were represented by their Agents, Mr K. Drzewicki and subsequently by Mr J. Wołasiewicz, of the Ministry of Foreign Affairs.

3. The applicant complained under Article 8 of the Convention that he had not been able to have his access rights enforced as the domestic authorities failed to give him adequate assistance. He further complained about an alleged breach of his and his son's rights to respect for private and family life.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

6. By a decision of 6 November 2003, the Court declared the application partly admissible.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1960 and lives in Celestynów, Poland.

9. The applicant and O. had a relationship and were living together for an unspecified period. In 1994 O. gave birth to the applicant's son, P. In August 1996 during the applicant's stay abroad, P.'s mother, O., moved out from their house and took P. with her, apparently as a result of growing tensions and disagreements in the couple. Afterwards she refused to allow the applicant to have contact with P. Subsequently, on an unspecified date, the applicant took P back to his place, without O.'s agreement.

10. On an unspecified later date O. filed with the Białystok District Court (*sąd rejonowy*) a request for limitation of the applicant's parental responsibility for P.

11. On 12 September 1996 the court issued an interim order to place P. with his mother. It relied on P.'s age, on the fact that O. breast-fed P. and, also, on the fact that he was suffering from allergy. On the following day a court-appointed guardian assisted by a police officer arrived at the applicant's place and after a two-hour skirmish took P. away.

12. On 8 November 1996 the applicant and O. concluded a friendly settlement as to the access arrangements. They agreed that P.'s place of residence would be with his mother. The applicant had a right to take P. to his place at specified dates and times in 1996. Starting from 1 January 1997 he was supposed to spend every second weekend with his son at his home. As to the exact dates of meetings in 1997 the parties agreed to determine them at a later date.

13. At the beginning of 1997 O. refused to hand over her son to the applicant, maintaining that P. was ill at that time.

14. In February 1997 the applicant requested that a court guardian assist him in meetings with P., submitting that O. failed to comply with the settlement they had concluded in November 1996.

15. On an unspecified date the applicant petitioned the Białystok District Court to fine O. for obstructing his contacts with P. as established in the settlement of 8 November 1996. He also requested the prosecution authorities to institute criminal proceedings against O.

16. On an unspecified date at the requests of the applicant and O. proceedings concerning parental responsibility were instituted.

17. On 4 April 1997 the Białystok District Court stayed the proceedings concerning the applicant's petition, considering that only after the completion of the parental-responsibility proceedings would it be possible to examine them. The court observed that the parties to the court settlement of November 1996 had not specified the dates of the applicant's meetings

with P. and that therefore the settlement was impossible to enforce. It was therefore impossible to examine the applicant's petition to have a fine imposed on O.

18. On 19 May 1997 the applicant went to O. and, after an altercation, took his son away. Subsequently, O. informed prosecution authorities that the applicant had kidnapped P. and threatened her.

19. On 22 May 1997 the applicant sent letters to the Białystok District Court and the prosecution authorities informing them that he had taken over the custody of P. and would continue to exercise his parental rights until the completion of the parental-responsibility proceedings pending before the District Court. He declared that O. would be able to meet her son at the applicant's home.

20. On 17 July 1997 the District Court, at O.'s request, ordered the applicant to hand over P. to O. within seven days. Initially, he declared his willingness to do so, but, subsequently, went into hiding together with his son.

21. On 5 August 1997 the Białystok District Prosecutor (*prokurator rejonowy*) discontinued the proceedings initiated at the applicant's request, considering that O. had not committed the criminal offence of obstructing his contacts with P. It was established that O. had ceased to comply with the terms of the November 1996 settlement at the beginning of 1997, relying on the fact that P. had been sick at that time. She also objected to the applicant taking P. to his home as he lived far away from O.'s residence. The applicant's appeal against that decision was dismissed by the Regional Prosecutor (*prokurator wojewódzki*).

22. On 25 August 1997 the prosecutor discontinued the investigations instituted at O.'s request. He considered that the applicant had not committed a criminal offence. It had been established that since 22 March 1997 O. had not allowed the applicant to take his son to his home, despite the fact that P. had got better. The applicant had only been allowed brief visits at her home to see P. The applicant had informed the police and requested to be given assistance, but his efforts failed to affect the mother's conduct. It was further pointed out that after taking away P. from his mother the applicant had informed the prosecution authorities in Białystok and Otwock about the incident. In the light of the fact that the applicant had full parental rights in respect of P. the prosecutor did not consider his acts a criminal offence. O.'s allegations about having been threatened by the applicant proved unsubstantiated.

23. On 21 August 1997 and 16 September 1997 the Otwock District Court ordered the applicant to reveal P.'s place of residence and warned him that in case of failure to comply with its order he would be fined, with imprisonment in default. He did not comply with these orders.

24. On 5 February 1998 the Otwock District Court issued an enforcement order in respect of the Białystok District Court's decision of

17 July 1997. It ordered a bailiff to take P. from the applicant by force and hand him over to O.

25. On 24 February 1998 in the course of the parental-responsibility proceedings the Białystok District Court limited the applicant's parental rights to a right to information about his child's health. It amended the settlement of 8 November 1996 in that it decided that further contacts between the applicant and his son should take place on the third Saturday of each month at the mother's home from 10 a.m. to 4 p.m. without the possibility to take P. anywhere.

26. The court referred to the November 1996 settlement between the parties, to the subsequent difficulties in the applicant's access to P. and to the fact that on 19 May 1997 he had taken P. to his place. The court considered that although there was nothing in the case-file to suggest that the applicant's parenting skills were insufficient and it was difficult to establish to which of the parents P. was more attached, the applicant's conduct in the course of the proceedings proved his disrespect to the organs of justice and disregard of the interest of the child.

27. The court dismissed O.'s request to divest the applicant of parental rights, considering that at that stage it was too early to adopt such a serious measure.

28. The applicant and O. appealed against that decision.

29. On 27 April 1998 the Warsaw Regional Court (*sąd wojewódzki*) dismissed the applicant's appeal against the enforcement order of 5 February 1998.

30. On 19 June 1998 the Białystok Regional Court amended the District Court's decision of 24 February 1998 in that it deprived the applicant of all parental rights in respect of P. It considered that he had abused his rights by making it impossible for the son to contact his mother, whereas the mother's care at that stage of the child's development was indispensable. The court further found that the applicant's continuing hiding was to the child's detriment, especially because he was apparently working and his son was taken care of by other people. It emphasised that the child had the right to decent life conditions, home and stability, of which the applicant had deprived him. The court further pointed out that the difficulties in enforcing court orders in the past could not justify the applicant's conduct and he should have availed himself of legal remedies.

31. On 8 August 1998 the police took P. away from the applicant.

32. On 17 August 1998 the applicant requested the District Court to prevent the issue of a passport for P., submitting that O. intended to abduct P. abroad. In reply, he was informed that until the date when the judgment of 19 June 1998 obtained legal force the passport would not be issued without the applicant's approval.

33. On 28 August and 23 September 1998 the applicant informed the Białystok District Court about instances of obstructing his contact with P. by O. and requested assistance in the enforcement of his access rights.

34. On 9 September 1998 the Białystok Regional Court dismissed the applicant's request for the appointment of a legal-aid lawyer for the purpose of lodging a cassation appeal and exemption from courts costs. The court found that he ran a business and in July 1997 his income had reached 700 Polish zlotys (PLN), whereas he would have to pay only a PLN 30 fee for his cassation appeal and the legal fees in a case like his would not exceed PLN 300. The court further noted that the applicant was single and owned a plot of land with a building under construction, as well as a car. On 6 October 1998 the Regional Court rejected the applicant's cassation appeal against that decision, as it was not provided for by law. On 16 December 1998 the Supreme Court rejected his appeal against the latter decision.

35. On 24 November 1998, in reply to the applicant's complaint, the Office of the Prime Minister requested the Białystok District Court to submit information and documents concerning the applicant's case, as it had certain doubts as to the decision to restrict his parental responsibility for P.

36. On 16 December 1998 the Head of the Family Department at the Białystok District Court informed the applicant that none of the court guardians had agreed to assist in the arrangements for his contact with P.

37. On 24 February 1999 the Ombudsman's office requested the Warsaw Regional Prosecutor to indicate the policemen who on 8 August 1998 had taken P. away from his father, as well as the person who had ordered it, in breach of the provisions of the Code of Civil Procedure. The applicant submits that no further measures were taken by the Ombudsman.

38. On 16 March 1999 the Białystok District Court dismissed the applicant's and O.'s petitions concerning his contact with his son. The court relied on the opinion prepared by two experts, according to which the relations between the child and parents were disturbed, and because of the child's age it was recommended that the meetings with the father would take place at the mother's home. The experts noted that P. would not want to leave his father. They pointed out that the need to maintain P.'s contacts with his father existed, but that the parents did not show understanding for the needs of the child and were driven by the wish to harm each other.

39. On 18 June 1999 the applicant filed with the Białystok Regional Court a petition in which he requested that O. be deprived of her parental rights and he be granted parental responsibility. Subsequently, he asked the court to issue an interim order to the effect that P.'s place of residence would be with the father.

40. In 2000 the applicant filed an unsuccessful request for the reopening of the proceedings terminated on 19 June 1998.

41. On 8 February 2001 the Białystok District Court refused the applicant's request for the enforcement of the part of the judgment given on

24 February 1998 concerning his contacts with his son. The court considered that the place of residence of O. and the son was unknown and therefore enforcement was impossible.

42. On 20 February 2001 the District Court dismissed the applicant's petition to deprive O. of parental responsibility for P. It noted that the applicant's submissions as to the allegedly improper manner in which the mother looked after P. were unsubstantiated. On the contrary, the experts were of the opinion that there were strong emotional bonds between her and P. The applicant appealed.

43. In her letter of 26 February 2001, written in reply to the applicant's complaint, the President of the Białystok Court of Appeal agreed with his contention that the proceedings were lengthy.

44. On 27 March 2001 the police authorities informed the applicant that O. with his son had left for London on 30 May 2000.

45. On 17 May 2001 the Białystok Regional Court quashed the District Court's decision of 8 February 2001. On 10 August 2001 the District Court, following the Regional Court's instructions, stayed the enforcement of the orders concerning contact between the applicant and his son because the applicant was unable to indicate O.'s place of residence.

46. On 27 September 2001 the Regional Court dismissed the applicant's appeal against the decision of the District Court.

47. The proceedings are stayed.

II. RELEVANT DOMESTIC LAW

48. The Family and Custody Code (*Kodeks Rodzinny i Opiekuńczy*) provides:

Article 58 § 1

“In a decision on divorce, the court is competent to issue orders concerning the manner in which the care of the parties' minor children should be carried out (...). The court may grant custody right to one parent and limit the custody rights of the other one.”

The Code of Civil Procedure (*Kodeks Postępowania Cywilnego*) provides:

Article 557

“The custody court can change its decision if the best interest of person whom it concerns so require. “

According to the Supreme Court's resolution, if a parent who has been obliged by a court decision to respect the other parents' access rights refuses to comply therewith, access decisions are liable to enforcement proceedings. The provisions of the Code of Civil Procedure on enforcement of

non-pecuniary obligations are applicable to enforcement of court decisions on parental rights or access rights (resolution of the Supreme Court of 30 January 1976, III CZP 94/75, OSNCP 1976 7-8).

Article 1050

“1. If the debtor is obliged to take measures which cannot be taken by any other person, the court in whose district the enforcement proceedings were instituted, on a motion of a creditor and after hearing the parties, shall fix the time-limit within which the debtor shall comply with his obligation, on pain of fine (...).

2. If the debtor fails to comply with this obligation, further time-limits may be fixed and further fines may be imposed by a court.”

If the court obliges a parent exercising custody rights to ensure access to a child to the other parent, Article 1050 of the Code of Civil Procedure is applicable to the enforcement of this obligation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

49. The applicant complained that the Polish authorities had failed to take effective steps to enforce his right to contact with his son. He alleged a violation of Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

50. It is not disputed that the matters concerned in the present case relate to “family life” within the meaning of Article 8 of the Convention and that this provision is applicable.

A. The parties' submissions

51. The Government were of the view that their positive obligations could not extend to an obligation to ensure the applicant the exclusive custody of his son or unlimited access to him. In the present case the authorities had taken all possible measures in order to make it possible for the ties between the applicant and his child to develop. The obstacles the

applicant encountered in respect of access to the child had stemmed from the mother's lack of co-operation, the responsibility for which could not be attributed to the State. They noted that between May 1997 and August 1998 the applicant had made it impossible for O. to see her son. The Government submitted that in their decisions the domestic authorities had essentially been guided by the interest of the child. Their decisions were also in accordance with applicable provisions of domestic law.

52. The applicant submitted that O. had disregarded the terms of the access arrangements settlement they had concluded. She had also been acting in defiance of the judicial order, having thereby deprived him of contact with the child. The authorities had also refused his requests for assistance in this regard. The applicant referred to the District Court's decision of 4 April 1997 in which the court considered that the settlement between him and O. was impossible to enforce. The applicant further referred to Article 100 of the Family Code, which stipulated that the family court should provide assistance to parents in exercising their parental rights.

He emphasised that, according to the psychologists, there existed strong emotional bonds between him and the child.

The applicant recalled that on 22 August 1996 O. had taken his son away from their place of residence and deprived the applicant of any further contact with him. He pointed out that he had irrevocably lost all contact with his son as O. had subsequently taken him out of the country. He emphasised that he did not even know where the child was.

B. The Court's assessment

53. The Court recalls that the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. There may however be positive obligations inherent in an effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps (see, amongst other authorities, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23, and, *mutatis mutandis*, *Osman v. the United Kingdom*, judgment of 28 October 1998, Reports 1998-VIII, p. 3159, § 115). In both the negative and positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation (see, amongst other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49).

54. Where the measures in issue concern parental disputes over their children, however, it is not for the Court to substitute itself for the

competent domestic authorities in regulating contact questions, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. In so doing, it must determine whether the reasons purporting to justify any measures taken with regard to an applicant's enjoyment of his right to respect for family life are relevant and sufficient (see, amongst other authorities, *Olsson v. Sweden*, judgment of 24 March 1988, Series A no. 130, p. 32, § 68).

55. The Court's case-law has consistently held that Article 8 includes a right for a parent to have measures taken with a view to his or her being reunited with the child, and an obligation for the national authorities to take such measures. This applies not only to cases dealing with the compulsory taking of children into public care and the implementation of care measures (see, *inter alia*, the *Olsson v. Sweden* (no. 2), judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90), but also to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family (e.g. *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299, p. 20, § 55).

56. The obligation of the national authorities to take measures to facilitate contact by a non-custodial parent with children after divorce is not, however, absolute (*mutatis mutandis*, *Hokkanen*, cited above, § 58). The key consideration is whether those authorities have taken all necessary steps to facilitate contact as can reasonably be demanded in the special circumstances of each case (*mutatis mutandis*, *Hokkanen*, cited above, § 58). Other important factors in proceedings concerning children are that time takes on a particular significance as there is always a danger that any procedural delay will result in the *de facto* determination of the issue before the court (*H. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 120, pp. 63-64, §§ 89-90), and that the decision-making procedure provides requisite protection of parental interests (*W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, pp. 28-29, §§ 62-64).

57. In the present case the Court observes, firstly, that on 8 November 1996 the applicant and the child's mother concluded a friendly settlement concerning the applicant's access to P. (paragraph 12 above). It was agreed that while P.'s residence would be with his mother, the applicant would spend every second weekend with him. The parties also decided that the exact dates of contact would be determined later.

58. The Court further notes that shortly afterwards O. failed to comply with the terms of the agreement. The applicant petitioned the court to grant him assistance of a court guardian to obtain compliance with the agreement, and to impose a fine on O. However, the court, by the decision of 4 April 1997, stayed the proceedings concerning this petition solely on the ground that parental responsibility proceedings had been instituted in the meantime. The court also considered that the access agreement was impossible to

enforce as the dates of P.'s visits to the applicants were not specified therein (paragraph 17 above).

59. In this connection, the Court observes that as a result of the decision of 4 April 1997 the applicant did not obtain any assistance capable of making the child's mother more co-operative in respect of the enforcement of the settlement which she had concluded with the applicant. The Court is of the view that, since the November 1996 agreement provided that P. should spend every second weekend with the applicant, the court's conclusion that this agreement could not be enforced is not fully persuasive. In any event, the Court cannot regard it as sufficient ground on which to refuse all assistance to the applicant in vindicating his contact rights originating from the November 1996 agreement.

60. The Court observes that later on, on 19 May 1997, the applicant took P. away from O., in defiance of that agreement. Subsequently, P. remained with the applicant until he was taken away from him by the police on 8 August 1998, under the enforcement order of 5 February 1998. The Court further notes that in the meantime, in its decision of 24 February 1998, the District Court seriously limited the applicant's parental rights. It restricted these rights to the right to obtain information about the child's health and to a visit once a month. In doing so, the court considered that there was nothing in the case-file to suggest that the applicant's parenting skills were insufficient. At the same time, the court relied on the fact that the applicant had abducted the child and concluded that this had showed disrespect to the courts.

61. The Court is not persuaded that the court's reasoning was fully relevant to the decision it was called upon to give. The Court acknowledges that co-operation with judicial bodies in the course of proceedings in which custody and access rights are to be determined can legitimately be regarded as an indicator, on the part of a parent, of due regard being given to the child's best interests. On the other hand, the Court is not convinced that lack of such co-operation can be regarded as a relevant factor justifying a decision on a far-reaching limitation of parental rights, if there are no grounds on which to believe that the contact with the parent is detrimental for the child.

In this connection, the Court is not convinced that the reasons for this decision were sufficient. The Court observes that no findings were made in the proceedings which would show either that the limitation of the applicant's parental rights would serve the child's best interests, or that the continued regular contact with the applicant would be harmful to him.

62. The Court observes that later on, on 19 June 1998 the Regional Court took the harshest measure possible under domestic law in that it deprived the applicant of all parental rights in respect of P. The court pointed out that the difficulties in enforcing access orders in the past could not justify the fact that the applicant had taken P. away from his mother.

The court also observed that, in order to tackle the mother's lack of co-operation, the applicant should have availed himself of legal remedies.

The Court observes that this was precisely what the applicant had been trying to do from February 1997 when difficulties in the enforcement of the access agreement had first arisen, until 4 April 1997, when the District Court stayed the proceedings relating to his petitions for assistance. The Court notes that his petitions proved ineffective as the courts refused to take measures to ensure the effective enforcement of the access agreement of November 1996 (paragraphs 17 and 58 above). In these circumstances, the Court is of the view that the decision of 19 June 1998 to take the strictest possible measure available in law in respect of the applicant's parental rights cannot be justified by his alleged failure to pursue available legal remedies to ensure effective access to his son.

63. The Court further notes that on 8 August 1998 the police took P. away from the applicant (paragraph 31 above). In August and September 1998 the applicant informed the Białystok District Court about further instances of O. obstructing his contacts with P. He also requested assistance in the enforcement of his access rights as determined by the decision of 24 February 1998, to no avail. What is more, on 16 December 1998 the Head of the Family Division of the Białystok District Court informed the applicant that none of the court guardians had agreed to assist him. No explanation was provided for these refusals. Likewise, the courts apparently did not consider it appropriate to make any enquiry into the reasons for which the competent court officers thought it appropriate to decline to assist the applicant.

The Court considers that an unmotivated refusal of assistance by a state authority vested with powers to assist the parties to family and custody cases in obtaining effective compliance with judicial orders on access arrangements is incompatible with the positive obligations of the State under Article 8 of the Convention.

64. The Court further notes that the applicant requested the courts to take steps that would prevent O. from taking P. abroad. On 17 August 1998 he requested the District Court to prevent the issuing of a passport for P, submitting that the boy's mother intended to take him abroad. He was informed in reply that the passport would not be issued without the applicant's approval, but only until the decision of 19 June 1998, which deprived the applicant of his parental rights, would become valid. Later on, apparently the passport was issued as O. left Poland with the child.

65. The Court observes that on 18 June 1999 the applicant instituted the second set of proceedings concerning parental responsibility. During those proceedings the child's mother left Poland. The Court notes that no consideration was given by the courts to the applicant's concerns in this respect. The Court is of the view that the domestic authorities have thus failed to weigh carefully the interests involved in the case so as to strike a

fair balance between the mother's right to travel and the applicant's right of access to his child (see *Keegan*, cited above, p. 19, § 49).

66. The Court finally notes that in the overall assessment of the case it is relevant to note that the applicant's parenting skills were never seriously challenged during the proceedings. Neither were there any indications that the contacts with the applicant would be detrimental to the child's best interests. Quite to the contrary, in its decision of 24 February 1998 the Białystok District Court observed that there was nothing in the case-file to show that the applicant's parenting skills were insufficient and that the child was attached to both parents (paragraph 26 above). In its decision of 16 March 1999 the Białystok Regional Court referred to the expert's conclusion that there was a need for P to maintain contacts with his father (paragraph 38 above).

67. The Court acknowledges that the task of domestic courts was rendered difficult by the strained relationship between the applicant and O. However, the lack of cooperation between separated parents is not a circumstance which can by itself exempt the authorities from their positive obligations under Article 8. It rather imposes on the authorities an obligation to take measures that would reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child.

The Court recalls in this connection that the co-operation and understanding of all concerned will always be an important ingredient in such proceedings. While national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention (see *Hokkanen*, cited above, § 58; *Olsson (no. 2)*, cited above, § 90). In the applicant's case the authorities failed to take practical steps that would, firstly, encourage the parties to co-operate in the enforcement of the access arrangements and, secondly, secure concrete and appropriate assistance by competent state agents within a specific legal framework suited to the needs of separated parents and their underage child. The Court emphasises that this resulted in the applicant permanently losing contact with his child. The Court concludes that in the circumstances of the case the domestic authorities failed in their positive obligation to provide the applicant with assistance which would make it possible for the applicant to effectively enforce his parental and access rights.

68. Accordingly, there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

70. The applicant sought compensation for pecuniary and non-pecuniary damage he suffered in connection with the case in the amount of 460,000 euros (EUR).

71. The Government submitted that the amount claimed by the applicant was excessive. They requested the Court to hold that a finding of a violation of Article 8 of the Convention constituted a sufficient just satisfaction.

72. The Court considers that in the circumstances of the case the finding of a violation constitutes in itself a sufficient just satisfaction for any damage which could have been suffered by the applicant.

B. Costs and expenses

73. The applicant claimed EUR 40,000 as reimbursement for costs he had borne in connection with both domestic proceedings and these before the Court.

74. The Government submitted, firstly, that the costs claimed by the applicant were irrelevant for the case at hand. Secondly, they emphasised that the applicant had not submitted any documents to show that he actually incurred these costs.

75. The Court observes that the applicant has not submitted any evidence in support of his claims for costs and expenses, except for one document certifying that he had paid PLN 402 in connection with translation of his submissions to the Court. It therefore decides to award EUR 100 to the applicant under this head as reimbursement of the costs the applicant had borne.

C. Default interest

76. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 8 § 1 of the Convention;
2. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 100 (one hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 June 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mr Bîrsan, Mr Garlicki and Mr Myjer is annexed to this judgment.

V.B.
B.M.Z.

JOINT DISSENTING OPINION OF JUDGES BÎRSAN,
GARLICKI AND MYJER

1. The majority found in the present case that the Polish authorities had failed in their positive obligation under Article 8 of the Convention to provide the applicant with assistance which would make it possible for him to effectively enforce his parental rights. We disagree with that decision for the following reasons.

2. It is true that the Court has consistently held that Article 8 enshrines a right for a parent to have measures taken with a view to his or her being reunited with the child, and an obligation for the national authorities to take such measures. In paragraphs 53-56 the majority rightly quote the relevant case-law of the Court in this respect. However, they then proceed down a path which we cannot follow. In our view, the Court should be extremely reluctant to second-guess, with hindsight, the assessment made by the domestic authorities in matters of parental custody and access rights, given its subsidiary role under Article 19 of the Convention. It should also be borne in mind that the national authorities have the benefit of direct contact with the persons concerned. This particular application presents the added difficulty that the case file before the Court is in a way “incomplete”: whilst it contains the version of the facts as seen by the applicant and the Government, it does not contain the version of the other principal party at domestic level, namely the mother. The majority finally conclude that there has been a violation of Article 8 on four grounds: the unpersuasive/insufficient reasoning of the national courts, the far-reaching limitation of the applicant's parental rights, the unexplained refusal of assistance in obtaining effective compliance with judicial orders on access arrangements, and the failure to weigh up carefully the interests involved in the case so as to strike a fair balance between the mother's right to travel and the applicant's right of access to his child. We are not convinced by these reasons.

3. This case is an example of what can happen when a relationship between a mother and a father has irretrievably broken down. One begrudges the other the slightest happiness or comfort, let alone the enjoyment of the child's company. What makes this case different from cases such as *Hokkanen v. Finland* (judgment of 23 September 1994, Series A no. 229) or *Ignaccolo-Zenide v. Romania* (no. 31679/96, ECHR 2000-I) is that the applicant himself cannot be regarded as entirely blameless for the situation complained of before the Court. It was the applicant who twice took the small child away from the mother, the second time for a period of almost 15 months. He did not even comply with repeated court orders to reveal the child's place of residence. It was only after several warnings had been given in vain that the court finally deprived him of all parental rights

because he had abused his rights by making it impossible for the child to have contact with his mother, whereas the mother's care – at that stage of the child's development – was indispensable. In our opinion, taking into account all the relevant circumstances, this far-reaching limitation of the applicant's parental rights was justified as he had shown a complete disregard for the child's well-being and health. It was only after this decision that the police removed the child from the applicant. In these circumstances it is quite understandable – although not justified – that the mother was not immediately prepared to restore the applicant's access rights as determined by the court during the time when the applicant had abducted his child (one visit on the third Saturday of each month at the mother's home from 10 a.m. to 4 p.m. without the possibility of taking the child anywhere outside). Given that the parents were apparently unable or unwilling to communicate with each other in a rational manner about, for instance, parental issues and that the child's welfare obviously required that he should not be exposed to a bitter parental dispute, we feel that the domestic authorities would have been irresponsible in imposing stringent coercive measures on the mother, at least during the initial period in which she was reunited with the child.

4. The only point on which we agree with the majority is that there is something strange in the facts as set out in paragraph 36 of the judgment, namely that none of the court guardians had agreed to be present when the applicant exercised his right of access to his child. But to infer from that mere fact a failure by the State to comply with its positive obligations under Article 8 is one bridge too far. To reach that conclusion, we would need more clarification as to the reasons why no one agreed to provide such assistance.

5. As far as the travelling abroad is concerned, within ten days of the child's return to the mother on 8 August 1998 the applicant requested the court to prevent a passport from being issued for the child, submitting that the mother intended to abduct the child and take him abroad. To us such an assertion, by its nature and timing, can only be regarded as the next move on the legal chessboard. The answer given to the applicant was that, until the date on which the judgment removing his parental rights obtained legal force, the passport would not be issued without his approval. That stands to reason. But as soon as that judgment did become final and only the mother held parental rights, there were no further legal obstacles to the issuing of a passport for the child. The mother's right to travel with her child, if need be abroad, is also a fundamental right (Article 8 in conjunction with Article 2 §§ 1 and 2 of Protocol No. 4). She merely availed herself of that right. Can one really argue that the national authorities were under a legal (or moral) obligation to warn the applicant, who had lost his parental rights, that the mother, who did have parental rights, was going abroad on 30 May 2000? And can one blame the State for the fact that the mother apparently wanted

to start a new life with the child abroad and broke off all contact with the applicant? One cannot expect the impossible from the national authorities.

6. This case is not only about the margin of appreciation; it is also about the limits of positive obligations. Can the national authorities be blamed for situations where both parents have demonstrated that they are not willing to comply with court orders and where they each try everything to prevent the other parent from seeing the child?

7. We voted with the majority not to award any compensation to the applicant for non-pecuniary damage, albeit on the basis of different considerations.

8. One last remark: we were struck by the facts as set out in paragraph 35 of the judgment. The fact that the Office of the Prime Minister expressed certain doubts as to the court's decision to restrict the applicant's parental responsibility reminds us of something we had almost forgotten.