



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

FOURTH SECTION

CASE OF PAWLIK v. POLAND

(Application no. 11638/02)

JUDGMENT

STRASBOURG

19 June 2007

FINAL

19/09/2007

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 Pawlik v. Poland,

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

Sir Nicolas BRATZA, *President*,

Mr G. BONELLO,

Mr K. TRAJA,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA,

Mrs P. HIRVELÄ, *judges*,

and Mrs F. ARACI, *Deputy Section Registrar*,

Having deliberated in private on 29 May 2007,

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

PROCEDURE

1. The case originated in an application (no. 11638/02) 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 Pawlik (“the applicant”), on 8 May 2000.

2. The applicant, who had been granted legal aid, was represented by Mr B. Sochański, a lawyer practising in Szczecin. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, that the Polish authorities had failed to take effective steps to enforce his right of contact with his son, which had violated his rights under Article 8 of the Convention.

4. On 27 March 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1953 and lives in Szczecin, Poland.

6. In 1987 the applicant married I.P. In 1984 and 1988 respectively, K., his daughter, and R., his son, were born. In spring 1992 I.P. filed for a divorce.

7. On 11 May 1993 the Szczecin Regional Court issued an interim contact order. According to its terms, the applicant was allowed to visit the children on Wednesdays and Fridays for 2 hours and to spend 2 weeks with them in summer.

8. On 16 September 1994 the Szczecin Regional Court dissolved the applicant's marriage. The court held that the applicant's ex-wife was responsible for the breakdown of their marriage. It also awarded parental rights to both parents. It also limited the applicant in the exercise of his rights: it ordered that K. and R.'s permanent residence be with their mother. The applicant was allowed to co-decide about the children's education, health and place of residence. The court specified access arrangements as determined in the interim contact order of 11 May 1993.

9. On an unknown date in October 1994 the applicant filed a motion with the Szczecin District Court for enforcement of the access arrangements. On 11 October 1994 the District Court dismissed his application. On 9 January 1996 the applicant again applied to the District Court complaining that his ex-wife was not respecting the access arrangements.

10. On 17 May 1996, upon the applicant's motion, the Bailiff of the Szczecin District Court refused to enforce the judgment of 16 September 1994. He stated that pursuant to Articles 1050 and 1051 of the Civil Procedure Code custody arrangements should be enforced by a court.

11. On 18 June 1996 the Szczecin District Court, referring to the children's best interest, dismissed the applicant's application for enforcement of his visiting rights. Upon the applicant's appeal, on 2 October 1996, the Szczecin Regional Court quashed this decision and remitted the case to the District Court for re-examination. The Court held that the applicant was entitled to have access to his children and that the District Court should have examined the case from the perspective of enforcing his rights. In case the mother obstructed the access arrangements, the District Court should consider imposing a fine on her pursuant to Article 1050 § 1 of the Civil Procedure Code.

12. On 24 June 1997 the applicant asked the District Court to expedite the proceedings.

13. On 11 September 1997 the Szczecin District Court ordered the mother to make R. available for contact. The court attached a penal order: in case of failure to comply with that decision I.P. was to pay a fine of PLN 300 [approx. EUR 75]. The court further discontinued the enforcement proceedings as regards contacts with K.

14. On 6 January 1998 the applicant informed the District Court that I.P. was still failing to comply with the decision of 11 September 1997. He

further asked the court to impose a fine on her. The District Court examined his motion on 19 February, 24 March and 10 June 1998. On the latter date the District Court dismissed the motion.

15. On 23 June 1998 the Szczecin District Court informed the applicant that he could see R. on 29 June 1998 in the Szczecin Consultation Centre (*Ośrodek diagnostyczno-konsultacyjny*). On 29 June 1998 the visit took place.

16. On 12 September 1998 the court informed the applicant that he could meet his son in the Psychiatric Consultation Centre (*Poradnia i pogotowie umacniania zdrowia psychicznego*). It is not clear whether the visit took place.

17. On an unknown date in 1998, of its own motion, the Szczecin District Court instituted proceedings against the applicant's ex-wife for limitation of custodial rights and failure to establish access arrangements for the applicant.

18. On 11 January 1999 the applicant informed the court that I.P. had again failed to make R. available for the meeting. On 15 February 1999 the Szczecin District Court ordered I.P. to comply with the divorce judgment as regards the applicant's access rights on pain of a fine in the amount of 500 PLN. On 15 September 1999 and 19 June 2000 the court held hearings. On the latter date the District Court stayed the proceedings.

19. On 30 June 2000 the Szczecin District Court gave a decision and for the second time determined the applicant's visiting rights. The applicant could visit R. every second Saturday and Sunday. He could also spend with him the second day of the Christmas holidays, Easter Monday and two weeks of holidays either in July or August. The applicant did not appeal against this decision.

20. On 25 July 2000 the Szczecin District Court discontinued the enforcement proceedings against I.P. in view of the new access arrangements. The court considered that the applicant should have filed a new motion for enforcement of his visiting rights.

21. On 12 December 2000 the applicant sent a letter to the District Court complaining that the mother had failed to comply with the terms of the new contact order.

22. On 28 May 2001 the Szczecin District Court ordered the mother to make the child available for contact on pain of a fine in the amount of PLN 500 [approx. EUR 125].

23. On 9 June 2001 the applicant attempted to visit R. However, I.P. was absent and R. was not available for the meeting. Subsequently, on 11 June 2001 the applicant informed the court that his ex-wife had again failed to comply with the decision of 30 June 2000.

24. Meanwhile, the applicant applied to be granted full custody rights in respect of R. On 4 October 2000 the Szczecin District Court dismissed his

application. This decision was upheld by the Szczecin Regional Court on 11 June 2001.

25. On 24 September 2001 the Szczecin District Court imposed a fine on I.P. for failure to comply with the court's orders concerning the applicant's visiting rights. I.P. appealed against this decision. She claimed that she had never prohibited R. from seeing his father. She had even tried to explain to R. that it was important to have contacts with his father. On 9 June 2001 R. had refused to meet the applicant and she had not wanted to interfere with his decision. In her opinion, the applicant had been "torturing" R. with his constant request for visits.

26. On an unknown later date the applicant's ex-wife filed an application to limit the applicant's contacts with R. She also appealed against the decision of 24 September 2001.

27. On 14 March 2002 the Szczecin Regional Court gave a decision and dismissed I.P.'s appeal against the decision to impose a fine on her. The court held that since the access arrangements had been specified for the second time, I.P. had been refusing to make the child available for contacts. In addition, I.P. was the debtor in the enforcement proceedings and she was required to comply with the access arrangements. Lastly, the applicant's requests, based on a lawful court order, could not have been considered as "torturing the child".

28. On 17 June 2002 the Szczecin District Court discontinued the proceedings in the applicant's case, since the applicant and his ex-wife had reached an agreement concerning access to the child.

29. On 11 April 2005 the applicant lodged a complaint about a breach of the right to a trial within a reasonable time under the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time alleging inactivity on the part of the Szczecin District Court. On 27 April 2005 he submitted that his complaint related to all sets of proceedings concerning enforcement of the contact orders, since 1994.

30. On 10 May 2005 the Regional Court asked the applicant to specify which set of enforcement proceedings he had referred to in his complaint. On 20 May 2005 the applicant submitted that all sets of proceedings concerned the enforcement of contact orders. He further claimed that, while the case numbers and the presiding judges had changed, the enforcement proceedings concerned the same contact order in respect of his child.

31. On 23 May 2005 the Szczecin Regional Court rejected the applicant's complaint. The court found that the applicant had failed to indicate to which set of proceedings he had referred. It added that the applicant's complaint could be considered as concerning the first set of enforcement proceedings which had been terminated on 11 October 1994. Therefore, his complaint had to be rejected as lodged outside the time-limit.

II. RELEVANT DOMESTIC LAW

1. *The length of proceedings*

32. The relevant domestic law and practice concerning remedies for the excessive length of judicial proceedings are stated in the Court's decisions in the cases of *Charzyński v. Poland* no. 15212/03 (dec.), §§ 12-23, ECHR 2005-V and *Ratajczyk v. Poland* no. 11215/02 (dec.), ECHR 2005-VIII and its judgment in the case of *Krasuski v. Poland*, no. 61444/00, §§ 34-46, ECHR 2005-V.

2. *Visiting rights*

33. As regards visiting rights, according to the Supreme Court's resolution, if a parent who has been obliged by a court decision to respect the other parent's access rights refuses to comply therewith, decisions on access rights are liable to enforcement proceedings. The provisions of the Code of Civil Procedure on enforcement of non-pecuniary obligations are applicable to the 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).

34. If a court obliges a parent exercising custody rights to ensure the other parent's access to a child, Article 1050 of the 1964 Code of Civil Proceedings (*Kodeks Postępowania Cywilnego*) is applicable to the enforcement of this obligation. This article provides:

“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 the 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 a 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.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

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

“1. Everyone has the right to respect for his 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.”

36. The Government contested that argument, stating that the complaint had been lodged out of time and, in the alternative, was manifestly ill-founded.

A. Admissibility

37. The Court firstly notes that the Government raised a preliminary objection that this complaint had been lodged outside the six-month time-limit (see paragraph 36 above). They claimed that the applicant in his application form had not expressly referred to Article 8 of the Convention. The applicant argued that while he had not literally indicated Article 8 of the Convention, he had in fact complained about the violation of his right to respect for his family life.

38. The Court accepts the applicant's arguments and considers that the applicant raised in substance his complaint about the alleged violation of his right to respect for his family life, thereby complying with the six-month time-limit required by Article 35 § 1 of the Convention.

39. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

40. The applicant claimed that there had been a continuing violation of his right to respect for family life. He had repeatedly instituted several sets of proceedings aimed at providing him with a possibility to have regular contacts with his son. Despite the fact that two court orders had been issued, none of them gave the applicant an effective opportunity to meet his son. He concluded that there had been a violation of Article 8 in this respect.

41. The Government did not submit any observations on the merits of this complaint. They merely stated it should be declared inadmissible as being manifestly ill-founded (see paragraph 36 above).

2. *The Court's assessment*

42. The relationship between the applicant and his son amounted to “family life” within the meaning of Article 8 § 1 of the Convention. This has not been disputed.

43. The essential object of Article 8 is to protect an individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in effective “respect” for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, p. 20, § 55).

44. 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).

45. 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 v. Finland*, cited above, § 58). The key consideration is whether those authorities have taken all necessary steps to facilitate contact such as can reasonably be demanded in the special circumstances of each case (*mutatis mutandis*, *Hokkanen v. Finland*, cited above, § 58).

46. In examining whether non-enforcement of the access arrangements ordered by the domestic court amounted to a lack of respect for the applicant's family life the Court must strike a balance between the various interests involved, namely the interests of the applicant's son and his mother, those of the applicant himself and the general interest in ensuring respect for the rule of law.

47. In the light of the above principles, what is decisive in this case is whether the Polish authorities took all the necessary adequate steps to facilitate the enforcement of the access arrangements as specified on 16 September 1994 and 30 June 2000.

48. According to the access order the applicant was firstly authorised to meet with R. twice a week and to spend two weeks in summer with him; subsequently he was authorised to meet R. every second weekend and to spend two weeks in summer.

49. The difficulties in arranging access were admittedly in large measure due to the animosity between the applicant's former wife and the applicant.

Whilst I.P. consistently refused to comply with the access arrangements, the applicant actively sought their enforcement. He had several times unsuccessfully approached the national authorities to put an end to this situation (see paragraphs 14, 18, 21, 23 above). It would further appear that he managed to see his son only on a very few occasions. Despite that, the only sanction that the authorities used in the present case against I.P. was the imposition of a fine on 24 September 2001 (see paragraph 25 above).

50. In this respect, the Court notes that there were long delays in the enforcement proceedings before the Szczecin District Court. In particular, the Court would point to the periods between 2 October 1996 and 11 September 1997 (see paragraphs 11-13 above), 15 February 1999 and 15 September 1999 (see paragraph 18 above), 12 December 2000 and 28 May 2001 (see paragraphs 21 and 22 above).

51. The Court further considers that the domestic authorities had an obligation to ensure enforcement of access arrangements, since it is they who exercise public authority and have the means at their disposal to overcome problems in the way of execution.

52. In addition, the Court observes that no satisfactory explanation has been put forward to justify the delays in the enforcement proceedings. Similarly, the Government have failed to provide any explanation as to whether the domestic authorities facilitated the enforcement of the access arrangements.

53. From the foregoing it cannot be said that, bearing in mind the interests involved, the competent authorities made reasonable efforts to facilitate the reunion. On the contrary, the inaction of the authorities placed on the applicant the burden of having to have constant recourse to a succession of time-consuming and ultimately ineffectual remedies to enforce his rights.

54. The Court reiterates that in cases of this kind the adequacy of measures taken by the authorities is to be judged by the swiftness of their implementation; they require urgent handling as the passage of time and change of circumstances can have irreparable consequences for relations between the children and the parent who does not live with them (see *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 102, ECHR 2000-I).

55. Accordingly, the Court concludes that, notwithstanding the margin of appreciation enjoyed by the competent authorities, the non-enforcement of the applicant's right of access constituted a breach of his right to respect for his family life under Article 8. There has consequently been a breach of that provision.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

56. The applicant further complained that the length of the proceedings in his case had exceeded a “reasonable time” within the meaning of Article 6 § 1, which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

57. The Government maintained that the applicant had failed to exhaust domestic remedies, as he had not lodged a complaint about the breach of the right to a hearing within a reasonable time under the 2004 Act in accordance with the procedural requirements.

58. The applicant, for his part, submitted that this remedy was not effective, as the domestic court had rejected his complaint under the 2004 Act.

59. Pursuant to Article 35 § 1 of the Convention:

“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law...”

60. The Court observes that the present application was lodged with the Court when the relevant proceedings were pending before the domestic court. It further observes that, pursuant to section 18 of the 2004 Act, it was open to persons such as the applicant in the present case whose case was pending before the Court to lodge, within six months from 17 September 2004, a complaint about the unreasonable length of the proceedings with the relevant domestic court, provided that their application to the Court had been lodged in the course of the impugned proceedings and that it had not yet been declared admissible.

61. The Court has already examined that remedy for the purposes of Article 35 § 1 of the Convention and found it effective in respect of complaints about the excessive length of judicial proceedings in Poland. In particular, it considered that it was capable both of preventing the alleged violation of the right to a hearing within a reasonable time or its continuation, and of providing adequate redress for any violation that has already occurred (see *Michalak v. Poland* (dec.), no. 24549/03, §§ 37-43).

62. The applicant, after having been informed by the Registrar of the possibility of lodging a complaint about the length of the proceedings under the 2004 Act, availed himself of this remedy. However, when filing his complaint with the Szczecin Regional Court he failed to comply with the procedural requirements attached to that remedy. In particular, he failed to submit his application within the prescribed time-limit.

63. The Court reiterates that domestic remedies cannot be said to be exhausted when an appeal has been rejected or not allowed because of a procedural mistake by the appellant (see *Ben Salah Adraqui and Dhaime v. Spain* (dec.), no. 45023/98, ECHR 2000-IV).

64. It follows that the applicant has not complied with the requirement under Article 35 § 1 of the Convention as to the exhaustion of domestic remedies, and, therefore, this complaint must be rejected in accordance with Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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

66. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage for the distress caused as a result of the failure to enforce the decisions concerning access to son.

67. The Government considered that the sum in question was excessive.

68. The Court sees no reason to doubt that the applicant suffered distress as a result of the non-enforcement of the contact orders at issue and that sufficient just satisfaction would not be provided solely by the finding of a violation. Making an assessment on an equitable basis, the Court awards the applicant the sum of EUR 5,000 under this head.

B. Costs and expenses

69. The applicant who received legal aid from the Council of Europe in connection with the presentation of his case, also claimed EUR 5,000 for the costs and expenses incurred before the domestic courts and for those incurred before the Court.

70. The Government contested this claim.

71. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,500 for the proceedings before the Court, less EUR 850 received by legal aid from the Council of Europe. It therefore awards EUR 650.

C. Default interest

72. 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 UNANIMOUSLY

1. *Declares* the complaint concerning the failure to protect the applicant's right to respect for family life admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (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 5,000 (five thousand euros) in respect of non-pecuniary damage and EUR 650 (six hundred and fifty euros) in respect of costs and expenses, to be converted into Polish zlotys at the rate applicable at the date of the 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş ARACI
Deputy Registrar

Nicolas BRATZA
President