



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

FOURTH SECTION

CASE OF JAREMOWICZ v. POLAND

(Application no. 24023/03)

JUDGMENT

STRASBOURG

5 January 2010

FINAL

05/04/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Jaremowicz v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 1 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 24023/03) 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 Paweł Jaremowicz (“the applicant”), on 10 July 2003.

2. The applicant was represented by Mr Z. Cichoń, a lawyer practising in Kraków. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, a breach of Article 12 of the Convention in that he had been refused leave to marry in prison. He also alleged a violation of Article 13 on account of the fact that he had had no domestic remedy to challenge that refusal. Lastly, he invoked Article 14, maintaining that he had been discriminated against on the ground of his status as a prisoner.

4. On 23 January 2007 the Chamber to which the case has been allocated decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility.

5. Having consulted the parties, the President of the Chamber decided that in the interests of the proper administration of justice, the proceedings in the present case should be conducted simultaneously with those in the case of *Frasik v. Poland* (application no. 22933/02) (Rule 42 § 2).

6. The applicant and the Government each filed further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other’s observations. In addition, third-party comments were received from the Helsinki Foundation for

Human Rights, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties have not replied to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1973 and lives in Głogów. He is detained in Wołów Prison.

8. The facts of the case, as submitted by the applicant, may be summarised as follows.

9. Throughout 2003 the applicant was serving a sentence of imprisonment in Wrocław Prison No. 1, following his conviction for attempted burglary by the Głogów District Court on 13 February 2001. He completed the sentence on 15 January 2004 and, on an unknown later date, was transferred to Wołów Prison.

10. On 9 June 2003 the applicant asked the Governor of Wrocław Prison No. 1 for leave to have visits from a certain M.H. in prison. M.H. had been detained in the same prison from 10 July to 17 December 2002. At the relevant time, she was detained in another Wrocław Prison (at Kurkowa Street). The request was refused.

11. On 16 June 2003 the applicant asked the Wrocław Regional Court – the Penitentiary Division (*Sąd Okręgowy – Wydział Penitencjarny*) for leave to marry M.H. in prison.

On 20 June 2003 M.H. made a similar request to the Penitentiary Division of the same court, asking for leave for her and the applicant to marry in prison.

Their requests were referred to the Governor of Wrocław Prison No. 1.

12. On 18 July 2003 the Governor refused both requests. The refusals were phrased in an identical way. The replies read, in so far as relevant, as follows:

“Replying to your request of 16 June 2003, which was referred to me by the Penitentiary Division of the Wrocław Regional Court, I hereby inform you that I refuse to give you leave to marry M.H. on the prison premises. The question of your having visits from M.H. was already decided negatively earlier (on 10 June 2003), in connection with your request of 9 June 2003. I now maintain that earlier standpoint taken by the Governor

Analysing your family situation one can see that M.H. is not a member of your family or a “close person” (*osoba bliska*) within the meaning of Article 102 § 2 of the [Code of Execution of Criminal Sentences]. Neither you nor M.H. are able

to substantiate your relationship in the period prior to her stay in [this prison] in connection with her pre-trial detention from 10 July 2002 to 17 December 2002.

In view of the foregoing, I refuse your request.”

13. On 23 July 2003 the applicant unsuccessfully appealed to the Wrocław Regional Court against the refusal.

14. The applicant also complained to, and sought assistance from, the Ombudsman (*Rzecznik Praw Obywatelskich*).

On 21 July 2003 the Ombudsman informed the Governor of Wrocław Prison of the applicant’s complaint and asked him to consider the possibility of granting him visits from his fiancée who was apparently his only close person, especially given their intention to get married and the fact that the applicant had volunteered for participation in a therapeutic rehabilitation programme based on deepening contact with close persons.

On 1 August 2003 the Governor informed the Ombudsman that the principal ground for refusal to grant the applicant visits from M.H. and leave to marry her in prison was the fact that they could not prove that they had had a relationship before her detention in the same prison which “made his attempts to obtain the leave ‘premature’.”

On 13 August 2003 the Ombudsman wrote back to the Governor, stating that he had reservations about the grounds for the refusal of leave to marry and asking him to conduct an enquiry into the applicant’s allegations and to reconsider the possibility of granting him visits from M.H.

15. On 9 September 2003 the prison authorities prepared a report on the enquiry which was later transmitted to the Ombudsman. The report read, in so far as relevant, read as follows

“Undoubtedly, [the applicant] became illegally acquainted with M.H. during her detention on remand in this establishment (from 10 July to 17 December 2002). In his complaint, [the applicant] states that ‘I [had] got to know a girl who stayed in this remand centre more than a year ago’. It is difficult to call “fiancées” persons who get to know each other in this manner (kites, writing on their hands – often without seeing each other).

This contact, which was made in prison (certainly illegally) and which by the nature of things is very superficial, is not a worthy contact from the point of view of the applicant’s rehabilitation. For that reason, the applicant’s requests [for leave to marry M.H. in prison] had received negative opinions from his supervising officer [*wychowawca*].”

16. On 25 September 2003 the Ombudsman replied to the applicant’s complaint. The letter reads, in so far as relevant, as follows:

“I would like to inform you that, as unequivocally emerges from the findings relating to your wish to get married to M.H. in prison, your relationship with Ms M[...] H [...] developed in an illegal manner during her detention on remand in the prison in which you remain. It was precisely your illegal relationship maintained by means of, among other things, sending kites (*za pomocą grypsów*) in prison which,

in the opinion of the prison administration, was decisive [for considering] your union unworthy from the point of view of your social rehabilitation.

At the same time, I would like to add that, as emerges from the information I have received, this matter is at present being examined by the Wrocław Regional Court, from which you should get a reply.

In view of the foregoing, acting upon the Ombudsman's authorisation, I consider the matter as clarified in its entirety and I do not see any indication of your rights having been infringed by the [prison] administration."

17. Meanwhile, on 24 September 2003 the applicant had complained to the Minister of Justice about the refusal to give him leave to contract a marriage in prison. The complaint was referred to the Wrocław Regional Director of the Prison Service (*Dyrektor Okręgowy Służby Więziennej*) who, on 17 October 2003, addressed the matter as follows:

"In reply to your complaint of 24/09/2003 addressed to the Ministry of Justice and concerning the decision of the Governor of Wrocław Prison No. 1 refusing to grant you leave to contract a marriage on the prison premises, I would like to inform you that, according to the rules on competence [in such matters], your complaints have been examined by the Wrocław Regional Inspectorate of the Prison Service (*Okręgowy Inspektorat Służby Więziennej*).

Following an enquiry it has been ascertained that, indeed, the administration of Wrocław Prison No. 1 did not give you leave to contract a marriage on the premises of the penitentiary establishment. You were notified of the reasons for it by, *inter alia*, the letter of 18 July 2003

At the same time, I inform you that this decision did not infringe the applicable legal provisions. No provision obliges a governor of a penitentiary establishment to grant a detained person leave to contract a marriage in the establishment run by him.

In view of the foregoing, I do not see any grounds for upholding your complaint."

18. On 2 October 2003 the Wrocław Regional Court-Penitentiary Divisions examined the applicant's appeal of 23 July 2003 but did not take any decision on the matter.

19. On an unspecified date in November 2003 the Deputy Governor of the Wrocław Prison issued a certificate addressed to the Wrocław Civil Status Office (*Urząd Stanu Cywilnego*) confirming that the applicant had obtained leave to marry M.H. in prison.

20. The Government submitted that, according to information supplied by the Wrocław Prison's authorities, the applicant did not marry M.H. in prison.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Code of Execution of Criminal Sentences and related ordinance

21. Article 102 of the Code of Execution of Criminal Sentences (*Kodeks karny wykonawczy*) (“the Code”) lists the rights of a convicted person. It reads, in so far as relevant, as follows:

“A convicted person has, in particular, the following rights:

...

2) to maintain relationships (*więzi*) with the family and other close persons;

...

10) to make applications, complaints and requests to an authority competent to deal with the subject-matter and to present them, in the absences of third parties, to the prison administration, heads of organisational units of the Prison Service, penitentiary judge, prosecutor and the Ombudsman.”

22. Detailed rules on the procedure referred to in paragraph 10 is laid down in the Minister of Justice’s Ordinance of 13 August 2003 on dealing with applications, complaints and requests by persons detained in prisons and remand centres (*Rozporządzenie Ministra Sprawiedliwości w sprawie sposobów załatwiania wniosków, skarg i próśb osób osadzonych w zakładach karnych i aresztach śledczych*),

23. Article 7, paragraphs 1 and 2, of the Code provides that a convicted person can challenge before a court any unlawful decision issued by a judge, a penitentiary judge, a governor of a prison or a remand centre, a regional director or the Director General of the Prison Service or a court probation officer. Applications relating to the execution of prison sentences are examined by a competent penitentiary court.

The remainder of Article 7 of the Code reads as follows:

“3. Appeals against decisions [mentioned in paragraph 1] shall be lodged within seven days of the date of the pronouncement or the service of the decision; the decision [in question] shall be pronounced or served with a reasoned opinion and an instruction as to the right, deadline and procedure for lodging an appeal. An appeal shall be lodged with the authority which issued the contested decision. If [that] authority does not consider the appeal favourably, it shall refer it, together with the case file and without undue delay, to the competent court.

4. The Court competent for examining the appeal may suspend the enforcement of the contested decision ...

5. Having examined the appeal, the court shall decide either to uphold the contested decision, or to quash or vary it; the court's decision shall not be subject to an interlocutory appeal."

B. The Family and Custody Code

24. Under the provisions of the Family and Custody Code (*Kodeks Rodzinny i Opiekuńczy*) the registrar of the relevant Civil Status Office (*Kierownik Urzędu Stanu Cywilnego*) may refuse to solemnise marriage only if there exists any statutory obstacle rendering the marriage null and void, such as age, legal incapacity, mental disorder, bigamy, close affinity of the parties or adoptive relationship (Articles 5, 10 11, 12, 13, 14 and 15). In case of doubt, the registrar should ask the competent court to rule on whether the marriage can be contracted (Article 5).

25. Pursuant to Article 4, a marriage before the registrar may not be concluded before 1 month after the persons concerned have made a written declaration that they have no knowledge of any statutory obstacle to the solemnisation of their marriage. At their request and for important reasons, the registrar may solemnise the marriage before the expiry of that term.

26. Article 6 of the Family and Custody Code lays down the rules for a proxy marriage. Contracting a marriage through a representative is subject to leave that can be granted by a family court in the non-contentious procedure. It depends on two principal conditions. First, the court must be satisfied that there exist "important reasons" justifying the departure from the normal procedure. Secondly, the applicant's signature on a proxy must, on pain of being null and void, be made in the presence of a notary, who confirms its authenticity by a special declaration.

The Supreme Court's case-law and practice of the domestic courts in respect of a proxy marriage is very scant. A few existing rulings of the Supreme Court relate to applications for leave to contract proxy marriages with Polish women made by foreign persons and date back to the 1970s.

III. EUROPEAN PRISON RULES

27. The Recommendation of the Committee of Ministers to member states on the European Prison Rules (Rec(2006)2) ("the European Prison Rules"), adopted on 11 January 2006, sets out the following standards in respect of the enforcement of custodial sentences that are relevant in the context of the present case.

Rule 3 reads:

"Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed."

Rule 24 reads, in so far as relevant:

“1. Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.

2. Communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum of contact.

...

4. The arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible.

Rule 70 reads, in so far as relevant:

“1. Prisoners, individually or as a group, shall have ample opportunity to make requests or complaints to the director of the prison or any other competent authority.

...

3. If the request is denied or a complaint rejected, reasons shall be provided to the prisoner and the prisoner shall have the right to appeal to an independent authority.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

28. The applicant complained under Article 12 of the Convention about the prison authorities’ refusal to grant him leave to marry in prison. In his submission, they had failed to give any cogent reasons for their decision and it had been taken in an arbitrary fashion.

Article 12 of the Convention reads as follows:

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

A. Admissibility

29. The Government raised two preliminary objections. They maintained that the application was incompatible *ratione personae* with the provisions of the Convention or, in any event, that it should be rejected for non-exhaustion of domestic remedies.

1. The Government's preliminary objection on compatibility ratione personae

(a) The Government

30. The Government submitted that the applicant had lost his victim status for the purposes of Article 34 since he had been granted leave to marry M.H. in prison in November 2003.

(b) The applicant

31. The applicant disagreed and maintained that this fact could not have any retrospective effect on the violation of Article 12 that had already occurred on account of the delay in the procedure for granting him leave to marry.

(c) The Court's assessment

32. The features and conduct (including the alleged delay) of the domestic procedure whereby the applicant sought to obtain leave to marry in prison are matters also going to the issue whether his right under Article 12 was respected in the particular circumstances of the case. That being so, these matters would, in the Court's view, more appropriately be examined at the merits stage.

33. The Court accordingly joins the Government's plea of inadmissibility on the ground of incompatibility *ratione personae* to the merits of the case.

2. The Government's objection on exhaustion of domestic remedies

(a) The Government

34. The Government's objection was two-fold. First, they maintained that the application had been premature since it had been lodged before the end of the domestic procedure for granting leave to marry in prison. The applicant complained to the Court on 10 July 2003, when his and M.H.'s request for leave to marry in prison had already been rejected but he could still make use of the procedure under Article 7 § 1 of the Code of Execution of Criminal Sentences and appeal against the refusal to the Wrocław Regional Court – which he had later done. Moreover, at the same time, his other complaints, for instance those addressed to the Ombudsman, had been pending before the relevant authorities.

35. Secondly, the Government argued that the applicant had had at his disposal yet another remedy. In their opinion, he could contract his marriage also outside the prison – without leaving it. In particular, he could ask a civil court to grant him leave to contract a proxy marriage with M.H.

relying on Article 6 of the Family and Custody Code, which gave such a possibility to a party who, for important reasons, could not be personally present before the civil status authorities.

(b) The applicant

36. The applicant replied that in the circumstances of his case the remedies suggested by the Government could not be considered adequate and effective for purposes of Article 35 § 1 of the Convention.

(c) The Court's assessment

37. As regards the first limb of the Government's objection, the Court, having regard to the fact that the effectiveness of the procedure for leave to marry in prison afforded to the applicant is inseparably linked with the merits of his complaint under Article 13, joins this part of the Government's plea of inadmissibility to the merits of the case.

38. As regards the second limb, the Court would recall that, although Article 35 § 1 requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, it does not require that recourse should be had to remedies that are inadequate or ineffective (see *Egmez v. Turkey* no. 30873/96, ECHR 2000-XII, §§ 65 et seq).

39. The Government relied on a remedy which, under the Polish family law, is designed to address exceptional circumstances, such as important obstacles to appearing in person before the authorities in order to contract a marriage. According to Article 6 of the Family and Custody Code, the person concerned may obtain leave to contract a proxy marriage if the court is satisfied that there are important reasons for the departure from the ordinary procedure and subject to the condition that he or she had supplied a proxy signed in the presence of a notary, with the authenticity of the signature being officially confirmed (see paragraph 26 above).

However, the Government seem to have overlooked the fact that the applicant's prospective wife, who was at the time likewise detained, would have had to complete the same procedure and formalities in order to ask the court to enable them to contract their marriage – through representatives appointed for each party, as they both would have been absent at such a wedding. What is more, the recourse to this remedy would necessarily require assistance from the prison authorities in producing the requisite notarised documents by both parties. Given that the proxy marriage procedure would, for all practical purposes, be seen as tantamount to an attempt to circumvent the authorities' refusal and considering the grounds on which they relied, it is debatable whether in reality they would be willing enough to facilitate the process. In any event, the Government have not supplied any example from the domestic practice demonstrating

that the proxy-marriage procedure can effectively be used by persons in detention.

The Court is therefore not persuaded that this remedy, although available to the applicant in theory, would have been adequate for the purposes of Article 35 § 1 and, consequently, rejects this part of the objection.

B. Merits

1. The parties' submissions

(a) The applicant

40. The applicant maintained that the refusal to grant him leave to marry M.H. in detention was clearly in breach of Article 12 of the Convention. In particular, he drew the Court's attention to, in his view, unacceptable grounds given by the authorities for the refusal and to their unfair and disparaging comments on his and M.H.'s decision to marry – for instance that their relationship had been “superficial”, “illegal” or “unworthy for his social rehabilitation”, as though the quality of feelings and the dignity of a person could be assessed only from the perspective of their rehabilitative usefulness.

(b) The Government

41. The Government stressed that there was no established case-law of the Court concerning the exercise of the right to marry by a person in detention. In the case of *Hamer v. the United Kingdom* (appl. no. 7114/75, decision of 13 October 1977, D.R. 10 p. 174) the former European Commission of Human Rights found admissible a complaint under Article 12 about a refusal to grant leave to marry to a prisoner sentenced to a defined term of imprisonment, who could not marry his partner until he had been released from prison. However, Article 12, they added, did not guarantee an unlimited right to marry since, as the Court held in the case of *B. and L. v. the United Kingdom* (no. 36536/02; judgment of 13 September 2005), this right was regulated by “the national laws” governing its exercise and was subject to limitations, although they could not restrict or reduce the right to such an extent that its very essence was impaired.

42. In the present case the applicant was eventually granted leave to marry M.H. in detention but, in any event he could marry M.H. after his release, or as already suggested, contract a proxy marriage. In sum, there had been no violation of the applicant's right to marry as guaranteed by Article 12 of the Convention.

2. *The third party's comments*

43. The Helsinki Foundation for Human Rights stressed the importance of the fundamental human right to marry which, it added, had been acknowledged by the Court on many occasions, to mention only the case of *Christine Goodwin v. the United Kingdom* (no. 28957/95; judgment of 11 July 2002).

It drew the Court's attention to the fact that the case-law of the Convention institutions relating to prisoners' right to marry had gradually developed from non-recognition to explicit protection.

In the case of *X. v. the Federal Republic of Germany* (no. 892/60, Yearbook IV 1961, p.240 (256), the Commission, relying on the domestic court's finding that it had been expected that the applicant would be detained for a long time and he would not therefore be able to cohabit with his prospective wife for a long time to come and that marriages of prisoners inevitably tended to affect the maintenance of order in prison, rejected the complaint under Article 12 as manifestly ill-founded. However, subsequently, in the case of *Hamer v. the United Kingdom*, (no. 7114/75, Commission's report of 13 December 1979) where the Article 12 complaint was based on similar facts, the Commission altered its previous position and expressed an opinion that there was a breach of this provision, holding that "[t]he essence of the right to marry ... is the formation of a legally binding association between a man and a woman. It is for them to decide whether or not they wish to enter such an association in circumstances where they cannot cohabit".

44. It was natural that, as the Court had held in many cases concerning the rights of prisoners, any measure depriving a person of liberty inevitably entailed limitations on the exercise of Convention rights, including a measure of control on prisoners' contacts with the outside world. In the context of the right to marry it could mean that the authorities, in exercising their power in this area, could monitor the wedding ceremony and limit, for instance, the number of participants. However, they should maintain a fair balance between the demands of security in prison and the prisoner's right to marry. Their discretion should be limited to, and their decisions based on, concrete facts, not on prejudice. A refusal should be restricted to situations where the marriage ceremony would jeopardise the prison security – and not be merely difficult to organise. Moreover, rules regulating the authorities' discretion should be laid down in the national law. In particular, the law ought to list specific circumstances in which the authorities should not give leave to marry – for example, if it would affect the process of rehabilitation. In this context, it must be stressed that the issues involved were of a sensitive nature; thus, an unjustified refusal to grant leave to marry could be regarded as additional or disciplinary punishment.

45. The authorities, the third party added, often based their refusals on the argument that there was a risk that the detained applicant intended

to contract a fictitious marriage in order to achieve another purpose or advantage. Polish law did not require the civil status authorities to check whether an intended marriage was fictitious or “genuine” before its solemnisation. Since there was no difference in legal status between unmarried persons at liberty and unmarried persons in prison, imposing such a requirement on prisoners was tantamount to discrimination.

46. It was difficult to gauge the scale of the problem in Poland since the authorities did not conduct any statistical surveys regarding the number of marriages in prison. Furthermore, Polish legislation gave the authorities deciding on prisoners’ request for leave to marry an unlimited discretion. This was shown by the facts of the present case, in which the refusal to grant that applicant leave to marry in prison had been justified by, *inter alia*, the fact that “[n]o provision oblige[d] a governor of a penitentiary establishment to grant a detained person leave to contract a marriage in the establishment run by him”.

It was true that the national law did not lay down any procedure for contracting a marriage in prison. A marriage of a person at liberty could not be forbidden if the requisite conditions, such as for example, marriageable age, were met. In contrast, a request for the solemnisation of a marriage in prison could, as shown by the facts of the present case, be rejected for reasons that were not listed in the legal provisions governing marriage.

47. The Helsinki Foundation for Human Rights concluded that the effective protection of the right to marry in prison required additional procedural guarantees, such as the possibility of challenging the prison authority’s decision before a court, the stipulation of a time-limit for handling a leave request– so that the procedure be terminated within a reasonably short time, and the publication of a list of grounds for a possible refusal, which should be limited to genuine, neutral and legitimate interests.

3. *The Court’s assessment*

(a) **Principles deriving from the Court’s case-law**

48. Article 12 secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. Both as to procedure and substance it is subject to the national laws of the Contracting States, but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see *F. v. Switzerland*, judgment of 18 December 1987, Series A no. 128, § 32; and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 29, ECHR 2002-VI).

In consequence, the matter of conditions for marriage in the national laws is not left entirely to Contracting States as being within their margin

of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far (*R. and F. v. the United Kingdom*, (dec.) no. 35748/05, 28 November 2006).

49. The Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage. However, the relevant laws – which must also meet the standards of accessibility and clarity required by the Convention – may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice (see *Hamer v. the United Kingdom*, no. 7114/75, Comm. Rep. 13 December 1979, D.R. 24, pp. 12 et seq., §§ 55 et seq.; *Draper v. the United Kingdom*, no. 8186/78, Comm. Rep., 10 July 1980, D.R. 24, § 49; *Sanders v. France*, no. 31401/96, Com. Dec., 16 October 1996, D.R. no. 160, p. 163; *F. v. Switzerland* cited above; and *B. and L. v. the United Kingdom*, no. 36536/02, 13 September 2005, §§ 36 et seq.).

50. This conclusion is reinforced by the wording of Article 12. In contrast to Article 8 of the Convention, which sets forth the right to respect for private and family life, and with which the right “to marry and to found a family” has a close affinity, Article 12 does not include any permissible grounds for an interference by the State that can be imposed under paragraph 2 of Article 8 “in accordance with the law” and as being “necessary in a democratic society”, for such purposes as, for instance, “the protection of health or morals” or “the protection of the rights and freedoms of others”. Accordingly, in examining a case under Article 12 the Court would not apply the tests of “necessity” or “pressing social need” which are used in the context of Article 8 but would have to determine whether, regard being had to the State’s margin of appreciation, the impugned interference has been arbitrary or disproportionate (see paragraph 48 above, with references to the Court’s case-law).

51. Personal liberty is not a necessary pre-condition for the exercise of the right to marry.

Imprisonment deprives a person of his liberty and also – unavoidably or by implication – of some civil rights and privileges. This does not, however, mean that persons in detention cannot, or only very exceptionally can, exercise their right to marry. As the Court has repeatedly held, a prisoner continues to enjoy fundamental human rights and freedoms that

are not contrary to the sense of deprivation of liberty, and every additional limitation should be justified by the authorities (see *Hirst (no. 2) v. the United Kingdom*, [GC], no 74025/01, § 69, ECHR 2005- IX, with further references).

52. In the above-mentioned case of *Hirst (no.2)*, the Grand Chamber of the Court referred to a non-exhaustive list of rights that a detained person may exercise. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention. They continue to enjoy the right to respect for private and family life, the right to freedom of expression, the right to practice their religion, the right of effective access to a lawyer or to a court for the purposes of Article 6 and the right to respect for their correspondence (*ibid.*). In the same way, as emphasised by the European Commission of Human Rights in the case of *Hamer v. the United Kingdom* (cited above, § 49) they enjoy the right to marry.

The principle that any restrictions on those other rights require to be justified in each individual case is also explicitly stated in the European Prison Rules which, in its Rule 3, stipulate that “[r]estrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed” (see paragraph 27 above).

53. While such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment, there is no question that detained persons forfeit their right guaranteed by Article 12 merely because of their status. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for any automatic interference with prisoners’ rights, including their right to establish a marital relationship with the person of their choice, based purely on such arguments as what – in the authorities’ view – might be acceptable to or what might offend public opinion (see, *mutatis mutandis*, *Hirst (no. 2)* cited above § 70; *Dickson v. the United Kingdom*, [GC], no. 44362/04, §§ 67-68, ECHR 2007-...; *Hamer v. the United Kingdom*, cited above, § 67; *Draper v. the United Kingdom* cited above, § 54; and *F. v. Switzerland*, cited above, §§ 43 et seq.).

(b) Application of the above principles in the present case

54. The applicant’s complaint was not directed against the laws governing marriage in Poland, their quality or their application in his particular case. It solely concerned the refusal to grant him leave to marry in prison which, as he alleged, amounted to an arbitrary and disproportionate interference contrary to Article 12. In the Government’s

view, it did not impair the essence of his right to marry as guaranteed by this provision (see paragraphs 40-42 above).

55. The Court would observe at the outset that a requirement for a person detained to obtain prior leave in order to have a marriage contracted in prison cannot by itself be regarded as contrary to Article 12 – as stated above, limitations on marital, private and family life are inherent in deprivation of liberty (see paragraphs 51-52 above). Also, in deciding whether or not such permission is to be granted, the authorities have a margin of discretion and must have regard not only to the personal interest pursued by the prisoner – however important it may be – but equally to such factors as the maintenance of good order, safety and security in prison. Furthermore, the aims of imprisonment, which are not limited to punitive and deterrent aspects of the penalty but necessarily encompass the rehabilitative elements, are considerations that are relevant in this context (see paragraph 53 above and *Dickson* cited above, § 75).

56. Turning to the circumstances of the present case, the Court notes that the authorities dealing with the applicant's request for leave to marry justified their refusal by reference to grounds which were in no way linked to prison security or prevention of disorder but limited to their assessment of the nature and the quality of his relationship with M.H. First of all, they considered that since the applicant and M.H. could not "substantiate" their acquaintance as being prior to their stay in the same prison, such a relationship had, in their words, been "illegal" or "developed illegally". This conclusion was based on the fact that the applicant and M.H. had apparently become acquainted with each other when she had been temporarily detained in the same establishment and that they had maintained contact through sending kites – a form of correspondence forbidden in prison (see paragraphs 12, 15 and 16 above). Second, the authorities held that the circumstances in which the couple's bond had originated – "in prison" and "certainly illegally" – meant that it was "very superficial" and "unworthy" from the point of view of the applicant's social rehabilitation (see paragraphs 15-16 above).

57. Whilst the above arguments clearly reflect the authorities' own highly subjective opinion on what kind of relationship should not deserve solemnisation through a marriage, they bear no relation whatsoever to the provisions of the Polish Family and Custody Code governing the exercise of the right to marry and enumerating the grounds on which an authority may refuse an adult person to enter into a marriage. Under Polish law this is for the civil status, not for any other, authorities to determine whether there are any legal obstacles to the parties' marriage, failing which they cannot be refused to marry each other at any given chosen time following the statutory waiting period of 1 month (see paragraphs 24-25).

58. The Court accepts that the prison authorities were entitled to make their permission subject to conditions on which the applicant's marriage

was to take place, in particular having regard to the demands of security and prevention of disorder in prison (see paragraphs 53 and 55 above). However, it does not see any reason why they should – as they did in the present case – evaluate the depth of the applicant’s feelings, debate on the quality of his relationship and make remarks implicitly or explicitly criticising his decision to marry a particular person, based solely on the circumstances in which he found and chose his intended wife.

Obviously, detention facilities are not typical places for bringing together future partners but the fact that the bond between a man and a woman developed when they both have been detained does not automatically render their relationship “illegal”, “superficial”, having no rehabilitative value or not deserving respect.

59. The choice of a partner and the decision to marry him or her, at liberty and in prison alike, is a strictly private and personal matter and there is no universal or commonly accepted pattern for such a choice or decision. Except for overriding security considerations and in order to ensure that the right to marry is exercised “in accordance with the national laws” – which, as said above, must themselves be compatible with the Convention – the authorities are not allowed under Article 12 to interfere with a prisoner’s decision to establish a marital relationship with a person of his choice, especially on the grounds that the relationship is not acceptable to them or deviates from prevailing social conventions and norms (see paragraphs 48-49 and 53 above).

Some administrative arrangements must of course be made by the prison authorities before a prisoner can marry. However, the same applies to other Convention rights, such as the right of access to a court, the right to vote and the right to respect for family life and correspondence, the exercise of which in prison requires, by the nature of things, a positive action on the part of the authorities to make the enjoyment of those right effective (see *Hirst (no. 2)* cited above, § 68; *Draper* cited above, § 55; and paragraphs 51-52 above).

60. The essence of the right to marry is the formation of a legal union of a man and a woman. It is for them to decide whether they wish to enter such relationship in circumstances in which there are objective obstacles to their living together (see *Hamer* cited above and paragraph 48 above). In the present case the only reason why the applicant was unable to exercise his right to marry was not his ineligibility caused by the existence of any statutory obstacle listed in the Polish Family and Custody Code but the fact that the authorities disputed his decision to marry M.H. and refused him permission to have the necessary civil status celebration held in prison. In practice, the refusal had identical consequences as an effective legal bar on the exercise of his right guaranteed by Article 12. This, having regard to the scope of the State’s discretion accorded under this provision

(see paragraphs 48-50 above), cannot be justified by any conceivable legitimate aim pursued by the authorities.

61. The Government argued that the applicant had finally been granted leave to marry M.H. in prison and that he could in any event have married her after his release. In their submission, these circumstances were relevant for the applicant's status as a victim and for the assessment of the merits of his complaint under Article 12 (see paragraphs 30 and 41-42 above).

The Court does not accept this argument. The Government seem to suggest that the fact that the applicant obtained the leave he sought some 5 months after he had made his request to the authorities (see paragraphs 11 and 19 above) or that he retained the possibility of marrying M.H. at some unspecified future stage could alleviate the consequences of the initial ban placed on the exercise of his right to marry. However, a delay imposed before entering into a marriage in respect of persons of full age and otherwise fulfilling the conditions for marriage under the national law, be it a civil sanction or the practical consequence of such a refusal as in the instant case, cannot be considered justified under Article 12 of the Convention (see *F. v. Switzerland* cited above, § 33-37). Consequently, the Court rejects the Government's plea of inadmissibility on the ground of incompatibility *ratione personae* (see paragraphs 32-33 above).

62. The third party drew the Court's attention to another, general aspect of the case, namely the lack of any procedure for contracting marriage in prison under Polish law. It submitted that, as shown by the facts supplied by the applicant, the authorities' discretion in granting or refusing a detained person the right to marry is unlimited. There are no rules stating in which circumstances a request for leave to marry in a detention facility can be refused and no time-limits are set for handling such requests (see paragraphs 45-47 above).

63. It is true that Polish law leaves to the relevant authorities a complete discretion in deciding on a detainee's request for leave to marry in prison (see paragraphs 21-23 above). It is also true that no specific provision of the national law deals with marriage in detention but, in the Court's view, Article 12 does not require the State to introduce separate laws or specific rules on marriage of prisoners; thus, as stated above, detention is not a legal obstacle to marry (see paragraphs 51-53 above). Nor can it be said that there is any difference in legal status in respect of eligibility between unmarried persons at liberty and unmarried persons detained.

64. The essential element of the violation of Article 12 of the Convention alleged in the present case is not the scope of discretion afforded to the Polish authorities but the arbitrary fashion in which they exercised their decision-making power. The discretion available in theory may be very wide, but the decisive element is how it is applied in practice. In the applicant's case the Convention breach was caused by the authorities'

failure to strike a fair balance of proportionality among various public and individual interests at stake in a manner compatible with the Convention, rather than by the absence of detailed rules on marriage in prison. As a result, the measure applied impaired the very essence of the applicant's right to marry.

Accordingly, the Court concludes that there has been a violation of Article 12 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

65. Invoking Article 13 of the Convention, the applicant further complained that he had been unable to challenge the refusal to grant him leave to marry in prison in any meaningful way.

Article 13 reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

66. 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 applicant*

67. The applicant submitted that the procedure for granting leave to marry in prison had been inefficient and did not satisfy the requirements of Article 13 in respect of an “effective remedy”.

2. *The Government*

68. The Government disagreed. They maintained that applicant had a two-tier remedy at his disposal. First, he could, as he had done, ask the governor of the prison for leave to contract a marriage in prison. It was true that the first attempt had been unsuccessful but the applicant could contest the refusal before the penitentiary court, pursuant to Article 7 of the Code of Execution of Criminal Sentences. Furthermore, had it still been unsuccessful, he could have made a fresh request to the governor who, if the grounds for the original refusal had no longer existed, could have granted him the leave sought.

In sum, the Government considered that the procedure afforded to the applicant in connection with his request for leave to marry in prison complied with the standards under Article 13.

3. *The Court's assessment*

69. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI; and *Christine Goodwin*, cited above, § 112-113).

The “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (*Kudła*, cited above, § 157).

70. Having regard to its above finding that there has been a violation of Article 12 in the present case (see paragraph 64 above), the Court observes that the applicant’s complaint is without doubt arguable for the purposes of Article 13 of the Convention. It must accordingly determine whether the remedies available to the applicant under Polish law for raising a breach of his right to marry satisfied the requirements of that provision, in particular whether they were “effective” in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred (see *Kudła*, cited above, § 158).

71. It is true that, as the Government pointed out, the applicant was eventually granted leave to marry in prison on an unspecified date in November 2003 – some 5 months after he had made the request to this effect to the prison authorities (see paragraphs 11 and 19 above). It is also true that the applicant could, as he did, challenge the initial refusal before the penitentiary court (see paragraph 23 above). However, the procedure lasted for nearly five months and no ruling on his appeal had yet been given until the prison authorities eventually changed their original decision and the appeal had become purposeless (see paragraphs 13, 18 and 19 above). In consequence, it cannot be said that in the instant cases it offered the applicant the requisite relief, that is to say, a prompt decision on the substance of his Convention claim under Article 12.

The Court has already held that the delay in examining the applicant’s request for leave to marry was a factor relevant for finding a breach of this

provision (see paragraph 61 above). Assessing the issue from the angle of the Article 13 requirements, it concludes that the protracted procedure had no meaningful effect for the right asserted by the applicant. Nor could the authorities' belated permission for contracting his marriage in prison constitute redress required by this article (see paragraph 69 above).

Accordingly, the Court finds that in the circumstances of the case the remedy in question was not "effective" and rejects the Government's preliminary objection on exhaustion of domestic remedies in that the complaint to the Court was premature (see paragraphs 34 and 37 above). It further holds that there has been a violation of Article 13 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 12

72. Lastly, the applicant alleged a breach of Article 14 read in conjunction with Article 12 of the Convention, maintaining that the refusal to grant him leave to marry in prison had amounted to discriminatory treatment on the ground of his status as a prisoner since the only reason for it had been the fact that he and his fiancée had remained at that time in prison. In this context, he referred to the authorities' opinion that they had entered into their relationship "illegally" and that their prospective marital union had been "unworthy".

Article 14 reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

73. 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 applicant*

74. The applicant submitted that the sole reason why he could not exercise his right to marry the person of his choice had been his status as a prisoner. No person at liberty would have undergone such

discriminatory and humiliating experiences as he had done when asking for leave to marry. Had he been at liberty, the civil status authorities would not have delayed the solemnisation of his marriage or refused him the right to marry because they had not accepted the manner in which he had become acquainted with his fiancée. Nor would he have been required to explain before them why he had wished to marry and whether – as had happened in his case – his relationship was “useful”, “worthy” or otherwise acceptable.

2. *The Government*

75. The Government replied that, having regard to the fact that the applicant had eventually been granted leave to marry M.H in prison, the question of his alleged discrimination could be discussed only *in abstracto*.

Even if the situation were to be so assessed, the limitations on the right to marry in prison in Poland were reasonable and decisions of prison authorities were supervised by the penitentiary court, which excluded the risk of arbitrariness.

In these circumstances, it could not be said that the applicant had been discriminated against in the exercise of his right to marry.

3. *The Court's assessment*

76. The Court observes that the authorities' arbitrary qualification of the applicant's relationship with M.H. as not fit for a marital union and the grounds on which they refused him leave to marry in prison lie at the heart of his complaint under Article 14. These issues, although presented by the applicant from a different perspective, have been examined under Article 12 and resulted in the finding of a violation of this provision (see paragraphs 56-64 above). In the circumstances, the Court considers that no separate issue arises under Article 14 and makes no separate finding (see also *Christine Goodwin*, cited above, § 108).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. 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**

78. The applicant claimed non-pecuniary damage of 20,000 euros (EUR) in respect of distress, anxiety and grief caused by the fact that, on account

of the authorities' arbitrary refusal to grant him leave to marry, he had irrevocably lost the possibility of marrying the lady he had loved who, after waiting nearly a half year for the authorities' permission, had eventually renounced her decision.

79. The Government considered that the sum was exorbitant. If the Court were to find a violation of any of the Convention provisions invoked by the applicant, this finding would provide sufficient and just satisfaction. Alternatively, they asked the Court to assess the applicant's claim on the basis of its case-law in similar cases and in the light of the particular circumstances of this case.

80. The Court, having regard to its findings in respect of Article 12 (see, in particular, paragraph 64 above), concludes that the applicant certainly suffered non-pecuniary damage – such as feelings of frustration and emotional distress – which is not sufficiently compensated by the finding of violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,000 under this head. As regards Article 13, the Court considers that the finding of a violation of this provision constitutes sufficient just satisfaction for the applicant and makes no financial award under this head.

B. Costs and expenses

81. The applicant, who was granted legal aid in connection with the presentation of his case, claimed EUR 2,500 for costs and expenses involved in the proceedings before the Court.

82. The Government asked the Court to grant the reimbursement, if any, of this sum, only in so far as the costs and expenses claimed had actually and necessarily been incurred and were reasonable as to quantum.

83. The Court considers it reasonable to award the sum of EUR 1,500, less EUR 850.00 already paid under the Court's legal-aid scheme.

C. Default interest

84. 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. *Joins* to the merits the Government's preliminary objections on victim status and the premature nature of the application;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 12 of the Convention;
4. *Holds* that there has been a violation of Article 13 of the Convention;
5. *Dismisses* the above-mentioned preliminary objections;
6. *Holds* that no separate issue arises under Article 14 of the Convention;
7. *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, the following amounts, to be converted into Polish zlotys at the rate applicable at the date of settlement:
 - (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,500 (one thousand five hundred euros), less EUR 850 (eight hundred fifty euros) received under the Court's legal-aid scheme, plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (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;
8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President