



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

FOURTH SECTION

CASE OF WOJCIECH NOWAK v. POLAND

(Application no. 11118/06)

JUDGMENT

STRASBOURG

8 June 2010

FINAL

08/09/2010

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

In the case of Wojciech Nowak 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,

David Thór Björgvinsson,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 18 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 11118/06) 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 Wojciech Nowak (“the applicant”), on 13 March 2006.

2. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry for 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 17 November 2008 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1966 and lives in Zawiercie.

6. In 1993 the applicant married A.N. In 1994 they had a son, D. Subsequently, the applicant and A.N. separated. Since their separation, they have been living in the same town and in the same street.

7. On 3 September 1996 the Zawiercie District Court issued an interim contact order. According to its terms, the applicant was allowed to visit the child every Tuesday and every first Saturday and third Sunday of the month, between 4 p.m. and 6.30 p.m.

8. Between 29 September 1996 and 5 October 1997 the Zawiercie police intervened on 12 occasions in order to facilitate the applicant's contact with his child. These interventions took place at A.N.'s place of residence and it would appear that on all these occasions the applicant was able to see the child.

9. On 27 May 1997 the Katowice Regional Court dissolved the applicant's marriage. It awarded parental rights to A.N., limited the applicant in the exercise of his rights and ordered that D.'s permanent residence be with his mother. The applicant was allowed to participate in decisions about the child's education and health.

10. On 1 September 1997, 5 May 1998 and 18 May 1999 the applicant made applications for fines to be imposed on A.N. under Article 1051 of the Code of Civil Procedure. He subsequently withdrew the applications.

11. On 4 March 1998 the District Court modified the access arrangements to allow the applicant to take his son for two weeks' holiday between 1 and 15 July.

12. Between 1 June 1998 and 28 January 1999 the Zawiercie police intervened on nine occasions in order to facilitate the applicant's contact with D. It appears that only on one of these occasions was the applicant unable to see D., as the child stated that he had not wished to see his father.

13. On 15 April 1999, on the applicant's motion, the Zawiercie District Court ordered A.N. to allow the applicant's contact with the child on pain of a 100 PLN fine.

14. Between 18 April 1999 and 8 June 1999 the police intervened on eight occasions in order to enforce the applicant's contacts with his son.

15. On 9 December 1999 the applicant and his ex-wife concluded a court settlement concerning the applicant's visiting right. According to its terms the contacts were to be enforced under supervision of a court appointed guardian in order to protect D.'s well-being.

16. However, the mother failed to comply with the access arrangements. On 5 January 2000 the applicant asked the Zawiercie District Court to impose a fine on A.N. for failure to comply with the settlement. On 9 March 2000 the District Court ordered A.N. to make the child available for a visit (by 1 May 2000), on pain of having to pay a fine.

17. On 28 April 2000 the applicant lodged yet another request for a fine to be imposed on A.N. On 19 December 2000 the District Court dismissed that request. The court obtained reports from two experts including a psychologist and heard evidence from several witnesses. It considered that A.N. had not turned the child against his father. It noted that the child had not wished to attend the meetings with his father. Moreover, because of the

forced contacts, in particular the two-week holiday in 1998, D. started suffering from anxiety and fear. The court also made reference to the fact that the applicant had proposed not to have any contacts with the child for 5 years if A.N did not claim maintenance payments for that period. The applicant's further appeal was dismissed by the Katowice Regional Court on 28 February 2001.

18. Meanwhile, on 21 February 2000 the applicant filed a motion for amendment of the divorce decree in the part relating to parental rights. On 18 October 2000 the Zawiercie District Court dismissed his application.

19. The applicant appealed, and on 28 December 2000 the Katowice Regional Court gave a decision granting custody to the applicant and ordering that D.'s permanent residence be with his father. The mother was allowed to participate in decisions concerning the child's education and choice of profession.

20. On 29 December 2000 A.N. filed an application with the Zawiercie District Court to be granted sole custody of D.

21. On 23 August 2001 the District Court returned the applicant's request to impose a fine on A.N. since he had failed to pay the required court fee. His subsequent interlocutory appeal was dismissed on 15 November 2001.

22. On 12 October 2001 the Zawiercie District Court modified the decision of 28 December 2000. The court held that A.N. should be granted full custody over D. and that D.'s place of residence should be with his mother. The applicant was allowed to decide jointly about the child's education and choice of profession.

23. A further appeal lodged by the applicant was dismissed by the Czeszochowa Regional Court on 19 December 2001. The court held that the applicant had not had a good relationship with his child and that the boy was afraid of him. The court stressed that the applicant could not have successfully claimed custody over D. since his son fled from him whenever he had seen him.

24. Meanwhile, the applicant asked the court to hand D. over to him. On 27 June 2001 the District Court gave an interim decision and held that while the custody proceedings were pending the child should stay with his mother. On 31 January 2002 the District Court refused to hand D. over to the applicant.

25. On 15 March 2002 the Zawiercie District Court dismissed the applicant's motion to impose a fine on A.N. for obstructing his access to the child.

26. On 6 October 2005 the applicant again requested that D. be restored to him. On 14 October 2005 the Zawiercie District Court refused his request. The applicant did not appeal against that decision.

27. On 16 December 2005 the applicant filed an application to be granted full parental rights. His application was dismissed by the Zawiercie

District Court on 28 July 2006. The court held that D. had been living with his mother, with whom he had very close relations, and it was in the child's best interest to leave him with her. The court referred to the child's (then 12 years old) own statements that his mother had not obstructed his contact with the applicant. It was D. himself who had avoided contact with his father. The court further noted that between 2001 and 2005 (when A.N filed a claim for increase of maintenance payments) the applicant had not attempted to contact his son and to exercise his visiting rights. Their contact was limited to occasional meetings on the street, since they lived nearby. The applicant's appeal against this decision was dismissed on 27 September 2006 by the Czeszochowa Regional Court.

28. On 24 March 2006 the applicant asked the court to impose a fine on the mother for obstructing his contacts with D. On 22 June 2006 the District Court dismissed his request. The applicant did not appeal against that decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. The relevant domestic law concerning the enforcement of a parent's visiting rights is set out in the Court's judgment in the case of *P.P. v. Poland* no. 8677/03, §§ 69-74, 8 January 2008.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

30. The applicant complained that the Polish authorities had failed to take effective steps to enforce his right of contact with his son, D. 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.”

31. The Government contested that argument.

A. Admissibility

32. The Government submitted a preliminary objection that the applicant had failed to exhaust the required domestic remedies. They stressed that the applicant had failed to appeal against the decisions on the merits of his claims concerning parental rights. He had also failed to appeal against the divorce decree and the decisions on the imposition of fines on the mother. In addition, after 2005 he had failed to file further applications in order to gain full parental rights over D. Lastly, they stressed that the applicant had failed to lodge a constitutional complaint challenging the provisions of the family and custody code.

33. The applicant replied that he had made use of all available remedies in respect of his complaints.

34. The Court notes, that in the present case the applicant did not object to the contact arrangements as specified in the decisions of 3 September 1996, 9 December 1999 and the divorce decree. He only maintained that the Polish authorities had failed to take effective steps to enforce his right of contact with his son.

35. In this connection the Court observes that it is true that the applicant did not appeal against the decisions referred to by the Government. He did, however, appeal against other decisions given in his case (see paragraphs 15, 18 and 19 above). He further initiated enforcement proceedings and asked the domestic courts to fine A.N. for failure to comply with the access arrangements (see paragraphs 10, 16, 21 and 25 above).

36. In so far as the Government alleged that the applicant should have lodged a constitutional complaint, the Court observes that the applicant did not object to the relevant provisions of the family and custody code, he merely stressed that the authorities had not enforced his right of contact with his son.

37. Against that background, the Court concludes that the applicant did everything that could reasonably be expected of him to exhaust the national channels of redress. The Court accordingly dismisses the Government's objections.

38. The Court notes that the application 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

39. The applicant claimed that there had been a continuing violation of his right to respect for his family life. He had repeatedly instituted

proceedings aimed at providing him with the opportunity to have regular contacts with his son. He further claimed that the child's mother had a negative influence on D. As a result, emotional ties between them had loosened and to all intents and purposes he had been excluded from the process of bringing up his child. He concluded that this amounted to a violation of Article 8.

2. The Government

40. The Government stressed that the applicant was himself responsible for not forging stronger emotional bonds with his son and for weakening their relations. He had insisted on enforcing his visiting rights even when the child had been sick. At present D., now a teenager did not seek contact with the applicant, despite the fact that they both lived in the same street, in the same town.

41. The Government pointed to the domestic courts' findings, according to which the applicant had a negative influence on his son.

42. They further stressed that the applicant had enforced his visiting rights in the presence of the police and of court-appointed guardians. The Government concluded that the authorities had done everything they could to protect the applicant's rights to respect for his family life.

3. The Court's assessment

43. 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.

44. 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).

45. 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).

46. 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 (see, *mutatis mutandis*, *Hokkanen*, 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 (see, *mutatis mutandis*, *Hokkanen*, cited above, § 58).

47. 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 (see *D.v. Poland* (dec). no. 82115/02, 14 March 2006).

48. In the light of the above principles, what is decisive in this case is whether the Polish authorities took all the necessary steps to facilitate the enforcement of the contact arrangements as specified on 3 September 1996, 4 March 1998 and 9 December 1999. According to the access orders the applicant was first authorised to meet D. every Tuesday and every first Saturday and third Sunday of the month for two and a half hours. Subsequently he was authorised to take D. for two weeks' holiday.

49. The Court considers that the domestic authorities had an obligation to ensure enforcement of contact arrangements, since it was they who exercised public authority and had the means at their disposal to overcome obstacles to execution. In this respect the Court notes that between 1996 and 1997 the Zawiercie police intervened on 12 occasions facilitating the applicant's access to the child (see paragraph 7 above). In 1998 the child spent a two-week holiday with the applicant (see paragraph 11 above). Subsequent visits in 1998 and 1999 were also facilitated by the police intervention. It appears, that on all but one occasion, the applicant managed to see his son (see paragraph 12 above). Lastly, the applicant's enforcement request eventually led to a court order of 9 March 2000 (see paragraph 13 above).

50. The difficulties in arranging contacts in the present case were admittedly in large measure due to the animosity between the applicant and his former wife, and subsequently to the child's attitude.

51. The Court further observes that the conflict between the applicant and A.N. made it particularly difficult for the domestic authorities to act in order to enforce the applicant's visiting rights. Already in 2000, the experts noted that D. was suffering from anxiety and fear as a result of forced contacts with his father (see, paragraph 19 above). As time went by, D. matured and was able to take his own decisions in respect of his contacts with his father. The Court notes that the domestic authorities were also aware of the fact that the nature of the applicant's contact with D. became

dependent not only on the attitude of the child's mother, but also on the boy's own wishes (see paragraphs 12, 17 and 23 above). In addition, the Court observes that between 2001 and 2005 the applicant had not sought any contact with D. which was noted by the domestic court (see paragraph 27 above). The Court reiterates here that it is not seeking to substitute itself for the domestic authorities in the exercise of their responsibilities as regards parental authority, but rather to review under the Convention the decisions taken by those authorities in the exercise of their margin of appreciation (see *Kaleta v. Poland*, no. 11375/02, § 58, 16 December 2008).

52. The foregoing considerations are sufficient to enable the Court to conclude that there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 8 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President