AS TO THE ADMISSIBILITY OF

Application No. 25718/94
by Swi*toslaw ADAMCZAK
against Poland

The European Commission of Human Rights (Second Chamber) sitting in private on 27 November 1996, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 20 June 1994 by Swi*toslaw ADAMCZAK against Poland and registered on 18 November 1994 under file No. 25718/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 20 November 1995 and the observations in reply submitted by the applicant on 23 January 1996;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows:

The applicant, a Polish citizen born in 1964, is a farmer residing in Mirostowice.

On 19 December 1990 the police in Zary refused to institute criminal proceedings against the applicant and his parents for ill-treatment of his wife, finding that no criminal offence had been committed.

On 17 April 1991 the applicant's wife lodged a divorce action with the Zielona Góra Regional Court (S*d Wojewódzki). Subsequently, she moved with their son K. to her parent's house in Bagienice.

On 19 March 1992 the applicant requested the Court to decide on his access to K., who was in his mother's care.

On 29 July 1992 the Zielona Góra Regional Court ruled that during the divorce proceedings their three year old child K. should be in his mother's care, with the applicant having access to him at his wife's residence on each first and third Saturday and Sunday from 9 a.m. to 5 p.m.; the applicant's wife was ordered to allow the access.

On 31 July 1992 the applicant requested to be served a copy of the decision of 29 July with its executory character being confirmed.

On 8 August 1992 the Court confirmed that the order was liable to execution and on 12 August the enforcement order was served on the applicant.

At the hearing on 25 August 1992 the President of the Court asked the applicant whether he had tried to see the child. The applicant replied that he had a right not to reply and that he wished to avail himself thereof.

On 17 September 1992 the Zielona Góra Regional Court suspended the divorce proceedings in view of the fact that the applicant had in the meantime lodged a motion to have his wife legally incapacitated.

On 1 May 1993 the applicant came to Bagienice with his brother to visit his son. He showed the court order of 29 July 1992 to his wife. However, she did not allow the applicant to see K. Thereupon an argument developed between the applicant and his brother on the one hand and his wife, her brother and father on the other. The father screamed at the applicant, tried to hit him with his stick and uttered threats. The applicant's wife called the police. Three policemen arrived and after negotiations the applicant eventually visited the child from 13.30 to 14.00.

On 5 June 1993 the applicant requested the institution of criminal proceedings against his father-in-law for uttering threats and hindering the execution of the court order on 1 May 1993.

On 24 June 1993 the Mlawa District Prosecutor terminated the investigations, finding that no offence had been committed by the applicant's father-in-law. The applicant appealed against this decision.

On 26 July 1993 the Warsaw Regional Prosecutor quashed this decision and ordered the case to be reconsidered, finding that insufficient evidence had been taken; that the assessment of the evidence given by the suspect appeared to be entirely erroneous; and, consequently, that the decision was ill-founded.

On 28 September 1993 the Mlawa District Prosecutor terminated the criminal proceedings against the applicant's father-in-law P.S. for compelling the applicant to certain behaviour ("zmuszanie do okreslonego zachowania"), and against P.S. and the applicant's brother-in-law for uttering threats against the applicant. The Prosecutor found that on 1 May 1993 the applicant's wife had initially refused her consent for the applicant's visit to their son as she was afraid that he might abduct the child. She had eventually agreed and the applicant had visited the boy in accordance with the conditions set out in the Zielona Góra Regional Court order ("zgodnie z istniej*cym postanowieniem S*du Wojewódzkiego w Zielonej Górze"). He further found that the applicant's father-in-law had not intended to beat the applicant, and that the witnesses (policemen) had not confirmed that he had uttered threats to the applicant.

On 4 October 1993 the applicant appealed against this decision.

He submitted that his father-in-law had in fact threatened him. He contended that during his visit on an unspecified date before 1 May 1993 he had been brandishing a knife, thus making it impossible for the applicant to see his child. During the altercation on 1 May 1993 the suspect had gone to the house to fetch his stick in order to threaten the applicant. The applicant stated that as a result of such conduct he was afraid to visit the child .

On 15 November 1993 the Warsaw Regional Prosecutor quashed the decision of 28 September 1993 and ordered the case to be reconsidered.

On 23 November 1993 the applicant requested the Mlawa District Prosecutor to take certain evidence in the resumed proceedings against P.S., requesting in particular that his brother and a policemen, who had been present at the relevant time, be heard.

On 30 December 1993 the Zielona Góra Regional Court resumed the divorce proceedings.

On 19 January 1994 the Mlawa District Prosecutor refused to institute criminal proceedings against the applicant's wife for giving false evidence in the proceedings against her father. He found that the applicant's wife had stated in these proceedings that on 1 May 1993 her father had not threatened the applicant; and that he had said that the applicant could only visit the child with the local mayor ("soltys") as a witness, but not together with his brother. The Prosecutor concluded that no offence had been committed.

The applicant unsuccessfully appealed to the Warsaw Regional Prosecutor. He submitted that his wife had written in a letter to the Zielona Góra Regional Court in divorce proceedings that she was categorically opposed to the applicant seeing the child and that she continued to object to the applicant doing so. On 14 March 1994 the Prosecutor upheld the contested decision.

On 30 March and 19 April 1994 the applicant complained to the Warsaw Appeal Prosecutor about the wrongful decisions of the Public Prosecutors. He submitted inter alia that his wife prevented him from seeing the child; and that she refused him taking the child with him for holidays. In a letter of 17 April 1994 he was informed that his complaints had been carefully investigated and that the decisions complained of were well-founded.

On 31 March 1994 the Mlawa District Court (S*d Rejonowy), in summary proceedings, found the applicant's father-in-law guilty of uttering threats and imposed a fine on him. Apparently the applicant filed an objection to the case being dealt with in summary proceedings and the case was accordingly transmitted to the ordinary proceedings. On 12 April 1994 the applicant requested to be admitted as a civil party to these proceedings. He claimed compensation for moral damages caused by the fact that he had not been able to see his son on 1 May 1993 due to the actions of the accused and reimbursement of travel expenses. He also wished to be admitted as a private prosecutor to the proceedings.

On 19 April 1994 the Mlawa District Court refused the former request as the civil claim for compensation was not related to the merits of the criminal proceedings, and apparently allowed the latter.

On 26 April 1994 the applicant filed an appeal against the refusal to be admitted as a civil party to the criminal proceedings, submitting that his claim for reimbursement was related to the criminal proceedings, since he wanted reimbursement of the travel costs (600 km) as he had not been able to see the child due to the actions of the accused and that he had suffered moral damage.

On 29 April 1994 the President of the Court rejected this appeal

as no appeal lay against the contested decision.

On an unspecified date criminal proceedings on suspicion of persistent failure to pay child support were instituted against the applicant. The case is pending before the Mlawa District Court. On 25 May 1994 this Court refused legal aid to the applicant. The applicant apparently appealed and on 29 August 1994 he was granted legal aid.

On 9 September 1994 the Mlawa District Court informed the applicant that a court hearing in his criminal case would be held on 21 September and that he would be detained on remand if he failed to appear.

On 21 September 1994 the hearing in the proceedings against the applicant's father-in-law was not held as planned.

On 25 April 1995 the Zielona Góra Regional Court pronounced a divorce. The custody of K. was granted to the applicant's wife, with the applicant having to participate in decisions concerning K.'s education and schooling. The applicant filed an appeal against this judgment.

On 29 December 1995 the Poznan Court of Appeal (S*d Apelacyjny) rejected the applicant's appeal against the divorce judgment as he had failed to pay the court fee within the statutory time-limit.

On 12 January 1996 the applicant requested the Mlawa District Court to amend the 1992 decision on his access to K. so that he could take the child for the Christmas holidays, instead of visiting him at his mother's residence.

On 17 July 1996 the Mlawa District Court refused to grant the applicant's request. The Court noted that the applicant had not been visiting K. for two years and had not sent any letters to him. Before the Court the child's mother refused her consent to any change of access rights as the child did not have a strong recollection of his father. She further stated that the applicant had ceased to have contacts with K. after an altercation in 1992. The witnesses confirmed that the applicant's contacts with K. were sporadic and that the link between them had weakened as shown by the fact that the child never mentioned his father.

The Court considered that both parties were in a difficult financial situation, both being unemployed and in bad health, with the mother having two children in custody and the child support being paid only for one child. Thus, the Court concluded that it would put too serious a burden on the parties if they were ordered to undergo psychological consultation and mediation as they did not have means to pay travel costs. The Court further considered that the applicant's request was motivated more by his own convenience than by the child's best interests which should prevail. It would best serve the child's interests if the applicant reestablished his contacts with him on the conditions set out in the 1992 access decision. As the mother had stated that she did not oppose these contacts, this would help in reestablishing the emotional relationship between the applicant and K.

Relevant domestic law

The Polish Family and Care Code provides that the court competent to entertain an action for divorce is also competent to issue interim orders concerning the manner in which the care of the parties' minor children should be carried out and about the access rights until the divorce judgment. Either party can file a request to have such an order pronounced or the court does so ex officio (Article 443).

The decision can be appealed against to a second instance court.

A final court decision as to parental rights/access rights can be changed at any time if the interest of the child so requires. Such a change is made upon a motion of either parent or ex officio by the court.

If a parent who has been obliged by a court decision to respect the other parent's access rights refuses to comply therewith, access decisions are liable to execution. The provisions of the Code of Civil Procedure (CPP) on execution of non-pecuniary obligations are applicable to execution 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).

Enforcement proceedings are instituted on a motion by the "creditor", i.e. the parent to whom access rights have been granted, but who fails to respect these rights. The motion shall be accompanied by the decision concerned, certified as being enfoceable. The motion is submitted to the bailiff who carries out the enforcement measure. The debtor is informed at the time of the first enforcement measure that the enforcement proceedings have been instituted. He is also informed of the manner in which the enforcement is to be carried out (Article 805 para. 1 of the CCP).

If a parent refuses to comply with the enforcement measures, a motion to have a fine imposed on him/her can be submitted to the court in whose district the enforcement is carried out. The court hears the parties and shall impose a fine if the decision is not complied with within the time-limit fixed for this purpose. Further fines can be imposed if the "creditor" is persistent in his refusal (Article 1051 of the CCP).

COMPLAINTS

The applicant complains that despite the Zielona Góra Regional Court order granting him access to his son, he does not enjoy such access. He submits that since his wife moved out in 1990 he has seen the child only twice. He complains that his wife in fact wishes that his parental rights be withdrawn and her actions are motivated by this wish. The applicant invokes in substance Article 8 of the Convention. He further relies on Article 5 of Protocol No. 7 to the Convention.

The applicant complains under Article 6 of the Convention that one hearing in criminal proceedings against his father-in-law was not held as planned on 21 September 1994. He complains about the initial refusal to have an officially assigned lawyer.

The applicant alleges that the courts in the criminal proceedings against him are biased against him and have been bribed by his father-in-law.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 June 1994 and registered on 18 November 1994.

On 17 May 1995 the Commission decided to communicate the applicant's complaint concerning difficulties in obtaining access to his son to the respondent Government for observations on the admissibility and merits to be submitted by 1 September 1995.

On 4 August 1995 an extension of the time-limit for the submission of the observations was granted to the respondent Government until 3 November 1995. The Government's written observations were submitted on 20 November 1995. The applicant replied on 19 December 1995.

THE LAW

1. The applicant complains that despite the Zielona Góra Regional Court order of 1992 granting him access to his son, he does not enjoy such access. He submits that since his wife moved out in 1990 he has seen the child only twice. He complains that his wife in fact wishes that his parental rights be withdrawn and her actions are motivated by this wish. The applicant invokes in substance Article 8 (Art. 8) of the Convention. He also relies on Article 5 of Protocol No. 7 (P7-5) to the Convention.

Article 8 (Art. 8) of the Convention reads:

"1. Everyone has the right to respect for his (...) family life (...).

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."

a) The Government first submit that the application, insofar as it relates to events prior to 1 May 1993, i.e. the date of recognition of the right of individual petition by Poland, is outside the competence ratione temporis of the Commission. The Government further submit that events prior to this date should be taken into account merely as a background to the issues before the Commission (Eur. Court HR, Hokkanen v. Finland judgment, Series A vol. 299, p. 19, para. 53).

The applicant submits that the decision on his access was pronounced before 1 May 1993, but his difficulties to obtain access to his son continue after this date.

The Commission recalls that Poland recognised the competence of the Commission to receive individual applications "from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation of the rights recognised in the Convention through any act, decision or event occurring after 30 April 1993". It follows that the Commission is not competent to examine complaints relating to violations of the Convention by acts, decisions or events that have occurred prior to this date. The Commission notes that certain relevant facts occurred after 30 April 1993.

It follows that the Commission is competent ratione temporis to examine the application insofar as it relates to events after 30 April 1993.

b) The Government further submit that the applicant failed to avail himself of domestic remedies available to him under Polish law. First, had the applicant not been satisfied with the access rights granted to him by the court order of 29 July 1992, it was open to him to lodge an appeal against this order, claiming that wider rights be granted to him. He failed to do so. It is true that if the applicant had done so within the statutory time-limit, the decision upon appeal would have been pronounced before 1 May 1993, i.e. before the date on which the Commission's competence ratione temporis to examine applications against Poland became effective. However, it was furthermore open to the applicant at any time during the divorce proceedings, even after expiry of the time-limit to appeal against the order of 29 July 1992, to request a new court order concerning his access to the son. He could also have requested that in the new order the court award him the assistance of a court guardian in the execution of his access rights. The applicant did not do this. Moreover, it was open to him to use

normal enforcement measures, applicable to enforcement of court orders concerning non-pecuniary obligations. The order of 29 July 1992 was executory and this was certified in the document served on the applicant on 12 August 1992. The applicant did not request the bailiff of the court competent for the mother's residence to assist him in the enforcement of the access order.

The Government conclude that the applicant failed to exhaust domestic remedies available to him under Polish law and that for this reason the application should be declared inadmissible.

The applicant submits that all his requests for assistance were disregarded by the authorities. He submits that he did not receive any effective help from any competent authorities, such as police, public prosecutor and court. He was afraid to avail himself of his access rights as a result of the hostility of his former wife and her family. The authorities were biased in favour of the mother. He requested the court's assistance in securing compliance with the 1992 order, but he never received any reply. He received this order without confirmation that it was liable to execution. On 1 May 1993 the police did not ensure that he visited K. in accordance with the conditions set out in the order. It would have served no purpose to appeal against the 1992 order as it gave him access to the child. The problem was that this order proved to be unenforceable. He finally submits that it fell to the court to institute enforcement proceedings.

The Commission recalls that the rule of exhaustion of domestic remedies dispenses the States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. However, international law, to which Article 26 (Art. 26) makes express reference, demands solely recourse to such remedies as are both available to the persons concerned and sufficient (cf. Eur. Court HR, De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 29, para. 50, and p. 33, para. 60).

In the present case the Commission observes that the divorce proceedings lasted from 17 April 1991 to 17 September 1992, the date on which the court suspended them in connection with the applicant's request to have his wife declared legally incapacitated. They were subsequently resumed on 30 December 1993 and judgment was pronounced in first instance on 25 April 1995. It was open to the applicant during these proceedings to lodge a request to have the access decision of 29 July 1992 changed and his access rights altered, had he wished to do so. Further, it was open to him to take enforcement measures, as provided for by the Code of Civil Procedure, i.e. to request the bailiff of the court competent for the mother's residence to assist him in obtaining compliance with the access order. Had this assistance turned out to be ineffective, it was open to the applicant to ask the court to impose successive fines on the mother.

The Commission, on the basis of the documents submitted by the Government, finds it established that the 1992 order was served on the applicant, with its executory character certified by the court. Therefore the formal conditions for the institution of enforcement proceedings, applicable to enforcement of non-pecuniary obligations, were met and it was open to the applicant to institute relevant proceedings. The Commission considers that these measures were effective and sufficient with regard to his access rights. The applicant has not shown that he availed himself of these remedies.

It follows that this part of the application must be rejected on the ground that the applicant has not exhausted domestic remedies, pursuant to Article 27 para. 3 (Art. 27-3) of the Convention.

2. The applicant complains under Article 6 (Art. 6) of the Convention that one hearing in criminal proceedings against his father-

in-law was not held as planned on 21 September 1994.

The Commission observes that the Convention does not guarantee a right to have a hearing held on any given date in criminal proceedings against a third party. It follows that the Commission has no competence ratione materiae to examine this part of the application which must be rejected in accordance with Article 27 para. 2 (Art. 27-2) as being incompatible with the provisions of the Convention.

3. The applicant further complains under Article 6 (Art. 6) of the Convention about the initial refusal to have an officially assigned lawyer in the criminal proceedings against him.

The Commission observes that on 25 May 1994 the Mlawa District Court dismissed the applicant's request for the assistance of an officially assigned lawyer. However, the Commission further notes that later the Court granted the applicant the assistance of an officially assigned lawyer. The applicant cannot, therefore, be regarded as a victim since his request was eventually granted.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant finally alleges that the courts in the criminal proceedings are biased against him and have been bribed by his father-in-law.

The Commission observes that the applicant has not shown that a final judgment in these proceedings has been pronounced. Therefore the applicant's complaints are premature. It follows that this part of the application should be declared inadmissible for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER	G.H. THUNE
Secretary	President
to the Second Chamber	of the Second Chamber