AS TO THE ADMISSIBILITY OF

Application No. 22819/93
by Metody BOJLEKOV
against Poland

The European Commission of Human Rights (Second Chamber) sitting in private on 9 April 1997, 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 31 May 1993 by Metody BOJLEKOV against Poland and registered on 25 October 1993 under file No. 22819/93;

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 5 January 1996 and the observations in reply submitted by the applicant on 22 March 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Bulgarian citizen born in 1936, is a businessman residing in Burgas in Bulgaria.

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

Particular circumstances of the case

In January 1993 he came to Poland to sell a load of fruit to a Polish buyer in accordance with a contract which they had previously concluded. He received the payment of $ 3700 in cash and a statement that this sum had been paid upon receipt of the merchandise. Subsequently the applicant inquired in a bank whether he could transfer the money to Bulgaria by a bank transfer. He was informed that such transfer would take approximately a month. On 26 January 1993 the applicant drew a sum of $ 3320 in cash from his account in another

bank, whereupon he received a bank statement, equivalent to an authorisation to export, that this sum had been taken from his account.

The applicant was leaving Poland at Warsaw airport on 1 February 1993, taking both sums with him. After he had crossed a "nothing to declare" line, the customs officer asked him whether he carried any foreign currency. It is undisputed between the parties that thereupon the applicant produced US $ 3320 and the relevant bank authorisation. The applicant submits that he also produced the $ 3700 accompanied by the contract and the receipt for the delivered merchandise. However, the Government assert that this sum and the accompanying documents were retrieved only after a body search.

The applicant explained that he had believed that those documents were sufficient to authorise a legal export of the money. The customs officer informed him that the export of US $ 3700 was irregular as the applicant did not have a necessary bank authorisation required by applicable foreign currency regulations. A sum of US $ 4300 was seised, including the actual exported amount and US $ 600 as a guarantee covering a possible fine. The applicant signed a statement to this effect.

On 26 April 1993 the Warsaw Ok*cie Customs Office, without hearing the applicant, decided on the basis of the case-file that the applicant was guilty of a breach of the Fiscal Criminal Offences Act in that he had attempted to export foreign currency without a bank authorisation required by law, and sentenced him to a fine of PZL 10.000.000 (approximately US $ 600) and the confiscation of the sum of US $ 3700. The Customs Office considered that the applicant could have known that the authorisation was necessary, as he had possessed another authorisation relating to the other sum. Thus, he had to be considered as deliberately attempting to infringe the foreign currency export prohibition. The decision notified the applicant of the possibilities of filing an appeal, namely by lodging an appeal to the Main Customs Office or by demanding that the case be considered by a court.

The applicant's wife, a Polish citizen residing in Poland, appealed against this decision to the Main Customs Office. On 31 May 1993 the Warsaw Ok*cie Customs Office refused to transmit this appeal to the Main Customs Office and rejected it as having been filed by a person not being a party to the proceedings. Subsequently the applicant himself appealed to the Main Customs Office against this decision, and against the decision on the merits of 26 April 1993.

On 24 June 1993 the Main Customs Office confirmed the decision of 31 May 1993 as the appeal concerned had been made by a third party to the proceedings. The Office also upheld the original decision as the applicant's argument that he had not acted deliberately was not credible. An appeal against this decision was not possible.

Relevant domestic law

a. The relevant substantive provision of the Criminal Fiscal Offences Act reads as follows:

<Translation>:

Article 48:

"1. If a person takes foreign currency abroad without a required authorisation or counter to its terms, he is liable to a fine of up to 500 000 000 zlotys. (...)"

b. The provisions concerning appeal procedure provide:

<Translation>:

Article 208:

"1. A penal decision can be appealed.

2. In cases concerning fiscal offences, a party to the proceedings is entitled either to file an appeal against a penal decision [to a higher administrative authority] or to demand that the case be dealt with by a court. An option to use one remedy bars the use of the other one.(...)"

Article 269:

"Parties to the court proceedings can file an appeal against court judgments of the first instance in accordance with general rules [to a higher court]."

COMPLAINTS

The applicant complains under Article 6 of the Convention that the proceedings before the administrative authorities did not comply with the requirements of a fair and public hearing. He maintains that he could not file an appeal to the court as he could not afford to pay a lawyer. He complains that he was obliged to sign an acknowledgment of the seizure of the money in Polish which he did not understand. He submits that due to his limited knowledge of the Polish language he could not understand the charges against him. The applicant further complains about the outcome of the proceedings.

The applicant further complains under Article 3 of the Convention that he was humiliated by a customs official who treated him as a criminal in spite of the fact that the origin of the money was perfectly legal. He complains that the confiscation and fine ruined his business prospects and his livelihood, and were disproportionate to his offence.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 31 May 1993 and registered on 25 October 1993.

On 6 April 1995 the Commission decided to communicate the application to the respondent Government pursuant to Rule 48 para. 2(b) of its Rules of Procedure.

The time-limit for the Government's written observations was 23 June 1995. At the end of June 1995 the Government requested an extension of this time-limit, which was refused in view of the fact that it had been requested out of time. The Government submitted written observations on 5 January 1996. The applicant replied on 22 March 1996, after an extension of the time-limit.

THE LAW

1. The applicant complains under Article 3 (Art. 3) of the Convention that he was humiliated by a customs official who treated him as a criminal in spite of the fact that the origin of the money was perfectly legal. He complains that the confiscation and fine ruined his business prospects and his livelihood, and were disproportionate to his offence.

The respondent Government make a preliminary objection that the application as a whole is out of the Commission's competence ratione temporis. Thus, although the Convention has entered into force in respect of Poland on 19 January 1993, in its declaration under Article 25 (Art. 25) of the Convention Poland has recognised the Commission's competence only in respect of acts, decisions or events which have occurred after 30 April 1993. In the applicant's case the decision of

the Warsaw Ok*cie Customs Office imposing fine and confiscation was of 26 April 1993.

The applicant has not commented on this point.

The Commission notes that the applicant's complaint under Article 3 (Art. 3) of the Convention concerns alleged ill-treatment which occurred on 1 February 1993. However, Poland has accepted the Commission's competence under Article 25 (Art. 25) of the Convention to deal with individual complaints only in respect of alleged violations of the Convention by virtue of acts, decisions or events which have occurred after 30 April 1993. Therefore, the Commission is not competent ratione temporis to examine the complaint under Article 3 (Art. 3) (cf. No. 24086/94, Dec. 2.12.96, unpublished).

It follows that this part of the application has to be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 6 (Art. 6) of the Convention that the proceedings before the administrative authorities did not comply with the requirements of a fair and public hearing. He maintains that he could not file an appeal to the court as he could not afford to pay a lawyer. Also, he was obliged to sign an acknowledgment of the seizure of the money in Polish which he did not understand. His knowledge of Polish being very limited, he could not understand the charges against him. The applicant further complains about the outcome of the proceedings.

Article 6 (Art. 6) of the Convention, insofar as relevant, reads:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> ...
>
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given if free when the interests of justice so require;
>
> ...
>
> e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> ..."

The Government submit that this complaint is also out of the Commission's competence ratione temporis.

They further contend that the applicant had the opportunity to have his case heard by a court in compliance with the guarantees of Article 6 (Art. 6) of the Convention but that he, voluntarily and in full awareness, preferred the alternative administrative procedure and thus failed to make use of his right.

The Government also maintain that in compliance with Article 6

paras. 3(a) and 3(e) (Art. 6-3-a, 6-3-e) the customs officers at the airport informed the applicant promptly and fully about the accusation against him. This was done without an interpreter because the officers noted the applicant's sufficient command of Polish. Thus, he is married to a Polish citizen.

The applicant replies that his knowledge of Polish is very limited. Thus, he does not live in Poland and does not use the Polish language in his family. He further states that on 1 February 1993, due to his poor command of Polish, he was under the wrong impression that he was only required to sign a document and that he would receive back his money if he secured later a bank export authorisation. However, it turned out that it was not possible to obtain an authorisation for a past period of time. Moreover, it is unacceptable that he was not informed of his rights under the Convention to a free interpreter and a lawyer.

The applicant further states that he chose the administrative proceedings because he did not have money for a lawyer. He did not know at the time that under the Convention he was entitled to free legal aid.

The Commission recalls its case-law according to which "when the Commission's competence (ratione temporis) begins in the course of proceedings before a second instance, it may examine such proceedings, but not those at first instance" (No. 24571-24572/94, Dec. 28.6.95, D.R. 82-A, pp. 85, 94).

Insofar as the applicant raises complaints under Article 6 para. 3 (Art. 6-3) of the Convention in respect of the acts of the customs officers at the Warsaw airport on 1 February 1993, the Commission finds that, assuming the existence of a "criminal charge" and, accordingly, the applicability of Article 6 para. 3 (Art. 6-3) of the Convention, this initial part of the proceedings was concluded by the decision of the Warsaw Ok*cie Customs Office of 26 April 1993 and, therefore, falls outside the Commission's competence ratione temporis.

As regards the applicant's remaining complaints the Commission recalls that under Article 19 (Art. 19) of the Convention its only task is to ensure the observance of the obligations undertaken by the Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention. The Commission refers on this point to its established case-law (see e.g. No. 21283/93, Dec. 5.4.94, D.R. 77-A, pp. 81, 88).

The Commission further recalls that conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention, provided that the person concerned is enabled to take any decision thus made against him before a tribunal that offers the guarantees of Article 6 (Art. 6) (Eur. Court HR, Öztürk v. Germany judgment of 27 May 1983, Series A no. 73, p. 21-22, para. 57).

In the present case the proceedings were first conducted before an administrative authority, i.e. the Warsaw Ok*cie Customs Office, which on 26 April 1993 decided the case and imposed a penalty on the basis of the file, without a public hearing. However, this decision informed the applicant that he could challenge it either by lodging an appeal to the Main Customs Office or by demanding that the case be considered by a court. The applicant chose to file his appeal to the Main Customs Office. He thereby waived his right to have his case heard by a court with full jurisdiction.

The Commission recalls that such a waiver does not in principle offend against the Convention; however, absence of constraint is at all events one of the conditions to be satisfied (Eur. Court HR, Deweer v. Belgium judgment of 27 February 1980, Series A no. 35, p. 25, para. 61).

It is true that the applicant maintains that he filed an appeal to the Main Customs Office as he could not afford to pay a lawyer to represent him in judicial proceedings. However, it was neither mandatory for him to be represented by a lawyer, nor can it be assumed that, had he instituted such proceedings and requested legal aid, it would have been refused. On the whole there is no indication that the applicant waived his right to have his case heard by a court under constraint.

It follows that the applicant's complaints under Article 6 (Art. 6) must be rejected as being partly incompatible ratione temporis with the provisions of the Convention and partly manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber