AS TO THE ADMISSIBILITY OF

Applications Nos. 29692/96
and 34612/97
by R.D.
against Poland

The European Commission of Human Rights (Second Chamber) sitting in private on 22 October 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
A. ARABADJIEV

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 applications introduced on 31 August 1995 and 11 December 1996 by R.D. against Poland and registered on 4 January 1996 and 28 January 1997 under file Nos. 29692/95 and 34612/97;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Polish citizen, born in 1959, is a civil servant residing in Walbrzych, Poland. The facts of the case, as submitted by the applicant, may be summarised as follows:

Particular circumstances of the case

a. Criminal proceedings instituted against the applicant

On 16 September 1994 the Walbrzych District Prosecutor (Prokurator Rejonowy) charged the applicant with receiving a bribe and detained him on remand in view of the reasonable suspicion that he had committed the offence in question. On the same day the prosecutor confronted the applicant with his co-suspect who had offered him a bribe, and ordered a search of the applicant's home. The applicant took part in the search and did not submit any complaints concerning its conduct. On 28 September 1994, upon the applicant's appeal, the Walbrzych Regional Court (S*d Wojewódzki) altered the preventive measure imposed on him and released him under police supervision.

In a letter of 1 February 1995 the applicant requested the investigating prosecutor to postpone the lodging of a bill of indictment since, as a result of his illness, he had not been able to read all the materials contained in the case-file. On 6 February 1995 the prosecutor rejected his request, finding that the applicant had had sufficient access to the case-file for two days and that, in view of the fact that his co-suspects were still in detention, any further delay in submitting the bill of indictment was impossible.

On 10 February 1995 the prosecutor lodged the bill of indictment with the Walbrzych Regional Court. It comprised twelve different charges, including an attempt to trafficking in women, against seven co-accused.

On 24 February 1995 the applicant submitted a petition to the Chief Justice of the Walbrzych Regional Court. He requested the Chief Justice to reject the bill of indictment as, in his view, he had been unlawfully charged with an offence which he had never committed and the accusation against him had not been based on any sound evidence. In a letter of 7 March 1995 the Chief Justice informed the applicant that under Polish law there was no possibility of rejecting a bill of indictment and that the applicant could put forward all his submissions concerning the evidence against him during his trial.

Subsequently, on an unspecified date, the Walbrzych Regional Court officially appointed a defence counsel for the applicant.

On 17 March 1995 the applicant unsuccessfully requested the Walbrzych Regional Court to grant him permission to impart information about his trial to the public through the press and television.

The trial court held hearings on 4, 5, 6, 16, 17 and 23 May, on 4 September and 9 November 1995, and on 15 January, 11 March and 15 April 1996. During this time the court heard evidence from seven co-defendants and eleven witnesses, and considered documentary evidence. On 15 April 1996 the Walbrzych Regional Court pronounced a judgment, convicted the applicant of receiving a bribe and sentenced him to one year and six months' imprisonment, suspended for two years.

On 14 June 1996 the applicant submitted a forty-eight-page memorandum to the Wroclaw Court of Appeal (S*d Apelacyjny). This contained the applicant's submissions concerning the establishment of the facts of his case, the assessment of the evidence presented during his trial and his opinion about the way in which the relevant criminal law had been applied. On 24 June 1996 the applicant's lawyer submitted his appeal to the Walbrzych Regional Court.

On 30 July 1996 the applicant complained to the Walbrzych Regional Court that the case-file had not been transferred to the Wroclaw Court of Appeal and that, therefore, he was not able to defend himself in the appeal proceedings.

On 27 September 1996 the applicant filed a supplementary memorandum and submitted documents in support of his arguments.

Subsequently, on an unspecified date, the Wroclaw Court of Appeal officially appointed a new lawyer to assist the applicant in the appellate proceedings.

On 10 October 1996 the Wroclaw Court of Appeal held a hearing. The applicant and his officially-appointed lawyer appeared before the court. The applicant requested the court to read all the evidence given by him during the trial at first instance. The court rejected the request, finding that the appellate hearing was limited to the questions of fact and of law which had been put forward by the parties

in their appeal memoranda and oral submissions, and that reading of voluminous records of the evidence taken from the applicant was unnecessary. On the same day the court upheld the judgment of the court of first instance.

On 12 October 1996 the applicant lodged a notice of a cassation appeal with the Wroclaw Court of Appeal, requesting the court to serve him with the reasons for its judgment. He also requested that court to appoint a new lawyer for him in order to assist him in the preparation of his cassation appeal. He submitted that his monthly salary amounted to PLZ 565.90, whereas the costs of court fees and legal assistance in cassation proceedings would amount to a minimum of PLZ 1,100.00 and that, therefore, he could not bear such costs without a substantial reduction in his and his family's standard of living.

On 9 December 1996 the reasons for the judgment of the Wroclaw Court of Appeal were served on the applicant.

On 23 December 1996 the Wroclaw Court of Appeal dismissed the applicant's request of 10 October 1996, relating to the appointment of a lawyer for him in cassation proceedings, and held that the applicant had failed to prove that he could not afford such assistance.

b. Applicant's requests for criminal proceedings to be instituted

On 12 January 1995 the applicant requested the Walbrzych Regional Prosecutor (Prokurator Wojewódzki) to institute criminal proceedings against M.B and A.Ch, prosecutors at Walbrzych District Prosecution Office (Prokuratura Wojewódzka), on charges of having abused their powers in the course of the criminal proceedings instituted against him on 16 September 1994. In particular, he submitted that his detention on remand and a search of his home had been "unlawfully ordered by the prosecutors", that at the investigative stage he had not had access to the case-file and that, finally, "the prosecutors had submitted an invalid and ill-founded bill of indictment".

Apparently, on an unspecified date, his request was transferred to the Wroclaw-Sródmiescie District Prosecutor.

On 25 May 1995 the applicant requested the Wroclaw-Sródmiescie District Prosecutor to institute criminal proceedings against M.B. and M.Ch.

On 18 August 1995 the Wroclaw-Sródmiescie District Prosecutor dismissed the applicant's request, finding that the prosecutors had acted lawfully and diligently throughout the criminal proceedings complained of, and that there was no indication that their conduct had amounted to a breach of law or abuse of powers.

On 4 October 1995, upon the applicant's appeal, the Wroclaw Regional Prosecutor (Prokurator Wojewódzki) upheld the decision of the prosecutor at first instance and the reasons therefor.

Relevant domestic law and practice

1. Appeal proceedings

Under Section 402 of the Code of Criminal Procedure, an appellate court shall not be allowed to take evidence pertaining to the essence of the case. In exceptional instances the appellate court may take evidence if it is necessary and will expedite the course of the proceedings.

Section 403 of the Code, concerning the course of an appellate hearing, insofar as relevant, provides:

"1. An appellate hearing shall begin with an oral report by a

judge rapporteur who shall present an account of the previous course and outcome of the proceedings, the contents of the judgment given at first instance and the parties' appeals (...).

2. The parties may submit pleadings, statements and motions either orally or in writing (...).

3. The president of the court shall allow the parties to present their arguments in the order established by him. An accused and his defence counsel shall have the right to present their arguments after the submissions of other parties."

2. Legal assistance

According to Section 69 of the Code of Criminal Procedure a court may appoint a lawyer for an accused who has proved that he cannot afford legal assistance, i.e. that the costs of such assistance would entail a substantial reduction in his and his family's standard of living.

Section 71 of the Code of Criminal Procedure lays down the principle known as "compulsory assistance of a lawyer", providing that:

"An accused must have a defence counsel [of his own choice or officially appointed] when a regional court is competent to deal with his case as a court of first instance. The counsel must take part in the main hearing; he must also take part in any appellate hearing if the president of the court or the court itself has found this necessary."

Under Section 75 para. 1 of the Code of Criminal Procedure the official appointment of a lawyer shall be valid for the entire proceedings. However, according to domestic practice since 1 January 1996 (the date on which a new cassation appeals procedure was introduced into the existing system of criminal justice), a lawyer must again be officially appointed in the cassation proceedings. There is no appeal against the court's refusal to grant legal assistance.

3. Cassation appeal

As from 1 January 1996, i.e. the date on which the relevant provisions of a new Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes entered into force, a party to criminal proceedings may lodge a cassation appeal with the Supreme Court against any final decision of an appellate court which has terminated the criminal proceedings.

Section 463a para. 1 of the Code of Criminal Procedure, insofar as relevant, provides:

"1. A cassation appeal may be lodged only on the grounds referred to in Section 388 [these include a number of procedural irregularities] or on the ground of another flagrant breach of law provided that the judicial decision in question was affected as a result of such breach. ..."

Section 464 of the Code of Criminal Procedure provides:

"1. Parties to criminal proceedings shall be entitled to lodge a cassation appeal.

2. A cassation appeal which has been lodged by a party other than a prosecutor shall be filed and signed by a lawyer.

3. Notice of a cassation appeal must be lodged with the court which has given the [relevant] decision within seven days from the date on which such decision was pronounced. The appeal

itself must be lodged within thirty days from the date on which the decision, together with the reasons therefor, was served on the party concerned."

Under Section 467 para. 2 of the Code of Criminal Procedure, the court which has given the decision in question is competent to decide whether the formal requirements of a cassation appeal have been complied with. If an accused's appeal has not been filed and signed by a lawyer, it must be rejected. If an appeal complies with the formal requirements, the case shall be transferred to the Supreme Court (S*d Najwyzszy). According to para. 4 of the above-mentioned provision, the Supreme Court shall grant leave to appeal or declare the cassation appeal inadmissible.

COMPLAINTS

1. The applicant raises various complaints under Articles 3 and 6 paras. 1 and 3 (c) of the Convention. In particular he submits that:

a) his conviction was unjustified since the courts had incorrectly assessed the evidence presented during his trial, made erroneous findings of fact and wrongly applied Polish law;

b) the proceedings before the Wroclaw Court of Appeal were conducted unfairly as the court deprived him of defence rights by appointing a new counsel for him and rejecting his request for it to read out records of the evidence taken from him at first instance.

c) the Wroclaw Court of Appeal refused to grant him legal assistance in the cassation proceedings whereas, according to Polish law, a cassation appeal must be filed by a lawyer;

2. Under Articles 2, 3 and 5, Article 6 paras. 2 and 3, and Articles 8 and 13 of the Convention the applicant complains that the Polish authorities arbitrarily rejected his requests that criminal proceedings be instituted against the investigating prosecutors.

3. He also complains under Article 10 para. 1 of the Convention that the Polish authorities deprived him of his right to impart information about his trial to the public.

THE LAW

1. The Commission finds it necessary to join the applications under Rule 35 of its Rules of Procedure.

2. The applicant complains under Articles 3 and 6 paras. 1 and 3 (c) (Art. 3, 6-1, 6-3-c) of the Convention that his conviction was unjustified since the courts had incorrectly assessed the evidence presented during his trial, made erroneous findings of facts and wrongly applied Polish law. He also submits that the proceedings before the Wroclaw Court of Appeal were conducted unfairly as the court deprived him of defence rights by appointing a new counsel for him and rejecting his request to read out records of the evidence taken from him at first instance.

The Commission has examined the applicant's above complaints under Article 6 paras. 1 and 3 (c) (Art. 3, 6-1, 6-3-c) of the Convention. These provisions, insofar as relevant, state:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... before ... [a] tribunal established by law. ...

3. Everyone charged with a criminal offence has the following

minimum rights: ...

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 it free when the interests of justice so require;"

The Commission notes that the applicant failed to file a cassation appeal as he was refused legal assistance to do so. An issue, therefore, arises as to whether the applicant has complied with the requirements under Article 26 (Art. 26) of the Convention as to the exhaustion of domestic remedies. However, the Commission need not resolve this question since this part of the application is in any event inadmissible for the following reasons:

As regards the applicant's complaints about the judicial decisions given in his case, the Commission recalls that, in accordance with 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. 7987/77, Dec. 13.12.79, D.R. 18 pp. 31, 45; No. 25062/94, Dec. 18.10.95, D.R. 83, p. 77).

The Commission also recalls that the admissibility and the assessment of evidence are primarily a matter for regulation by national law. As a rule, it is for the national courts to assess the evidence before them, whereas it is the Commission's task to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair (see Eur. Court HR, Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

In the present case the Commission finds no elements which would indicate that the courts went beyond their discretion as to the assessment of evidence presented in the course of the entire proceedings complained of. Nor does it consider that the Wroclaw Court of Appeal, by its decision appointing a new counsel for the applicant and the refusal to read all the records of the evidence taken from him at first instance, failed to respect his defence rights. Finally, assessing the proceedings as a whole, the Commission finds no indication that they were unfairly conducted in any other way.

It follows that this part of the application is inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. Under Articles 2, 3 and 5, Article 6 paras. 2 and 3, and Articles 8 and 13 (Art. 2, 3, 5, 6-2, 6-3, 8, 13) of the Convention the applicant complains that the Polish authorities arbitrarily rejected his requests that criminal proceedings be instituted against the investigating prosecutors.

However, the Commission recalls that neither Article 6 (Art. 6) nor any other provision of the Convention invoked by the applicant guarantees a right to have criminal proceedings instituted against third persons (No. 9777/82, Dec. 14.7.83, D.R. 34 p. 158).

It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant also complains under Article 10 para. 1 (Art. 10-1) of the Convention that the Polish authorities deprived him of his right to impart information about his trial to the public.

The Commission notes that the applicant, save for a copy of his request of 17 March 1995, has failed to adduce any further circumstances or documents relating to the substance of this complaint. The Commission has, therefore, examined it as it has been submitted. However, after considering the facts of the case as a whole, the Commission finds that the complaint does not disclose any appearance of a violation of the rights and freedoms set out in this provision of the Convention.

It follows that this part of the application in inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant finally complains under Article 6 paras. 1 and 3 (c) (Art. 6-1, 6-3-c) that the Wroclaw Court of Appeal refused to grant him legal assistance in the cassation proceedings, whereas under Polish law a cassation appeal must be filed by a lawyer.

The Commission considers that it cannot, on the basis of the file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Commission's Rules of Procedure, to give notice of this complaint to the respondent Government.

For these reasons, the Commission,

DECIDES TO JOIN APPLICATIONS Nos. 29692/96 and 34612/97;

DECIDES TO ADJOURN the examination of the applicant's complaint under Article 6 paras. 1 and 3(c) of the Convention about the refusal to grant him legal assistance in the cassation proceedings;

unanimously,
DECLARES INADMISSIBLE the remainder of the applications.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber