AS TO THE ADMISSIBILITY OF

Application No. 24715/94
by Jacek SZTAJER
against Poland

The European Commission of Human Rights (Second Chamber) sitting in private on 16 January 1996, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN

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 25 June 1993 by Jacek SZTAJER against Poland and registered on 27 July 1994 under file No. 24715/94;

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

The applicant, a Polish citizen born in 1955, is an economist residing in Warsaw.

I.

In 1988 the applicant filed an action for divorce with the Warsaw District Court (S*d Rejonowy).

In June 1989 the Warsaw District Prosecutor (Prokurator Rejonowy) refused to institute criminal proceedings against the applicant's father-in-law for giving alcohol to his son, considering that the applicant's allegations lacked any factual basis.

On 13 February 1991 the Warsaw District Court dissolved the applicant's marriage, awarded custody over his son J., born in 1983, to the applicant's wife and granted the applicant access to the child.

In December 1991 the Warsaw District Prosecutor refused to institute criminal proceedings against the applicant's mother-in-law

for ill-treatment of the child, by vilifying the father and lowering him in the child's opinion as the investigations had shown that no criminal offence had been committed.

On 6 February 1992 the Warsaw Regional Court (S*d Wojewódzki) dismissed the applicant's appeal against the divorce judgment in its part concerning custody and access and upheld the judgment.

In March 1992 the applicant requested that the decision concerning access to the child be amended. On 13 November 1992 the Warsaw Regional Court changed the access arrangements in accordance with the applicant's request. The applicant would, inter alia, have access to J. every second weekend.

On 7 January 1993 the applicant requested the Warsaw District Court to impose a fine on his former wife for consistently failing to comply with the court decision concerning the access arrangements.

On 26 January 1993 the applicant requested the court to amend the access order. He requested to be granted access on Saturdays from 10 a.m. to 3 p.m. instead of Thursdays from 1 p.m. to 6 p.m.

On 29 April 1993 the Minister of Justice refused leave for an extraordinary appeal against the divorce judgment of 1992.

On 5 May 1993 the Warsaw District Court refused to grant the applicant's request of 26 January 1993. The Court considered that both parents were entitled to spend time with the child. The child spent every second weekend with the father. There were no good reasons for the mother to be prevented from spending weekends with her son. The Court commented unfavourably on the pressure which the applicant exerted on the child to make him express hostility towards the mother.

On the same day the District Court dismissed the applicant's request to have a fine imposed on the mother for failure to comply with the access arrangements. The Court heard the applicant's son in the absence of the parents. The child had said that he had been seeing his father regularly, that he had enjoyed these contacts and did not want them to be changed. The only occasions on which he had not seen his father as planned were when the boy had fallen ill. The Court indicated that the applicant had abused his access rights as he had on several occasions failed to comply with the access arrangements. The Court concluded that there was no indication of bad faith on the part of the mother and therefore no grounds for the imposition of a fine.

On 14 May 1993 the Warsaw District Prosecutor refused to institute criminal proceedings against the applicant's former mother-in-law for ill-treatment of the child, by vilifying the applicant. The Prosecutor considered that the investigations had not shown that a criminal offence had been committed, nor that the boy had a negative attitude towards his father.

On 29 June 1993 the Warsaw District Prosecutor refused to institute criminal proceedings against the mother for the theft of gold jewellery. The Prosecutor found that the applicant had given the jewellery at issue to her during their marriage.

On 5 October 1993 the Warsaw Regional Court dismissed the applicant's appeal against the decision of 5 May 1993 regarding access to the son. The Court observed that from February 1992 to January 1993 the applicant had three times requested that the access arrangements be changed. The child had stated in the proceedings that he wished to spend weekends with his mother and that he preferred to spend time with the father on Thursdays. The lower court was justified in finding that the applicant's statements that the mother did not have time to take care of the child on Saturdays had not been credible. The Court concluded that the interests of the child did not necessitate the

change of the access arrangements.

II.

On 25 June 1992 the applicant's friend O. took his 10-year-old daughter A. from her grandparents who took care of her and brought her to the house of the applicant's mother in Warsaw. The child called her grandmother several times and informed her that she had been taken away by her father and that she had been given certain medicines which made her feel nauseous. The grandmother G. called the police, complaining that the child had been taken away by O. without her consent and that she was concerned about the child's well-being. The police squad of two women and three men arrived at the applicant's house and obviously wanted to take the girl away. The applicant and O. refused to let the police into the garden as they considered that they did not have any authorisation either to enter or to take the child. Thereupon they were brutally assaulted by the police, handcuffed, taken to the police station, questioned and subsequently released on the same day. The police took the child back to her grandparents. The incident caused substantial damage in the house and serious injuries to both the applicant and O.

On 26 June 1992 the applicant obtained two medical certificates from a physician. One of them stated that he had scratches on the face, numerous longish bruises on the chest and hands and bruises and scratches on both thighs. The second certificate, issued by the same physician, stated that the applicant had a jagged wound in his left ear, felt pain in his head, had bruises on the left side of his chest and numerous elongated bruises on the abdomen. On the same day the applicant was certified medically unfit for work for seven days.

On 9 November 1992 the Warsaw Regional Public Prosecutor, having investigated the case, refused to institute criminal proceedings against the police for exceeding the limits of their competence with regard to use of force as set out in the Police Act. It was established that O. had taken his daughter from her grandparents without their consent. The girl had phoned her grandmother G. several times. She had cried and said that she had been given sedatives by her father. G. had informed the police of the abduction. Two policewomen had been instructed to make inquiries as to the situation of the child. They had arrived at the house in a marked police car, accompanied by two uniformed policemen. They had talked to the applicant over the fence, trying to obtain information about the child. He had refused to give any information, alleging that they had come to take the child away, without any proper authorisation. Later O. had approached the fence. As he had been advancing, the child had appeared in the doorway of the house, calling to the police: "Please, take me away from here". She had been visibly upset, crying and trembling. O. had gone back to the house and pushed her inside. O. had also refused to give any information, saying that the child was properly cared for. From her behaviour the police had concluded that she was detained against her will. They had called the officer on duty and informed him of the situation. He had phoned the District Prosecutor who had authorised him to intervene by force if the applicant and O. persisted in their refusal to give information or cooperate, and to take the child to the hospital. Three further policemen had been sent to the scene of the incident. The policeman L. had requested the applicant and O. to open the gate and to come to the local police station. As they had continued refusing, L. and the other policeman S. had jumped over the fence at the back of the garden, approached O. and overpowered him. As he had resisted by kicking and hitting them, a truncheon had been used. Subsequently he had been handcuffed and taken to the police car. The policemen had searched the house. They had found the applicant on the roof, hiding behind a chimney. As he had been resisting arrest, he had twice been hit with a truncheon and handcuffed. Subsequently the applicant and O. had been taken to the police station, questioned

and released. The child had been taken to the hospital, examined and then returned to her grandmother.

The applicant and O. complained to the General Public Prosecutor (Prokurator Generalny), who quashed the decision and ordered investigations to be reopened. On 5 April 1993 the Warsaw Regional Public Prosecutor reopened the investigations.

On 25 August 1993 the Warsaw Regional Public Prosecutor, having investigated the case, refused to institute criminal proceedings against the police. The findings of the Prosecutor were identical to the findings made in the first set of investigations as set out in the decision of 9 November 1992.

The applicant and O. appealed against this decision, complaining that the Prosecutor had failed to hear testimony of H.B. and L.G. or to take into consideration the medical certificates concerning the applicant's injuries and the tape-recording of the incident.

On 19 October 1993 the Warsaw Appellate Public Prosecutor (Prokuratura Apelacyjna) quashed the decision and ordered the case to be investigated again.

On 30 November 1993 the Warsaw Regional Public Prosecutor, having reinvestigated the case, refused to institute criminal proceedings. The Prosecutor heard testimony from H.B. who had not seen the applicant and O. being beaten by the police. She had only seen them in the police car after their arrest. In his evidence L.G. stated that he had not seen the events at issue but had only discussed them with the policemen concerned on 26 June 1992. The events had been recorded on audiotape. It had clearly transpired from this recording that the applicant and O. were informed of the purpose of the police visit, which was to take information about A. and to talk to her. They had disregarded the arguments of the police, argued that the police only wanted to take the child away and refused to cooperate. The Prosecutor considered that the material in the case-file did not permit the conclusion that the police had exceeded their competence as set out in the Police Act. The conduct of the applicant and O., in particular their refusal to give any information about A. and to let her talk to the police, justified the suspicion that the child had been the victim of a criminal offence. Regard had to be had to the fact that O. had abducted the child without the consent of her grandmother. The condition of the child, the fact that she had been visibly distressed and had asked to be taken away indicated that she was being kept by her father against her will. As regards the use of force, the injuries as stated on the medical certificate could have originated from the legitimate use of force by the police. There was no evidence that the police had overstepped the limits relating to use of force as set out in the relevant laws. The Prosecutor concluded that no criminal offence had been committed.

COMPLAINTS

The applicant complains under Article 6 of the Convention that the divorce proceedings were unfair and that in these proceedings he was discriminated against by the courts, which amounted to a violation of Article 3 of the Convention. He complains under Article 13 of the Convention about refusal of leave for an extraordinary appeal. He also relies on Article 2 of Protocol No. 1 and Article 5 of Protocol No. 7.

As regards the proceedings concerning access to his son, the applicant contends that they were unfair as the principle of equality between the parties was not observed by the courts. He further submits that the decisions concerned amounted to breaches of Articles 3, 13 and 14 of the Convention as well as of Article 2 of Protocol No. 1 and Article 5 of Protocol No. 7.

The applicant submits that the refusals to institute criminal

proceedings against third parties breached Articles 6 para. 1, 13 and 14 of the Convention.

He further complains about the police intervention in June 1992 and the subsequent decisions of the Public Prosecutor. He relies in this respect on Articles 3, 5, 6, 7, 8, 13 and 14 of the Convention.

THE LAW

1. The applicant complains about the judicial decisions concerning his divorce and custody of and access to his son and about the police intervention in his house in June 1992.

Insofar as the applicant's complaints relate to a period prior to 30 April 1993, 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 by Poland of the rights recognised in the Convention through any act, decision or event occurring after 30 April 1993." The Commission is not competent to examine complaints relating to alleged violations of the Convention by acts, decisions or events that have occurred prior to this date. It follows that these complaints must be rejected as being incompatible with the provisions of the Convention within the meaning of its Article 27 para. 2 (Art. 27-2).

2. The applicant further complains under Articles 3, 13 and 14 (Art. 3, 13, 14) of the Convention as well as Article 2 of Protocol No. 1 (P1-2) and Article 5 of Protocol No. 7 (P7-5) of the judicial decisions concerning access to his son. He submits in particular that these decisions were unfair as the principle of equality between the parties was not observed by the courts.

The Commission has examined the applicant's complaints under Article 8 (Art. 8) of the Convention. The Commission recalls that in accordance with its established case-law the right to respect for family life within the meaning of Article 8 (Art. 8) of the Convention includes the right of a divorced parent who is deprived of custody following the break-up of the marriage to have access to or contact with his or her child (cf. Hendriks v. the Netherlands, Comm. Report 8.3.82, para. 94, D.R. 29 p. 14).

Even assuming that the decisions of the Polish authorities concerning access to his son constituted an interference with the applicant's right to respect for his family life, it falls to the Commission to examine whether this interference was justified under Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission first observes that these decisions were based on the provisions of the Family and Custody Code. The interference was thus in accordance with the law within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention.

The Commission accepts that the interference with the applicant's right was aimed at protecting the interests of the child and thus pursued a legitimate purpose recognised in Article 8 (Art. 8).

The question remains whether the decisions were "necessary" within the meaning of Article 8 para. 2 (Art. 8-2) of the Convention. According to the case-law of the Commission and Court, the notion of necessity implies that the interference shall correspond to a pressing social need and that it shall be proportionate to the aim pursued. Further, in determining whether an interference is necessary the Commission will take into account that a margin of appreciation is left to the Contracting States, which are in principle in a better position to make an initial assessment of the necessity of a given interference. It is not the Commission's task to take the place of the competent

national courts and make a fresh examination of all the facts and evidence in the case. The Commission's task is to examine whether the reasons adduced to justify the interference at issue are "relevant and sufficient" (Eur. Court H.R., Olsson judgment of 24 March 1988, Series A no. 130, p. 32, para. 68).

In the present case it appears that the parties could not agree on how to cooperate on the questions of access. This has been demonstrated, inter alia, in the applicant's repeated requests to have criminal proceedings instituted against the mother and her parents, on grounds which the Public Prosecutor found ill-founded.

The Commission further notes that the competent national courts carefully examined the question of access. They heard the son without his parents being present so as to ensure that no pressure could be exerted on him. The courts commented unfavourably on the applicant's inability to cooperate and to fulfil his obligations under the access arrangements. They also had regard to the interests of the child. It was established that the child was fond of his father and enjoyed his contacts with him, but the courts found no sufficient reasons to change the access arrangements as often as the applicant wished them to be changed. The courts had regard to the need to preserve the existing good relationship between the applicant and J. No indications of bad faith on the part of the mother as regards compliance with the access arrangements was found. This was shown in the decisions in which the court refused to impose a fine on the mother for failure to comply with the access arrangements, finding that no such failure had been established. The decision of 5 October 1993 confirmed previous decisions awarding the applicant access to his son every second weekend.

In these circumstances the Commission is satisfied that the interference complained of was required by the interests of the child and that the courts, when so deciding, did not exceed their discretionary power.

The Commission concludes therefore that the interference with the applicant's right to respect for his family life, being proportionate to the legitimate aim pursued, was justified under Article 8 para. 2 (Art. 8-2) as being necessary in a democratic society for the protection of health and the rights of others, namely the child concerned.

Insofar as the applicant complains that he was treated by the courts in a discriminatory manner on the ground of his sex, the Commission considers that no separate issue arises under Article 14 (Art. 14) of the Convention taken together with Article 8 of the Convention. Indeed there is no evidence that in taking their decisions on access the Polish courts attached any importance to the gender of the custodial and of the non-custodial parent.

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

3. The applicant further complains under Articles 6 para. 1, 13 and 14 (Art. 6-1, 13, 14) of the Convention of the manner in which the prosecution authorities dealt with his requests to have criminal proceedings against his former wife and her parents and against the police instituted. The Commission finds that these proceedings concerned neither the determination of the applicant's civil rights, nor of a criminal charge against him, and, therefore, fall outside the scope of Article 6 (Art. 6) of the Convention (No. 7116/75, Dec. 4.10.76, D.R. 7, p. 91). The Commission notes that in none of these proceedings did the applicant raise any civil claims.
Had the applicant wished to raise such claims, it would have been open to him under Polish law to take the matter to a civil court.

Thus, this complaint is incompatible ratione materiae with the provisions of the Convention and has to be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)