AS TO THE ADMISSIBILITY OF

Application No. 23420/94
by Jan TOMASZKIEWICZ
against Poland

The European Commission of Human Rights (Second Chamber) sitting in private on 17 May 1995, the following members being present:

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

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 29 November 1993 by Jan TOMASZKIEWICZ against Poland and registered on 7 February 1994 under file No. 23420/94;

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 1934, is a psychiatrist residing in Poznan.

On 23 August 1990 E.B., acting as a private prosecutor, requested institution of criminal proceedings for defamation against the applicant before the Warsaw District Court (S*d Rejonowy w Warszawie). She contended that the applicant, in two letters published in two periodicals, "Szpilki" and "Czas", in April 1990 and July 1990, had defamed her late husband O.B.

In a letter of 18 March 1991 the applicant complained to the President of the Warsaw District Court that he had become aware of the criminal proceedings against him pending before that Court through an informal source. He requested to be duly served with the bill of indictment.

On 14 May 1991 the President sent a copy thereof to the applicant and confirmed that the indictment had not previously been served on the applicant.

On 4 October 1991 the Warsaw Regional Court (S*d Wojewódzki w

Warszawie), in accordance with Article 26 of the Code of Criminal Procedure, transferred the case from the Warsaw District Court to the Koscian District Court as it considered that the persons who would have to be summoned to appear before the court, lived in the vicinity of the Koscian Court.

On 28 January 1993 the Koscian District Court convicted the applicant of defamation and sentenced him to six months' limitation of liberty in that the applicant had to pay 10 per cent of his salary to the Association of Assistance to Handicapped Persons in Koscian.

The Court observed that in January 1990 the Koscian Society had decided to attribute to the local psychiatric hospital O.B.'s name for the purpose of acknowledging his professional achievements as a director of the hospital from 1945 to 1957. On 4 April 1990 and 28 July 1990 two periodicals, "Szpilki" and "Czas", published the applicant's letters in which he opposed this idea. He contended, without mentioning O.B.'s name or initials, that during his directorship several patients had died in suspicious circumstances in the Koscian hospital. It had given rise to suspicions that there had been politically motivated murders, committed on the orders of the communist authorities, in particular as two of those patients had been former soldiers of the anticommunist Home Army during the Second World War. The patients had been selected in categories which received treatment of unequal quality. Those patients, whose diseases had been particularly serious, had been transferred to worse hospitals. O.B. had been subservient to the communist authorities.

The Court considered that it could not be disputed that the applicant's letters concerned O.B., who had died in 1973. The applicant denied that his purpose had been to lower O.B. in public esteem. He only wished to dissuade the local authorities from giving his name to the hospital as he considered him unworthy. However, it was obvious that the statements were of a disparaging character, notwithstanding the applicant's intentions. These statements did not find support in the evidence, in particular in the testimony of four witnesses H.F., J.Z., Z.J. and M.G., who had been O.B.'s collaborators. The Court also heard witnesses A.R. and I.U, who had not worked with O.B. The Court considered the account given by Z.J. of the content of the medical records of five patients, who allegedly had been killed or allowed to die in the Koscian hospital on the orders of the communist authorities and refuted the allegations. O.B. had owed his position to his outstanding professional skills, independence of character and ability to influence people. He was not a member of the communist party, although this was normally required from hospital directors. Thus the allegations of his subservience to the authorities were unfounded. The fact that the patients had been put into different groups was motivated by needs of treatment; in particular the purpose had been to avoid a negative influence which the conduct of severely ill patients could exert on the less severely afflicted ones.

The Court further observed that the applicant's right to freedom of expression under Article 10 of the Convention was not unlimited. Freedom of expression involved a right to express views, which find support in proven facts. Legitimate interests of third parties, such as good reputation, required that public criticism be fair and based on ascertainable facts and not on conjecture.

In his appeal against the judgment the applicant, relying on Articles 6 and 10 of the Convention, pointed out that the Court had disregarded all evidence favourable to him. He became aware of the proceedings only after nine months. He had never been served with any decision relating to the transfer of the case to the Koscian Court. He stressed that he had not mentioned O.B.'s name in the letters at issue. He had not alleged that O.B. had caused the deaths of five patients but had only put forward a suspicion that this might have been the case. The applicant complained that three articles in the local

press, which he had submitted to the Koscian Court, had been disregarded by the Court.

On 23 June 1993 the Poznan Regional Court changed the judgment in that it decided that the applicant had disseminated false information and had acted with intention to lower O.B. in public esteem, thus having committed aggravated defamation, according to Section 178 para. 2 of the Criminal Code. The Court, in addition to the sentence imposed by the Koscian Court, obliged the applicant to apologise to O.B.'s widow in the periodicals which had published the letters at issue and upheld the remainder of the contested judgment.

The Court observed that the lower court had ample evidence from various sources and had assessed it carefully, including the three press articles relied on by the applicant, which the Koscian District Court had included in the case-file. It was true that the applicant had not mentioned O.B.'s name or even his initials. However, it clearly appeared from the context that his letters related to him, as they had mentioned the director of the psychiatric hospital in Koscian. The applicant should have known that his allegations were untrue as the sources on which he relied, namely the articles in the local press, had not contained a sufficient basis therefor; in particular one of them had only praised O.B. and his modern methods of treatment. Another article had described the dramatic state of health in which several patients had been brought to the hospital in the 1950's, apparently having been tortured by the communist secret police. This article had not contained any suggestion that they had subsequently died as a result of any acts or negligence of the hospital staff. While it was true that O.B. had grouped the patients according to their diseases, this had not been based on any inappropriate reasons, but had been justified by the needs of treatment. The applicant had not adduced any evidence with regard to his allegations of O.B.'s subservience to the communist authorities other than the general assumptions about everyone in managing position during the stalinist years having to conform to the orders of the political authorities.

The Court considered that the sentence imposed was adequate having regard both to the danger of the offence and to the applicant's personal situation, in particular his bad health.

COMPLAINTS

The applicant complains under Article 10 of the Convention that the criminal conviction amounted to a violation of his right to freedom of expression. He submits that he had acted in the public interest.

He complains under Article 6 of the Convention that the proceedings were unfair. The courts failed to take into consideration the evidence submitted by the applicant. His defence rights were violated as for nine months he did not know the exact contents of the bill of indictment. The courts were not impartial, given that the Public Prosecutor did not participate in the proceedings and the courts had to carry out both the judicial function and that of a Public Prosecutor. The transfer of the case to the Koscian District Court negatively affected the impartiality of the court as this Court was biased against him.

THE LAW

1. Insofar as the applicant's complaints relate to a period prior to 1 May 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".

It follows that this part of the application is outside the competence ratione temporis of the Commission and therefore incompatible with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

2. The applicant complains under Article 10 (Art. 10) of the Convention that the criminal conviction breached his right to freedom of expression. He submits that he had acted in the public interest.

Article 10 (Art. 10) of the Convention reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Commission considers that the applicant's conviction for aggravated defamation constituted an interference with the exercise of his freedom of expression within the meaning of Article 10 para. 1 (Art. 10-1) of the Convention. Such interference is in breach of Article 10, unless it is justified under paragraph 2 of Article 10 (Art. 10-2), i.e. it must be "prescribed by law", have an aim or aims that is or are legitimate under Article 10 para. 2 (Art. 10-2) and be "necessary in a democratic society".

The Commission notes that the applicant's conviction was based on Section 178 para. 2 of the Criminal Code, and was, therefore, "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

Moreover, the interference complained of was aimed to protect "the reputation or rights of others",i.e. the right of O.B.'s widow to have her husband's reputation protected against unfounded attacks, which is a legitimate aim under Article 10 para. 2 (Art. 10-2) of the Convention.

It remains to be examined whether the interference was "necessary in a democratic society". The term "necessary" implies the existence of a "pressing social need". Nevertheless, the Contracting States enjoy a certain margin of appreciation in determining whether such a need exists, but this goes hand in hand with a European supervision, the extent of which depends upon the circumstances. The review under the Convention is confined to the question whether the measures taken on the national level are, in the light of the case as a whole, justifiable in principle and proportionate (cf. Eur. Court H.R., Sunday Times (No. 2) judgment of 26 November 1991, Series A no. 217, pp.28-29, para. 50).

The Commission observes that the applicant was convicted of defamation because he had published two letters, containing allegations that O.B. had not observed professional conduct in managing the Koscian psychiatric hospital in 1945-1957. The applicant's statements in these letters were considered to be of disparaging nature as they questioned

both O.B.'s professional skills and his moral character.

It is true that the subject of both publications related to a matter of general interest. However, having regard to the fact that the applicant's allegations were not found to be supported by relevant evidence as well as the sentence imposed on the applicant, the obligation to pay 10 per cent of his monthly salary to a non-profit organisation, the applicant's interest in criticising the idea of attributing O.B.'s name to the hospital cannot, in the Commission's opinion, outweigh the right of O.B.'s widow to have her late husband's reputation protected against being disparaged in public. Therefore, the Commission considers that the interference at issue was justifiable and proportionate.

In these circumstances, the interference complained of can be reasonably regarded as "necessary in a democratic society" within the meaning of Article 10 para. 1 (Art. 10-1) of the Convention.

This part of the application is therefore manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant complains under Article 6 (Art. 6) of the Convention that the proceedings were unfair and the courts were not impartial.

The Commission first observes that certain events of which the applicant complains took place before 1 May 1993, notably the serving of the bill of indictment and the transfer of the case to the Koscian District Court. There is no indication that these events affected the fairness of the proceedings after 1 May 1993. They are therefore outside the Commission's competence ratione temporis (see 1. above).

The Commission recalls that the admissibility and assessment of evidence is primarily governed by the rules of domestic law, and as a general rule it is for the national courts to assess the evidence before them. The Commission's task is to ascertain whether the proceedings, considered as a whole, including the way in which the evidence was submitted, were fair (see Eur. Court.H.R., Lüdi judgment of 15 June 1992, Series A no. 238, p. 23, para.43).

In the present case there is no indication that the applicant could not duly put forward his submissions or any evidence.

The applicant also complains of the lack of impartiality of the courts as they carried out both a judicial function and that of Public Prosecutor. However, the Commission notes that in the proceedings concerned the prosecuting function was carried out by O.B.'s widow. The applicant has not submitted any ascertainable facts which might raise doubts as to the impartiality of the courts.

In sum, the Commission finds no appearance of a violation of Article 6 (Art. 6) of the Convention.

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.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber President of the Second Chamber

(M. T. SCHOEPFER) (H. DANELIUS)