AS TO THE ADMISSIBILITY OF

Application No. 26169/95
by Marek WIELGOSZ
against Poland

The European Commission of Human Rights (Second Chamber) sitting in private on 18 October 1995, 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 6 October 1994 by Marek WIELGOSZ against Poland and registered on 10 January 1995 under file No. 26169/95;

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 1951, is an engineer residing in Katowice.

I.

On 18 February 1992 the Katowice District Court (S*d Rejonowy) dissolved the applicant's marriage, awarded custody of the children, P., born in 1988, and Z., born in 1979, to his wife and granted the applicant access to the children. The Court also decided that the applicant should pay maintenance.

On 15 July 1992 the applicant filed an action with the Gorlice District Court to have the access arrangements changed. He requested to be allowed to see his sons on every first and third Saturday of the month from 8 a.m. on Saturday to 6 p.m. on Sunday and to take them out; to see the children on his days off and take them out for periods not exceeding nine days per month; to take them on holiday for a month every year; to visit them and take them out on the first day of Christmas and the second day of Easter from 8 a.m. to 6 p.m.

On 15 February 1993 the Court held its first hearing and ordered

the Nowy S*cz Family Diagnostics Centre to prepare an expert psychological opinion on the applicant's relations with his children and the best possible access arrangements.

On 5 July 1993 the Nowy S*cz Family Diagnostics Centre submitted the required expert opinion to the Court.

On 5 August 1993 the applicant extended and modified his access claims. He also requested that the specialists who had prepared the expert opinion be heard as witnesses as their opinion was based on allegedly false statements made by the mother and by other persons upon her instigation. He disputed that he and his wife should be supervised by a court custody guardian (kurator s*dowy) in the exercise of their parental rights. He submitted that the proceedings had already been delayed, which had negatively affected his relationship with the boys. Therefore the questioning of the experts should expedite the proceedings.

At a court hearing on 18 November 1993 one expert was heard and questioned by the applicant. On 12 January 1994 the Gorlice District Court heard another expert as requested by the applicant. In order to accelerate the proceedings the applicant withdrew his request to hear a third expert.

On 25 January 1994 the Gorlice District Court pronounced its decision concerning access, partly allowing and partly dismissing the applicant's claims. The Court allowed the applicant:

1. to visit his 5-year-old son P. on every first and third Saturday of the month from 9 a.m. on Saturday to 6 p.m. on Sunday and to take him out so that he could stay overnight with his father in Gorlice;

2. to visit P. on other dates, for not more than 3 days per month, from 9 a.m. of the first day until 6 p.m. of the last day and to take him home, upon 7 days' notice to his mother;

3. to take P. home every other year, for the first or second day of Christmas and Easter,

4. to spend 15 days of the holidays with P., and as from 1994, one month of the holidays;

5. to see his older son Z. as ordered in the divorce judgment and, additionally, on the dates suggested by the applicant, if Z. agreed to it in writing.

The Court ordered the mother to respect these arrangements and dismissed the remainder of the applicant's claims.

In taking this decision the Court considered evidence taken in the proceedings, i.e. statements of four witnesses and of the parties. The Court also had regard to the expert opinion, to the experts' oral statements and to a report submitted by the court custody guardian. It found that the applicant was a responsible father who obviously was emotionally attached to the children. Thus his requests had been granted for the most part. Permission to visit P. when he was ill was refused due to the conflicts between the parties which would have inevitably surfaced if the applicant had visited P. where he lived with his mother, i.e. at his grandparents' apartment. Regarding the older son Z., the Court considered that in view of his reserve and even hostility towards his father it was not reasonable to impose extended contact with him. However, the Court stressed that the applicant could see Z. on the terms set out in the divorce judgment and on other occasions, if the child expressly agreed to see his father.

On 23 February 1994 the applicant appealed against the decision.

On 28 April 1994 the Nowy S*cz Regional Court (S*d Wojewódzki) dismissed the applicant's appeal as it found that the access arrangements best served the children's interests, given the circumstances of the case, in particular the stormy relationship between the parties, the need to avoid further conflicts between them and the good relationship between the applicant and his younger son P.

II.

On 15 May 1993 the applicant filed an action with the Gorlice District Court, requesting a reduction in child maintenance payments as he could not afford to pay the percentage of his income ordered in the divorce judgment of 1992.

On 23 November 1993 the Court dismissed this action as there were no changes in the parties' financial situation which would justify the reduction in child maintenance.

On 10 January 1994 the applicant appealed against this judgment.

On 17 May 1994 the Nowy S*cz Regional Court dismissed the applicant's appeal.

COMPLAINTS

The applicant complains under Article 8 in conjunction with Article 14 of the Convention of the decisions concerning access to his children. He complains that he was discriminated against as a man, whereas his wife was treated favourably by the courts.

The applicant complains under Article 6 of the Convention of the proceedings concerning access to his children and their outcome. He contends that the proceedings were unfair as the courts were biased against him. He contends that the experts were also biased against him and that their opinion was erroneous. He further complains of the length of the proceedings.

THE LAW

1. The applicant complains under Article 8 in conjunction with Article 14 (Art. 8+14) of the Convention of the decisions concerning access to his children. He alleges that he was discriminated against as a man, whereas his wife was treated favourably by the courts.

Article 8 (Art. 8) of the Convention provides, insofar as relevant:

> "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 ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

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).

The Commission does not find it necessary in the present case to decide whether the decisions of the Polish courts constitute an interference with the applicant's right to respect for his family life

as protected by Article 8 para. 1 (Art. 8-1) of the Convention, since even assuming this to be the case, the Commission finds the interference justified under paragraph 2 of that Article (Art. 8-2) for the following reasons.

The Commission first observes that the court 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 to protect the interests of the children 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. The case-law of the Commission and Court establishes that 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).

It is an important function of the law in a democratic society to provide safeguards in order to protect children from harm and mental suffering resulting, for instance, from the break-up of their parents' relationship. In such cases this purpose may be achieved by keeping the child away from a situation which could be detrimental to his or her mental development owing to the existence of a conflict of loyalty vis-à-vis one or both of the parents and the inevitable parental pressure put on him or her causing feelings of insecurity and distress (cf. Hendriks v. the Netherlands, loc. cit., para. 120).

In the present case the Commission notes that the competent national courts carefully examined the question of access. They considered extensive evidence, including the expert opinion and the questioning of the experts requested by the applicant. The courts also considered a report by the court custody guardian. The final decision awarded the applicant access to P., for the most part in conformity with his wishes. The courts had regard to the need to preserve the existing good relationship between the applicant and P. As regards the older son Z., the courts had regard to the fact that he expressed reserve towards his father. The Commission notes that the decision did not deprive the applicant of contact with Z., but kept the access arrangements as set out in the divorce judgment. Moreover, the decisions concerned created an additional opportunity for the applicant to see Z., on condition that the boy agreed to meet his father. The courts concluded that, given the conflict-ridden relationship between the parents, it was important for a child who was already 15 years old to have a say in respect of his contact with the father. In these circumstances the Commission is satisfied that the interference complained of was required by the interests of the children 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 for the protection of the rights of others, namely the children 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 of the Convention taken together with Article 8 (Art. 14+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.

2. The applicant raises various complaints under Article 6 (Art. 6) of the Convention alleging that the proceedings concerning access to his children were unfair, that the judge and experts were biased against him, and that the case was not determined within a reasonable time.

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

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

Insofar as the applicant complains about the outcome of the proceedings, 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. 458/59, Dec. 29.3.60, Yearbook 3 pp. 222, 236; No. 5258/71, Dec. 8.2.73, Collection 43 pp. 71, 77; No. 7987/77, Dec. 13.12.79, D.R. 18, pp. 31, 45; No. 21283/93, Dec. 5.4.94, D.R. 77-B, p. 81).

The applicant complains under Article 6 (Art. 6) that the courts were biased against him and thus not "impartial". However, in this respect, too, the applicant only refers to the outcome of the proceedings and does not adduce ascertainable facts which would be susceptible of throwing any doubt on the impartiality of the judges concerned.

As regards the complaint that the courts based their decisions on erroneous expert opinions, the Commission recalls that the admissibility and assessment of evidence are primarily matters for domestic courts, and that States enjoy a certain margin of appreciation in this respect (cf., mutatis mutandis, Eur. Court H.R., Asch judgment of 26 April 1991, Series A no. 204, p. 10, para. 26).

In the present case the Commission observes that the decision concerning access to the children was based mainly on the expert opinion of the Family Diagnostics Centre. Subsequently the applicant requested that three experts who had prepared this opinion be heard by the court. He did not challenge them in the domestic proceedings. The Court complied with the applicant's request and heard two of the experts. The applicant waived his request to have the third expert heard. Thus the court decisions were based on extensive expert opinions, submitted both in writing and orally, and the applicant had an opportunity to question the experts and reply to their submissions. There is no indication that the courts acted arbitrarily in assessing the evidence or that the applicant was otherwise deprived of a fair hearing.

The applicant finally complains about the length of the access proceedings.

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". The Commission is not competent to examine complaints relating to alleged violations of the Convention by acts, decisions or events that occurred prior to this date.

However, the Commission further recalls the Convention organs' case-law according to which where, by reason of its competence ratione temporis, the Commission can only examine part of the proceedings, it can take into account, in order to assess the length of the proceedings, the stage reached in the proceedings at the beginning of the period under consideration (No. 7984/77, Dec. 11.7.79, D.R. 16, p. 92).

In the present case the proceedings started on 15 July 1992, i.e. on the date on which the applicant filed an application with the Gorlice District Court to have the access arrangements changed. They came to an end on 28 April 1994, i.e. the date on which the Nowy S*cz Regional Court dismissed the applicant's appeal. The Commission can only consider the period after 30 April 1993, the date on which the recognition of the right of individual petition against Poland took effect. The period to be considered is therefore slightly less than one year. However, in the examination of the reasonableness of the period after 30 April 1993 the stage reached in the proceedings at this date must be taken into account (see No. 7984/77, loc. cit.).

In this respect, the Commission recalls that the reasonableness of the length of proceedings must be assessed in accordance with the circumstances of the case and the criteria laid down by the Convention organs' case-law: complexity of the case, conduct of the applicant and conduct of the case by the judicial authorities (see, inter alia, Eur. Court H.R., Vernillo judgment of 20 February 1991, Series A no. 198, p. 12, para. 30).

The Commission observes that in the present case the subject-matter of the proceedings - issues of access to children - was not particularly complex. As regards the applicant's behaviour, he extended and modified his claim in August 1993. The Commission also notes that the access arrangements requested by the applicant were particularly detailed. The applicant further requested that three experts who had prepared the expert opinion should be heard as witnesses. The court complied with his request and held two hearings, on 18 November 1993 and 25 January 1994, at which two of these experts were heard. The judgment of the first instance court was pronounced at another hearing immediately following that of 25 January 1994. The second instance court decided on the applicant's appeal at its first hearing. There were no delays in the proceedings which could be attributed to the conduct of the authorities. The Commission concludes that the proceedings did not exceed a reasonable time within the meaning of Article 6 para. 1 (Art. 6-1) 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, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber President of the Second Chamber

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