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Secretary to the Committee of Ministers
Council of Europe
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COMMUNICATION FROM
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
Z. V. POLAND
APPLICATION NO. 34694/06

1. INTRODUCTION

- 1.1. The Helsinki Foundation for Human Rights, with its seat in Warsaw, Poland (the "Foundation"), submits this communication to the Committee of Ministers of the Council of Europe in respect of implementation of the European Court of Human Rights judgment issued in *Z. v. Poland* (Application no. 34694/06) case (the "Judgment").
- 1.2. The Foundation is a non-government organization established for promotion and protection of human rights. One of the most important aspects of its activity in Poland is preparation of legal submissions to national and international courts and tribunals, as well as interventions regarding implementation of human rights standards.
- 1.3. Since the Polish authorities have not undertaken sufficient legal steps to implement the judgment, the Foundation finds it necessary to submit this communication, acting under Rule 9, paragraph 2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of terms of friendly settlements.
- 1.4. The communication to the Committee of Ministers of the Council of Europe has been prepared by **Radosław Rudnik, Anna Olczak-Agacka and Ewa Don-Siemion**, lawyers of the law firm **Chajec, Don-Siemion & Żyto Legal Advisors** with its seat in Warsaw, Poland under supervision of the lawyers of the Helsinki

any reasonable costs incurred by the entitled person and connected with the preparation for the meeting with the child.

- 2.3. In addition to the amendment of the provisions of the CCP, the Judgment was translated into Polish and published on the website of the Ministry of Justice⁵, along with the Standards of Conduct in cases involving the right of access to a child against the backdrop of the case law of the European Court of Human Rights⁶.
- 2.4. In the Government's opinion, the amendment of the CCP has contributed to eliminating the source of violations of the Convention that was indicated in the Judgment. Z has received a compensation in amount of EUR 5.000 awarded him in the Judgment. There was no need to take any other individual measures in this case. Therefore, in the Government's opinion Poland has fulfilled its obligations arising from the Article 46 § 1 of the Convention with regard to the breach of the provisions of the Article 8 § 1 therein.
- 2.5. In our opinion, the Judgment has not been fully implemented.
- 2.6. Firstly, the Government does not gather any statistical data allowing it to verify whether the new regulations are effective or not.
- 2.7. Secondly, the new regulations are not fully consistent with the other institutions of the Polish legal system that the courts may use in cases related to contacts with children. In particular, it is not clear which conditions should be met to enable an entitled person to file an application for compulsory removal of a child by a court guardian and at which stage of the execution proceedings such an application may be filed (Article 598¹ and the following of the CCP).
- 2.8. Thirdly, the threat of a mere obligation to pay a fine does not seem a sufficient reason to change the behavior of persons persistently obstructing the other parent's contacts with a child.
- 2.9. Fourthly, all significant actions in cases relating to contacts with children may be undertaken by courts only at the request of the person concerned. Therefore, it appears that a useful legal measure may not be applied at all if the person concerned is not represented by a professional proxy. This is because the court has no obligation to inform the parties of all available options to enforce the arrangements concerning contacts with children.
- 2.10. Legal provisions give courts a great deal of freedom in certain aspects relating to contacts with children (e.g. regarding a possibility to include a warning about fines in the Child Contact Ruling). Courts are entitled (but not obligated) to use measures improving the enforceability of rulings in cases relating to contacts with children.

⁵ <http://www.ms.gov.pl>

⁶ <http://bip.ms.gov.pl/pl/prawa-czlowieka/europejski-trybunal-praw-czlowieka/opracowania-i-analazy-standardy-w-zakresie-ochrony-praw-czlowieka/>

Recommendations

(i) *Courts should provide information to the parents about all available measures, as well as should use all legal measures which help to settle the cases.*

2.11. Courts should be obligated to inform the parties not represented by professional proxies about all options in order to effectively enforce the Child Contact Ruling in cases concerning contacts with children. Such information should be supplied both at the stage of the establishment of the rules for contacts with children and at the stage of execution proceedings.

2.12. Greater emphasis should be placed on settlement proceedings, in particular by applying, to a greater extent, mediation in cases relating to contacts with children. In our opinion mediation should be mandatory in such cases.

(ii) *Courts should act faster during execution proceedings. Amendments should be made to regulations in order to facilitate the proceedings.⁷*

2.13. The period of examining applications filed in execution proceedings should be shortened. This should particularly concern applications for decisions with a warning of imposing a fine and applications for decisions imposing a fine.

2.14. According to Article 598¹⁸ § 2 CCP the court is always obligated to hear the parties before issuing any decisions in cases concerning contacts with children. In our opinion such regulation should be changed so the court may choose not to hear the party obstructing the proceedings by persistent absence.

2.15. A warning of a fine should be a crucial part of a Child Contact Ruling. It would significantly affect the speed of the execution proceedings because the entitled person would not need to apply for such a warning separately and in cases of any breach of a Child Access Ruling the motion for a fine might be filed at once. The court should be entitled to leave out this part of the ruling only under special, justified circumstances.

2.16. It should be clarified in the CCP that all breaches may be taken into consideration in calculation of the fine to be paid by the person obstructing contact with children, provided that such breaches have occurred after delivering a decision with a threat of imposing a fine and regardless of whether the breaches have or have not been named in such decision.

(iii) *The court guardian's participation in the proceedings relating to the contacts with children should be strengthened.*

2.17. The CCP should expressly state that a person entitled to have access to a child outside the place of his or her residence and without the presence of the child's other parent

⁷ Initiated on request of the person entitled to have contacts with a child if the person obligated to grant access to the child does not comply with court decisions (or settlements) concerning the method of contacting the child.

may take advantage of a court guardian's assistance consisting in the compulsory taking away of the child for the duration of meetings.

- 2.18. The court guardian's participation should be regulated in such a way that the court guardian should get involved if the execution proceeding brings no effect.
- 2.19. The CCP (in the scope of the execution proceedings) should be amended in such a way that there is no doubt that a decision on the compulsory taking away of the child for the duration of meetings may concern more than one instance and be in force for a specific time (e.g. three months).
- 2.20. The CCP should also be amended in such a way that the court could change the Child Contact Ruling while deciding on the compulsory taking away of the child.
- 2.21. The rules for the payment of the costs of a court guardian appointed to take away the child for the time of meetings must be changed in such a way that these costs are charged to the person who obstructs or prevents contacts with the child.

(iv) The Ministry of Justice should be obliged to gather relevant statistical data

- 2.22. The Ministry of Justice should gather statistical data to be able to evaluate whether the new regulations have increased the effective execution of Child Contact Rulings. Such data should include quantitative information about legal measures applied by courts and about the length of proceedings. Due to the lack of such data, it is difficult to establish the effectiveness of the amendment of the CCP made in 2011⁸.

(v) Other measures for the effective execution of Child Contact Rulings should be introduced

- 2.23. In addition to financial penalties, further coercive measures could be introduced against persons obstructing contacts with children:
 - 2.23.1. If a pre-determined limit of ineffective execution proceedings (e.g. three) has been reached, it should be possible to apply a mechanism for an imposition of a fine to enforce compliance (this mechanism is used in court enforcement proceedings)⁹.
 - 2.23.2. The obligation to respect the rules for contacts with a child should be applied jointly with the provisions of the Assistance to Persons Eligible to Receive Alimony Act of 7 September 2007¹⁰. This Act provides for a possibility of issuing a decision to take away a driving license of a person persistently avoiding child support payments.

⁸ Journal of Laws of 2011, No. 144, item 854.

⁹ In our opinion the Ministry of Justice should also carry out a thorough analysis of the prospective problem of the permanent avoidance of the imposed fine's payment.

¹⁰ Consolidated text: Journal of Laws of 2012, item 1228 as amended.

2.23.3. Likewise, regulations may be introduced aiming at taking away the passport of a person persistently obstructing contacts with a child or ordering such person to do community service.

2.23.4. Following a Dutch example¹¹, a mechanism may be introduced whereby a person obstructing or preventing contacts with a child is partially or totally deprived of alimony benefits paid by the person entitled to contact a child.

2.24. In our opinion, the minimal amendments of the procedure should be to include a warning of a fine as a mandatory provision of a Child Contact Ruling. This would allow the entitled person to demand an immediate payment of a fine in the event of any breaches of a Child Contact Ruling. If this were ineffective, then the entitled person should be able to demand the assistance of a court guardian in the compulsory taking away of the child.

3. FACTS OF THE Z V. POLAND CASE

- 3.1. The Court held that the essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by public authorities and protect family life. It was also stated that the Convention provides for an obligation to ensure a regular system of case-law and enforcement, and for state authorities to take appropriate steps to enforce the parents' rights to contact their children.
- 3.2. The applicant, Mr. Z., invoking Article 8 of the Convention, alleged that the Polish authorities failed to give him adequate assistance in his exercise of the right to contact his child. Additionally, he alleged a violation of Article 13 of the Convention claiming that the remedies in Polish law to enforce contact rights were not effective.
- 3.3. In 1996 the applicant's wife gave birth to their daughter. In 2000, following a conflict between the spouses, the applicant moved out of their place of residence. In the same year, the Bytom District Court regulated the applicant's contact with his daughter.
- 3.4. Between 2000 and 2010 different District Courts regulated the applicant's contact with his daughter. The child's mother neither challenged the judgment nor complied with its provisions related to the applicant's contact with the child.
- 3.5. Courts repeatedly imposed fines on the mother (and increased their amounts) and held that should she fail to comply with the courts orders, another, higher fine would be imposed on her. However, the child's mother did not comply with the courts orders.
- 3.6. Courts suggested also various solutions such as: the applicant's contacts with his daughter placed in Family Consultation Centre (*Rodziny Ośrodek Diagnostyczno-Konsultacyjny*) in the presence of a psychologist, or in presence of a court guardian. Unfortunately they proved to be ineffective. The applicant made several attempts to

¹¹ "Transfrontier Contact Concerning Children" General Principles and a Guide to Good Practice, Hague Conference on Private International Law which is available at: http://www.hcch.net/upload/guidecontact_e.pdf

contact his daughter but, according to his submissions, the doors of the apartment where she lived were locked. Mr. Z. requested the Bytom District Court for assistance in establishing the current address and place of residence of his daughter. The fact that the mother did not appear before the court was an additional obstacle. She submitted a medical certificate indicating that she would not be able to appear before the court in person until January 2010. Since then, the applicant has been deprived of any contact with his daughter.

4. THE COURT'S JUDGEMENT IN THE Z. CASE

- 4.1. The Court held that the complaint should be examined from a perspective of the rights resulting from Article 8 of the Convention.
- 4.2. In the case of *Z. v. Poland*, the European Court observed that the decision made by the Bytom District Court concerning the applicant's contacts with his daughter was changed several times.
- 4.3. It was emphasized that the applicant had lodged five requests to impose a fine on the child's mother for non-compliance with the court orders. The above means that the Polish authorities had an opportunity to apply further provisions of the CCP (e.g. compulsory taking away of the child, increasing the fine, converting of the fine into arrest). In the Court's view, the Polish authorities never made use of more coercive measures and continued to apply measures which were ineffective.
- 4.4. The Court also noted that the applicant's requests that a fine be imposed on a child's mother were not examined promptly. The requests were examined with a long delay.
- 4.5. The Court considered that the low amounts of the fines combined with the delays in the proceedings may have contributed to a decline in the emotional ties between the applicant and his daughter. The Court also noted that the strained relationship between the parents should not be a circumstance which can exempt the authorities from their positive obligations under Article 8 of the Convention. The authorities have an obligation to take measures that would reconcile the conflicting interests of the parties.
- 4.6. The Court emphasized that the authorities failed to take practical steps that would encourage the parties to cooperate and to secure concrete and appropriate assistance by the State agents within a specific legal framework suited to the needs of separated parents and their underage child.

5. LEGAL FRAMEWORK:

- A. Contacts with a child in light of the Family and Guardianship Code (the “FGC”)¹².
- 5.1. In accordance with Article 113 FGC, the parents and the child have the right and obligation to maintain contact with each other. The FGC does not define “contact” but lists examples¹³. The issue of contacts with a child is separate from the issue of parental authority, i.e. even a parent deprived of parental authority has a right and duty to maintain contact with his or her child.
 - 5.2. Under the FGC, parents agree on the rules for contacts with the child, having regard to the child’s reasonable wishes.
 - 5.3. The basic criterion taken into account by the court when establishing rules for contacts with a child is the welfare of the child. If required for the child's welfare, the guardianship court may limit or even prohibit contact between parents and the child. Additionally, previous court decisions in this respect may be changed later¹⁴.
 - 5.4. If the parents are unable to agree on the rules for contacts with the child living with one of them, these rules may be established in the Child Contact Ruling, i.e. a judgment concerning the divorce or separation, a judgment establishing rules for contacts or the judgment securing such contacts.
 - 5.5. Pursuant to Article 113⁴ FGC, when deciding on the matter of contacts with the child, the guardianship court may order the parents to behave in a certain way, in particular, refer them to institutions or specialists providing family therapy.
 - 5.6. In the Child Contact Ruling courts should include regulations aimed at making the parties respect the established rules for contacts. In particular, the court may, already at this stage:
 - 5.6.1. obligate the child’s custodial parent to cover the costs of travel and stay of the child with the person entitled to contact the child;
 - 5.6.2. require the child’s custodial parent to deposit with the court a sum of money to cover expenses incurred by the person entitled to contact the child and connected with the non-performance or the negligent performance of the Child Contact Ruling by the custodial parent;
 - 5.6.3. threaten that if the child’s custodial parent violates the established rules for contacts with the child, the custodial parent will have to pay the sum of money

¹² The consolidated text: Journal of Laws of 2012, item 788 as amended.

¹³ Spending time with a child (visits, meetings, taking the child outside his or her place of residence) and direct communication, maintaining correspondence, using other means of remote communication (including electronic communications). The provisions concern parents and children but may also apply accordingly to contacts with siblings, relatives by direct affinity and other persons if they exercised custody over the child for a longer time.

¹⁴ The court may change its decision on the request of the parties due to changes in circumstances, e.g. in the case of inability to enforce contact with the child the parent can request a change of contacts and demand a court guardian’s presence during visits.

to the person entitled to contact the child¹⁵.

- 5.7. The data presented to us by the Government shows that since 2008 the number of cases for the establishment or change of rules for contacts with children examined by Polish courts has been growing steadily. Unfortunately, the Ministry of Justice has no statistical data on how often courts, while resolving such disputes, use legally prescribed instruments that may contribute to the higher enforceability of Child Contact Rulings.
- 5.8. At the same time, worth noting is a growing number of cases ended with a settlement or successful mediation between the parties¹⁶.

B. Execution Proceedings¹⁷ (Articles 598¹⁵-598²¹ CCP)

- 5.9. In cases related to the exercise of rights to contact children, courts may act only on request of the case participants. Any action on the court's own initiative is prohibited. No decisions concerning exercise of rights to contact children may be changed by the court¹⁸.
- 5.10. If rules concerning contacts with children are violated¹⁹, the court should, pursuant to Article 598¹⁵ CCP, warn that the person violating these rules will pay the other parent a specific amount of money for each violation. The provisions do not specify the maximum fine but courts must take into account the financial situation of the obligated person. Decisions in this respect may be appealed.
- 5.11. A ruling with a threat of a fine is not necessary at the stage of the execution proceedings if the court delivering the Child Contact Ruling includes relevant regulations in this respect in it (see item 5.6.3. above).
- 5.12. If a ruling with a threat of a fine has no effect and the obligated person obstructs contacts, the entitled person may request the court to order payment of a fine in the amount corresponding to the number of violations and the rate determined by the court for each of such violations²⁰. The fine may not be imposed on the court's

¹⁵ Pursuant to Article 582² § 3 of the CCP in force as of 13 August 2011. This is one of the most crucial powers of the court that may take, already at the stage of issuing the Child Access Ruling, an action directly increasing the likelihood of the voluntary execution of the ruling by the parties. However, courts are not obligated to apply this measure, which otherwise shortens the length of potential execution proceedings.

¹⁶ In 2013 more than 25% of all court cases related to the establishment of rules for contacts with children were ended with a settlement or successful mediation between the parties. Considering court cases globally, this is a good result.

¹⁷ Proceedings conducted if the person entitled to contact children or the person obligated to allow such contact does not comply with the Child Access Ruling. These provisions have been in force since 13 August 2011 and their enactment has had such a result that at present no regulations related to court enforcement proceedings, including regulations related to imposing fines and converting fines to detention, are applied to cases related to contacts with children.

¹⁸ Unlike Child Access Rulings which may be changed by the court.

¹⁹ This regulation also applies to the rules of contact with children established in a settlement reached before the court or a mediator.

²⁰ Legal doctrine is unclear as to what violations of child contact rulings should be taken into account when

initiative.

- 5.13. Unlike with the regulations previously in force²¹ in cases related to the execution of child contact rulings, the fine may not be converted to detention if the obligated person avoids payment.
- 5.14. In execution proceedings all court decisions are made after the participants are heard.
- 5.15. In the course of parliamentary work on the amendment of the CCP, the proposed article 598¹⁷ CCP was not introduced. This provision was to regulate clearly within the execution framework, the rules for the taking away of a child by a court guardian for the duration of meetings with the entitled person. Under this regulation the court would have been entitled to instruct a court guardian to take away the child during contact times for a specified time if, despite being fined, the obligated person continued to obstruct contacts. Due to the fact that this provision was not introduced, the court guardian's role in this aspect is regulated by the provisions of Article 598⁵ and the following of the CCP (please refer to letter C below).
- C. Participation of the court guardian (Article 598⁵ and the following of the CCP and Article 113² § 2 FGC)

Meetings with the child in the presence of a court guardian.

- 5.16. The entitled person may request that the court, while establishing the rules for contact in the Child Contact Ruling pursuant to Article 113² § 2 FGC, allow meetings with the child in the presence of a court guardian. Although this measure is primarily designed to limit contacts with the child, in practice it may be used to prevent the person obligated to allow contacts with the child from obstructing such meetings.
- 5.17. Statistics made available to the Foundation by the Ministry of Justice show that in 2013 courts made use of the possibility to engage a court guardian under Article 113² § 2 of the FGC only in one out of thirty examined cases.

The court guardian's participation in the compulsory handing over of the child.

- 5.18. A Child Contact Ruling that determines contacts with the child in such a manner that the entitled person shall meet the child outside the child's place of residence and without the presence of the person having custody of the child may also be executed through the compulsory handing over of the child (Article 598⁵ and the following of the CCP)²².

calculating the fine, i.e. only those indicated in the ruling with a threat of imposing a fine or any violations committed from the date of delivering this ruling.

²¹ Prior to the amendment of the CCP in 2011.

²² This matter was already resolved by the Supreme Court in its judgment of 28 August 2008 (file reference number: III CZP 75/08). The relevant provisions in this regard were in force during the time the Polish courts conducted legal proceedings in Z.'s case, however, they were not applied then.

- 5.19. It is currently unclear whether the proceedings concerning the compulsory taking away of a child for the duration of meetings may be conducted after the execution proceedings are deemed ineffective (Article 598¹⁵ and the following of the CCP) or if they may be initiated directly after the non-execution or obstruction of the execution of the Child Contact Ruling by the obliged person. Unlike the rejected draft amendment to the CCP (please refer to section 5.15 above), the legal framework currently in force does not provide for the order in which the person entitled to maintain contacts with the child may use particular methods of enforcement of the obligation to enable contacts with the child. Therefore, theoretically the proceedings concerning the compulsory taking away of a child for the duration of meetings may be conducted without the prior initiation of execution proceedings. In our opinion, such a solution is not well thought out (the preferred solution is outlined in Section 2.22. above).
- 5.20. The person entitled to contact the child outside the child's place of residence and without the presence of the child's custodial parent may apply for a decision regarding the taking away of the child within a certain time if his/her rights to contact the child are hindered.
- 5.21. If the child is not handed over at the time agreed upon, the court - at the request of the entitled person - shall order a compulsory taking away of the child by a court guardian. If the child's place of residence is unknown, the court may initiate an investigation to determine the child's place of residence.
- 5.22. Legal provisions do not determine whether the decision concerning the compulsory taking away of a child will apply to one meeting or all meetings within a certain period of time. In practice, this decision is left to the court's discretion. In some cases all meetings within a certain period are covered by a single decision.
- 5.23. Appointment of the court guardian does not automatically mean that the taking away of the child will occur automatically. The taking away of the child may occur only in the presence of the person entitled to maintain contacts with the child or a person authorized by him/her. The court guardian may refuse to perform actions which in his/her opinion may cause serious damage to the welfare of the child.
- 5.24. The court guardian may use the assistance of the Police and the social services agencies.
- 5.25. Under Article 598^{12a} CCP, subsequent decisions regarding the compulsory taking away of a child may be issued on the basis of the same decision regarding the obligation to hand over a child (section 5.21 above), provided that within three months from the date of issuance of this decision, the obliged person acted in a manner contrary to the decision or to the Child Contact Ruling.

6. ASSESSMENT

The nature of the problem

- 6.1. The judgment touches upon the issue of the protection of private and family life, in particular upon the deprivation of parents of the right of respect for family life regarding contacts with a child despite the lack of reasons to limit the parent's rights. In this situation, a parent who is not represented by a professional attorney is not aware of available remedies that may be used to protect his or her rights to contact the child. (*Information*)
- 6.2. Although the obligation of the State authorities to take measures to facilitate contact by a non-custodial parent with children after divorce is not absolute, authorities should take all necessary steps to facilitate contact. The State must take practical steps aimed at changing the situation, to encourage the parties to cooperate in the child's best interests. Any forms of amicable resolution of disputes between parents regarding contacts with the child should be promoted. (*Mediation*)
- 6.3. Time takes on a particular significance in proceedings related to children. First, any procedural delay will result in the *de facto* determination of the issue before the court. The lack of cooperation between separated parents is not a circumstance which can of itself exempt the authorities from their positive obligations to act. Secondly, the decision-making procedures may not provide requisite protection of parental interests. Thirdly, in the meantime the custodial parent often ignores Court rulings intentionally and without being penalized, while turning the child against the other parent. Protracted proceedings adversely affect the child's interests and the relations with the parent. It is therefore necessary to apply procedures and institutions which would effectively reduce the length of cases related to contacts with a child. Naturally, this does not eliminate the need to provide additional training to judges to bring them up to European standards in this area, including training on principles applied in execution proceedings²³. (*Acceleration of proceedings*)
- 6.4. Another problem is the difficulty in forcible execution of Court rulings that grant the non-custodial parent the right to regular contacts. No statistical data is available at the moment that would demonstrate whether the amendment of the Polish Code of Civil Procedure introduced in 2011 in this respect has improved the execution of the Child Contact Rulings. In our view, it has not yet done so, and the measures proposed in this Memorandum could contribute to custodian parents effectively complying with the rules established in Child Contact Rulings. (*Increase of enforceability of the Child Contact Ruling*)

Information

²³ Pursuant to information available on the website of the National School of Judiciary and Public Prosecution (the "NSJPP") - the only central institution responsible for the initial and continuous training of the judiciary and prosecution staff in Poland - from 2011 to 2013 (in each year) there were organised trainings in the child contact proceedings. Such trainings were continued in 2014 since in the NSJPP's best opinion the Execution Proceedings still cause practical problems for the judges.

- 6.5. In our opinion the first obstacle in the way to increasing effectiveness of the Child Contact Ruling is the lack of knowledge about remedies available in the broadly understood execution proceedings.
- 6.6. According to Article 5 and 212 CCP the court may (but is not obligated to) give substantial advice on procedural actions to parties to and participants in proceedings who appear without an attorney or legal advisor and advise them on appointing a professional proxy.
- 6.7. Whilst preparing this communication both the CDZ Legal Advisors and the Foundation received pieces of information from fathers about their experiences of court cases regarding contacts with children. Some of them did not even know about the amendment to the CCP which came into force in 2011, or about the possibility of applying for a decision on the taking away of the child within a certain time and then for the compulsory taking away of the child by a court guardian.
- 6.8. Courts should be obligated to inform parties not represented by professional proxies about all options in order to effectively enforce Child Contact Rulings.
- 6.9. Such information should be supplied in brochures publicly available in family and minors court divisions.

Mediation

- 6.10. Cases relating to contacts with children are very difficult to manage because participants are usually conflicting parents. The child becomes an object of contention between two former partners. This does not release courts from the obligation to do everything possible to make the parties reconcile.
- 6.11. Greater emphasis should be placed on settlement proceedings, in particular by applying, to a greater extent, mediation in cases relating to contacts with children.
- 6.12. Mediation should be mandatory in cases regarding contact with children. We are aware that mandatory mediation is somewhat contrary to the general nature of this institution. However, the prospective benefits from such an obligation (acceleration of proceedings, settlement accepted by both parties and avoidance of involving a child in conflict between parents) seem to justify this proposal.
- 6.13. Parents should be motivated to amicably settle disputes concerning contacts with the child not only in a courtroom. Therefore, of certain importance are all social campaigns organized by the Polish Commissioner for the Rights of the Child²⁴, such as “Jestem mamy i taty!”, conducted to draw the society’s attention to a problem of involving the child in the matters connected with parents’ divorce, and in a loyalty

²⁴ The Commissioner for the Rights of the Child (the “CRC”) is a constitutional authority appointed to protect the child rights defined in the Polish constitution, the United Nations Convention on the Rights of the Child and other binding laws. The official website of the CRC is available at: <http://www.brpd.gov.pl/>

conflict in particular²⁵.

Acceleration of proceedings

- 6.14. The acceleration of proceedings concerning contacts with the child was one of the most important objectives of the amendment to the CCP introduced in 2011.
- 6.15. Unfortunately, neither the Government nor the courts provided the CDZ Legal Advisors and the Helsinki Foundation for Human Rights with any data that we could use to analyze whether at present courts actually need less time to resolve cases regarding contacts with children. Moreover, the Foundation have received the answer that such data is neither collected nor available. The proper application for public information regarding the use of new legal solutions by the courts has been filed by the Foundation to the Ministry of Justice. The Foundation received in response the quantitative data regarding the number of proceedings conducted in each year and the particular manners of the proceeding's conclusions (e.g. dismissals of the cases, the motions' rejections, the concluded settlements etc.). Unfortunately, the data does not show (i) how often the courts have used the new institutions of the execution proceedings which came in force in 2011, (ii) how these solutions affect the length of proceedings or (iii) whether they cause the increase of the Child Contact Rulings' enforceability. Therefore, the Foundation has applied with similar motions to all Polish appeal courts and the regional courts having the jurisdiction over the biggest cities in Poland. Certain courts answered that they do not collect such data, others provided the Foundation with information similar to that received from the Ministry of Justice. Some courts refused to answer certain questions asked by the Foundation stating that the requested data constitutes so-called processed information and the Foundation is obligated to prove that it acts in significant public interest²⁶.
- 6.16. The answers given by fathers about their experiences of court cases regarding contacts with children justify the conclusion that the wait period for the issue of rulings is still unacceptable. The same conclusion was reached by the participants of the debate organized on March 14, 2014 by the "Association of the Polish Judges IUSTITIA in co-operation with the "Association of the Polish Judges Ruling in Family Courts"²⁷ (the "Debate").
- 6.17. The problem with acceleration of proceedings should be solved by amending legal provisions, as well as by conducting training courses for judges.
- 6.18. The participants of the Debate pointed out that the execution proceedings are extended by judges who examine the circumstances of the Child Contact Ruling's violations,

²⁵ The official website of the campaign is available at:

<http://www.brpd.gov.pl/jestemmamyitaty/odslona2/index.html>

²⁶ Explanation that the Foundation works on the Memorandum was not sufficient for these courts.

²⁷ A short summary of the debate is available on the website of the Association of the Polish Judges Ruling in Family Courts at:

<http://www.ssrwp.pl/aktualnosci.php?typ=ko&art=50&start=0&irek=22>

while the examination proceedings should not be conducted in this scope during the execution proceedings. During the execution proceedings the court is obligated to establish if, how and how often the Child Contact Ruling has been violated. The courts should not examine any circumstances which may (or may not) justify behavior contrary to the Child Contact Ruling. Such circumstances may be the grounds for filing a motion to change the rules established in the Child Contact Ruling.

- 6.19. A warning of a fine should be a crucial part of a Child Contact Ruling. It would significantly improve the speed of the execution proceedings because it would not be necessary to apply for it separately. We estimate that such amendment would shorten the execution proceedings by three to six months. It should also allow the party not represented by a professional proxy to avoid the consequences of lacking legal knowledge. The warning, as a required part of the Child Contact Ruling, would be issued by the courts *ex officio*, i.e. without the party's motion.
- 6.20. During the execution proceedings courts should be legally able to dispense with hearing the party that obstructs the proceedings by persistent absence. According to the current regulation, the court cannot issue any ruling in the execution proceeding without hearing the parties (in person or by written statements). This rule may be used by the custodial parents to extend the proceedings. We estimate that a single absence could extend proceedings by several weeks. The party persistently failing to appear in court practically prevents the conclusion of the proceeding.
- 6.21. The CCP should clearly stipulate that all breaches may be taken into consideration in calculation of the fine to be paid by the person obstructing contacts with children, provided that such breaches have occurred after delivering a legally valid decision with a threat of imposing a fine and regardless of whether the breaches have or have not been named in such decision. The current wording of Article 598¹⁶ § 1 CCP²⁸ in connection with Article 598¹⁵ § 2 CCP²⁹ give rise to doubts of the civil jurisprudence as to whether the fine to be paid by the party violating the Child Contact Ruling should be calculated as a certain amount of money only for each violation specified in the warning or for each violation occurring after the warning was issued. In our opinion it should be clear that the second alternative is appropriate. Therefore, courts issuing the warning should anticipate that some unusual breach may happen and warn that a certain amount of money will be ordered in case of "any other breach of the Child Contact Ruling".

Increase of enforceability of the Child Contact Ruling

²⁸ If a person warned by the court with being ordered to pay a certain amount of money continues to violate his obligation, the court should order him/her to pay the required amount of money, determined according to the number of violations (Article 598¹⁶ § 1 CCP).

²⁹ If a person with custody over a child fails to perform or improperly performs the obligations resulting from the Child Contacts Ruling, the court should, taking into account that person's financial situation, warn to order him/her to pay to a person authorised to contact with the child a certain amount of money for each breach of his/her obligation (Article 598¹⁵ § 1 CCP).

(i) *The FGC regulation*

6.22. In our opinion the FGC regulations are almost appropriate in the scope regarding this Memorandum.

6.23. We think that Articles 107 and 111 FGC, which specify the rules for limiting and taking away of parental authority (respectively), should be changed to stipulate that a breach of the Child Contact Ruling is a ground for limiting or taking away that authority. The parental authority should be limited or taken away depending on the number of violations and their range.

6.24. We are aware that now acting against the rules stipulated in the Child Contact Ruling can be also a basis for a decision concerning parental authority. However, introducing an express phrase regulating this matter could undoubtedly be a factor which would simplify navigating through the legal provisions on contacts with a child.

(ii) *The amendment of the CCP (2011)*

6.25. Increasing the enforceability of the Child Contact Ruling was also one of the most important purposes of the CCP amendment in 2011. The legislator resigned from typical enforcement proceedings conducted mainly by court enforcement officers and introduced a regulation regarding the execution proceedings.

6.26. The Government should, however, gather statistical data to be able to evaluate whether the new regulations have increased the effective execution of Child Contact Rulings. In the absence of such data it is difficult to assess the effectiveness of the discussed amendment.

6.27. In our opinion the amendment was a step in right direction. However, we think that the regulation concerning the compulsory taking away of the child by the court guardian should have been expressly introduced into the execution proceedings. In that case, the compulsory taking away would not require a previous decision about taking away of the child issued in separate proceedings.

6.28. The court conducting the execution proceedings would be able to order that the court guardian compulsorily take away the child for the time of contact with the non-custodial parent. The court should also be able to change the rules stipulated in the Child Contact Ruling along with the decision about the compulsory taking away, including e.g. an increase in the number or dates of meetings.

6.29. Such a decision should be allowed only if a previously issued order to pay a fine was not sufficient to ensure the effective compliance with the Child Contact Ruling.

6.30. The rules for the payment of the costs of a court guardian appointed to take away the child for the time of meetings should be regulated in such a way that these costs are charged to the person who obstructs or prevents contacts with the child. Currently (as

a rule) the costs of the participation of a court guardian have to be covered by the party that applied for such participation (i.e. the party who intended to exercise his/her rights specified in the Child Contact Ruling).

(iii) Other measures and possibilities

- 6.31. The execution proceedings could be supplemented by a mechanism for an imposition of a fine to enforce compliance. Such measure could be allowed at the party's request if a pre-determined limit of ineffective execution proceedings has been reached.
- 6.32. The obligation to respect the rules for contacts with a child could also be applied jointly with the provisions of the Assistance to Persons Eligible to Receive Alimony Act of 7 September 2007, in particular with the regulation allowing decisions to take away driving licenses from persons who persistently avoid performing their duties. In our opinion there are no crucial obstacles to widening this regulation to enable taking away of passports as well.
- 6.33. It is also possible to introduce legal provisions which allow partial or total deprivation of alimony benefits paid by the person entitled to contact a child if the custodial parent obstructs or prevents such contacts.

On behalf of Helsinki Foundation for Human Rights,



Dr Adam Bodnar
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Cc.:

1. Mr. Z., the applicant in the case Z v. Poland,
2. Director of the Department of Proceedings before International Human Rights Protection Bodies, Ministry of Foreign Affairs of Poland.