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TO THE EUROPEAN COURT OF HUMAN RIGHTS
(Application No. 28586/03)

EDWARD CZARNOWSKI V. POLAND

WRITTEN COMMENTS

BY

THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

19 December 2007

I. INTRODUCTION

1. These written comments are submitted by the Helsinki Foundation for Human Rights (hereinafter referred to as **the “HFHR”**), with its seat in Warsaw, Poland at ul. Zgoda 11 pursuant to a leave granted to the HFHR by Mr P. Lorenzen, the President of the Chamber of the European Court of Human Rights (hereafter: the **“Court”**) under Rule 44 § 2 of the Rules of the Court.

2. These comments are limited only to the points of law, and in particular to the interpretation of the Convention requirements, as well as the Polish and relevant foreign law and practice regarding protection of the right to respect of family life in respect of granting release on temporary licence. Moreover, the comments discuss the question of availability of relevant domestic remedies under Polish law in as far as the complaint of a prisoner about the refusal of temporary leave. These submissions do not include any comments on the facts or merits of the case of *Edward Czarnowski v. Poland* (Application No. 28586/03), but address only the general principles involved in the case.

II. INTEREST OF THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

3. The HFHR is a non-governmental organization established in 1989 by members of the Helsinki Committee in Poland in order to promote human rights and rule of law as well as to contribute to the development of an open society in Poland. The Articles of Association of the HFHR include legal actions undertaken in the public interest, including the representation of parties and preparation of legal submissions to national and international courts and tribunals, particularly within the framework of the Strategic Litigation Program. The aim of such submissions is to influence the process of changing laws and practices that the HFHR finds contrary to human rights standards.

4. Since its establishment, the HFHR has been promoting the standards of the European Convention on Human Rights (hereafter: the **“Convention”**), including human rights protection established by Articles 8 & 13 of the Convention. **The case of *Edward Czarnowski v. Poland* is of vital importance to the HFHR as it concerns the improper practice in granting temporary leaves on compassionate grounds and lack of effective domestic remedies in the Polish law in case a prisoner complains about refusal to grant such a leave.**

III. THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

5. Protection of private and family life is a fundamental right protected under Article 8 of the Convention. It is said to be one of the very foundations of a “democratic society ruled by law”. In the present case, the problem concerns the refusal to grant a temporary leave on compassionate grounds to a prisoner. A person serving a prison sentence is not deprived of all his rights. It is true that various limitations of rights and freedoms are justified by the very nature of the situation of a prisoner and his or her crime history. However, any interference with the individual's right to respect for his family life will constitute a breach of Article 8 of the Convention unless it is in “*accordance with the law*”, pursues a “*legitimate aim*” and is “*necessary in democratic society*” in the sense that it was proportionate to the aims sought to be achieved (*Elsholz v. Germany* [GC], application no. 25735/94, para 45). Moreover, it is a

positive obligation of the state to demonstrate that such necessity really existed. The Court has already stated that the refusal of the authorities to allow a detainee to attend the funeral of a close relative can constitute an interference with the prisoner's right to respect for his or her family life (see *Ploski v. Poland*, application no. 26761/95 or *Lind v. Russia*, application no. 25664/05).

6. Temporary leaves in contemporary penitentiary systems constitute the most important element of resocialisation. Many international documents underline their importance. According to the Standard Minimum Rules for the Treatment of Prisoners¹, prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits². At the Council of Europe level, the European Prison Rules of 2006 (hereinafter "EPR")³ is the main standard-setting document. It states that restrictions placed on persons deprived of their liberty shall be limited to the minimum that is necessary and proportionate to the legitimate objective for which they are imposed and that prisoners shall be allowed to communicate as often as possible with their families⁴. Recommendation No. R (82) 16 of the Committee of Ministers to Member States on Prison Leave states that prison leave contributes towards making prisons more humane and improving the conditions of detention and is one of the means of facilitating the social reintegration of the prisoner. It recommends that prison leave be granted to the greatest extent possible on medical, educational, occupational, family and other social grounds.

7. As a rule, the function of temporary leaves is to allow prisoners to maintain ties with their families, and – on the other hand – to test the behaviour, the preparation for life outside of a prison, as well as to minimalise the negative impact of isolation⁵. They are often given as an award for good behaviour while serving a prison sentence. However, temporary release for compassionate reasons is a special kind of a leave which has a somewhat different function than other temporary leaves⁶. Its aim is to create the possibility for a detainee to go outside of prison for a special event which is important to him, often out of humanitarian considerations. The EPR state that *whenever circumstances allow, the prisoner should be authorised to leave prison either under escort or alone in order to visit a sick relative, attend a funeral or for other humanitarian reasons.*⁷

8. According to Article 102.2 of the Polish Code of the Enforcement of the Sentences (hereinafter the "Code"), the prisoner has the right to maintain contacts with his family. Temporary release for compassionate reasons is regulated by Article 141a of the Code. Article 141a §1 states that "*In circumstances very serious for the convicted person (wypadki szczególnie ważne dla skazanego) he/she may be allowed to leave the prison, for a period not exceeding 5 days, if necessary under the escort of prison officer or assisted by a reliable person*". Both prisoners and temporarily arrested persons are concerned by this regulation.

¹ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the United Nations Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977;

² point 37 of Standard Minimum Rules for the Treatment of Prisoners;

³ Recommendation Rec(2006)2 of the Committee of Ministers to member states replaced Recommendation No. R (87) 3 of the Committee of Ministers on the European Prison Rules.

⁴ point 24.1 of EPR;

⁵ G. Kaiser, K. Schoch, *Kriminologie, Jugendstrafrecht, Strafvollzug*, Monachium 1982 after: J. Górny, *Zezwolenie na czasowe opuszczenie zakładu karnego przez skazanych in: Przegląd Więziennictwa Polskiego*, nr 11, 1995;

⁶ A. Siemaszko, J. Szumski, Dobrochna Wójcik, *Zezwolenia na czasowe opuszczenie zakładu karnego*, *Archiwum Kryminologii*, T. XXIII-XXIV, 1997-1998, p.120;

⁷ point 24.7 of EPR;

9. In practice, there are problems with the use of temporary leaves on compassionate grounds. There are different reasons for that. First, the wording of the Code's provisions is not precise enough. It allows for a wide discretion of state organs. This discretion concerns the decision as to what is meant by "*circumstances very serious for the convicted person*", as to whether a person is suitable for a leave (here the organ has an opinion prepared most often by a prison tutor) and as to whether a person should obtain an escorted leave or not (if an opinion on behaviour is negative). The decision made should take into consideration all these factors.

10. First of all, it is important to state whether a situation is very serious for the convicted person. The Code is not very helpful in detailing who is to judge and on what grounds that a situation amounts to such a very serious circumstance. It is unclear if there are objectively very serious circumstances or if every situation should be judged in a context of a particular prisoner. The practice is that the state organ gets a wide margin of discretion as to whether a funeral or a terminal illness of a close relative is of special importance to the prisoner. Even though the doctrinal authorities⁸ and international documents⁹ pin down that a funeral of a close relative always constitutes such a situation, it is still not certain that it will be considered as such by the relevant authority, which is exemplified by the present case. While in some other cases funeral is not judged an important reason, there are decisions where a birth of a child, a child's first Holy Communion or its baptism is considered a situation very serious for the prisoner.

11. It seems that in practice the first element which is taken into consideration while making a decision on granting a temporary leave on compassionate grounds is not the "very serious circumstance" criterion but a person's characteristics and behaviour. The reasoning should be that – for example – a funeral is an important reason to give a temporary leave unless there are important reasons not to give it. However, the reasoning is reverse – the particular person does not deserve any temporary outing, so a funeral will not be judged as very serious circumstance to the prisoner and considering escort becomes unnecessary. In practice, if a person is judged as behaving properly by a prison administration he will receive a temporary leave for whatever occasion. The research made in 1990 shows that – among all temporary leaves – those on compassionate grounds constituted only 4% and temporary leaves because of illness or a funeral of a close relative (the most serious grounds for giving a leave) constituted only 2%¹⁰. Among other reasons, there was the baptism or the first Holy Communion¹¹. It was before the Code was amended to replace the formulation „wydarzenia losowe”¹² (*compassionate grounds*) by “wypadki szczególnie ważne dla skazanego” (*circumstances very serious for the convicted person*) which is a wider term¹³. In our opinion, the law should proceed with the assumption that a funeral of a close relative constitutes circumstance very serious for the convicted person. The law should be more precise and enumerate situations such as “visiting a sick relative, attend a funeral or for other humanitarian reasons” in order to avoid arbitrariness of state authorities.

12. Secondly, the state authority should consider whether a person is suitable for a leave. Negative opinion concerning prisoners' behavior is not decisive in the case of deciding the grant of a temporary leave for compassionate reasons. In *Ploski v. Poland*, the Court stated that the concerns that “*the applicant posed a significant danger to society*” or “*was a habitual offender whose return to the prison cannot be guaranteed*” were not sufficient to refuse a

⁸ cf. commentaries to the Code of the Enforcement of the Sentences;

⁹ cited above;

¹⁰ A. Siemaszko, J. Szumski, Dobrochna Wójcik, “Zezwolenia na czasowe opuszczenie zakładu karnego”, *Archiwum Kryminologii*, T. XXIII-XXIV, 1997-1998, p. 142;

¹¹ Ibid.

¹² Article 59§1 of the of the Enforcement of the Sentences of 1969;

¹³ Z. Hołda, K. Postulski, *Komentarz do kodeksu karnego wykonawczego*, Gdańsk 2005, p. 480;

compassionate leave as they could have been addressed by escorted leaves. The decision not to give an escort might thus only be justified in the case of a prisoner who is convicted for a violent crime and who presents no prospect of being released from prison.

13. Thirdly, the organ should assess whether an escort is available. Escorted temporary leave is provided for in the Code so that a detainee whose behaviour does not give basis for the assumption that he or she would not violate the law could still get such a leave¹⁴. The research made in 1974 showed that under the law in force at that time the refusals to grant temporary leaves were motivated by a negative opinion about prisoner's behaviour, fears of the authorities that he or she would not come back from a leave, or lack of legal basis for granting a leave (which meant that, for example, in case of a funeral the link between a prisoner and a dead person was loose or a dead person was only a distant relative). Situations where a person left a prison escorted were extremely rare¹⁵. It seems that nowadays the situation is not different in this respect. Escorted leave is used extremely rarely¹⁶. This means that often the negative opinion on a prisoner's behaviour brings about the refusal of granting a temporary leave for compassionate reasons.

14. There are problems of financial and logistical nature caused by escorted leaves. There is also not a sufficient number of prison officers prepared to be sent as an escort. Such an officer has to know how to use a gun in case of an emergency. Normally, before being sent as an escort they should have a training in how and when to use a weapon which is time consuming. It happens that the application for a temporary leave with an opinion from a prison director is sent to the penitentiary judge where the judge is asked to make decision of his own with only one request – not to give an escort¹⁷. However, if the state creates certain rights for an individual they must be effective. The state may refuse attendance of a detainee at the event such as a parent's funeral only if there are compelling reasons and no alternative solution - like escorted leaves – available.

15. The Council of Europe's Recommendation on Prison Leave¹⁸ recommends in its point 9 *to inform the prisoner, to the greatest extent possible, of the reasons for a refusal of prison leave*. However, the decisions refusing to grant a temporary leave are often poorly justified, which might be exemplified by the present case. Such decisions are widely discretionary, they often lack a proper justification and thus infringe not only the right to family life but also the principle of equality. The reason might be lack of guidelines for making such a decision. Such guidelines exist in some countries, such as in Canada¹⁹. Another reason is the lack of adequate practice. In case of other temporary leaves, it is normally a prison tutor who prepares an application in the name of a prisoner and when he does it the decision of a judge is most often positive. In case of temporary release for compassionate reasons – and specifically for a funeral – it is the prisoner himself who prepares the application and then the state authorities

¹⁴ Ibid.

¹⁵ A. Siemaszko, J. Szumski, Dobrochna Wójcik, Zezwolenia na czasowe opuszczenie zakładu karnego, *Archiwum Kryminologii*, T. XXIII-XXIV, 1997-1998, p. 121;

¹⁶ The high official in Central Managing Body for Prisons;

¹⁷ The high official in Central Managing Body for Prisons;

¹⁸ Recommendation No. R (82) 16 of the Committee of Ministers to Member States on Prison Leave

¹⁹ Correctional Service of Canada Legislative and Policy Obligations Related to Families and Visiting stated that *“To attend a funeral or a visit to a terminally ill person identified above, the costs (such as, escorting officers, translation services, transportation, etc.) will not be a factor in the decision. For all other compassionate reasons, all factors surrounding the situation, including cost, will be considered in making the decision.”* or *“When an application for an ETA to attend a funeral is denied, every reasonable effort will be made to ensure that the offender is informed prior to the time and date when the funeral is to take place. The reasons given must be clearly stated and recorded in the Assessment for Decision.”* available at http://www.csc-scc.gc.ca/text/portals/families/legislation_e.shtml;

make a decision – most often negative²⁰. So, only in the small number of cases an organ has to make a real decision granting or refusing the leave.

IV. THE EFFECTIVE DOMESTIC REMEDY

16. According to the Court's jurisprudence, it is crucially important for the effective enjoyment of the right to private and family life that the applicable laws provide for reasonable time limits within which relevant state authorities should be required to act. It is also important that applicable domestic laws provide actionable remedy for a breach at the relevant deadline (cf. *Peck v. United Kingdom*, application no. 44647/98).

17. The person requesting a leave from prison on compassionate grounds should be given a remedy against such decisions which is available and effective both in law and in practice. In case of a funeral, the detainee should have the possibility to receive a final decision before the event takes place. Most authors agree²¹ and such seems to be practice that it is possible to appeal from a decision refusing granting a leave on compassionate grounds. The time-limit for an appeal is 7 days. This procedure is inadequate to situations such as a funeral where a date of an event is a matter of days. Although it exists in law, the remedy is not adequate and effective in practice and thus cannot be considered an effective remedy. It can be concluded, therefore, that the remedies available to the applicant in the present case, all of them having a a posteriori character, could not provide adequate redress in respect of the alleged violation (*Bączkowski and Others v. Poland*, application no. 1543/06, para 83).

18. There should be a special urgent procedure provided for in law which would take for example maximum 3-4 days. Moreover, the detainees should not be requested to deliver the death certificate of a close relative with the application as it obviously takes time for the family to provide it. To make a decision a simple telegram from a family might be required, which can be double-checked by prison administration as to its authenticity with local administration or local police units. The requirement for the prisoner to provide a death certificate at a later date should be made. It should be noted that the practice of what proof should be provided to the prison administration is also disparate²².

V. RELEVANT STATE PRACTICE OF OTHER COUNTRIES

19. Relevant practice of other Council of Europe countries in relation to the temporary release of the prisoner on compassionate grounds in exceptional circumstances varies from one country to another. In most cases, it is regulated by the separate regulations of prisons or prison acts and not by the relevant Codes as for example Code of Execution of Criminal Sentences as it is in Poland.

²⁰ The high official in Central Managing Body for Prisons

²¹ Z. Hołda, K. Postulski, Komentarz do kodeksu karnego wykonawczego, Gdańsk 2005, p. 480;

²² A. Siemaszko, J. Szumski, Dobrochna Wójcik, Zezwolenia na czasowe opuszczenie zakładu karnego, *Archiwum Kryminologii*, T. XXIII-XXIV, 1997-1998, p.127;

1. France

20. As far as French law is concerned, it expressly provides for a special kind of leaves named „leave in case of serious family circumstances (*permission de sortir pour circonstances familiales graves*) regulated by Article D.144 of the Criminal Procedure Code. However, these „serious family circumstances” are precisely enumerated in article D. 425 of the same Code: prison detainees can be authorised to visit a member of their closest family who is seriously ill or deceased. In those cases, the leave can be granted for the maximum of three days. However, this right is not guaranteed for all the prisoners. It can only be issued to the persons who fall into two categories: those who serve a prison sentence of five years, and, secondly, those who serve a prison sentence of more than five years and have already undergone half of their punishment (in case of recidivism this period is of two-thirds of their punishment, Article D.146-2 Code of Criminal Procedure). This direct link in French law between the length of the prison punishment and the right to participate in such important family events as death (which amounts to depriving a whole group of prisoners of this right) seems to be a too severe limitation and can constitute a violation of their right to respect for private and family life.

21. Moreover, there is no special regulation of obtaining this special leave in serious family circumstances, which would guarantee the leave to be obtained on time to participate in the family event in question. French law only regulates the general procedure of obtaining all kinds of leave. The procedure, regulated in Article 712-5 of the Criminal Procedure Code, consists of an opinion (*avis*), that has to be rendered by a particular commission for the execution of punishment (*commission de l'application des peines*) composed by the penitentiary judge (*juge d'application des peines*), the prosecutor and the prison director; this opinion is given to the penitentiary judge who takes the decision to grant or refuse the leave in an *ordonnance*.

22. According to Article 712-11, the prisoner, as well as the prosecutor and the general prosecutor, has a right to appeal against this decision during 24 hours after its notification. The only temporary boundary to this procedure is the presumption that the commission has delivered its opinion, in the case when it actually has not, after one month from the moment of asking the commission for the opinion. That means that all the procedure cannot last less than one month. The only thing that suggests that there are cases when the procedure of granting the leave should take less time, but without saying clearly how fast it should be, is the expression „except in case of urgency” (*sauf en cas d'urgence*) preceding the description of all this procedure. However, neither the law, nor the jurisprudence give the definition of urgency in this context. We can therefore assume that French law – like Polish law – does not offer any adequate guarantee for the leave to be granted on time, before the day of the family event. It makes the right of the prisoner to participate in important family events ineffective, thereby violating the right to an effective remedy entrenched in Article 13 of the Convention.

2. United Kingdom

23. According to the UK legislation, a prisoner may be granted a temporary release on compassionate grounds if he or she meets the following criteria: 1) proves that his situation is indeed exceptional, for example, he wants to attend a funeral or visit terminally-ill close relative 2) is not presenting a danger to the society. Prisoners with indeterminate sentences are considered dangerous to the society and are never temporarily released on compassionate grounds. If these conditions are fulfilled, prisoners are normally granted a compassionate leave if the governor of the prison receives a medical advice that a close relative of a prisoner is dying or is dead. Upon the discretion of the governor, the prisoner can be released either

alone or escorted by the reliance officers.²³ In addition, paragraph 9 (3) (a) of The Prison Rules 1999²⁴ provides that – besides by the governor of the prison – the prisoner may be released by the Secretary of State²⁵ also “*on compassionate grounds such as a death or a terminal illness of a close relative*”. According to the paragraph 9 (4) of the same law, a prisoner shall not be released under this rule unless the Secretary of State is satisfied that there would not be an unacceptable risk of his committing offences whilst released or otherwise failing to comply with any condition upon which he is released. Moreover, the Secretary of State shall not release a prisoner if a he would be likely to undermine public confidence in the administration of justice.²⁶ It is not specified in the Rules whether a prisoner should submit his request first to the governor or if he can submit it directly to the Secretary of State.

24. In terms of appeal procedure, the Prison Rules 1999 provide that complaints regarding a prisoner’s imprisonment can be made orally, in writing or in confidence; it does not specify the appeal procedure.²⁷ However, the PSO 6300²⁸ besides the detailed description of eligibility for the Release on Temporary License (ROTL) also sets out the 3 stages of the complaint procedure for the prisoners that wish to challenge temporary release decision. This document provides that where the authorizing Governor agrees the recommendation made by the Chair of the ROTL board, a first stage complaint, made by the prisoner, about the decision must be responded to by the Chair of the Board. In the event that the authorizing Governor overturned the recommendation made by the Chair of the Board, the first stage complaint must be responded to by the authorizing Governor.²⁹ Moreover, Prison Service Order 6300 (hereinafter “PSO”) specifies that the governors must take into account that within some communities, funerals may occur within 24 hours and the decision to grant temporary release must be taken at short notice. PSO 6300 also discusses the fact that the complaint application forms should be available for the prisoners all the time and at the third stage of complain the prisoner may contact Prison Ombudsman within a month from receiving governor's response.

25. UK legislation provides for a highly perplexing and unclear complaint procedure for the temporary release on compassionate grounds. It mentions that the decision on temporary release in certain cases should be made within 24 hours. However, it does not specify the stages of the complain procedure. Moreover, it is not clear in which cases the prisoner can submit his request for temporary release on compassionate grounds directly to the Secretary of State.

²³ The Prison Rules 1999 as amended by the Prison (Amendment) Rules 2000, the Prison (Amendment) (No. 2) Rules 2000 and the Prison (Amendment) Rules 2002, Statutory Instrument 1999 No. 728. Original rules entered into force 1 st April 1999. Latest amendment entered into force 15 th August 2002;

²⁴ Ibid.

²⁵ Secretary of State-is a Cabinet Minister in charge of Government department;

²⁶ The Prison Rules,1999 supra. n.2, para 4(b);

²⁷ The Prison Rules 1999,n.2, para 11;

²⁸ Prison Service Order 6300, issued on 19/11/2005 sets out the Release on Temporary License (ROTL) policies and required actions for the Prison Service and Controllers of contracted prisons, consolidating and modernizing several existing guidance instructions dating from 1995 and incorporating the provisions of Criminal Justice Act 2003;

²⁹ Ibid, Art 1.3.1

VI CONCLUSIONS

26. The judgment of the Court in case *Czarnowski v. Poland* is important as it might set a proper standard in the correctional policy concerning granting temporary leaves on compassionate grounds to detainees. Not only Poland but also other Council of Europe countries have rules that need to be amended and a practice that lacks European standards. It is important to reiterate in the judgment that there are such situations as parent's funeral where only compelling reasons and no alternative solution — such as an escort — may justify the refusal to grant a leave. It is also important that the Court states that rules governing appeal procedure must guarantee that a final decision is obtained before the date of the event.

On behalf of the Helsinki Foundation for Human Rights,³⁰

Prof. Andrzej Rzepliński

³⁰ On behalf of the Helsinki Foundation for Human Rights written comments were also prepared by Dorota Pudzianowska, Aysel Allahverdiyeva, Ewa Dukaczewska and Joanna Lora.