SENTENCE
IN THE NAME OF THE REPUBLIC OF POLAND

17 September 1996

The High Administrative Court (HAC) in Warsaw composed of President judge of the HAC - K. Brzezinski

Judges of the HAC - H. Rybinska

J. Chlebny (judge rapporteur)

Recording clerk - B. Galecka

after examination on 17 September 1996 of the case arising from complaint of T L against the decision of the Ministry of Internal Affairs of 9 October 1995, No. BMU-III-1323/95 concerning refusal of granting the refugee status

1. reverses the decision which was the subject of complaint;

2. awards 300 PLN (three hundred) from the Minister of Internal Affairs to T L in compensation for costs of legal proceedings.

V SA 1969/95

JUSTIFICATION

In an application of 19 August 1994 lodged to the Minister of Internal Affairs, T L, the citizen of Georgia of Russian nationality, applied for granting the refugee status in the Republic of Poland. In the justification of the application she stated that in August 1992 the war in Abkhazia broke out. The Georgians persecuted the inhabitants of Abkhazia. The husband of the applicant was beaten several times by the Georgians and left the family. As soon as the Georgian forces left Abkhazia the Abkhazian soldiers persecuted the Georgians. The applicant gave shelter to a Georgian woman and kept her in hiding for approximately two months. The Abkhazian soldiers beat the applicant and threaten her with killing her child. The applicant escaped to the parents of her husband who lived in Azerbaijan. While staying in Azerbaijan she was informed that her flat was occupied, therefore she decided to return there. After her arrival she managed to evict the persons who unlawfully occupied her flat. Her son had problems in school, because his father escaped and did not participate in fights against Georgia, and his mother helped people of Georgian origin. The applicant received threats by telephone. In the meantime she offered shelter and kept in hiding a woman of Georgian origin again. One day her son was beaten at home and she was ordered to leave within 24 hours. In the application, answering the question whether she was the subject of physical violence the applicant stated that in winter 1993 she was beaten by persons who occupied her flat and that in May 1994 she was beaten by other persons. The applicant declared that she did not intend to return to her country, because she did not have job and she had been persecuted, and that she would be killed by the Abkhazian soldiers or the Chechens, who were helping them.

On 12 May 1995 during the "status interview" conducted by the officer of the Ministry of Internal Affairs' Office the applicant declared additionally that, among others, she could not return to the country, because since 1989 she had been the Jehovah Witness and she feared that she could be arrested for that reason. On 22 August 1995 the Consular and Emigration Department of the Ministry of Internal Affairs, on the basis of Art. 10, sec. 3 and 4 of the Aliens Act of 29 March 1963 (Journal of Law of 1992, No. 7, item 112) in the writing signed by the Deputy Director of that Department stated that Mrs Tatiana Liutikowa does not meet requirements to be recognized as refugee,

The Minister of Internal Affairs, rendering decision on 9 October 1995, refused to grant the status of refugee to Tatiana, Liutikowa. In the justification it was stated that according to Art. 1, para. A, sec. 2 of the Convention concerning the status of refugees, which was prepared in Geneva on 28 July 1951 (Journal of Law of 1991, No. 119, item 515) the notion of refugee is applied to persons who cannot enjoy protection of their state on account of well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. The facts of beating were connected with execution of eviction from the flat and had no connections with offering hiding to persons of Georgian origin, because the applicant stated in the interview which was conducted on 12 May 1995 that the nationality of persons occupying her flat is unknown to her. That interview shows also that the cases of beating her son were connected with conflicts with his classmates and that the physical violence related to assistance offered to her friend and did not concern the applicant. She could fear violence only on the part of her friend. In the justification of the decision it was also stressed that the applicant revealed the fact of being the member of Jehovah Witnesses no sooner than on 12 May 1995, while earlier she only stated that she was Christian and she did not present fears connected with the professed religion. Accordingly, the Minister of Internal Affairs determined that the premises which would justify the recognition of Mrs Tatiana Liutikowa as refugee were not met.

In the complaint against the above decision, which was lodged to the High Administrative Court, Tatiana Liutikowa stated that the facts of beating were connected with the fact of hiding a person of Georgian nationality, and therefore were of political nature. Although the complainant does not know the nationality of persons who occupied her flat, she can fear persecution both on the part of Abkhazian authorities and natural persons who live there and show hostility with respect to those who offered assistance to persons of Georgian nationality. According to the complainant the possibility of persecution on account of membership in Jehovah Witnesses Church were not examined in an appropriate extent.

Responding to the complaint, the Minister of Internal Affairs made request for its dismissal stressing that during the proceedings the complainant had the possibility to present motions as to evidence, however she did not exercised these fights. The explanations presented by the complainant were not coherent and consistent, which was raised in the content of the decision which was the subject of complaint.

The High Administrative Court weighed what follows:

The complaint is justified.

Firstly, during the proceedings the procedure of cooperation provided for in Art. 106 of the Administrative Procedure Code and Art. 10, sec. 4 of the Aliens Act was transgressed. Apart from the decision which was referred to in the complaint, that charge is also confirmed by the sentence of 7 May 1996, file signature V SA 22/95. The administrative law doctrine stresses that Art. 106 of the APC creates procedural framework for the obligation of cooperation between agencies, which arises by virtue of separate provisions of substantive character (B. Adamiak, J. Borkowski, The Polish Administrative and Judicial Proceedings, the Polish Scientific Publishers (PWN) 1996, p. 167). The Aliens Act does make the content of the Minister of Internal Affairs' decision subject to the Minister of Foreign Affairs' opinion. Although the meaning of the notion 'to consult" not only denotes 'to contact" but also 'to agree to sth, to coordinate sth" (the Dictionary of the Polish Language, edit. M. Szymczak, the Polish Scientific Publishers, 1988, Vol. II, p. 827), in case when the legislator does not offer clear articulation concerning necessity of obtaining consent of the Minister of Foreign Affairs it shall be assumed that the cooperation referred to in Art. 10, sec. 4 of the Aliens Act, on account of the international context of the case, is in fact to enable to express not binding opinion of the Minister of Foreign Affairs. The cooperation of the Minister of Foreign Affairs is of essential significance to make correct establishments as to the situation prevailing in the country of origin of the person who applies for the refugee status. The Minister of Internal Affairs, who carries out proceedings in the case, evaluates the gathered evidence and establishes circumstances which are significant for the

determination of the case. The regulation included in Art. 106 of the APC indicates that the opinion of the Minister of Foreign Affairs shall be expressed in the form of a decision. This decision is not the subject of complaint, however the party may lodge a motion to the agency for re-examination of the case (Art. 127, sec. 3 read in conjunction with Art. 144 of APC), or lodge a complaint to the High Administrative Court. The decision shall be delivered to the party in a written form together with the notification of possibility to lodge a complaint and with the factual and legal justification (Art. 125, sec. 1 and 3 of the APC). The Minister of Internal Affairs applying to the Minister of Foreign Affairs for taking an opinion is obliged to notify the party (Art. 106, sec. 2, of the APC). The notice of the procedural action which has been taken enables the party to participate actively in the proceedings according to the general principle expressed in Art, 10 of the APC. Rendering decision without consultation with the Minister of Foreign Affairs constitutes proceedings regulations transgression, which usually would have significant influence on the result of the case, and simultaneously constitutes transgression of the law which gives reason to resume proceedings (Art. 145, sec. 1, para. 6 of the APC). Consequently, the decision rendered without the required consultation constitutes justification to reverse decision on the basis of Art. 22, sec. 2, para. 2 and 3 of the High Administrative Court Act. The administrative files include the declaration of the Minister of Foreign Affairs, which was rendered without adherence to the procedure foreseen in Art. 106 of the APC. The Minister of Internal Affairs did not notify the party that he applied to the Minister of Foreign Affairs, and the latter did not notify the party of the expressed opinion. The powers of the complainant to participate actively in the proceedings were significantly limited.

Secondly, the justification of the decision which was the subject of complaint does not include factual establishments concerning the situation in Abkhazia. The content of the decision which was the subject of complaint refers to the explanations of the complainant, but it lacks establishments made by the agency. The justification of the decision does not meet the requirements of Art. 107, sec. 3 of the APC, because it does not include facts which has been recognized by the agency as proved. The establishment that in relation to Jehovah Witnesses no discriminatory acts had been recorded was made without demonstration of evidence which would justify the above statement. The abandonment of justifying the decision in manners which meet requirements provided for in Art. 107, sec. 3 of the APC renders review of the decision which was the subject of complaint impossible.

Thirdly, the collection and examination of all evidence (Art. 77, sec. 1) and its evaluation according to the principle of free evaluation of evidence (Art. 80 of the APC constitutes the obligation of the agency. The Administrative Procedure Code includes an open catalogue of evidence, therefore everything what can contribute to explanation of the case and does not contradict the law shall be admitted as evidence (Art. 75, sec. I of the APC). The administration agency may apply to an expert for rendering opinion when the case requires special information (Art. 84 of the APC). The evaluation of the political situation in connection with war and migration phenomena in Abkhazia and Georgia and the situation of Jehovah Witnesses were of essential significance for establishing whether the complainant's statements are credible and whether the complainant could fear persecution for reasons of nationality and religion, and therefore whether she is the refugee as interpreted by Art. I of the Geneva Convention concerning the status of refugees. Challenging the credibility of the complainant's testimony concerning the fact of her membership in the Jehovah Witnesses organization would require deeper considerations during the re-examination of the case, together with the regard to evidence presented in the course of judicial proceedings in the form of certificate of the Jehovah Witnesses' Church in Nadarzyn, the content of which indicates that the complainant has been the Jehovah Witness since 1989.

Taking into account the above considerations, on the basis of Art. 22, sec. 1, para. 1, and sec. 2, para 2 and 3, and Art. 55, sec. 1 of the High Administrative Court Act of 11 May 1995 (Journal of Law No 74, item 368) it shall be adjudicated as in the conclusion of the judgment.