



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF CHERNYSHOV v. POLAND

(Application no. 35630/02)

JUDGMENT

STRASBOURG

3 May 2011

FINAL

03/08/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Chernyshov v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

Päivi Hirvelä,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 5 April 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 35630/02) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Igor Chernyshov (“the applicant”), on 12 August 2002.

2. The applicant, who had been granted legal aid, was represented by Mr P. Sendeki, a lawyer practising in Lublin. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that his pre-trial detention exceeded a “reasonable time” within the meaning of Article 5 § 3 of the Convention.

4. On 6 December 2007 the President of the Fourth Section of the Court decided to give notice of the application to the Polish Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). The Ukrainian Government did not exercise their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b) of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1977. He is currently detained in Hrubieszów Prison.

A. Criminal proceedings against the applicant and his pre-trial detention

6. On 19 August 1998 the applicant was arrested on suspicion of murder.

7. On 20 August 1998 the Słubice District Court (*Sąd Rejonowy*) remanded him in custody, relying on the reasonable suspicion that he had committed the offence in question. It considered that keeping the applicant in detention was necessary to secure the proper conduct of the proceedings, given the risk that he might tamper with evidence or go into hiding. As regards the latter, the court relied on the fact that he did not have his place of residence in Poland. It also stressed the severity of the anticipated prison sentence.

8. The applicant's appeal against the detention order, likewise his further appeals against decisions extending his detention and all his subsequent applications for release and appeals against refusals to release him, were unsuccessful.

9. In the course of the investigation, the applicant's detention was extended on 14 October 1998 to 15 January 1999. The Słubice District Court relied on the original grounds given for the applicant's detention. It also underlined that the applicant was a foreign national and therefore there was a risk of his absconding if released.

10. The applicant asserted that at the early stage of the investigation he had admitted to having committed the offence he had been charged with. He further submitted that he had agreed to cooperate with the authorities in order to have his future sentence mitigated.

11. On 28 December 1998 the Słubice District Prosecutor lodged a bill of indictment with the Gorzów Wielkopolski Regional Court (*Sąd Okręgowy*). The applicant was charged with murder. The bill of indictment comprised several charges brought against three defendants.

12. The applicant was tried on the basis of the relevant provisions of the Criminal Code of 6 June 1997 (the so-called "New Criminal Code") which entered into force on 1 September 1998, replacing the Criminal Code of 19 April 1969 (the so-called "Old Criminal Code"). According to Article 4 of the New Criminal Code, in the event that a case is being examined at a time when the New Criminal Code is in force but concerns an offence which was committed prior to its entry into force, the new law shall

nevertheless apply if it is more lenient for the perpetrator (*względniejszy dla sprawcy*).

13. On 18 February and 18 March 1999 the trial court held hearings. The applicant pleaded guilty before the trial court. In particular, he testified that he had committed the murder together with a certain W.B. and a certain A.T.

14. During the trial the authorities further extended the applicant's detention pending trial on 13 January 1999 (to 15 June 1999). The courts repeated the grounds previously given for the applicant's continued detention.

15. On 18 March 1999 the Gorzów Wielkopolski Regional Court gave judgment. The applicant was convicted as charged and sentenced to 15 years' imprisonment. The court noted, *inter alia*, that although the applicant pleaded guilty, his testimonies had not been fully coherent and contained a number of inconsistencies. It therefore considered that the conditions for the extraordinary mitigation of sentence had not been met in the case.

16. The applicant, other co-accused and the District Prosecutor appealed.

The applicant's legal-aid counsel argued that the first-instance court had not mitigated the applicant's sentence as required by Article 60 § 3 of the New Criminal Code, despite the fact that the applicant had cooperated with the authorities. According to that provision, a domestic court shall mitigate the sentence if the defendant committed the offence with accomplices, and revealed to the prosecution information about the persons involved in the commission of the offence and any significant circumstances in which the offence was committed.

17. The applicant was kept in detention pending appeal.

18. On 23 November 1999 the Poznań Court of Appeal (*Sąd Apelacyjny*) heard the appeals. It quashed the first-instance judgment and remitted the case for retrial. The appellate court observed at the outset that the appeals lodged by the applicant and the District Prosecutor contested only the severity of the penalty imposed and not the applicant's guilt which was clearly established. It further considered the arguments advanced on behalf of the applicant to be reasonable. However, it found that the evidence examined by the first-instance court had not been sufficient to allow for a definite conclusion as to whether or not the provision on the mitigation of the sentence was applicable in the circumstances of the case, namely whether or not the applicant had disclosed a full and accurate account of events. It further ordered that the applicant's detention should continue until 30 April 2000. The court repeated the grounds previously given for the applicant's continued detention. In addition, it underlined the need to obtain a report from an expert in graphology.

19. On 15 February, 21 March and 11 April 2000 the trial court held hearings.

20. On 18 April 2000 the Gorzów Wielkopolski Regional Court convicted the applicant as originally charged and sentenced him to 15 years' imprisonment. The other defendants were likewise convicted.

21. The applicant, other co-accused and the District Prosecutor appealed. The applicant remained detained pending appeal.

22. It appears that the applicant changed his testimony in that he no longer claimed that A.T. had been an accomplice to the offence he had been charged with. He continued to admit his own guilt.

23. On 9 November 2000 the Poznań Court of Appeal again quashed the first-instance judgment and remitted the case for retrial. It ordered that the applicant's detention should continue until 31 January 2001.

24. On 14 March, 15 March and 27 April 2001 the trial court held hearings.

25. In the retrial proceedings the applicant made numerous, unsuccessful applications for release and appealed, likewise unsuccessfully, against decisions extending his detention. The relevant decisions on the extension of his detention were given by the Gorzów Wielkopolski Regional Court on 30 January 2001 (to 30 April 2001), on 27 April 2001 (to 27 July 2001), on 10 July 2001 (to 10 October 2001) and on 9 October 2001 (to 9 January 2002).

26. On 5 December 2001 the Gorzów Wielkopolski Regional Court convicted the applicant as originally charged and sentenced him to 25 years' imprisonment. As concerns the other defendants, the court convicted W.B. but acquitted A.T.

27. The applicant appealed. The applicant's legal-aid counsel argued, *inter alia*, that the trial court had erred in that it had not mitigated the applicant's sentence. The lawyer noted that the material in the case file clearly indicated that the applicant had cooperated with the authorities and therefore had complied with the requirements of Article 60 § 3 of the New Criminal Code. Admittedly, the applicant had changed his pleadings after the judgment of 18 April 2000. That, however, should not have had any bearing on the outcome of the case, since the applicant had undoubtedly been coerced into changing his testimony by his co-defendants.

28. On 16 May 2002 the Poznań Court of Appeal upheld the first-instance judgment. It acknowledged that the applicant had given an account of his own wrongdoing. The court observed however that the remainder of his testimony, in particular in part regarding the responsibility of other co-accused had not been credible and had not been taken into consideration by the trial court. The appellate court concluded that the applicant's testimonies had not been wholly credible and therefore he was not entitled to an extraordinary mitigation of his sentence.

29. By letter of 3 December 2002 the applicant's legal-aid lawyer informed the Poznań Court of Appeal that he had not found any grounds for lodging a cassation appeal in the case.

30. It appears that throughout the trial the applicant was represented by a lawyer assigned to him under the legal-aid scheme. The applicant submitted that between 1999 and 2000 his legal-aid lawyer had never met him to prepare the case and had put forward an ineffective defence.

B. Conditions of the applicant's detention

31. On 19 August 1998 the applicant was committed to Międzyrzecz Remand Centre. Since that date he has been continuously detained in several penitentiary facilities. On 10 December 2007 the applicant was transferred to Hrubieszów Prison where he is currently detained.

32. The parties gave partly differing accounts of the conditions of the applicant's detention.

33. The applicant maintained that during most part of his detention he was held in overcrowded cells in conditions which did not comply with the basic standards of hygiene.

34. The Government submitted that they could not formally confirm whether during his detention from 19 August 1998 to 28 November 2000, from 22 March to 25 April 2001, from 6 June to 29 November 2001, from 28 February to 15 May 2002, from 27 August to 29 November 2002, from 7 to 18 March 2003 and from 26 August 2005 to 2 February 2006 the applicant was detained in cells with a surface area of at least 3 m² per person. The Government further submitted that the period of the applicant's detention in cells in which the statutory minimum requirement of 3 m² per person had not been respected amounted to some 979 days. Finally, they maintained that the applicant was currently detained in a cell in which the statutory minimum requirement of 3 m² per person was respected. This submission was not contested by the applicant.

35. At the beginning of his detention the applicant lodged numerous complaints with the penitentiary authorities regarding the conditions of his detention. He submitted that he had later given up as his complaints had no prospects of success and he had feared being persecuted by the prison authorities. The applicant did not bring a civil action in tort to seek compensation for the infringement of his personal rights.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Preventive measures, including pre-trial detention

36. The relevant domestic law and practice concerning the imposition of detention on remand (*tymczasowe aresztowanie*), the grounds for its prolongation, release from detention and rules governing other, so-called "preventive measures" (*środki zapobiegawcze*) are stated in the Court's

judgments in the cases of *Kudła v. Poland* [GC], no. 30210/96, §§ 75-79, ECHR 2000-XI; *Bagiński v. Poland*, no. 37444/97, §§ 42-46, 11 October 2005; and *Celejewski v. Poland*, no. 17584/04, §§ 22-23, 4 May 2006.

B. Conditions of detention

37. A detailed description of the relevant domestic law and practice concerning general rules governing the conditions of detention in Poland and domestic remedies available to detainees alleging that conditions of their detention were inadequate are set out in the Court's pilot judgments given in the cases of *Orchowski v. Poland* (no. 17885/04) and *Norbert Sikorski v. Poland* (no. 17599/05) on 22 October 2009 (see §§ 75-85 and §§ 45-88 respectively). More recent developments are described in the Court's decision in the case of *Latak v. Poland* (no. 52070/08) on 12 October 2010 (see §§ 25-54).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

38. The applicant complained that the length of his pre-trial detention had been excessive. He relied on Article 5 § 3 of the Convention, which, in so far as relevant, reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. Admissibility

39. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Period to be taken into consideration

40. The applicant's detention started on 19 August 1998, when he was arrested on suspicion of having committed a murder.

41. On the following dates the Gorzów Wielkopolski Regional Court convicted the applicant: on 18 March 1999 (quashed by the Poznań Court of Appeal on 23 November 1999), on 18 April 2000 (quashed by the Poznań Court of Appeal on 9 November 2000) and on 5 December 2001 (upheld by the Poznań Court of Appeal on 16 May 2002).

42. Accordingly, the period to be taken into consideration amounts to two years and twenty-one days (from 19 August 1998 to 18 March 1999, from 23 November 1999 to 18 April 2000 and from 9 November 2000 to 5 December 2001). For the remaining period of his confinement the applicant was detained “after conviction by a competent court”, within the meaning of Article 5 § 1 (a) and, consequently, that period of his detention falls outside the scope of Article 5 § 3 (see, *Kudła v. Poland*, cited above).

2. The parties’ submissions

(a) The applicant

43. The applicant maintained that the length of his pre-trial detention had been unreasonable.

(b) The Government

44. The Government were of the opinion that the whole period of the applicant’s detention had been justified. They stressed that the domestic courts dealing with the applicant’s case had found his detention to be compatible with the provisions of Article 258 of the Code of Criminal Procedure and that no grounds warranting the applicant’s release from detention as provided for by Article 259 of the Code had been established.

45. The Government further submitted that the applicant’s detention had been justified by the reasonable suspicion that he had committed the offence with which he had been charged and the fact that the charge against him attracted a heavy sentence.

46. Lastly, they maintained that the applicant’s detention was warranted by the substantial risk of his absconding given that he was a foreigner without a permanent place of residence in Poland.

3. The Court’s assessment

(a) General principles

47. The Court reiterates that the general principles regarding the right to trial within a reasonable time or to release pending trial, as guaranteed by Article 5 § 3 of the Convention have been stated in a number of its previous judgments (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 110 *et seq*, ECHR 2000-XI; and *McKay v. the United*

Kingdom [GC], no. 543/03, §§ 41-44, ECHR 2006-..., with further references).

(b) Application of the above principles in the present case

48. In their detention decisions, the authorities, in addition to the reasonable suspicion against the applicant, relied principally on three grounds, namely, (1) the serious nature of the offence with which he had been charged, (2) the severity of the penalty to which he was liable, and (3) the need to secure the proper conduct of the proceedings given the risk that the applicant might go into hiding. As regards the latter, they relied on the fact that the applicant was a foreigner and before his arrest he had not resided in Poland.

49. The applicant was charged with murder. The Court accepts that the reasonable suspicion against the applicant of having committed a serious offence could initially warrant his detention. The Court notes that the latter was amplified by the fact that during the domestic proceedings the applicant admitted to having committed the offence he had been charged with. It was therefore reasonable to believe for the authorities extending the applicant's pre-trial detention that a severe sentence could be imposed on him.

50. Furthermore, according to the authorities, the likelihood of a severe sentence being imposed on the applicant created a risk that the applicant would obstruct the proceedings. However, the Court reiterates that, while the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or reoffending, the gravity of the charges cannot by itself justify long periods of pre-trial detention (see *Michta v. Poland*, no. 13425/02, § 49, 4 May 2006).

51. The danger of the applicant's absconding was one of the main grounds referred to by the domestic courts (see paragraphs 7 and 9 above). The Court is of the opinion that there was a substantial risk of the applicant's absconding which persisted throughout his pre-trial detention. This risk was confirmed by a number of relevant factors, such as the fact that the applicant was a foreigner without an abode in Poland, lacking links or property in the country. It was therefore reasonable to believe that the applicant was under considerable temptation to evade trial, especially in view of the heavy prison sentence to which he was liable. In view of the above, the Court is persuaded that the danger of absconding constituted, in the particular circumstances of the present case, a relevant and sufficient ground for refusing the applicant's applications for release and to remand him in custody for the relevant period (see, *mutatis mutandis*, *Van der Tang v. Spain*, 13 July 1995, §§ 64-67, Series A no. 321).

52. Given the above and in view of the fact that the relevant period of the applicant's detention lasted two years and twenty-one days, the Court considers that the grounds given for the applicant's pre-trial detention were

“relevant” and “sufficient” to justify holding him in custody for the entire relevant period.

53. It therefore remains to be ascertained whether the national authorities displayed “special diligence” in the conduct of the proceedings.

54. The Court observes that there were no significant periods of inactivity on the part of the prosecution authorities and the trial court during the period to be taken into consideration. The investigation was completed by the Regional Prosecutor within a relatively short period of time and the trial court held hearings at regular intervals.

55. The Court notes that the case was twice remitted by the second-instance court. It reiterates that in a number of cases it has found that the repetitive re-examination of the claims within one set of proceedings disclosed a deficiency in the domestic judicial system (see e.g., *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003). The Court finds however that in the particular circumstances of the present case the domestic courts proceeded without undue delays. In particular, the Court observes that the case was dealt with by the courts of two levels of jurisdiction repeatedly within relatively short periods of time. The court of first instance considered the case on three occasions, with the period of consideration ranging from four to twelve months. On three occasions the case was brought before the Regional Court, each time the proceedings being completed within some seven months.

56. For these reasons, the Court considers that the domestic authorities displayed “special diligence” in the handling of the applicant’s case.

57. In view of the above considerations and in the light of the criteria established in its case-law in similar cases, the Court considers that the period of the applicant’s detention does not disclose any appearance of a breach of the “reasonable time” requirement of Article 5 § 3 of the Convention.

58. There has accordingly been no violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

59. In his letter to the Court of 24 March 2003 the applicant alleged a breach of Article 3 of the Convention in that he had been detained in overcrowded cells and that the State had failed to secure to him adequate living conditions throughout his detention.

A. The Government's objections

1. *The Government's objection on compatibility ratione personae*

60. The Government submitted that the applicant had lodged several complaints with the prison authorities about the conditions of his detention in Gorzów Wielkopolski Prison from 30 November to 27 December 2002. He had complained in particular about the overcrowding of his cell, lack of bed and lack of a ladder to the upper bed. Those complaints had been considered well-founded at the domestic level and the applicant had obtained appropriate relief by being moved to a cell with a bed and with a surface area of at least 3 m² per person.

61. They concluded that the applicant cannot further claim to be a victim of the alleged violations in respect of his detention in Gorzów Wielkopolski Prison from 30 November to 27 December 2002 and that in this part the application should be considered incompatible *ratione personae* with the Convention.

2. *The Government's objection regarding compliance with the six-months' rule*

62. The Government submitted that the conditions of the applicant's detention should not be treated as a continuous situation as they had frequently changed – both in terms of penitentiary facilities and cells in which the applicant had been detained.

63. In view of the foregoing, the Government requested the Court to consider the part of the application relating to the period of the applicant's detention before 24 September 2002 or at least before 28 February 2002 inadmissible as lodged out of time and to reject it in accordance with Article 35 §§ 1 and 4 of the Convention

3. *The Government's objection based on exhaustion of domestic remedies*

Article 35 § 1 of the Convention reads, in so far as relevant, as follows:

“1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ...”

64. The Government argued that the applicant had not exhausted domestic remedies available to him, as required by Article 35 § 1 of the Convention. They raised a preliminary objection similar to that relied on in the case of *Latak v. Poland* (see *Latak v. Poland* (dec.) no. 52070/08, 12 October 2010, §§ 63-64). In particular, they stressed that the applicant had been moved to a cell in which he had been secured at least the minimum standard space of 3 m² per person shortly after the delivery of the *Orchowski* and *Norbert Sikorski* pilot judgments. In these circumstances,

the situation giving rise to the alleged breach of Article 3 of the Convention no longer existed and the applicant should have brought a civil action under Article 24 taken in conjunction with Article 448 of the Civil Code in order to seek compensation for the past violation.

65. In view of the foregoing, the Government invited the Court to reject the application for non-exhaustion of domestic remedies, pursuant to Article 35 § 1 of the Convention.

B. The applicant's position

66. The applicant in general disagreed with the above arguments and maintained that the remedy suggested by the Government could not be considered "effective" for the purposes of Article 35 § 1 of the Convention.

C. The Court's conclusion

1. Exhaustion of domestic remedies

67. The Court has already examined the same objection raised by the Government in the above-mentioned case of *Latak v. Poland* and considered their arguments not only in the context of that particular applicant but also in respect of other actual or potential applicants with similar cases (see *Latak*, cited above, §§ 71-85).

68. In so doing, the Court had regard to the fact that on the date of the adoption of its decision there were 271 cases pending before it where the applicants had raised complaints similar in substance, alleging a violation of Article 3 in that at various times and for various periods they had been adversely affected by the same structural problem, having been detained in overcrowded, insanitary cells (*ibid.* § 84).

69. Having found that a civil action under Article 24 taken in conjunction with Article 448 of the Civil Code could be considered an "effective remedy" for the purposes of Article 35 § 1 of the Convention as from 17 March 2010 and having regard to the 3-year limitation period for lodging such an action, the Court held that essentially in all cases in which in June 2008 the alleged violation had either been remedied by placing the applicant in Convention-compliant conditions or had ended *ipso facto* because the applicant had been released, the applicants concerned should bring a civil action for the infringement of personal rights and compensation (*ibid.* § 85 and § 76 respectively).

70. In the present case, the situation giving rise to the alleged violation of Article 3 ended after June 2008 when the applicant had been placed in a cell in which the statutory minimum size requirement of 3 m² per person was respected. That being so and having regard to the fact that he still has

adequate time to prepare and lodge with Polish civil courts an action under Article 24 taken in conjunction with Article 448 of the Civil Code, he should, before having their Convention claim examined by the Court, be required to seek redress at the domestic level.

71. In any event, as from 6 December 2009, the date on which Article 110 § 2 (f) of the Code of Execution of Criminal Sentences entered into force, a detainee placed in conditions where the area per person is less than the statutory minimum may lodge a complaint with the court and contest a decision of the prison administration to reduce his cell space (see *Latak*, cited above, §§ 42-43 and 86-87).

72. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

2. Other preliminary objections

73. In view of its finding regarding the Government's objection on exhaustion of domestic remedies (see paragraph 74 above), the Court considers that it is not necessary to examine the remaining objections.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

74. Invoking Article 5 § 1 (c), the applicant complained that he had not been duly informed about the reasons for his arrest.

75. The Court notes that the applicant was arrested on 19 August 1998, while he lodged his application on 12 August 2002. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

76. The applicant also complained under Article 6 § 1 of the Convention about the alleged unfairness of the criminal proceedings against him. He alleged in particular that he had not been assisted by an interpreter during his psychiatric evaluation and that the domestic courts had failed to mitigate his sentence in breach of the provisions of the New Criminal Code.

77. The Court notes that the applicant failed to raise on appeal the issue of allegedly not being provided with an interpreter during a psychiatric evaluation. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

78. As to the applicant's complaint that the domestic courts had failed to mitigate his sentence, the Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by the domestic courts – to which it falls in the first place to interpret and apply the domestic law – unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I; *Kopecký v. Slovakia* [GC], no. 44912/98, § 56,

ECHR 2004-IX). The Court notes that there is no indication that the domestic courts were arbitrary in the assessment of evidence or that they reached conclusions that were unreasonable. In the proceedings the applicant was represented by a qualified lawyer and was not prevented in any way from presenting his arguments to the courts. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 § 3 and 4 of the Convention.

79. The applicant further complained under Article 6 § 1 of the Convention about the excessive length of the proceedings.

80. The Court notes that the impugned proceedings came to an end on 16 May 2002, i.e. less than three years before 17 September 2004, the date on which the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) (“the 2004 Act”) had come into force. It further observes that, pursuant to section 16 of the 2004 Act, it was open to persons such as the applicant to seek compensation in tort from the State Treasury, relying on Article 417 of the Civil Code for damage caused by the allegedly excessive length of proceedings in which a judicial decision on the merits of the case had already been given (see *Turzyński v. Poland* (dec.), no. 10453/03, 22 November 2005). The Court has already examined whether a civil action for damages brought under section 16 of the 2004 Act read together with Article 417 of the Civil Code was an effective remedy in respect of the length of judicial proceedings. It held, having regard to the characteristics of these remedies and notwithstanding the absence of established judicial practice in respect of such claims, that these remedies were effective in respect of persons who on 17 September 2004, when the 2004 Law entered into force, could still lodge such an action with the competent domestic court (see *Krasuski v. Poland*, judgment of 14 June 2005, §§ 69-72). However, the applicant has failed avail himself of this remedy. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

81. Finally, the applicant complained about an inadequate legal assistance provided by his legal-aid lawyer during the proceedings.

82. The Court reiterates that “a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes (...) It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed (...) [T]he competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way” (*Kamasinski v. Austria* judgment of

19 December 1989, Series A n° 168, p. 33, § 65). The Court notes that in the present case the applicant failed to raise the complaint before any relevant domestic authorities. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the length of detention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 5 § 3 of the Convention.

Done in English, and notified in writing on 3 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President