



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

FOURTH SECTION

CASE OF MIROSLAW GARLICKI v. POLAND

(Application no. 36921/07)

JUDGMENT

STRASBOURG

14 June 2011

FINAL

14/09/2011

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

In the case of Mirosław Garlicki v. Poland,
The European Court of Human Rights (Fourth Section), sitting as
a Chamber composed of:
Nicolas Bratza, *President*,
Lech Garlicki,
Ljiljana Mijović,
Sverre Erik Jebens,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva, *judges*,
and Lawrence Early, *Section Registrar*,
Having deliberated in private on 24 May 2011,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 36921/07) 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 Polish national, Mr Mirosław Garlicki (“the applicant”), on 11 August 2007.

2. The applicant was represented by Ms M. Bentkowska-Kiczor and, subsequently, by Ms M. Gąsiorowska, lawyers practising in Warsaw. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołásiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that his detention on remand had not been imposed by an independent judicial officer and that his right to be presumed innocent had been violated.

4. On 2 October 2007 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time.

5. The Court took note of Judge Lech Garlicki’s declaration that the fact of his surname being the same as the applicant’s was purely coincidental and that there was no relationship of any kind.

6. Written submissions were received from the Helsinki Foundation for Human Rights in Warsaw, which had been granted leave by the President to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1960 and lives in Kraków.

A. The applicant's arrest and detention on remand

8. The applicant is a doctor, specialising in cardiac surgery. He is one of the few specialists in Poland qualified to perform heart transplants. At the relevant time he was the Director of the Cardiac Surgery Clinic in the Ministry of Internal Affairs and Administration Hospital in Warsaw and an assistant professor at the Jagiellonian University Medical College in Kraków.

9. Following information submitted by doctors employed in the Ministry of Internal Affairs and Administration Hospital, on 12 December 2006 the Warsaw Regional Prosecution Office instituted an investigation into cases of alleged medical negligence and several counts of harassment of hospital staff by the applicant. It appears that the applicant was also suspected of receiving bribes from his patients.

10. On 12 February 2007 the applicant arrived at work at about 7 a.m. and started preparing for an operation which was planned for that morning.

11. At 7.40 a.m. a dozen masked and armed officers of the Central Anti-corruption Bureau (CAB) stormed the Cardiac Surgery Clinic. Some of the officers burst into the applicant's office pointing their firearms and shouting. The officers threw the applicant to the floor, pinned his head to the floor and then handcuffed his hands behind his back. They searched the applicant's office. Subsequently, they allowed him to change his clothes and handcuffed him again, this time with his hands in front.

12. The applicant was taken, in handcuffs, out of his office to the hospital's outdoor car park. There were a large number of masked and armed officers in the car park and some were in plain clothes. The applicant's car was searched over a period of about one hour. A sniffer dog was also used. During this time the applicant stood nearby with his hands visibly handcuffed. The events were viewed by hundreds of hospital staff, patients and visitors. The applicant's arrest was filmed continuously by one of the officers.

13. Subsequently the applicant was taken to his flat in Warsaw. Several dozen officers searched the flat over a period of nine hours. They seized several hundred objects, including bottles of alcohol, watches, fountain pens, cutlery, porcelain, and so on which were to be used as evidence of the applicant's bribe-taking. The search of his flat was also filmed.

14. The applicant was then taken to a hospital for a medical check. At about midnight on 12 February 2007 the officers took the applicant to see Mr Mariusz Kamiński, the Head of the CAB, who shouted at him using offensive language. He said, among other things, that the applicant would not leave prison before turning seventy. The Government submitted that there was no information in the case file concerning the meeting between the Head of the CAB and the applicant.

15. The applicant was detained at Warsaw Police Headquarters.

16. According to the Government, the applicant did not appeal against his arrest (*zażalenie na zatrzymanie*) or object to the way in which the CAB's officers executed the search of his flat.

17. On 13 February 2007 at about 3 p.m. the Warsaw Regional Prosecutor charged the applicant with twenty offences, including exposing a patient to a direct danger to his life or health (Article 160 § 1 of the Criminal Code ("CC")), homicide of a patient (Article 148 § 1 of the CC), harassing a member of staff, forgery of medical documentation, and sixteen counts of taking bribes from patients. The prosecutor based his decision on the evidence gathered in the case, including statements of victims and secret video-recordings of some cases of receiving bribes.

18. According to the applicant, on 12 and 13 February 2007 he was not given any food.

19. On 14 February 2007 A.M., an assessor (junior judge) at the Warsaw-Mokotów District Court, remanded the applicant in custody until 11 May 2007. The order read as follows:

"The evidence gathered in the case, in particular witnesses' depositions and the suspects' statements (...), expert reports (...) and documentation from the secret files (...) points to a strong likelihood that the suspect [applicant] committed the offences with which he is charged, and that is a basic evidentiary condition for the imposition of a preventive measure pursuant to Article 249 § 1 of the Code of Criminal Procedure.

The investigation is in its early stage and it is necessary to undertake many further investigative measures to clarify fully the circumstances under investigation. Having regard to the nature of the charges and the surrounding circumstances, there is a reasonable risk that the suspect, if left at liberty, could engage in acts aimed at obstruction of the proceedings. Many persons who must necessarily be questioned in the course of the present proceedings are hierarchically subordinate to the suspect [applicant], and that necessitates preventing the suspect [applicant] from contacting them in any manner. Moreover, as Director of the Cardiac Surgery Clinic the suspect [applicant] has access to information which must be kept secure and is required by the authorities conducting the investigation to allow the circumstances which gave rise to the charges to be clarified in full.

Furthermore, in respect of one of the offences with which the suspect is charged [homicide] he is liable to a sentence of 25 years' imprisonment or life imprisonment, while in respect of many other offences he is liable to a maximum sentence of 8 years' imprisonment. The real risk that a severe penalty might be imposed on him may thus induce the suspect to undertake illegal actions to obstruct the proceedings. ..."

20. On the same day, following the pronouncement of the Warsaw-Mokotów District Court's decision, the Minister of Justice -Prosecutor General and the Head of the CAB held a press conference concerning the applicant's case.

21. The applicant appealed against the detention order. He submitted that the evidence in the case was insufficient to charge him with homicide and that the prosecution had intentionally formulated the charge with a view to compelling the court to remand him in detention. Furthermore, the applicant contested the finding that he would obstruct the proceedings. He argued that the District Court should have considered the imposition of other, more lenient, preventive measures having regard to the applicant's unblemished reputation and in view of the Court's case-law. In addition, he submitted that remanding him in detention could expose his patients to death by preventing them from undergoing their planned cardiac operations. Lastly, referring to the Convention, the applicant raised the issue of the status of the assessor and averred that she did not enjoy the necessary guarantees of independence from the executive.

22. On 15 March 2007 the Warsaw Regional Court dismissed the applicant's appeal. It found that the applicant was suspected of having committed a series of offences. The court noted:

“even leaving aside the charge of homicide, other charges (bribery) attracted a statutory maximum sentence of at least eight years' imprisonment”.

Thus, the applicant's detention on remand was justified by the severity of the anticipated penalty, in view of the significant number of bribery charges.

23. As to the applicant's argument that the evidence in the case had been insufficient to charge him with homicide, the Regional Court noted that that was not the only charge against the applicant. In connection with other charges (including bribery) there was enough evidence to substantiate a reasonable suspicion that the applicant had committed the offences. The Regional Court further concurred with the District Court's view that there was a risk that the applicant would attempt to influence witnesses, and that only custodial measures would ensure the proper conduct of the proceedings. The court did not respond to the argument concerning the status of the assessor.

24. On 7 May 2007 the Warsaw Regional Court, on an application from the prosecution, extended the applicant's detention until 11 August 2007 but at the same time held that he would be released if he put up bail in the amount of PLN 350,000 (approximately EUR 90,000) by 31 May 2007. It reasoned as follows:

“The prosecutor justifies his application for the extension of detention on remand by the severity of the likely penalty and the risk of obstruction [of the proceedings] by the suspect.

The Code of Criminal Procedure requires the authorities conducting the proceedings to analyse, at every stage, whether the evidence gathered in the case sufficiently justifies the imposition of preventive measures. Thus, the court could not leave unaddressed the legal classification of the act allegedly committed by the suspect to the detriment of the victim J.G. under Article 148 § 1 of the Criminal Code, particularly as it appears from the grounds for the prosecutor's application that the likelihood of a severe sentence of imprisonment (even life imprisonment) for that act is one of the grounds for extending Mirosław Garlicki's detention. In the court's view, the prosecution's assessment cannot be sustained in any way. It has to be noted that the [prosecutor's] application does not contain any reasons for giving such a legal classification to the suspect's act. It cannot be maintained that the reports presented by experts Z.R. and A.B. point to a possibility of charging Mirosław Garlicki with homicide committed with conditional intent ("*zamiar ewentualny*"). Moreover, the prosecutor assumes such legal classification of the charge in isolation from the established case-law (...) Taking into account, as stated above that the charge [of homicide] is groundless, it evidently could not serve as a ground to grant the [prosecutor's] application.

However, the evidence gathered so far in the investigation, which, apart from witness statements, also includes evidence obtained by technical means as a result of covert measures (*czynności operacyjne*), points to a strong likelihood that the suspect committed the corruption-related offences with which he has been charged. Those offences attract a severe sentence of imprisonment, and having regard to their significant number it is likely that the suspect will be sentenced to a lengthy term of imprisonment. The last issue to determine is whether remand in custody is the only preventive measure which could secure the proper conduct of the proceedings.

In the court's view, contrary to the prosecutor's position, there is no substantiated risk that the suspect would unlawfully obstruct the criminal proceedings, e.g. by inducing witnesses to give false testimonies. Such a risk is not in any way apparent from the statements or testimonies of persons indicated in the grounds for the [prosecutor's] application. While it can be accepted that the need to remand the suspect in custody existed at the beginning of the proceedings, where there was a risk that he would influence the testimonies of his subordinates, there is clearly no such risk at the present moment. The investigation has been conducted with particular intensity and all the persons employed in the Cardiac Surgery Clinic of the hospital have already been heard and that evidence is secured. The suspect Mirosław Garlicki is also no longer the superior of those persons and it cannot be said that there is any hierarchical relationship between them. It is further difficult to assume in the circumstances of the case that the suspect will return to the post he held before. Similarly, it cannot be said that the suspect may influence the actions of the authority conducting the proceedings aimed at securing medical documentation and the preparation of a cardiac surgery expert report. Clearly, the suspect has no influence whatsoever in respect of the evidence obtained so far with the use of technical devices. (...) The suspect does not have a criminal record, and as it can be seen from the declarations produced by the defence, many public persons are willing to provide a guarantee that Mirosław Garlicki will not obstruct the pending proceedings. ...

In those circumstances, in the court's view, if bail in the amount of PLN 350,000 were paid within the fixed time-limit, that would be a sufficient preventive measure ensuring the proper conduct of the proceedings and the suspect's appearance in response to every summons of the authorities conducting the proceedings."

25. The prosecution appealed against the Regional Court's decision. On 18 May 2007 the Warsaw Court of Appeal partly amended the impugned decision by imposing further preventive measures in the event of the applicant's release. It ruled that guarantees given by A.W., deputy president of the Supreme Medical Chamber, and L.A., a member of the board of the Polish Transplantation Society, be produced. It also imposed a ban on the applicant's leaving the country and ordered the seizure of his passport. For the rest, the Court of Appeal upheld the Regional Court's decision.

26. On 18 May 2007 all the conditions specified by the Court of Appeal were met and the applicant was released.

27. It appears, as revealed by the *Gazeta Wyborcza* daily, that the investigation in the applicant's case was code-named "*Mengele*" by the CAB. The Court of Appeal considered the code name to be inappropriate and informed the Prosecutor General accordingly.

28. On 12 May 2007 the applicant's employment contract with the Ministry of Internal Affairs and Administration Hospital came to an end.

29. On 24 September 2007 the public prosecutor additionally charged the applicant with nine counts of violation of employees' rights, harassment of his wife, subjecting a person to sexual intercourse several times while abusing a relationship of dependence, attempt to subject a person to sexual intercourse, and several counts of bribery. In total, the applicant was charged with forty-nine counts of bribery.

30. On 7 May 2008 the Warsaw Regional Prosecutor discontinued the investigation against the applicant in respect of the charges of exposing a patient to a direct danger to his life or health (Article 160 § 2 of the CC), homicide of a patient (Article 148 § 1 of the CC) and forgery of medical documentation on the grounds that there was no evidence that the applicant had committed those offences. In respect of the first two offences, the prosecutor based his decision on the expert evidence, in particular the report prepared by a German cardiology expert.

31. The bill of indictment against the applicant was filed with the Warsaw-Mokotów District Court on an unspecified date.

32. It appears that the applicant's trial is pending.

B. The press conference concerning the applicant

33. On 13 February 2007 the Minister of Justice – Prosecutor General and the Head of the CAB convened a press conference on the applicant's case for the following day. The press conference took place on 14 February 2007 at 2 p.m. shortly after the Warsaw-Mokotów District Court had pronounced its decision ordering the applicant's detention on remand.

34. During the press conference the Minister of Justice – Prosecutor General and the Head of the CAB referred to the applicant as “Doctor G.”. However, at the outset they specified that the applicant was the Director of the Cardiac Surgery Clinic in the Ministry of Internal Affairs and Administration Hospital at Wołoska Street in Warsaw, which enabled the media to quickly establish the applicant’s identity.

35. According to the transcript of the press conference, the Head of the CAB stated in respect of the charges concerning bribe-taking:

“The information gathered and the evidence obtained mean that today we can tell you clearly: Doctor G., acting the part of a virtuoso of Polish cardiac surgery, is a ruthless and cynical bribe-taker. We have knowledge of several dozen bribes accepted by this doctor.”

36. The Minister of Justice – Prosecutor General, Mr Z. Ziobro, stated in respect of the charge of homicide:

“Life often writes the most brutal scenarios. The facts which the service headed by Minister Kamiński [the CAB] succeeded in unveiling are truly shocking. What we are seeing here was not limited to cynical abuse of human feelings, emotions and the affection of close relatives for their loved ones who were ill, and the exploitation of those feelings. Extorting money, robbing people not only of money but also of hope-often, even when the hope was not really there, the money was still extorted. And not only that, the evidence shows that what could happen here is more than just massive corruption and gross negligence and medical malpractice. One of the charges made by the prosecution is that of homicide in one of the cases which the Minister Kamiński referred to me. ...

Initially (...) I did not believe it. I could not get it into my mind that in the health service, in a very well known clinic, a very well known and, at least until recently, universally respected cardiac surgeon and professor could perpetrate shameful acts of this sort. But when I began to find out what evidence had been gathered by the CAB, and later also by the prosecutors, I changed my mind. I have changed my mind and, unfortunately, I am more and more overcome with sadness, but we can see this unfortunately sad discovery of the truth as an important event in the true sense of that expression, in that no-one else will ever again be deprived of life by this man (*już nikt nigdy przez tego pana życia pozbawiony nie będzie*). Ladies and Gentlemen, at the present moment I have one substantiated case indicating with high probability a possible homicide, and in this connection a charge based on Article 148 [intentional homicide] of the Criminal Code was made. Other cases where the circumstances of patients’ deaths are unclear are obviously also being examined. We don’t prejudge the character of those events. Ultimately, the court will decide the case; nonetheless, what we have already established and gathered as evidence at the present moment is truly shocking ...

I would like to emphasise once again, that as the Prosecutor General, the person who directly supervised this case from a certain moment, I regard very highly the professionalism of the CAB’s officers, the professionalism of the prosecutors, thanks to which we succeeded in gathering strong evidence, which is rare and which definitely shows that we were dealing with a long-lasting criminal activity. ...

If you will permit me, in respect of the charge of homicide, the [applicant's] cynicism is demonstrated by the fact that where we can see from the evidence in our possession that a man [patient] was *de facto* sentenced to death, that did not prevent this gentleman [the applicant] from demanding a bribe from his close family, and as the family were poor, they had no possessions, they were farmers, he suggested that they sell their cow so as to have money purportedly to save their dear father. And how he went about saving [that patient] finds its expression in Article 148 of the Criminal Code, so I think that this example very [well] illustrates the attitude, the lofty morals of this virtuoso, as some media have called him. ...

I wanted to stress that the Director of the Clinic [the applicant] in the Ministry of Internal Affairs and Administration Hospital has been charged with homicide; according to the prosecutors, acting with the conditional intent ("*zamiar ewentualny*") of depriving a patient of life, and anticipating and accepting the result of his death, he undertook a series of acts which, in short, led to that [death]. That is what is meant by depriving of life with conditional intent, conduct which emerges from well documented evidence, hence the charge. It is a very striking and cynical desire for profit and arrogance, incredible and striking arrogance in the conduct of the person charged with committing those offences, those crimes"

37. During the press conference the CAB's recording of the applicant's arrest and the search of his apartment was shown. The recording emphasised the significant number of objects and money seized from the applicant's flat which were to be used as evidence of his corruption.

38. The main news programme broadcast on the public television station on 14 February 2007 at 7.30 p.m. started with a news story about the applicant which was entitled "Doctor Death". The news reader stated that "He [the applicant] had murdered a patient because he did not get a bribe from him" and informed viewers that the applicant had committed homicide and accepted bribes. News of the applicant's arrest and the press conference was widely reported in all the media.

39. The Minister of Justice – Prosecutor General's comments about the applicant prompted strong criticism from the former Ombudsman, the National Bar Council, the Polish Helsinki Committee and others. On 23 February 2007 the President of the Constitutional Court stated that the Minister of Justice – Prosecutor General had breached the Constitution by making statements about doctor G.'s [the applicant's] guilt and that he should be held to account before the State Tribunal (*Trybunał Stanu*).

40. In response to that suggestion the Minister stated, as reported in the *Rzeczpospolita* daily of 24-25 February 2007:

"A person who has just begun holding such office [as President of the Constitutional Court] sometimes says a few words too many. I don't take back anything and I am ready to repeat it all. The judge [the President of the Constitutional Court] should go further and demand that I be charged before the Rwanda Crimes Tribunal [International Criminal Tribunal for Rwanda]."

C. Civil proceedings brought by the applicant against Mr Z. Ziobro

41. On 12 September 2007 the applicant brought a civil action against Mr Z. Ziobro for infringement of his personal rights under Articles 24 and 448 of the Civil Code. He sought an order requiring the defendant to personally express the following apology on the main national radio and television stations and in four major newspapers:

“I, Zbigniew Ziobro, apologise to Dr Mirosław Garlicki for what I said about him, namely that ‘no-one else will be deprived of life by this man’, which tarnished the good name and reputation of Dr Mirosław Garlicki. I express my regret and admit that these words were deceitful and insulting and should have never been spoken by me.”

The plaintiff further sought an award of PLN 70,000 in compensation for non-pecuniary damage and an order enjoining the defendant to refrain from making any future statements which would suggest that the applicant had committed homicide.

42. On 25 August 2008 the Kraków Regional Court gave judgment. It ordered the defendant to publish an apology directly after the main evening news programmes on the three national television stations (TVP, Polsat and TVN). The apology read:

“I, Zbigniew Ziobro apologise to Dr Mirosław Garlicki for having said about him that ‘no-one else will ever again be deprived of life by this man’, which tarnished the reputation of Dr Mirosław Garlicki.”

„(Ja Zbigniew Ziobro przepraszam Pana dr Mirosława Garlickiego za wypowiedzenie pod jego adresem słów – już nikt nigdy przez tego Pana życia pozbawiony nie będzie – które naruszyły cześć Pana dr Mirosława Garlickiego).”

The court awarded the applicant compensation in the amount of PLN 7,000. It dismissed the remainder of the applicant’s action.

43. When establishing the facts, the court based its findings on the transcript of the press conference held by the Head of the CAB and the Minister of Justice – Prosecutor General on 14 February 2007, various official and private documents, press releases and rectifications issued by the Ministry of Justice and press articles.

44. As regards the question whether there was an infringement of the applicant’s personal rights, the Regional Court held that the defendant had damaged the applicant’s reputation (*cześć*). In this respect it found, *inter alia*:

“... the statements included in the defendant’s impugned announcement, including ... just the information about the prosecution’s charges brought against the claimant (whose identification was a simple matter since his first name, the first letter of his surname, his place of employment and the function held were given), without any need to refer to more categorical terms employed by the defendant such as ‘no-one else will ever again be deprived of life by this man’, or describing the claimant as a ruthless and cynical bribe-taker who *de facto* sentenced his patient to death and so on, objectively infringed the personal rights of the claimant...”

45. Once it was demonstrated that there was an infringement of the applicant's personal rights, Article 24 of the Civil Code established a presumption that such infringement was unlawful. Accordingly, the Regional Court examined next whether there had been any grounds to exclude the defendant's liability for unlawfully damaging the applicant's reputation. The court held that the defendant's actions had been unlawful, having regard to the nature of the allegations made against the claimant and the limitations stemming from the principle of the presumption of innocence. In this respect, the Regional Court found *inter alia*:

"...it was or could have been within the powers of the Prosecutor General – the office held by the defendant at the material time – to inform the public about particular investigations and their progress, and also to disclose – within the boundaries set by the law – information regarding the suspect or the accused. ...

However, those persons so authorised do not enjoy 'complete freedom of expression' as asserted by the defendant if their actions are undertaken in the public interest. That principle, despite the defendant's assertion to the contrary, has not been accepted in the jurisprudence of the Polish courts; in particular it is not reflected in the position set out ... in the Supreme Court's judgment of 23 July 2007 (case no. II CKN 285/97). It was clearly indicated [in this judgment] that a negative assessment of a person's behaviour expressed by a State authority (or official) is not an unlawful assessment where, although it was not sufficiently verified or justified in the specific circumstances (because, for example, of the erroneous assessment of certain facts or the lack of complete factual material), it was nonetheless made within the scope of statutory competences and within the boundaries of matter-of-fact necessity (*w ramach rzeczowej potrzeby*).

Worth noting here is the judgment of the European Court of Human Rights of 10 February 1995, ... which states that freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6 § 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (application no. 15175/89 [Allenet de Ribemont v. France]; see also the judgment of the ECHR of 26 March 2002, application no. 48297/99 [Butkevičius v. Lithuania]).

In the court's assessment, the critical statement of the defendant fell short of this obligation. Indeed, the defendant did not only state the charge of having committed an offence specified in Article 148 of the Criminal Code as brought against the claimant on the basis of the prosecution's decision and the circumstances justifying it, but in his emotional, exaggerated, unbalanced and judgmental statement emphasised this charge in a manner which excluded any doubts as to its correctness (*lecz swoją emocjonalną, egzaltowaną, niewyważoną i ocenną wypowiedzią wyeksponował ów zarzut w sposób wykluczający jakiegokolwiek wątpliwości co do jego słuszności*). This effect was exacerbated by the statement that 'no-one else will ever again be deprived of life by this man' ... For in situations where there is unintentional deprivation of life it is rather accepted to use such terms as an accident, error, coincidence, misfortune or incident. ...

It should be stated once more that at the press conference no accurate information was given about the results of the investigation, [and] almost no concrete information about the investigation at all.

It should be underlined that the defendant undoubtedly had the right to disclose information related to the charge brought against the claimant; however due to the risk of misinterpretation of this information by the recipients he should have refrained from statements giving rise to belief in the claimant's guilt. The more so since as the Prosecutor General, responsible for safeguarding the rule of law (section 2 of the Prosecution Authorities Act of 20 June 1985), [he] had the duty to comply with the important principle of the legal order imposing respect for the defendant's presumption of innocence as a legally protected interest. In this connection, the defendant should have presented the information concerning the investigation, in particular in respect of the charge of homicide, in a moderate form, without passing his own judgment, which would go significantly beyond reporting on the proceedings. It should thus be considered that the behaviour of the defendant was not factual and cautious, [and] that the opinions expressed exceeded what was strictly necessary, and the terms employed were exaggerated in form and content."

46. With regard to the redress for the damage to the applicant's reputation, the Regional Court partly modified the text of the apology by having its second sentence deleted. In so doing it took into account the type of right infringed and the scope of the infringement. Concerning the enforcement of its judgment, it obliged the defendant to publish the apology at his expense rather than requiring him to express it personally. The court further considered that it would be appropriate to limit the number of places where the apology should be published to three major television stations (one public and two private). This decision was motivated by the need to achieve the compensatory and preventive rather than the repressive goal of the publication of an apology.

47. As regards compensation for non-pecuniary damage suffered on account of the infringement, the Regional Court held that the defendant's fault, at least in the form of negligence, had been established. The use of words which clearly suggested that the claimant had undoubtedly committed homicide had breached the principle of the presumption of innocence, thereby infringing the claimant's personal rights. At the relevant time the defendant had held the office of Minister of Justice – Prosecutor General, so he had been under a particular duty to formulate his statements carefully. The Regional Court awarded the applicant PLN 7,000 which it considered adequate in the circumstances, having regard to a number of relevant factors, including the gravity of the infringement and the extent of the damage suffered. It took into account that the applicant had failed to demonstrate what precise impact the impugned statement had had on his private life and that, in respect of his professional life, the applicant had been employed in a private hospital since the summer of 2008.

48. Both parties appealed. The applicant contested, *inter alia*, the manner of publication of the apology and the modification of its text. He took issue with the deletion of the second sentence from the apology, which he considered important for the restoration of his reputation. He further objected to the low amount of compensation for non-pecuniary damage.

49. The defendant challenged the Regional Court's judgment in its entirety. He argued that he had not infringed the applicant's personal rights and, alternatively, that any such infringement had been in accordance with the law. The defendant alleged that the court had erroneously applied substantive and procedural law. He also submitted that the order to publish the apology had taken the appearance of a financial sanction.

50. On 9 December 2008 the Cracow Court of Appeal held a hearing and gave judgment. It amended the first-instance judgment only in respect of the compensation awarded to the applicant which it increased to PLN 30,000. The Court of Appeal dismissed the remainder of the applicant's appeal and dismissed the defendant's appeal in its entirety.

51. The Court of Appeal noted that the claimant had established, in accordance with the burden of proof lying on him, that his personal right to respect for his reputation had been infringed by the defendant's statement "no-one else will ever again be deprived of life by this man". In that connection, it fully accepted the factual findings and legal assessment of the Regional Court. The infringement of the claimant's personal right had been evident as the defendant had indicated that the charge of homicide had been made against the head of a specific department of a particular hospital. As regards the damage to the applicant's reputation, the Court of Appeal found:

"... the first-instance court did not violate the provisions of substantive and procedural law referred to by the defendant in his appeal. Similarly the allegation of errors in respect of factual findings which were relevant for the determination of the issue could not stand. The facts weighing in favour of the infringement of the claimant's personal right to respect for his reputation on account of the defendant's impugned statement were so obvious (*contra factum nullum argumentum*) that no argument by the defendant can entail the intended legal consequences. It is not open to doubt that since the impugned statement was made by the Minister of Justice -Prosecutor General the public reaction of persons who had no professional dealings with the law in respect of the claimant ... had to be negative, i.e. they would be convinced of his guilt."

52. With regard to the presumption of unlawfulness of the infringement, the Court of Appeal held that the defendant had failed to rebut the presumption. It found *inter alia*:

"The constitutional and criminal-law principle of the presumption of innocence implies that an accused person (and even more so a suspect) must be presumed innocent until his guilt is proved and confirmed by a final court decision. ...

The impugned statement [of the defendant] was inadmissible at that stage of the ongoing proceedings, and in particular because of the principle of the presumption of innocence. The defendant, even though he was the Minister of Justice - Prosecutor General, was not authorised to make such a statement in respect of the claimant since at that stage [of the proceedings] no final judgment convicting him of the alleged offence had been given. He [the defendant] had the unquestionable right to inform the public about the charges brought against the claimant ... but the manner in which he did it ... was not appropriate for the office which he held ...

Moreover, the degree of unlawfulness of the defendant's actions results from the fact that the prosecutor charged the claimant with homicide of a patient, and the court remanded the claimant in custody and his appeal was not allowed by the second-instance court. However, as it turned out later ... the evidence subsequently gathered in the investigation did not at all substantiate such accusations ...

The defendant's impugned statement in the light of the final result of the criminal proceedings against the applicant in respect of the offence specified in Article 148 § 1 of the CC clearly underlines the essence and the purpose of the principle of the presumption of innocence.

In the circumstances of the present case the defendant cannot exactly claim that he acted in accordance with the law or in defence of a justifiable public interest. It cannot be accepted either that the impugned statement was made on the basis of information which was collected with due diligence. The principle of the presumption of innocence required that the defendant display exceptional care and diligence in formulating publicly any statements to the effect that the claimant, as a doctor, committed homicide on a patient, irrespective of the information and opinions given by the persons he requested to be heard as witnesses in the case. The defendant, being a lawyer holding a high public office, should in particular have consulted expert opinions. ..."

53. The Court of Appeal concurred with the Regional Court's judgment in respect of the text of the apology and the form in which it was to be made. With regard to compensation for non-pecuniary damage, the Court of Appeal agreed that the defendant had been at fault through negligence, but held that it had been gross negligence. It found in this respect:

"... the defendant is a lawyer, and at the time of the infringement of the claimant's personal right he held the office of Minister of Justice – Prosecutor General, and as such he should have known what information from the investigation ... he could make public, as well as what he could say about a person who was charged and remanded in custody. On the other hand, as a politician he should have been aware of the media effect of such a categorical statement as 'no-one else will ever again be deprived of life by this man' in the claimant's case and where the defendant divulged the necessary information to enable the claimant's identification. ... The impugned statement, having regard to the stage of the ongoing criminal proceedings against the claimant, violated the basic written rules of legal knowledge (the presumption of innocence and *in dubio pro reo*). Moreover, in a case where a doctor – whose mission, vocation and task is to save human life and health – was charged with homicide of a patient in connection with a surgical operation (it is difficult to imagine a more serious allegation against a doctor in relation to his profession) he should have realised that to make publicly so categorical and definite a statement was highly unprofessional and irresponsible ..."

The Court of Appeal, having regard to all the factual circumstances of the case, including the significant publicity which the defendant's statement attracted in the media and the moral suffering of the applicant, found that it would be appropriate to award PLN 30,000 for non-pecuniary damage.

54. Mr Z. Ziobro lodged a cassation appeal against the Court of Appeal's judgment. On 29 October 2009 the Supreme Court refused to entertain his cassation appeal. It found that there had been no significant legal issue in the case which would justify the examination of the cassation appeal on the merits.

55. On an unspecified date the defendant paid the applicant the compensation awarded by the court.

56. On 9 January 2010 Mr Z. Ziobro's apology was broadcast.

D. The seizure of the applicant's property

57. On 16 February 2007 the Regional Prosecutor made a seizure order in respect of the applicant's property with a view to securing the payment of an anticipated fine in the amount of PLN 720,000 (EUR 180,000). The order extended to the applicant's movable property, including money found in his flat, his salary and his bank accounts. The applicant was also prohibited from selling his car.

58. On the same day the prosecutor made a second seizure order in respect of the money found during the search of the house of the applicant's parents. The prosecutor seized a total of approximately PLN 90,000.

59. The applicant appealed against the seizure orders, arguing that they were *ultra vires* at that stage of the investigation and clearly excessive in view of the charges against the applicant.

60. On 26 April 2007 the Warsaw-Mokotów District Court dismissed the applicant's appeal. It found that the seizure orders had complied with the requirements specified in Article 291 §§ 1-2 of the Code of Criminal Procedure, namely that he had been charged with offences in respect of which a fine or obligation to compensate damage might be imposed. The court noted that at this stage of the proceedings the prosecutor's decision could not be considered arbitrary, having regard to the evidence gathered in the case. Furthermore, the measure had been intended to effectively secure the payment of a significant fine which might be imposed on the applicant.

61. On 11 September 2007 the Warsaw Regional Prosecutor issued a press release announcing that some of the objects found in the applicant's flat had been returned to him as they were his personal property and were irrelevant to the ongoing proceedings.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention on remand

62. The relevant domestic law and practice concerning 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 judgment in the case of *Kauczor v. Poland*, no. 45219/06, §§ 25-27, 3 February 2009.

B. Presumption of innocence

63. Article 42 § 3 of the Constitution provides:

“Everyone shall be presumed innocent until proved guilty in a final decision of a court of law.”

A similar principle is laid down in Article 5 § 1 of the Code of Criminal Procedure.

C. The Prosecution Authorities and the Prosecutor General

64. The Law of 20 June 1985 (as amended) on Prosecution Authorities (the Prosecution Authorities Act) (*ustawa o prokuraturze*) sets out general principles concerning the structure, functions and organisation of prosecution authorities.

Section 1 of the Act, in the version applicable at the material time, stipulated, in so far as relevant:

“1. The prosecuting authorities shall be the Prosecutor General and, subordinate to him, prosecutors, military prosecutors and prosecutors of the Institute of National Remembrance (...).

2. The Prosecutor General shall be the highest prosecution authority; his functions shall be carried out by the Minister of Justice.”

Under section 7 of the Act, in carrying out his or her statutory duties, a prosecutor must abide by the principles of impartiality and equality of citizens before the law.

Pursuant to section 8 of the Act, a prosecutor is independent in carrying out his or her duties, within the limits set out in this section. A prosecutor is required to abide by the instructions, guidelines and orders of his superiors. However, if an order relates to the substance of any action to be taken in proceedings, a prosecutor may request [his superior] to issue the order concerned with reasons in writing, to alter the order, to relieve him from performing an act prescribed by that order, or to remove him from

conducting the case in question. Requests to be removed from a case must be decided by a hierarchical superior of the prosecutor who issued the order.

65. On 31 March 2010 the amendments to the Prosecution Authorities Act entered into force. The amended Act provides for the separation of functions between the Minister of Justice and the Prosecutor General.

D. Assessors (junior judges)

66. The relevant domestic law and practice regarding the status of assessors, including the landmark judgment of the Constitutional Court of 24 October 2007 (case no. SK 7/06), are set out in the Court's judgment in the case of *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, §§ 16-25, 30 November 2010.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

67. The applicant complained under Article 3 of the Convention that during his arrest he had been subjected to degrading treatment, in particular that the manner of his handcuffing had been entirely unnecessary in the circumstances. The applicant underlined that his exposure in handcuffs to the hospital staff, patients and third persons during his arrest and the search of his car had been totally unjustified. Similarly, the applicant's arrest had been filmed with the aim of degrading him. In this connection, he also complained that the pictures of him handcuffed taken by the CAB during his arrest had been made available to the press and had been published on 13 February 2007 in all newspapers. Article 3 of the Convention reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. The Government's submissions

68. The Government claimed that the applicant had not exhausted the remedies provided for by Polish law in respect of his complaint under Article 3. The applicant had been arrested on a prosecutor's order given on the basis of Article 247 of the Code of Criminal Procedure. Consequently, he should have availed himself of an appeal against his arrest (*zażalenie na zatrzymanie*) as provided for in Article 246 of the CCP, which

would have subjected his arrest to a comprehensive judicial review. A review under Article 246 would have enabled the applicant to contest the justification for (*zasadność*) and the lawfulness and expediency (*prawidłowość*) of his arrest. It transpired from the record of the applicant's arrest that he had been informed of the right to bring such an appeal. The Government argued that this remedy was effective and should have been exhausted, referring to the Convention case-law (*Berliński v. Poland*, no. 27714/95, Commission decision of 2 July 1997, unreported, and *D.D. v. Poland* (dec.), no. 29461/95, 5 October 2000).

69. Furthermore, the applicant could have given notice to the public prosecutor (*zawiadomienie o popełnieniu przestępstwa*) that the CAB's officers had abused their authority in the course of his arrest (Article 231 of the CC) or ill-treated him physically or mentally at the time when he had been taken into custody (Article 247 of the CC). Had he done so, the public prosecutor would have been obliged to examine the applicant's allegations and issue a formal decision. Were the prosecutor to refuse to initiate criminal proceedings upon receiving such notice, the applicant would have had the right to seek a judicial review of that decision. The Government emphasised that in several cases examined by the Court the applicants who had brought Article 3 complaints had first made use of that remedy and the Court had not contested its effectiveness (*Dzwonkowski v. Poland*, no. 46702/99, 12 April 2007; *Lewak v. Poland*, no. 21890/03, 6 September 2007). The applicant had failed to exhaust that remedy and had not provided the domestic authorities with an opportunity to examine his grievances.

70. The applicant had also had a compensatory remedy at his disposal. He could have lodged a civil action under Articles 23 and 24 of the Civil Code seeking compensation for a breach of his personal rights under the Civil Code from the State Treasury represented by the head of the agency concerned. Those provisions would have allowed the applicant to assert that, by exposing him to degrading treatment during his arrest, the authorities had infringed his personal rights entitling him to claim damages from the State Treasury.

The Government concluded that the applicant had not availed himself of any of the above remedies.

B. The applicant's submissions

71. The applicant admitted that he had not lodged an appeal against his arrest on 12 February 2007. The reason for not having done so was that he could not predict that his case would be thrown into the media spotlight, that it would be used by the Law and Justice Party for its political campaign, and that the Minister of Justice Mr Z. Ziobro would be personally involved in his case. The applicant submitted that the manner of executing his arrest,

and in particular the fact that he had been frogmarched down two floors, in full view of the medical personnel and many patients and their families, had been an intentional exhibition, as he could have been escorted out of the hospital more discreetly.

72. The applicant acknowledged that he had not raised any objections regarding the execution of his arrest as he had been deeply shocked by the events. He argued that CAB's officers had proceeded in accordance with their internal regulations, which allowed them to resort to excessive force in the course of an arrest. He had no influence on the internal regulations of a State agency which permitted this humiliating and degrading treatment. The applicant's degrading treatment had also continued on account of the media frenzy triggered by the authorities then in power and the repeated broadcast of the video recording his arrest.

C. The Court's assessment

73. The Court observes that the applicant did not complain of physical violence but of degrading treatment in the course of his arrest which had consisted in the manner of his handcuffing and his exposure in handcuffs to the hospital staff, patients and third persons during his arrest and the search of his car at the hospital car park. The alleged degrading treatment further consisted in the filming of the applicant's arrest by the CAB officer and making available to the media the recording of his arrest.

74. The Court recalls that handcuffing does not normally give rise to an issue under Article 3 of the Convention ("degrading treatment") where the measure has been imposed in connection with lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence (see *Raninen v. Finland*, 16 December 1997, § 56, *Reports* 1997-VIII; *Erdoğan Yağız v. Turkey*, no. 27473/02, § 42, ECHR 2007-III (extracts); *Kazakova v. Bulgaria*, no. 55061/00, § 53, 22 June 2006; and *Wieser v. Austria*, no. 2293/03, § 37, 22 February 2007).

75. The Court observes that in the present case the applicant did not simply object to his handcuffing. He also complained about the whole range of measures applied by the authorities in the course of his arrest, such as prolonged public exposure, the filming of his arrest and the use of the recordings to trigger the media frenzy in his case. Furthermore, the authorities used a dozen masked and armed officers to arrest the applicant although it appears that he did not present a particular security risk. The Court considers that the cumulative application of all those measures may exceed the usual degree of humiliation that is inherent in every arrest and detention and bring such situation within the ambit of degrading treatment

prohibited by Article 3 of the Convention. When the circumstances of a case, such as the manner of a person's arrest and the authorities' actions aimed at publicising the case extensively, give rise to legitimate grounds for assuming that the authorities' actions were motivated by political reasons the Court will subject such situations to special scrutiny.

76. However, the Court cannot examine the complaint under Article 3 since the applicant did not make use of any domestic remedies. The Court refers to its classic and comprehensive statement set out in the *Akdivar* judgment (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66-69, *Reports* 1996-IV) concerning the application of the rule of exhaustion of domestic remedies as required by Article 35 § 1 of the Convention.

77. The Court reiterates that the applicant did not complain about the use of physical violence, but took issue with the series of measures applied by the authorities in the course of his arrest which, according to the applicant, were aimed at humiliating him. Those measures could have affected his mental state. Having regard to the specific nature of the complaint under Article 3, the Court considers that the most appropriate remedy to be exhausted in the circumstances of the present case was a civil action for compensation for the infringement of the applicant's personal rights under Articles 23 and 24 taken in conjunction with Article 448 of the Civil Code. Article 23 of the Civil Code contains a non-exhaustive list of personal rights which include, *inter alia*, health, liberty and honour, and which are further developed in the domestic jurisprudence so as to include other rights such as dignity of the person (see *Norbert Sikorski v. Poland*, no. 17599/05, § 68, 22 October 2009). The Court agrees with the Government that the applicant should have availed himself of the civil action to assert that he had been exposed to degrading treatment in breach of his personal rights and to claim compensation from the State.

78. Although the civil remedy was the most appropriate one in the circumstances of the present case, the Court also notes that it was open to the applicant to request the prosecution of the CAB's officers, alleging that they had abused their authority in the course of his arrest (Article 231 of the CC) or had inflicted psychological suffering on him (Article 247 of the CC). Furthermore, the applicant could have separately lodged an appeal against his arrest under Article 246 of the CCP, which could have shed light on the exact circumstances in which his arrest had been effected. The use of this auxiliary remedy would have enabled the domestic court to assess not only the lawfulness of the arrest but also its expediency.

79. In conclusion, the Court finds that by failing to use any of the above domestic remedies, in particular a civil action for infringement of his personal rights, the applicant failed to exhaust the remedies provided for by Polish law and thus the Government's objection is well-founded.

It follows that the complaint under Article 3 must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

80. The applicant complained of a violation of Article 5 § 1 of the Convention. He alleged that the Warsaw-Mokotów District Court's decision of 14 February 2007 to place him in pre-trial detention had been arbitrary and in breach of this provision. The court had not considered the imposition of other, less severe, preventive measures and had not taken into account his personal circumstances, his professional achievements and his unblemished reputation. In respect of the charge of homicide relied on by the court to justify his detention, the applicant submitted that that charge could not possibly be read into the report of expert Z.R., as subsequently confirmed by the Regional Court and the Court of Appeal. Furthermore, there had been no circumstances to justify the court's finding that the applicant might unlawfully obstruct the proceedings. Article 5 § 1 provides, in so far as relevant:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;”

A. The parties' submissions

81. The Government maintained that the applicant's detention had been in compliance with the standards of Article 5 § 1 and free from arbitrariness. They averred that the applicant had been detained “in accordance with the law”. Both the formal and the substantive requirements of the law had been fulfilled. The lawfulness of the detention on remand had been reviewed by the Warsaw-Mokotów District Court in its decision of 14 February 2007 and confirmed on appeal by the Regional Court. Both courts had relied on the existence of a strong suspicion that the applicant had committed the offences with which he had been charged. They had also invoked the severity of the anticipated penalty and the risk that the applicant would attempt to influence witnesses. The Warsaw Regional Court had underlined in its decision of 15 March 2007 that “even leaving aside the charge of homicide, other charges (bribery) attracted a statutory maximum sentence of at least eight years' imprisonment” (see paragraph 22 above).

82. The Government submitted that the court decisions in the present case, in particular the Regional Court's decision of 7 May 2007 on the conditions of the applicant's bail, had proved that his detention had not been arbitrary. The domestic courts had thoroughly examined whether the reasons for the applicant's detention, as put forward in the prosecutor's application, had been convincing and well-established. They had also considered whether other preventive measures would have been sufficient in the circumstances of the case, and on this basis the present case should be distinguished from the case of *Ambruszkiewicz v. Poland* (no. 38797/03, § 32, 4 May 2006).

83. The applicant's detention had been applied only at the initial stage of the preparatory proceedings, in order to ensure the undisturbed gathering of witness evidence. His detention had been under the permanent supervision of the courts and had been terminated as soon as the Warsaw Regional Court had established that the risk of obstruction of the proceedings had ceased to exist. In those circumstances, the applicant's complaint under Article 5 § 1 was manifestly ill-founded.

84. The applicant did not comment.

B. The Court's assessment

85. The Court recalls that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and enshrine the obligation to conform to the substantive and procedural rules thereof. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should review whether this law has been complied with (see, among many other authorities, *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 1996-III, and *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II). A period of detention is, in principle, "lawful" if it is based on a court order. Even flaws in the detention order do not necessarily render the underlying period of detention unlawful within the meaning of Article 5 § 1 (see *Benham*, cited above, §§ 42-47, and *Ječius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX).

86. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33, and *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity

with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see, *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008-...).

87. The Court notes that in the instant case the applicant was detained on the basis of the Warsaw-Mokotów District Court's decision of 14 February 2007. That court found that the evidence presented by the prosecution substantiated the reasonable suspicion that he had committed the offences with which he had been charged. It also had regard to the risk that the applicant would obstruct the investigation, which was in its early stages and it was necessary to hear a number of witnesses of whom some were subordinate to the applicant. Those circumstances necessitated, in the District Court's view, the keeping of the applicant in custody. The Regional Court, ruling on the applicant's appeal, concurred with the District Court's findings.

88. The applicant emphasised that the prosecution had deliberately inflated the charge of homicide in order to compel the court to remand him in custody. However, even assuming that the applicant's misgivings in this regard might be warranted, the Court cannot but note that the Regional Court in its decision of 15 March 2007 reviewing the original detention order responded precisely to this argument and stated that even without the charge of homicide, the applicant's detention was still justified on account of the charges of bribery, which attracted a statutory maximum sentence of at least eight years and were sufficiently substantiated by the evidence. In those circumstances, the Court finds that the applicant's detention was effected in conformity with the Polish law.

89. The Court does not find established either that the applicant's detention on remand was arbitrary. The applicant's allegation of arbitrariness appears to have been fuelled by the prosecution's reliance on the charge of homicide. However, the Court notes that the domestic courts kept that issue under close scrutiny. The Regional Court in its decision of 7 May 2007 found the charge of homicide entirely unsustainable. In the same decision the Regional Court established that there was no longer a risk that the applicant would interfere with the proper conduct of the proceedings in respect of the bribery charges since a significant volume of evidence related to those charges had already been gathered. Having regard to the change in the circumstances of the investigation against the applicant, the Regional Court held that the applicant would be released if he put up bail. On 18 May 2007 the Warsaw Court of Appeal amended the decision to release the applicant on bail by imposing certain other preventive measures (see paragraph 25 above). The applicant complied with all those conditions and was released on the same day. Having regard to the above, the Court is satisfied that the domestic courts applied a proportionality test to the applicant's detention falling under Article 5 § 1 (c) and did consider, having

regard to the progress of the investigation, whether his detention on remand was strictly necessary to ensure his presence at the trial and whether other, less stringent, measures could have been sufficient for that purpose (see *Ambruszkiewicz v. Poland*, no. 38797/03, §§ 29-32, 4 May 2006, and *Ladent v. Poland*, no. 11036/03, § 55, ECHR 2008-... (extracts)). Accordingly, the Court cannot discern any element of arbitrariness in respect of the applicant's detention on remand.

90. In conclusion, the Court finds that the applicant's detention on remand was in compliance with Article 5 § 1 of the Convention. It follows that the complaint under this provision is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

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

91. Invoking Article 6 § 1 of the Convention, the applicant complained that following his arrest he had not been brought before a judge or other officer authorised by law to exercise judicial power. His detention on remand had been ordered by an assessor, who did not enjoy the same guarantees of independence as a judge, in particular *vis-à-vis* the Minister of Justice – Prosecutor General. The Court considers that this complaint falls to be examined under Article 5 § 3 of the Convention, the relevant part of which reads as follows:

“3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...”

A. Admissibility

1. *The parties' submissions*

92. The Government submitted that the applicant had lost his “victim” status with regard to the complaint under Article 5 § 3 of the Convention. He had been aware of the proceedings pending before the Constitutional Court in which the status of assessors had been challenged. The Constitutional Court in its judgment of 24 October 2007 (case no. SK 7/06) had expressly acknowledged that assessors were not competent to exercise judicial duties. It had held that the contested provisions of the Law on the Organisation of Courts (the 2001 Act) would remain in force for a period of eighteen months following the promulgation of the judgment. The Constitutional Court had also stressed that its ruling could not be understood as providing a legal basis for the re-examination of cases which had been adjudicated by assessors. In this way the Constitutional Court had

demonstrated its respect for the principle of legal certainty, which was a well-established constitutional principle of democratic states. The applicant, like other persons whose cases had been decided by assessors, had obtained moral satisfaction from the Constitutional Court's judgment. The Government were of the view that the said judgment repealing the provisions concerning assessors could constitute an appropriate relief for the applicant.

93. The applicant did not express an opinion on the issue.

2. The Court's assessment

94. The Court recalls that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, *inter alia*, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

95. The Court notes that the Constitutional Court's judgment of 24 October 2007 declared the provisions regulating the status of assessors incompatible with the Constitution. The finding of unconstitutionality was mostly based on the institutional argument (organisation of the judicial branch) and was not focused on protection of individual rights. The Constitutional Court's judgment did not contain any acknowledgment as regards the alleged breach of the Convention in the applicant's case. In addition, it is questionable whether a general finding of unconstitutionality in respect of a law which affected the applicant's rights, without any individual measures addressed to him, may at all be considered as a measure favourable to the applicant. In any event, the applicant was not afforded redress for the alleged breach of the Convention as the Constitutional Court excluded the possibility of reopening of cases in which assessors had adjudicated. In the Court's view, the Constitutional Court's judgment and the applicant's moral satisfaction stemming from it were not sufficient to provide adequate redress to the applicant.

96. Having regard to the above, the Court finds that the applicant can still claim to be a "victim" of a breach of Article 5 § 3 of the Convention as regards his right to be brought before a judge or other officer authorised by law to exercise judicial power. Accordingly, the Government's objection concerning the lack of "victim" status is dismissed.

97. 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. The applicant's submissions

98. The applicant submitted that an assessor's professional status depended to a considerable degree on the Minister of Justice. The Minister of Justice appointed assessors and vested judicial powers in them. Although the 2001 Act granted independence to assessors in respect of the exercise of their judicial functions, the Minister could remove them.

99. The applicant argued that in his case, which had been publicised from the moment of his arrest and in which the Minister of Justice had become personally involved, it could not be excluded that the assessor A.M. who had remanded him in custody had acted under enormous pressure and eventually yielded to it. The Regional Court which reviewed the original detention order on 15 March 2007 had been equally under considerable pressure. It had sat as a bench of three professional judges, but had decided in the period of intensive and unprecedented political and media frenzy following the public announcement of the applicant's guilt by the Minister of Justice.

100. The applicant pointed out that the Court of Appeal in its decision of 18 May 2007 had stated that "until now the findings and conclusions of experts do not constitute evidence indicating a strong probability that the suspect committed intentional homicide". This meant that from the very beginning the prosecution had not presented any reliable evidence of the charge of homicide brought against the applicant, which had been decisive for the imposition of the detention on remand. For the applicant this confirmed that the Warsaw-Mokotów District Court and the Warsaw Regional Court, when deciding on the application of detention on remand, had yielded to the political and media pressure concerning the applicant's guilt rather than basing their decisions on actual analysis of the case file.

2. The Government's submissions

101. The Government, having regard to the Constitutional Court's judgment of 24 October 2007, maintained that an assessor should have been considered as an "other officer authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention. Such officer had to satisfy certain conditions in order to exclude arbitrary or unjustified deprivation of liberty; in particular the "officer" had to be independent of the executive and the parties.

102. Applying the criteria set out in the Court's case-law (*H.B. v. Switzerland*, no. 26899/95, § 55, 5 April 2001) to the circumstances of the case, the Government emphasised that the assessor had had the power to make a binding order for the applicant's release, had heard the applicant before issuing the detention order and had not exercised prosecutorial

functions in the subsequent stages of the proceedings. Thus, the assessor had been fully independent of the parties.

103. Furthermore, the detention order issued by the assessor had been reviewed and upheld by the Warsaw Regional Court sitting as a panel of three professional judges. Therefore, even assuming that the decision issued by the assessor had not complied with all the requirements of Article 5 § 3, any disadvantage thereby caused to the applicant had nonetheless been alleviated by the subsequent review of the impugned decision by a panel of three professional judges (*mutatis mutandis*, *Laukkanen and Manninen v. Finland*, no. 50230/99, § 36, 3 February 2004). In addition, the Regional Court had confirmed the detention order and had stated that the assessment of the need to apply that preventive measure as made by the assessor had been correct.

104. The Government acknowledged the Constitutional Court's finding that the status of assessors had differed from the status of a professional judge in so far as the former presented no guarantees of complete independence from the executive. However, the 2001 Act had provided assessors with a degree of independence. In particular, pursuant to Article 135 § 2 of the 2001 Act, "while adjudicating, assessors shall be independent and subject only to the Constitution and statutes". Furthermore, judicial bodies (the board of judges of a regional court) played an important role in the procedure of vesting judicial powers in assessors. For those reasons, the Government were of the view that the assessor who had ordered the applicant's detention on remand should be recognised as an "officer authorised by law to exercise judicial power" under Article 5 § 3.

3. The third-party intervener's comments

105. The Helsinki Foundation for Human Rights presented the main points of the Constitutional Court's judgment of 24 October 2007. It submitted that there was little doubt that Mr Z. Ziobro had been personally involved in the applicant's case and that he had been interested in obtaining a particular decision as confirmed by his comments made at the press conference. In the third-party's opinion, this state of affairs had seriously undermined the independence of the assessor as her professional future depended on the Minister's decisions.

4. The Court's assessment

106. The Court recalls that it has already dealt with the institution of Polish assessors from the standpoint of Article 6 of the Convention. In the judgment *Henryk Urban and Ryszard Urban v. Poland* (no. 23614/08, 30 November 2010) the Court examined the question of the independence of a "tribunal" composed of an assessor in terms of conformity with the requirements of Article 6 § 1 and found as follows:

“48. The Constitutional Court considered the status of assessors in its leading judgment of 24 October 2007. It held that section 135 § 1 of the 2001 Act, providing that the Minister of Justice could confer the exercise of judicial powers on assessors, fell short of constitutional requirements because assessors did not enjoy the necessary guarantees of independence, notably vis-à-vis the Minister. The Court notes that in its analysis of the question of the independence of assessors the Constitutional Court referred to the Strasbourg case-law and observed that Article 45 of the Constitution was modelled on Article 6 § 1 of the Convention (...).

51. (...) The Court notes that the Constitutional Court’s findings were made in the context of an abstract review of the constitutionality of statutory provisions but, mindful of the principle of subsidiarity, considers that they may be applied to the facts of the present case, having regard to the similarity between the constitutional and the Convention requirements in so far as judicial independence is concerned and the reliance of the Constitutional Court on the relevant jurisprudence of the Court. (...) The important consideration for this Court is that the Constitutional Court found that the manner in which Poland had legislated for the status of assessors was deficient since it lacked the guarantees of independence required under Article 45 § 1 of the Constitution, guarantees which are substantively identical to those under Article 6 § 1 of the Convention.

52. The Court underlines that the Constitutional Court set aside the regulatory framework governing the institution of assessors as laid down in the 2001 Act. It further stresses that the Constitutional Court did not exclude the possibility that assessors or similar officers could exercise judicial powers provided they had the requisite guarantees of independence (...). The Constitutional Court, referring to international standards, pointed to the variety of possible solutions for allowing adjudication by persons other than judges. In this connection, the Court notes that its task in the present case is not to rule *in abstracto* on the compatibility with the Convention of the institution of assessors or other similar officers which exist in certain Member States of the Council of Europe, but to examine the manner in which Poland regulated the status of assessors.”

107. Thus, the first element of the Court’s test in the *Henryk Urban and Ryszard Urban* judgment concentrated on the institutional deficiency as regards the position of assessors *vis-à-vis* the Minister of Justice. However, in its analysis the Court also had regard to the second element of the test, namely whether the circumstances of a particular case could give rise to legitimate grounds for believing that the Minister of Justice took an interest in the proceedings (see *Henryk Urban and Ryszard Urban*, cited above, § 56).

108. In the present case the Court has to consider to what extent the *Henryk Urban and Ryszard Urban v. Poland* holding may be relevant for the determination of the complaint under Article 5 § 3 of the Convention.

109. The Court recalls that Article 5 § 3 of the Convention is structurally concerned with two separate matters: the early stages following an arrest when an individual is taken into the power of the authorities, and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked

(see *T.W. v. Malta* [GC], no. 25644/94, § 49, 29 April 1999, and *McKay v. the United Kingdom* [GC], no. 543/03, § 31, ECHR 2006-X). In the present case the Court is concerned solely with the initial stage under the first limb (the arrest period). With regard to this initial stage the Court's case-law establishes that there must be protection of an individual arrested or detained on suspicion of having committed a criminal offence through judicial control. The judicial control must satisfy the requirements of promptness, the automatic nature of the review and the characteristics and powers of the judicial officer. The judicial officer must offer the requisite guarantees of independence from the executive and the parties and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention (see *Assenov and Others*, cited above, § 146, and *McKay*, cited above, § 35).

110. The Court's case-law has already determined that the "officer authorised by law to exercise judicial power" is not identical with the "judge" but must nevertheless have some of the latter's attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested. The first such condition is independence from the executive and the parties (see *Schiesser v. Switzerland*, 4 December 1979, § 31, Series A no. 34). Accordingly, the requirement of independence *vis-à-vis* the executive applies in the same manner to both the "judge" and the "officer" mentioned in Article 5 § 3. This interpretation corresponds to the rationale of the judicial protection of an individual arrested on suspicion of having committed a criminal offence which serves to provide effective safeguards against the risk of ill-treatment and against the abuse of powers bestowed on law enforcement officers or other authorities (see *McKay*, cited above, § 32).

111. The Court has to determine whether the assessor A.M. possessed the attributes of the judicial officer required under Article 5 § 3, and, in particular, whether she offered the guarantees of independence *vis-à-vis* the executive.

112. The Constitutional Court in its leading judgment of 24 October 2007 examined two constitutional complaints, the first of which had challenged the imposition of detention on remand by an assessor. The Constitutional Court emphasised that its finding of unconstitutionality in respect of the regulatory framework governing the institution of assessors was not determinative of unconstitutionality in respect of the content of a ruling given by an assessor or the procedure employed to reach it (see *Henryk Urban and Ryszard Urban*, cited above, § 64). The Court observed in this connection that it had followed from the Constitutional Court's judgment that there had been no automatic correlation between the deficiency identified by that court and the validity of each and every ruling given by assessors in individual cases (see *Henryk Urban and Ryszard*

Urban, cited above, § 67). Having regard to the above, the Court considers that the finding of a breach of Article 5 § 3 of the Convention does not compromise its earlier finding in respect of the applicant's complaint under Article 5 § 1 (see paragraph 90 above).

113. The Court considers that the requisite guarantees of independence apply not only to a "tribunal" within the meaning of Article 6 § 1 of the Convention, but also extend to "the judge or other officer authorised by law to exercise judicial power" referred to in Article 5 § 3 of the Convention (see *McKay*, cited above, § 35, and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 45, 30 November 2010). Having regard to the above, the Court considers that the assessor A.M. who detained the applicant on remand did not offer the guarantees of independence required of an "officer" by Article 5 § 3 of the Convention, the reason being that she could have been removed by the Minister of Justice at any time during her term of office and that there were no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister (see *Henryk Urban and Ryszard Urban*, cited above, § 53). Having regard to the above, the Court's conclusion is indistinguishable from that reached in the *Henryk Urban and Ryszard Urban* judgment in so far as the first element of the twofold test is concerned.

114. Independently of the above institutional deficiency, the Court considers that the second element of its test is also met in the present case. In other words, there were specific circumstances in the instant case which gave rise to an assumption that the Minister of Justice – Prosecutor General's may have been taking an interest in the proceedings against the applicant. The Court notes from the transcript of the press conference held on 14 February 2007 that the Minister of Justice – Prosecutor General personally supervised the investigation against the applicant (see paragraph 36 above). The Court cannot lose sight of the broader context of the applicant's case, which appears to have been deliberately orchestrated as a sign of the authorities' resolve to root out corruption at that time. Furthermore, the Court also notes the spectacular manner of the applicant's arrest and the authorities' actions aimed at attracting as much media attention as possible to his case. All the above circumstances, and in particular the Minister of Justice – Prosecutor General's personal involvement in the case, could be seen as capable of undermining further the independence of the assessor A.M.. Having regard to the overall context of the case, the Court considers that there were grounds for believing that the assessor A.M. could have been influenced in her decisions by the possibility of her removal from office by the Minister of Justice -Prosecutor General.

115. The Government argued that any failing in respect of the decision given by the assessor of the Warsaw-Mokotów District Court was rectified on appeal as her decision was reviewed and upheld by the Warsaw Regional Court sitting as a bench of three professional judges. The Court does not accept this argument. It is true that in the context of a breach of Article 6 § 1 of the Convention the possibility exists that a higher or the highest court might, in some circumstances, make reparation for defects that took place in the first-instance proceedings (see *De Cubber v. Belgium*, 26 October 1984, § 33, Series A no. 86, and *Kyprianou v. Cyprus* [GC], no. 73797/01, § 134, ECHR 2005-XIII). However, the Court finds that the doctrine of rectification of defects which occurred at the first-instance level does not apply to the judicial control of a person's arrest or detention on suspicion of having committed a criminal offence under Article 5 § 3 of the Convention. The logic and the rationale of the Article 5 § 3 review requires that it is the judicial officer who has to satisfy the various conditions as defined in the Court's case-law under Article 5 § 3 of the Convention, in particular he must offer the requisite guarantees of independence from the executive and the parties (see *Schiesser v. Switzerland*, cited above, §§ 31-32, and *McKay*, cited above, § 35). This is supported by the fact that decisions on detention made by the "judge or other officer" under Article 5 § 3 are normally enforced instantly, for which reason deficiencies cannot be effectively rectified on appeal. In addition, the Court notes that the applicant raised the issue of the status of the assessor in his appeal against the detention order of 14 February 2007; however the Regional Court did not address it.

116. In the light of the foregoing, the Court finds that the assessor A.M. of the Warsaw-Mokotów District Court was not independent of the executive as required under Article 5 § 3 of the Convention. There has accordingly been a violation of this provision.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

117. The applicant alleged a violation of Article 6 § 2 on account of the categorical statements made by the Minister of Justice – Prosecutor General and the Head of the CAB during the press conference on 14 February 2007. He referred in particular to the statement that "no-one else will ever again be deprived of life by this man". In this connection the applicant invoked the findings of the Regional Court, which in its decision of 7 May 2007 had held that there had been no grounds to support the charge of homicide.

The Court raised the possibility, of its own motion, of examining the complaint under Article 6 § 1 of the Convention, namely whether the Minister of Justice – Prosecutor General's statement adversely affected the fairness of the applicant's trial. It considers, however, that the thrust of the

applicant's grievances concerns the breach of the principle of the presumption of innocence. The Court therefore finds that it is appropriate to examine the applicant's complaint under Article 6 § 2 of the Convention. This provision reads:

"2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Victim status

1. The Government's submissions

118. The Government initially maintained that the applicant had not exhausted domestic remedies in respect of his complaint under Article 6 § 2. On 12 September 2007 – that is, *after* he had lodged his application with the Court – the applicant had instituted civil proceedings against Mr Z. Ziobro seeking protection of his personal rights in connection with the Minister's statement "no-one else will ever again be deprived of life by this man". In so doing he had sought redress for the infringement of his personal rights. The Government stressed that in those proceedings the applicant had raised exactly the same issue as he had already brought before the Court under Article 6 § 2 of the Convention. Thus, they argued that the complaint under this provision was inadmissible for failure to exhaust domestic remedies.

119. Following the conclusion of the civil proceedings, the Government submitted that the applicant had lost his victim status in respect of the alleged violation of Article 6 § 2. They argued that in his civil action the applicant had clearly invoked the violation by Mr Z. Ziobro of his right to be presumed innocent until proved guilty and that the domestic courts had allowed his action almost entirely. It was true that the amount of compensation for non-pecuniary damage had been lower than that sought by the applicant. However, compared with the domestic practice in similar cases, the award in the applicant's case had clearly been comparable to the average sums awarded.

120. The Government contended that in the domestic proceedings the applicant had obtained both recognition of the violation and adequate redress. Consequently, having regard to the Court's jurisprudence on the issue (*Eckle v. Germany*, 15 July 1982, Series A no. 51), the Government averred that the applicant could no longer claim to be the victim of the alleged violation of his right under Article 6 § 2 since the said violation had already been acknowledged and remedied at the national level.

121. As regards the applicant's argument about the inadequacy of the redress obtained at the domestic level, the Government submitted that the applicant had not lodged a cassation appeal against the second-instance judgment and thus it could be assumed that he had been satisfied with the

result of the domestic proceedings. As to the form of the apology, it had been up to the applicant or his lawyer to demand a particular content or form of the apology and the Government had borne no responsibility in that regard. Nor was the Government responsible for the fact that the defendant had no longer been a Minister when he had published the apology.

2. The applicant's submissions

122. The applicant argued that the civil proceedings could not be regarded as an effective remedy in respect of the violation of Article 6 § 2. The principle of the presumption of innocence was not limited and was not equal to the right to one's reputation. It prohibited the authorities from declaring or doing anything which would indicate that they believed a person was guilty of an offence until their guilt had been proved. In the applicant's case the breach of the presumption had taken place at a very early stage in the proceedings and it must have had an impact on his situation.

123. In the civil proceedings the applicant had demanded an appropriate apology and compensation from Mr Z. Ziobro for having publicly called him a murderer. However, in bringing his case to the Court the applicant had sought appropriate redress from the Government for the fact that a high-ranking State official, by expressing his belief in the applicant's guilt, had deprived him of, or seriously impaired his chances of, impartial prosecution and court proceedings. The prosecutors involved in the applicant's case had been fully subordinate to the Prosecutor General and, according to the applicant, the latter had exerted pressure on them as to the conduct of the investigation. The applicant submitted that breach of the presumption of innocence had not been included in the catalogue of offences specified in the Criminal Code. A minister who breached the constitutional principle of the presumption of innocence was accountable only before the Tribunal of State. However, the applicant had no right to bring Mr Z. Ziobro before that tribunal.

124. The applicant claimed that despite the outcome of the civil proceedings, he had not lost his status as a victim as the redress afforded had been insufficient. He argued that the form of the apology had been inadequate in view of the gravity of the infringement. The apology had not been published directly after the news programme but in between advertisements. The text of the apology had been in very small brown or red letters on a green background and it had been shown for ten seconds. There had been no advance notification that the apology would be published on this particular day. Furthermore, following the publication of the apology, the defendant had given several statements in which he had sustained his allegations. On the day following the publication, Mr Z. Ziobro had declared that the judgment of the civil court had not changed his opinion about one important aspect of the case, namely that the applicant had left

a swab in a patient's body during surgery, which had resulted in the patient's death.

125. Likewise, the applicant claimed that the amount of PLN 30,000 awarded in compensation had been inadequate. Such amounts had been awarded in cases of less severe infringements of privacy, while the infringement in the applicant's case had had a huge impact on his professional and private life. The defendant's critical statement had been made at a press conference widely attended by the media and had subsequently been repeated many times in the newspapers and the audiovisual media.

126. The applicant further submitted that the statement at issue had been made by the defendant at the time when he had held the office of Minister of Justice – Prosecutor General. However, he had suffered no consequences for his actions as the Minister – Prosecutor General. The State, represented by his Ministry of Justice, had never expressed any regrets as regards the breach of the presumption of innocence in the applicant's case. In addition, the impugned statement had been made shortly after the applicant's detention and, importantly, before the examination of his appeal against the detention decision. It could not be excluded that the statement had had an impact on the judges who were to consider the applicant's appeal. According to the applicant, the domestic courts had said very little about the principle of the presumption of innocence and had not relied on the Convention.

127. The applicant stated that he sought redress before the Court as the negative consequences of the breach of his right to be presumed innocent had not been repaired. He was still regarded as a guilty person and the apology had not had the same impact as the infringement. Furthermore, the recording of the applicant's arrest and the search of his house was still available on the Internet. The civil law remedies had been solely of a compensatory nature and could not make up for the irreparable damage suffered by the applicant. The applicant had lost his reputation and his work in a public hospital and had suffered depression.

3. The Court's assessment

128. The Court will focus in its analysis on the statement made by the Minister of Justice – Prosecutor General that “no-one else will ever again be deprived of life by this man”. It notes that at the same press conference the Minister of Justice – Prosecutor General and the Head of the CAB also made some statements related to the corruption charges against the applicant. However, the Court observes that the applicant did not use the civil law remedy in respect of those statements (see paragraphs 135-136 below) and accordingly this part of his complaint under Article 6 § 2 must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

129. The Court considers that in the light of the domestic courts' decisions given in the civil case brought by the applicant against Mr Z. Ziobro, the question arises whether the applicant can still claim to be a victim of the alleged violation within the meaning of Article 34 of the Convention.

130. The Court reiterates that it falls firstly to the national authorities to redress any violation of the Convention. In this regard, the question whether an applicant can claim to be the victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see, *inter alia*, *Gäffen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010-...). A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, *inter alia*, *Eckle*, cited above, § 66; *Dalban* [GC], cited above, § 44; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 180, ECHR 2006-V; and *Ladent*, cited above, § 36).

131. In the present case the applicant alleged a violation of Article 6 § 2 on account of a statement made by a public official. The Court finds it opportune to recall that the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the official regards the accused as guilty (see, among other authorities, *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36; *Daktaras v. Lithuania*, no. 42095/98, §§ 41-44, ECHR 2000-X; and *Garycki v. Poland*, no. 14348/02, § 66, 6 February 2007). Furthermore, a distinction should be made between statements which reflect the opinion that the person concerned is guilty and statements which merely describe "a state of suspicion". The former infringe the presumption of innocence, whereas the latter have been regarded as unobjectionable in various situations examined by the Court (see, *inter alia*, *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, p. 25, § 62, and *Leutscher v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 436, § 31).

132. The freedom of expression guaranteed by Article 10 of the Convention includes freedom to receive and impart information. Article 6 § 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (see *Allenet de Ribemont*, cited above, § 38; and *Peša v. Croatia*, no. 40523/08, § 139, 8 April 2010). The Court has considered that in a democratic society it is inevitable that information

is imparted when a serious charge of misconduct in office is brought (see *Arrigo and Vella v. Malta* (dec.), no. 6569/04, 10 May 2005, which concerned serious charges against high-ranking judges). It has acknowledged that in cases where an applicant was an important political figure at the time of the alleged offence the highest State officials, including the Prosecutor General, were required to keep the public informed of the alleged offence and the ensuing criminal proceedings. The Court has however emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence. It has also asserted the importance of respect for the presumption of innocence during press conferences by state officials or in their interviews with the press (see *Butkevičius v. Lithuania*, no. 48297/99, §§ 50-52, ECHR 2002-II (extracts), which concerned statements to the press by the Prosecutor General and the Speaker of Parliament on criminal proceedings against a minister; *Lavents v. Latvia*, no. 58442/00, § 127, 28 November 2002; and *Y.B. and Others v. Turkey*, nos. 48173/99 and 48319/99, §§ 45, 28 October 2004). In any event, the opinions expressed must not amount to declarations by a public official of the applicant's guilt which would encourage the public to believe him or her guilty and prejudice the assessment of the facts by the competent judicial authority (see *Butkevičius*, cited above, § 53). In the present case the alleged violation resulted from the statement of Mr Z. Ziobro, the then Minister of Justice – Prosecutor General, that “no-one else will ever again be deprived of life by this man”, which was delivered at the widely broadcast press conference held directly after the applicant's detention on remand.

133. The Court has to examine firstly whether the national authorities have acknowledged the breach of Article 6 § 2 in the present case. It notes in this connection that in the civil proceedings brought by the applicant the domestic courts expressly stated that Mr Z. Ziobro's statement “no-one else will ever again be deprived of life by this man” had harmed the applicant's reputation. In arriving at that conclusion both the Kraków Regional Court and the Kraków Court of Appeal emphasised that the impugned statement was in breach of the constitutional and statutory principle of the presumption of innocence (see paragraphs 45 and 52 above). Furthermore, the Regional Court made explicit reference to the Court's case-law under Article 6 § 2 and observed that in order to respect the presumption of innocence the authorities were required to act with all due discretion and circumspection when informing the public about criminal investigations in progress. Having analysed the impugned statement of the Minister of Justice – Prosecutor General, the Regional Court found that it clearly fell foul of the obligation incumbent on the public officials in the light of the above-mentioned jurisprudence. It observed that the Minister of Justice -Prosecutor General did not confine himself to reporting on the proceedings but made an “emotional, exaggerated, unbalanced and judgmental

statement” (see paragraph 45 above). The Court of Appeal fully confirmed the findings of the first-instance court. It further emphasised that the principle of the presumption of innocence imposed on the Minister the duty of “exceptional care and diligence in formulating publicly any statements” as regards the charges brought against the applicant. The Court fully agrees with the position adopted by the domestic courts. It wishes to emphasise that it is the duty of the highest-ranking State officials, in particular those with responsibility for the prosecution authorities and administration of justice, to respect the presumption of innocence, one of the fundamental principles of the legal order, and to exercise particular caution when formulating any statements in relation to ongoing criminal proceedings. The Court considers that any statement of a high-ranking State official disregarding the principle of presumption of innocence is even more objectionable as it may be seen as a direction addressed to subordinate officials (see, *mutatis mutandis*, *Bączkowski and Others v. Poland*, no. 1543/06, § 100, ECHR 2007-VI). In view of the above considerations, the Court is fully satisfied that the domestic courts, having due regard to its relevant jurisprudence, acknowledged expressly and in an unequivocal manner that the statement of the Minister of Justice – Prosecutor General had damaged the applicant’s reputation and entailed a breach of the principle of the presumption of innocence.

134. As to the redress which is appropriate and sufficient to remedy a breach of a Convention right at the national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at issue (see, amongst other authorities, *Scordino (no. 1)*, cited above, § 186; *Niedźwiedź v. Poland* (dec.), 1345/06, 11 March 2008; and *Gäffgen* [GC], cited above, § 116). Furthermore, an applicant may lose his victim status even when the authorities provide no pecuniary award for a breach of his Convention rights (see *Arrigo and Vella* (dec.), cited above, in the context of an alleged breach of the principle of the presumption of innocence on account of a statement made by the Prime Minister of Malta).

135. In the instant case the domestic courts ordered the former Minister of Justice – Prosecutor General to publish an apology to the applicant for the damage to his reputation and awarded him PLN 30,000 (EUR 7,500) in compensation for non-pecuniary damage. The applicant argued that the apology and compensation did not provide him with adequate redress. As regards the text of the apology, the Court notes that this issue was thoroughly examined by the domestic courts, which found it to constitute sufficient non-pecuniary redress to remove the consequences of the infringement at issue. The Court does not discern any reason to contest the domestic courts’ decision in this respect. The applicant further took issue with the form in which the apology had been published by the defendant (the size and colour of the letters and the background, the length of the

broadcast, the lack of prior notification). However, the Court observes that the applicant had ample opportunities to plead before the domestic courts for the particular form of apology and related modalities he deemed appropriate.

136. The Court notes that Mr Z. Ziobro was ordered by the domestic courts to publish his apology on the three national television stations at his expense. The apology was broadcast at prime time and hence the approximate aggregate cost was in the region of PLN 200,000 (EUR 50,000). Taking into account the overall context, the Court does not share the applicant's argument that the compensation for non-pecuniary damage was inadequate. The applicant sought PLN 70,000 (EUR 17,500) and the Regional Court awarded him PLN 7,000 (EUR 1,750), having found that the applicant had not demonstrated the particular impact of the statement on his private life. On the applicant's appeal, the Court of Appeal, having regard to the adverse publicity which the statement had attracted and the degree of the applicant's moral suffering, increased the award to PLN 30,000 (EUR 7,500). Thus, when assessing the amount to be awarded the courts carefully considered all the pertinent circumstances, such as the degree of intensity of the harm, the nature of the infringement and its consequences for the applicant. The Court further notes that the courts justified their decisions by sufficient reasons. In those circumstances, the Court does not see any grounds to challenge the domestic courts' findings with regard to the amount of compensation awarded.

137. Lastly, the applicant contested the fact that he had not received any apology from the State, represented by the Minister of Justice or otherwise, for the breach of his right to the presumption of innocence. However, the Court notes that the applicant did not establish that it was impossible for him to sue the State Treasury in order to secure the relevant apology.

138. The Court further observes that the charge of homicide against the applicant (Article 148 § 1 of the Criminal Code) in respect of which the Minister of Justice – Prosecutor General made the impugned statement, was subsequently dropped by the prosecution for lack of substantiation (see paragraph 30 above). In those circumstances it appears that the critical statement cannot have any adverse impact on the fairness of the ongoing criminal proceedings against the applicant.

139. Having regard to the foregoing, the Court concludes that the applicant can no longer claim to be a victim of the alleged violation of Article 6 § 2 within the meaning of Article 34 of the Convention. This finding makes it unnecessary for the Court to examine the Government's objection on the grounds of non-exhaustion. It follows that the complaint under Article 6 § 2 is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

V. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

140. The applicant complained that the seizure orders had prevented him from using his property and had violated Article 1 of Protocol No. 1 to the Convention. The measures had been unlawful in that the seizure of all his existing and future assets could make it impossible for him to pay the mortgage on his flat in Warsaw, with the consequence that it would be repossessed. Moreover, the prosecution had not proved that the assets at issue were the proceeds of crime. Article 1 of Protocol No. 1 reads:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. The Government’s submissions

141. The Government maintained that the seizure of the applicant’s property had been a temporary measure. The applicant had not been deprived of his rights as the owner of the seized property but only provisionally deprived of the possibility to make use of it. The Government admitted that the seizure constituted interference with the applicant’s right to the peaceful enjoyment of his possessions and should be classified as “control of the use”.

142. In the Government’s view, the interference at issue had been justified under Article 1 of Protocol No. 1. The measure had been in accordance with the domestic law. The Code of Criminal Procedure regulated the seizure of property as an interim measure aimed at securing execution of a future judgment. It emerged from Articles 291-294 of the Code of Criminal Procedure that seizure could be ordered with regard to every item of property belonging to a suspect. There was no need to prove that the property constituted “proceeds of crime”. Furthermore, the applicant had been deprived of his possessions “in the public interest”. It was clear from the seizure order of 16 February 2007 that the aim of the measure had been to secure payment of the anticipated fines. Pursuant to Article 291 § 2 of the CCP a seizure could also be made to secure future claims for damages.

143. The Government submitted that the measures applied in the applicant's case had been proportionate. The Warsaw-Mokotów District Court underlined in its decision of 26 April 2007 that there had been a risk of the applicant being ordered to pay a considerable fine. Additionally, the Constitutional Court examined the constitutionality of Article 291 § 1 of the CCP on 6 September 2004 and ruled that this provision was compatible with the constitutional provisions on the protection of property rights and the presumption of innocence (case no. SK 10/04). In conclusion, the Government argued that the complaint under Article 1 of Protocol No. 1 was manifestly ill-founded.

B. The applicant's submissions

144. The applicant contested the seizure orders of 16 February 2007 as unwarranted and excessive. The consequence of those orders was that he had run the risk of defaulting on his mortgage. In respect of the order for seizure of the money found in his parents' house, he claimed that it had been unlawful and submitted that his father had lodged an application with the Court related to that decision.

145. The applicant argued that for greater media effect the prosecution had seized all his financial means, having assumed that the future fine would reach PLN 720,000. This amount was the maximum fine provided in the Criminal Code, but such a large fine could not be imposed on the applicant, who had been charged with accepting gifts and cash amounting to a total of PLN 50,000. Furthermore, any compensation for professional errors would have been covered by the applicant's insurance.

C. The Court's assessment

146. There is no dispute that the seizure of the applicant's property amounted to an interference with the peaceful enjoyment of his possessions. The Court considers that the impugned interference falls to be considered from the standpoint of the State's right "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest", the so-called "third rule" (see *AGOSI v. the United Kingdom*, 24 October 1986, § 51, Series A no. 108, and *Riela and Others v. Italy* (dec.), no.52439/99, 4 September 2001).

147. The Court notes that the seizure order at issue was effected pursuant to and in compliance with the provisions of the Code of Criminal Procedure. The interference was thus in accordance with the domestic law, and the applicant's arguments to the contrary were rejected by the Warsaw-Mokotów District Court which reviewed and upheld the legality of the seizure order. The Court accepts the Government's submission that the

seizure of the applicant's property conformed to the general interest, which submission was not contested by the applicant.

148. With regard to the proportionality of the measure, the Court observes that in assessing whether a fair balance was struck between the means employed by the authorities in the instant case and the protection of the applicant's fundamental right to the peaceful enjoyment of his possessions, due weight must be given to the wide margin of appreciation which the respondent State enjoys in the area of crime-prevention policy (see, *mutatis mutandis*, *Butler v. United Kingdom* (dec.), no. 41661/98, 27 June 2002). The Court notes that the seizure of the applicant's property was intended to be temporary and the issue of penalties to be imposed on the applicant will be determined in the criminal proceedings against him which are still pending before the trial court. The prosecutor's seizure order was subject to judicial supervision. In those proceedings the applicant, assisted by counsel, did not succeed in challenging the legality or proportionality of the seizure order. The domestic court noted in particular that at that particular stage in the proceedings there were no grounds to consider the prosecutor's order arbitrary, having regard to the evidence gathered in the case. It also found that the seizure order was made to effectively secure the payment of a significant fine which might be imposed on the applicant. In the circumstances there is no indication that the domestic procedure failed to afford the applicant an adequate opportunity to put his case to the responsible authorities, pleading, as the case might be, illegality or arbitrary and unreasonable conduct (see, *Riela and Others*, cited above and *Yildirim v. Italy* (dec.), no. 38602/02, 10 April 2003).

149. Furthermore, the Court observes that the Constitutional Court in its judgment of 6 September 2004 (case no. SK 10/04) validated the institution of seizure of a person's property with a view to securing execution of a future judgment as regulated in Article 291 § 1 of the CCP. The Constitutional Court found it to be constitutionally permissible as it was a temporary and limited restriction on a person's property rights.

150. Having regard to the above, the Court considers that the manner in which the applicant's property was seized did not amount to a failure to strike a fair balance between respect for his rights under Article 1 of Protocol No. 1 and the general interest of the community. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

151. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

152. The applicant claimed EUR 70,000 (PLN 240,000) in respect of pecuniary damage for lost remuneration. The amount included his annual salary in the Ministry of Internal Affairs and Administration Hospital as well as his income from counselling, private practice and teaching. He submitted that his employment contract with the hospital had been terminated as a result of his detention. As regards non-pecuniary damage, the applicant claimed EUR 120,000 (PLN 427,200) on account of the violation of his Convention rights. He argued that he had suffered damage to his dignity and reputation resulting from the breach of the presumption of innocence and the degrading treatment suffered. He also suffered from mild depression and shunned public places, being afraid of malicious comments. Furthermore, in the course of the campaign prior to the parliamentary elections in October 2007 Mr Z. Ziobro had made public the secret recordings made in the applicant’s office to prove that the applicant was corrupt.

153. In respect of the claims for pecuniary damage, the Government argued that they should be rejected as a whole. The applicant based his claims on the assumption that his detention had been unlawful, while the criminal proceedings against him were pending and it was premature at that stage to assess whether his detention had been justified. In addition, those claims were highly speculative and no direct link had been established between the applicant’s detention and the impossibility to find a new job. They were also excessive and premature. As regards the claims for non-pecuniary damage, the Government considered them exorbitant and, in respect of the alleged breach of the presumption of innocence, they submitted that that issue had been examined by the domestic courts. Should the Court establish that there had been a violation of the Convention, the Government respectfully requested the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage.

154. The Court does not discern any causal link between the violation of Article 5 § 3 found in the present case and the pecuniary damage alleged; it therefore rejects this claim. In respect of non-pecuniary damage, the Court notes that it has declared four complaints submitted by the applicant

inadmissible and found a breach only in respect of the complaint under Article 5 § 3 as regards the lack of independence of the assessor who had remanded him in custody. Ruling in equity, the Court awards the applicant EUR 6,000 in respect of non-pecuniary damage, having also regard to the fact that the circumstances of the case gave rise to legitimate grounds for believing that the Minister of Justice – Prosecutor General had taken a special interest in the proceedings against the applicant (see, *Henryk Urban and Ryszard Urban*, cited above, §§ 56 and 62).

B. Costs and expenses

155. The applicant claimed in total EUR 24,744.68 (PLN 89,291.34) for costs and expenses, which breaks down as follows:

- a) EUR 1,685 (PLN 6,000) for the lost interest on his bank deposits which resulted from the seizure order;
- b) EUR 843 (PLN 3,000) for the damage to his car, which had been seized by the CAB between February and November 2007;
- c) EUR 6,699.81 (PLN 23,851.34) for maintenance costs on his flat;
- d) EUR 2,342.70 (PLN 8,340) for travel and other costs related to the applicant's detention which had been incurred by his brother;
- e) EUR 702.25 (PLN 2,500) for the applicant's travel costs related to the summonses from the prosecution office, the CAB and the court bailiff;
- f) EUR 449.44 (PLN 1,600) for the purchase of a laptop to store the content of the case files;
- g) EUR 337.08 (PLN 1,200) for translation costs;
- h) EUR 561.80 (PLN 2,000) for the applicant's medical treatment;
- i) EUR 842.70 (PLN 3,000) for mobile phone cards;
- j) EUR 337.08 (PLN 1,200) for the cost of letting a flat;
- k) EUR 10,280.90 (PLN 36,000) for the cost of legal assistance provided by the applicant's first lawyer.

156. The applicant subsequently claimed PLN 2,440 (EUR 600) for reimbursement of legal costs incurred for the preparation of his subsequent submissions, principally on issues related to Article 6 § 2, by his second lawyer.

157. The Government submitted that most of the costs claimed by the applicant had been incurred in the framework of the criminal proceedings against the applicant and that the domestic court would be competent to decide on those costs.

158. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Roche v. the United Kingdom* [GC], no. 32555/96, § 182, ECHR 2005-X). It notes that the applicant made a number of claims under the heading of costs and expenses which were incurred in the context of the

domestic proceedings but not at all in order to prevent or redress the breach of the Convention. Accordingly, they are not recoverable under Article 41 of the Convention.

159. In respect of legal costs, the applicant claimed the total amount of PLN 36,000 (EUR 9,000) for costs of legal assistance provided by his first lawyer. He substantiated this claim by three invoices, each for PLN 12,200, dated 15 February, 2 May and 5 September 2007. The Court notes that the invoices were not signed and did not specify what legal assistance was provided. Moreover, only the last of the invoices was issued following the lodging of the application with the Court. It appears that the two earlier invoices relate to the costs of legal assistance provided to the applicant in the context of the domestic proceedings against him. In respect of the legal costs incurred in connection with the submissions made by the applicant's second lawyer, the Court observes that they mainly concerned the complaint under Article 6 § 2 which was eventually declared inadmissible by the Court. Having regard to the above considerations and the criteria established in its case-law, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

160. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 5 § 3 of the Convention concerning the lack of independence of the assessor admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros) in respect of non-pecuniary damage and EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable, to be converted into Polish zlotys at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President