



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

FOURTH SECTION

CASE OF WŁOCH v. POLAND

(Application no. 27785/95)

JUDGMENT

STRASBOURG

19 October 2000

FINAL

17/01/2001

In the case of Włoch v. Poland,

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

Mr G. RESS, *President*,

Mr A. PASTOR RIDRUEJO,

Mr L. CAFLISCH,

Mr J. MAKARCZYK,

Mr V. BUTKEVYCH,

Mr J. HEDIGAN,

Mr M. PELLONPÄÄ, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 13 June and 12 October 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 27785/95) against the Republic of Poland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Adam Włoch (“the applicant”), on 5 December 1994.

2. Before the Court the applicant, who is a lawyer, represented himself.

3. The applicant alleged, in particular, that his detention on remand lacked any legal basis under Polish law as it stood at the material time and that it was, therefore, in breach of Article 5 § 1 (c) of the Convention. He complained that the proceedings before the Cracow Regional Court and the Cracow Court of Appeal, concerning his detention on remand, were not truly adversarial as required by Article 5 § 4 of the Convention, and that the criminal proceedings against him had not been conducted within a reasonable time, within the meaning of Article 6 § 1 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court).

6. By a decision of 30 March 2000 the Chamber declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry.].

7. The applicant and the Polish Government (“the Government”) each filed observations on the merits (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 June 2000 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr K. DRZEWICKI, Ministry of Foreign Affairs,	<i>Agent,</i>
Ms M. WĄSEK-WIADEREK,	
Mr A. KALIŃSKI,	
Mr G. ZYMAN,	<i>Counsel,</i>
Mr H. KOMISARSKI,	<i>Adviser;</i>

(b) *for the applicant*

Mr A. WŁOCH	<i>Applicant.</i>
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The Court heard addresses by Mr Włoch, Mr Drzewicki, Ms Wąsek-Wiaderek and Mr Zyman.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. Investigations concerning the applicant's suspected involvement in illicit foreign adoptions began on an unspecified date in 1993.

10. On 19 September 1994 the Cracow Regional Prosecutor charged the applicant with trading in children and incitement to give false testimony. On 20 September 1994 the Cracow Regional Prosecutor remanded the applicant in custody.

11. On 29 September 1994 the applicant was served with written grounds for the decision of 19 September 1994. The Regional Prosecutor principally referred therein to numerous case files of adoption proceedings in which the applicant had acted as a representative of foreigners who had sought to adopt children. The prosecutor also had regard to testimony given by numerous witnesses. It was established that in many cases the prospective adoptive parents had given the applicant a power of attorney a long time before adoption proceedings had been instituted, or even before a child was born. The biological parents had had full parental rights and had given their consent to adoption exclusively by foreigners. The applicant, knowing their financial situation, which was usually difficult, had been inciting them to give their children for adoption in exchange for financial reward. It had been either the applicant himself or other persons assisting him who had later been taking

new-born children from hospital and placing them with third parties. The biological parents had not had any further contact with the children and had not participated in caring for them. However, they had remained in permanent contact with the applicant. Subsequently, at court hearings in the adoption proceedings, they had been waiving their parental rights and assenting to adoption. The prosecutor further considered that there was also a strong suspicion, supported by the evidence gathered in the investigations, that the applicant had been inciting the biological parents to give false evidence in the proceedings, in particular as regards the circumstances in which they had met the adoptive parents. On most occasions they had testified that they had met the would-be adoptive parents through common friends. Moreover, the applicant had exerted undue pressure on policemen taking certain measures in the proceedings against him. The prosecutor further noted that the applicant had received remuneration for his services which in certain cases was inordinately high. The prosecutor concluded that the circumstances of the case as a whole justified a suspicion that the applicant had been involved in the crime of trading in children within the meaning of Article IX of the transitional provisions of the Criminal Code and that he had committed the offence of incitement to give false testimony.

12. The applicant lodged an appeal against this decision. He argued, *inter alia*, that the acts which he had been charged with committing could not possibly amount to the crime of trading in children. He further argued that in view of the fact that a significant number of witnesses had already been questioned by the prosecuting authorities, there was no likelihood that his remaining at liberty would in any manner jeopardise progress in the proceedings.

13. On 4 October 1994 the Cracow Regional Court examined the appeals against the detention order lodged with the court by the applicant and by his lawyers, Mr W.P. and Mr M.G. The applicant was not present, whereas the public prosecutor, Ms I.K.-B., attended the court session. The court allowed the lawyers to make oral interventions and then ordered them to leave the courtroom. Subsequently, the prosecutor addressed the court, arguing that the detention should be upheld. She argued that the legal qualification of the offence concerned was correct, relying on Article 35 of the United Nations Convention on the Rights of the Child.

14. By decision of the same date, the court dismissed the applicant's appeal against the decision to remand him in custody. It first acknowledged that the case was without precedent and raised difficult questions of fact and law. The court stated that in examining the decision under appeal, it had limited itself to assessing, from the point of view of provisions governing ordering and maintenance of detention on remand, in particular Article 209 of the Code of Criminal Procedure, the relevance and sufficiency of the evidence gathered against the applicant for ordering detention on remand. However, it stressed that it had refrained from examining closely the

substantive-law issues involved in the case. The court further categorically observed that the evidence gathered so far did not justify a suspicion that the applicant had tried to exert undue pressure on policemen involved in the proceedings. However, the evidence in the case file did support a reasonable suspicion that he had committed an offence punishable under Article IX § 2 of the transitional provisions of the Criminal Code, which covered abduction of and trading in children for any purpose and in any form, including, in the court's opinion, situations in which offenders were motivated solely by profit. The court further considered that this provision should be interpreted in the light of the United Nations Convention on the Rights of the Child, which had been ratified by Poland in 1991. The court disagreed with the applicant's argument that he had been acting exclusively in his capacity as a lawyer, having regard to the fact that it transpired from the evidence that in his activities undertaken in connection with the adoption cases he had largely overstepped the limits of what would normally be expected from a lawyer in such cases. In particular, the applicant had been acting as a representative before the courts, but had also been actively seeking children for adoption. He had also been taking *de facto* and legal steps in order to create artificial situations, which would comply with the requirements of laws governing adoption. The court further agreed with the prosecutor's conclusion that in many cases the applicant's remuneration was improperly high, which seemed to contravene Article 21 of the United Nations Convention on the Rights of the Child. This, in the court's view, indicated that the applicant had been motivated solely by profit.

15. The court further considered that the assessment of the evidence as a whole warranted a conclusion that the legal requirements for detention on remand had been complied with. Firstly, the voluminous evidence showed that the suspicions against the applicant were well-founded. Secondly, the complexity of the case and the need to take further time-consuming measures, such as questioning further witnesses and examining numerous documents, argued in favour of the applicant's continued detention in order to safeguard the proper conduct of the proceedings. The court finally considered that there was a risk that the applicant's release would jeopardise the proceedings, having regard in particular to the nature of the charges against him which had included fabricating false evidence for the purposes of adoption proceedings in order to mislead the courts.

16. On 28 October 1994 the Regional Prosecutor examined the applicant's request for release submitted to the Minister of Justice on 22 September 1994 and refused to allow it.

17. On 2 November 1994 the applicant asked to be released, or to have his detention replaced by a more lenient preventive measure.

18. On 14 November 1994 the Cracow Regional Prosecutor declined to entertain the applicant's request for release. The prosecutor considered that, in the light of the applicant's medical records and those of his wife, there were

not sufficient grounds to accept his argument that he should be released as there were no indications that his continued detention entailed any danger to life or limb, or any particular hardship for him or for his family.

19. On 23 November 1994 the Cracow Regional Prosecutor ordered that a medical expert opinion be prepared by two psychiatrists and one psychologist in order to establish whether the applicant's health was compatible with his detention and whether he could be held criminally responsible.

20. On 2 December 1994 the Cracow Appellate Prosecutor dismissed the applicant's appeal against the decision of 14 November 1994 of the Regional Prosecutor. The Appellate Prosecutor considered that the assessment of the applicant's and his wife's medical records by the Regional Prosecutor had been correct. He further emphasised that the question whether the facts relied on by the prosecuting authorities to justify the applicant's detention could be considered as falling under Article IX of the transitional provisions of the Criminal Code had already been examined by the Regional Prosecutor in his decision of 29 September 1994 and by the Regional Court in its decision of 4 October 1994. Although it was true that the court had regarded this legal qualification as "controversial", it had accepted the prosecutor's arguments that the applicant's detention was justified.

21. On 5 December 1994 the Cracow Regional Prosecutor assigned a further expert, a neuropsychology specialist, to examine the applicant in order to complete the medical data gathered in preparing the expert report ordered by the decision of 23 November 1994.

22. On 5 December 1994 the applicant asked to be interrogated by the Regional Prosecutor.

23. On 12 December 1994 the Cracow Regional Prosecutor requested the Cracow Regional Court to prolong the applicant's detention until 28 February 1995.

24. In reply to the applicant's letter of 5 December 1994, the Regional Prosecutor informed him on 16 December 1994 that, in view of the fact that the expert report had to be prepared, he could not have been interrogated before the submission of the prosecutor's request of 12 December 1994 to the court for prolongation of the detention. It was further stated that the relevant legal provisions did not provide for a prosecutor's request for prolongation of detention on remand to be served on an accused. The applicant was also informed that, in view of the fact that the evidence gathered in the investigations justified a conclusion that new developments were to be expected as regards further persons who would ultimately be charged in the case, his lawyer had been refused access to the case file in order to safeguard the proper conduct of the proceedings.

25. In a letter of 16 December 1994 the applicant complained again that he had not been questioned in the investigations since the day of his arrest.

26. On 19 December 1994 the Cracow Regional Court, at the request of the Cracow Regional Prosecutor, prolonged the applicant's detention for three months.

27. In a letter of 21 December 1994 to the Regional Prosecutor the applicant complained that the proceedings concerning the extension of his pre-trial detention were not adversarial, contrary to the requirements of Article 5 of the Convention as neither he nor his lawyer had been allowed access to the case file. He also complained that he was not allowed to participate in religious services in prison and requested permission to obtain new books and newspapers from his family.

28. In a reply of 10 January 1995 the Regional Prosecutor stated that the applicant had not been questioned because further evidence had to be gathered in order to ensure that his questioning be effective.

29. On 11 January 1995 the Cracow Court of Appeal examined the applicant's appeal against the decision of 19 December 1994. The court stated that the acts with which the applicant had been charged could not reasonably be qualified as trading in children within the meaning of Article IX of the transitional provisions of the Criminal Code. This was so because, in the assessment of what could constitute an offence of "trading in children", regard had necessarily to be had to the fact that adoption was in a child's best interests, whereas the notion of trading in human beings inherently involved acts to the detriment of its victims. Whereas it was true, the court continued, that adoption did, to a certain extent, limit the liberty of the person to be adopted, its purpose was to improve the child's living conditions and to enhance its prospects of well-being. Therefore, the adoption in itself had to be perceived as beneficial for the child. In the case under examination, it had not been established by the investigating authorities that the acts with which the applicant had been charged had caused any harm to any children or to other persons. The court attached particular importance to the fact that Article IX of the transitional provisions of the Criminal Code, which penalised trading in human beings, was to be replaced, following a proposal of a committee charged with drafting a new code, by a separate offence of organising adoptions for commercial purposes. This indicated, the court emphasised, that it was impossible to charge the applicant with the offence laid down by Article IX of the transitional provisions, as the offence of trading in human beings was considered by a unanimous opinion of eminent legal scholars, members of the drafting committee, to constitute an offence separate from that of organising adoptions for commercial purposes. The court concluded that the fact that the applicant had acted as a lawyer in many adoption proceedings, and had received fees for doing so, was of itself not sufficient to found a reasonable suspicion that an offence punishable under Article IX had been committed. The applicant was released on the same day.

30. On 30 January 1995 the Cracow Regional Prosecutor decided to separate the proceedings concerning another lawyer, B.S., charged, together with the applicant, with trading in children, from the applicant's case.

31. On 23 March 1995 the applicant was to be questioned by the Cracow Regional Prosecutor. He maintained his earlier submissions and refused to testify, pleading that his defence counsel were absent. He also refused to comment on the documents collected as evidence during a search of his home on 20 September 1994.

32. On 12 April 1995 the applicant was due to be questioned in the presence of one of his defence counsel, Mr M.G. The applicant refused to give evidence, invoking his professional obligation not to reveal information gathered when representing clients.

33. On 8 May 1995 the United States District Court for the western district of Pennsylvania, upon letters rogatory from the Cracow Regional Prosecutor, ordered that certain witnesses be questioned in connection with the proceedings against the applicant. The court had regard to information submitted by the prosecutor to the effect that the Polish Criminal Code forbade Polish citizens to intervene in adoption proceedings for commercial motives and for profit. The witnesses were to be heard in order to obtain information concerning how the adoptive parents had obtained knowledge of the possibility of adopting Polish children, how they had proceeded to obtain the final judicial decisions on the adoption and what had been the applicant's role.

34. By letters of 2 June, 25 July and 14 September 1995 the Cracow Regional Prosecutor requested the Department of International Judicial Assistance of the Ministry of Justice to take steps with a view to expediting execution of letters rogatory addressed to the judicial authorities of the states of New York, Illinois and New Jersey.

35. On 17 June 1995 the applicant complained to the Minister of Justice about the manner in which the proceedings were being conducted. He complained in particular that, despite the considerations set out in the Court of Appeal's decision of 11 January 1995 to release him, the criminal proceedings were still being pursued. He further submitted that his private telephone was being tapped. He complained about a press campaign against him which, in his view, was inspired by Mr A.S., the President of the Supreme Court and at the same time a candidate in the national presidential election. He finally complained about the letters rogatory submitted to the American authorities on the ground that they erroneously stated that organising adoptions for commercial purposes was a criminal offence punishable under Polish law.

36. In reply, in a letter of 4 July 1995, the Cracow Appellate Prosecutor informed the applicant that an examination of the case files, comprising forty-six volumes, had shown that his complaints were ill-founded. The fact that the Court of Appeal had ruled that the applicant's detention should not

be continued had no bearing on the issue of his criminal responsibility. As regards the complaint that his phone was being tapped, the prosecutor's office had not issued any authorisation to that effect. If the applicant had any information indicating that his phone was being tapped illegally, it was open to him to request the institution of criminal investigations in this respect. In so far as the applicant complained that the criminal proceedings against him had been instituted for political motives, this complaint did not call for any comment, in particular in the light of the evidence gathered in the investigations and in view of A.S.'s public statements. As regards the letters rogatory, their legal basis was to be found in Chapter XII of the Code of Criminal Procedure. The complaint that in the applicant's case they amounted to an "abuse of law" was unfounded.

37. In a letter of 12 August 1995 to the Minister of Justice the applicant alleged that the reply of 4 July 1995 had failed to address his complaints adequately. He emphasised that in the light of the Cracow Court of Appeal's decision of 11 January 1995 the legal qualification of the charges against him was untenable. He further insisted that the prosecutor was well aware of the phone-tapping and that his allegations on the subject were well-founded. He further stressed that he had in fact requested that an analysis be made, in the light of the material gathered by the police using informal methods of obtaining evidence, of the extent to which the manner of conducting his case had really been influenced by A.S., the President of the Supreme Court, who had made "protection of the Polish family" one of the crucial slogans of his presidential campaign. He finally reiterated that in the letters rogatory the Polish authorities had misled the American court as to the legal qualification of the charges against him, in that they had stated that the organising of adoptions amounted to a criminal offence.

38. By letter of 22 September 1995, the Department of International Judicial Assistance informed the prosecuting authorities that its request had been forwarded to the Polish embassy in Washington on 7 September 1995. On 17 October 1995 the Regional Prosecutor received the evidence collected in pursuance of letters rogatory by the judicial authorities of Pennsylvania.

39. On 13 November 1995 the Regional Prosecutor again requested the Ministry of Justice to intervene in order to expedite the execution of the letters rogatory. On 23 November 1995 the Ministry of Justice forwarded this request to the Polish embassy in Washington. On 8 January 1996 the Ministry of Justice transmitted certain evidence collected in New Jersey to the Cracow Regional Public Prosecutor.

40. By letters of 23 February, 21 March and 5 July 1996 the Cracow Regional Public Prosecutor submitted to the Ministry of Justice fresh requests for intervention in order to have letters rogatory carried out. The prosecutor stressed that the investigations could only be completed after collecting the necessary evidence from abroad, and asked for information as

to a possible date of execution of the letters rogatory. In reply, by letters of 4 March and 19 July 1996, the Ministry of Justice once again requested the Polish Embassy in Washington to take the necessary steps to expedite their execution.

41. In a letter of 9 April 1996 the applicant requested the Minister of Justice to supervise the conduct of the case. He complained that his passport had been invalidated and that the relevant proceedings were pending before the Supreme Administrative Court. He further submitted that he had not had any access to the investigation files. He complained that the case had been pending since at least the beginning of 1993 without any decision on the merits having been rendered, and that, as a result of these proceedings, his reputation had suffered badly.

42. On 27 May 1996 the Cracow Regional Prosecutor requested the New York courts to take further evidence from three witnesses.

43. By a letter of 16 September 1996, served on the Cracow Regional Prosecutor on 15 October 1996, the United States Department of Justice asked the Polish authorities whether the last witness from the district of New York was still to be questioned. In reply, they were informed on 31 October 1996 that the Cracow Regional Prosecutor was still awaiting the evidence from the witnesses from the districts of New York and New Jersey.

44. On 7 March 1997 the Cracow Regional Prosecutor asked the United States consulate in Cracow for assistance and intervention in order to accelerate the collection of evidence upon his letter rogatory of 26 May 1994.

45. On 7 April 1997 the Cracow Regional Prosecutor again asked the Ministry of Justice to intervene. The prosecuting authorities stressed that they were awaiting the testimony of nine witnesses from New York and two witnesses from New Jersey. They stressed that the length of the investigation was due exclusively to the delay in executing the letters rogatory.

46. In a letter received on 15 April 1997 the Cracow Regional Prosecutor obtained the testimony of one further witness. In that letter the United States Department of Justice asked for more detailed information concerning the whereabouts of witnesses to be questioned. By letter of 28 May 1997, the Cracow Regional Prosecutor once again submitted the information requested.

47. On 20 November 1997 the Cracow Regional Prosecutor once again requested that the Ministry of Justice take appropriate steps for the evidence to be collected by the United States authorities. On 10 December 1997 the Polish Ministry of Justice informed the Cracow Regional Prosecutor that no further evidence in the case had been submitted by the United States authorities.

48. By a letter of 3 February 1998 served on the Cracow Regional Prosecutor on 23 February 1998, the United States Department of Justice informed the Polish authorities that further steps had been taken in order to gather the evidence requested.

49. By a letter of 9 June 1998 the Ministry of Justice reiterated its request, submitted to the United States Department of Justice, for prompt execution of the letters rogatory. In reply, on 8 October 1998 the Cracow Regional Prosecutor was supplied with further evidence, the testimony of one witness, D.L.

50. On 25 August 1998 the investigations were prolonged until 31 December 1998. By a decision of 30 December 1998 the Minister of Justice again prolonged the investigations, until 30 June 1999. He stressed that the process of collecting evidence following letters rogatory submitted to the United States judicial authorities had not been completed. The same reason was invoked by him in his decision to prolong the investigations further until 30 June 2000.

51. On 8 December 1998 witness B.B. was questioned by the Cracow Regional Prosecutor.

52. On 4 February 1999 the Regional Prosecutor refused the applicant access to the case file, considering that this would jeopardise the proper course of proceedings in which evidence was still being gathered.

53. By a letter of 22 March 1999 the Ministry of Justice again asked the United States Department of Justice for the execution of outstanding letters rogatory without further delay.

54. By a letter of 23 March 1999 the Cracow Regional Prosecutor once again requested the Ministry of Justice to take appropriate steps in order for the execution of the letters rogatory to be completed. On 19 April and 9 June 1999 the Ministry of Justice resubmitted this request to the United States Department of Justice.

55. On 23 July 1999 the Cracow Regional Prosecutor received a letter from the United States Department of Justice, informing him that the United States judicial authorities, in cooperation with the FBI, had taken the necessary steps to discover the place of residence of three further witnesses, and that in the near future the prosecution should receive further information.

56. By a letter of 22 July 1999, served on the Cracow Regional Prosecutor on 24 August 1999, the United States Department of Justice assured the Polish authorities that further evidence should be taken in the near future.

57. By a letter of 5 January 2000 the Ministry of Justice once again asked the United States Department of Justice to accelerate the execution of the letters rogatory.

58. On 25 January 2000 the applicant requested the Cracow Regional Prosecutor to grant him access to the case file. On 4 February 2000 this request was refused.

59. On 28 April 2000 the applicant was summoned to appear before the Cracow Regional Prosecutor on 12 May 2000. The prosecutor informed the applicant that on this date additional charges under the new Criminal Code were to be brought against him, and that afterwards he would be granted access to the case file.

60. By a letter of the same date the applicant requested the Cracow Regional Prosecutor to set a later date for his examination. Furthermore, he informed the Cracow Regional Prosecutor that on account of his earlier professional commitments he would not be able to read the case file until after 29 May 2000.

61. Subsequently, the Cracow Regional Prosecutor fixed 18 May 2000 as the date for questioning the applicant. On that day the applicant was charged with twenty-six counts of trading in children, eleven counts of incitement to give false testimony and of forgery. On the basis of the evidence gathered abroad following letters rogatory, the Cracow Regional Prosecutor calculated that the applicant's financial profits gained from trading in children between 1988 and 1993 were not less than 260,517 United States dollars and 25,000 French francs. During this period the applicant had paid to biological parents a sum of not less than 23,146 zlotys.

62. The proceedings are still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Evolution of Polish criminal legislation during the relevant period

63. Polish criminal legislation was amended several times during the relevant period. The Code of Criminal Procedure enacted in 1969 (the "old" Code) was replaced by a new Code of Criminal Procedure, adopted by Parliament (*Sejm*) on 6 June 1997, which entered into force on 1 September 1998. Likewise, the 1969 Criminal Code was replaced by a new Code adopted on 6 June 1997, which also entered into force on 1 September 1998.

64. The old Code of Criminal Procedure was significantly amended by the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes. This Law entered into force on 1 January 1996. However, the entry into force of the provisions concerning the ordering of detention on remand was postponed until 4 August 1996. According to these provisions, detention on remand was to be ordered by a judge, whereas before it was ordered by a prosecutor.

65. The second amendment, effected by the Law of 1 December 1995 on Amendments to the Law of 29 June 1995 (commonly referred to as “the Interim Law of 1 December 1995”), entered into force on 1 January 1996.

B. Preventive measures

66. The Polish Code of Criminal Procedure of 1969, applicable at the relevant time, listed as “preventive measures”, *inter alia*, detention on remand, bail and police supervision.

67. Articles 210 and 212 of the Code of Criminal Procedure provided that before the bill of indictment was transmitted to the court, detention on remand was ordered by the prosecutor. The decision to order detention on remand could be appealed against, within a seven-day time-limit, to the court competent to deal with the merits of the case. According to Article 222 of the Code, the prosecutor could order detention on remand for a period not exceeding three months. When, in view of the particular circumstances of the case, the investigations could not be terminated within this period, detention on remand could, if necessary and upon the prosecutor's request, be prolonged by the court competent to deal with the merits of the case, for a period not exceeding one year. This decision could be appealed to a higher court.

C. Grounds for detention on remand

68. Article 217 § 1 (2) and (4) of the Code of Criminal Procedure, as applicable at the material time, provided that detention on remand could be ordered if, *inter alia*, there was a reasonable risk that the accused would attempt to abscond, to induce witnesses to give false testimony or to obstruct the due course of proceedings by any other unlawful means, or if the accused had been charged with an offence which created a serious danger to society.

D. Proceedings to examine the lawfulness of detention on remand

69. At the material time there were three types of proceedings enabling a detainee to challenge the lawfulness of his or her detention and thus possibly obtain release. Under Article 221 § 2 of the Code of Criminal Procedure of 1969 he could appeal to a court against a detention order made by a prosecutor. Under Article 222 §§ 2 (1) and 3 he could appeal against a further decision by that court prolonging his detention at a prosecutor's request. Finally, under Article 214 an accused could at any time request the competent authority to quash or alter the preventive measure applied in his case. Such an application had to be decided by the prosecutor or, after the

bill of indictment had been lodged with the court competent to deal with the case, by that court, within three days.

70. Under all the relevant provisions of the Code of Criminal Procedure of 1969 read together, a detainee was entitled to appeal against any decision prolonging his or her detention on remand, regardless of whether it had been made at the investigative or the judicial stage of the proceedings.

71. The imposition and prolongation of preventive measures, including detention on remand, were examined by the courts in proceedings held in camera. The presence of the parties at court sessions other than hearings, including sessions held in proceedings concerning review of detention on remand, was regulated in Articles 87 and 88 of the Code of Criminal Procedure, the relevant parts of which provide:

Article 87

“The court pronounces its decisions at a hearing if the law so provides; and otherwise, at a court session held in camera. ...”

Article 88

“A court session in camera may be attended by a prosecutor ...; other parties may attend if the law so provides.”

72. According to Article 249 of the 1997 Code of Criminal Procedure, before deciding on the application of preventive measures, the court must hear the person charged. The lawyer of the detainee should be allowed to attend the court session, if he or she is present. It is not mandatory to inform the lawyer of the date and time of the court session, unless the suspect so requests and if it will not hinder the proceedings.

73. Under the provisions of the new Code, the court has to inform the lawyer of a detained person of the date and time of court sessions at which a decision is to be taken concerning prolongation of detention on remand, or an appeal against a decision to order or to prolong detention on remand is to be considered.

E. Provisions governing criminal responsibility for the offence of trading in children

74. Article IX of the transitional provisions of the 1969 Criminal Code provided that a person who delivered, enticed or abducted other persons for prostitution purposes, even with the person's consent, committed an offence punishable by a prison sentence of not less than three years. Under paragraph 2 of this provision the same sentence could be imposed on a person who engaged in trading in women or children.

75. On 25 June 1990 the then Deputy Minister of Justice, A.S., sent a letter to the presidents of regional courts stating that in 1989 there had been

a rapid growth of cases in which courts ruled on adoptions of Polish children of which the adoptive parents were foreigners. As a result, approximately one thousand children had left the country for good. This data should be considered as disturbing, the more so as it had been mainly small children that had been adopted. Public opinion was alarmed by the growing numbers of foreign adoptions. It was true that Polish law laid down the same requirements for adoptions, regardless of the nationality of the future adoptive parents, and that the children's welfare was a consideration of paramount importance for all adoption cases. However, the notion of a child's welfare should also include protection of its national identity. Hence, foreign adoptions should take place only in exceptional cases and the courts should first examine whether the child could not find adoptive parents in Poland. The presidents of the courts were invited to consider whether in cases in which the same persons were repeatedly acting as intermediaries in connection with the adoption proceedings, it was not advisable to inform the prosecution authorities accordingly. The presidents were finally requested to supervise closely this category of cases and to take measures in order to eliminate the climate favouring foreign adoptions.

76. Under Article 2 of the transitional provisions of the new Criminal Code, the transitional provisions to the 1969 Code were repealed.

77. Under Article 253 § 1 of the new Code, a person who trades in human beings, even with their consent, commits an offence punishable by a prison sentence of not less than three years. According to paragraph 2 of the same Article, a person who, with a view to obtaining profit, organises adoptions of children in a manner contrary to the law commits an offence punishable by a prison sentence of between three months and five years.

F. Case-law of the Polish courts and legal writings in cases in which charges of trading in children were brought against the accused

78. On 30 September 1994 the journal *Rzeczpospolita* published an article written by a renowned specialist in criminal law, entitled "Is it really trading in children?". The author expressed strong doubts as to whether the offence punishable by Article IX of the transitional provisions of the 1969 Criminal Code could be applied in a context other than trading in human beings for the purposes of prostitution. It was emphasised that in view of the historical background to this provision, dating back to international treaties of 1910 concluded for the purposes of combating international networks deriving profits from prostitution, it could not be applied to situations concerning adoptions of children in which no allegations were made of there being any links or intentions related to organising prostitution.

79. On 29 November 1995 the Supreme Court replied in the negative to a legal question put to it by the Warsaw Court of Appeal, in the context of criminal proceedings concerning charges made under Article IX of the

transitional provisions of the 1969 Criminal Code (namely, whether an intention to coerce a victim of the offence of trading in children into practising prostitution was a constituent element of this offence).

80. On 3 November 1999 the Warsaw Regional Court, in the same criminal proceedings in which five accused had been charged with an offence punishable under Article IX of the transitional provisions of the 1969 Criminal Code, discontinued the proceedings against them. The court recalled that in view of the fact that this Article had ceased to be in force, the prosecuting authorities had amended the charges by qualifying the acts which the applicants had been charged with committing as an offence punishable under Article 253 § 2 of the new Code. The court considered that this qualification could not be upheld. There were no grounds for accepting that the notion of “trading in children” also included the acts in question, which could only be regarded as organising illicit adoptions. It was only under the new Criminal Code, in force from 1 September 1998, that organising illicit adoptions had become a criminal offence. Consequently, the court had to discontinue the proceedings pursuant to Article 17 § 1, item 1, of the new Code, which provided that criminal proceedings had to be discontinued if the charges against the accused had not been made out.

81. On 4 February 2000 the Warsaw Court of Appeal, following the prosecutor's appeal against this decision, amended it in part, considering that the proceedings against the accused concerning the charges of trading in children should have been discontinued on the ground that the acts with which they had been charged had not amounted to a criminal offence punishable at the time of their commission. The court recalled that the accused had been indicted with trading in children on the basis that they had, with a view to profit, visited hospitals, orphanages and hostels for single mothers, trying to persuade the biological parents to place their children for adoption, in certain cases for money. Their actions had further been described as taking children away from their biological parents and taking further care of them, followed by taking steps to institute adoption proceedings. The accused had allegedly also arranged transfers of children to foreign citizens and made payments to the biological parents. The court considered that these acts could be qualified neither as trading in children within the meaning of the repealed Article IX of the transitional provisions of the old Code, nor as trading in human beings within the meaning of Article 253 § 1 of the new Criminal Code. Such acts could only be construed, regard being had to their nature, as organising foreign adoptions, in certain cases for commercial motives. As a result, these acts at the time of their commission, that is, from 1990 to 1993, had not constituted criminal offences, given that it was only under the 1997 Criminal Code, which had entered into force on 1 September 1998, that they could have been qualified as falling within the ambit of Article 253 § 2 of that Code, penalising the organisation of adoptions for commercial motives. Consequently, the

proceedings should have been discontinued on the ground that the acts concerned had not coincided with the constituent elements of the offence of trading in children as defined by the Polish law at the material time, and not on the ground that the charges against the accused had not been made out.

G. Relevant provisions of the United Nations Convention on the Rights of the Child

82. On 30 April 1991 Poland ratified the United Nations Convention on the Rights of the Child which, in its relevant provisions, reads:

Article 8

“1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference. ...”

Article 21

“States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of childcare, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.”

H. Proceedings for compensation for unjustified detention

83. Chapter 50 of the 1969 Code of Criminal Procedure, as applicable at the material time, provided in Article 487 § 4 for compensation for damage

arising out of manifestly unjustified detention on remand and for arrest and detention up to forty-eight hours. The regional court in whose region the detained person had been released was competent to examine whether the conditions for awarding compensation were met. The decision of the regional court could be appealed to the court of appeal.

84. According to Article 489 of the Code, a request for compensation for manifestly unjustified detention on remand had to be lodged within one year from the date on which the last decision terminating the criminal proceedings in question had become final. Therefore, in practice, a request for compensation for unjustified detention under Article 487 of the Code could not be lodged until the criminal proceedings against the person concerned had been terminated (see also the decision of the Supreme Court no. WRN 106/96, 9.1.96, published in *Prok. i Pr.* 1996/6/13). The court competent to deal with such a request was obliged to establish whether the detention was justified in the light of all the circumstances of the case, in particular whether the authorities considered all the factors militating in favour of or against the detention (see, *inter alia*, the decision of the Supreme Court no. II KRN 124/95, 13.10.95, published in *OSNKW* 1996/1-2/7).

85. Chapter 58 of the 1997 Code of Criminal Procedure provides for a request for compensation for, *inter alia*, unjustified detention. Article 552 § 4 of the current Code is an equivalent of Article 487 § 4 of the 1969 Code.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-exhaustion of domestic remedies

86. The Government contended that the applicant's complaint under Article 5 § 1 (c) of the Convention should have been declared inadmissible due to failure to exhaust domestic remedies, pursuant to Article 35 § 1 of the Convention, which states:

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

87. In the Government's submission, the applicant still has at his disposal an effective judicial remedy in order to establish whether his detention from 20 September 1994 until 11 January 1995 was lawful. It is open to him to obtain a ruling on this issue from the Polish courts by bringing a request for compensation for manifestly unjustified detention

under Article 552 of the new Code of Criminal Procedure once a final judgment on the merits of the case has been given by the domestic court. It is true, as stated by the Court in the admissibility decision, that the right to obtain release from detention and the right to obtain compensation for any deprivation of liberty incompatible with Article 5 of the Convention are two separate rights. However, the issue to be examined in the present case is whether the applicant's detention was lawful, and a request under Article 552 of the Code is a suitable legal avenue to have this issue determined.

88. The applicant submitted that the Government's arguments were contradictory in that they could not validly require him to have recourse to a remedy applicable in situations in which detention on remand was alleged to be unlawful if, on the other hand, they insisted that his detention on remand was in compliance with the requirements of Article 5 § 1 of the Convention.

89. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness (see the *Aksoy v. Turkey* judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2275-76, §§ 51-52, and the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, §§ 65-67).

90. The Court reiterates that, under the Convention organs' case-law, where lawfulness of detention is concerned, an action for damages against the State is not a remedy which has to be exhausted because the right to have the lawfulness of detention examined by a court and the right to obtain compensation for any deprivation of liberty incompatible with Article 5 are two separate rights (see *Zdebski, Zdebska and Zdebska v. Poland* (dec.), no. 27748/95, 6 April 2000, unreported).

91. The Court further recalls that a request for compensation for manifestly unjustified detention on remand under Article 552 of the Code of Criminal Procedure of 1997 enables a detainee to seek, retrospectively, a ruling as to whether his detention in already terminated criminal proceedings was justified, and to obtain compensation when it was not. The proceedings relating to such a request are essentially designed to secure financial reparation for damage arising from the execution of unjustified detention on remand.

92. The Court recalls its admissibility decision in the present case in which it considered that the applicant had availed himself of remedies available to him in order to have the lawfulness of his detention examined by a court, by lodging an appeal against the detention order of 20 September 1994. Further, the Court noted that in order to have the Cracow Court of

Appeal examine whether the prolongation of his detention would be justified, the applicant had appealed to that court against the decision of the Cracow Regional Court of 19 December 1994. The Court sees no specific reasons to alter this conclusion.

93. In the light of the foregoing, the Court concludes that the Government's preliminary objection of non-exhaustion must be dismissed.

B. Abuse of process

94. The Government further raised an objection as to the measures used by the applicant in pursuing his case before the Court. They contended that the applicant, by submitting unsubstantiated allegations, intended to mislead the Court as to the factual aspects of the case. They further maintained that the applicant intended to create a sensational climate around his case. They concluded that the application should therefore have been rejected under Article 35 § 3 of the Convention, which reads:

“The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of application.”

95. Having examined the applicant's complaints, the Court finds no grounds on which to hold that the present case was brought before it in abuse of the right of application. It therefore rejects this preliminary objection of the Government.

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

96. The applicant alleged a breach of Article 5 § 1 (c) of the Convention, the relevant part of which reads:

“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. Arguments before the Court

97. The Government submitted that the assessment of this complaint necessitates the consideration of two issues.

98. The first one is whether in September 1994 there existed a reasonable suspicion that the applicant had committed the offence of trading in children. It transpired from the written grounds of the decision to bring charges against the applicant that he had actively sought children for adoption, by looking for parents or mothers and, knowing their difficult financial situation, inciting them to give their children away against financial reward. The applicant had been undertaking all necessary factual and legal measures in order to organise lawful transfers of babies abroad. In particular, he had been acting as a representative of adoptive parents in adoption proceedings before Polish courts. The evidence gathered by the prosecuting authorities had shown that the applicant, by inciting biological parents to give false evidence in the adoption proceedings, had intended to mislead the courts as to the circumstances which had led them to waive their parental rights.

99. The facts referred to by the prosecuting authorities in the detention order of 20 September 1994 and corroborated at that time by the evidence gathered before that date had later been confirmed by the evidence taken upon letters rogatory by French, Italian and United States judicial authorities. Moreover, on the basis of this testimony given by the applicant's clients, on 18 May 2000 the Cracow Regional Prosecutor had brought new, broader charges against the applicant. In the opinion of the Government, the circumstances known to the prosecuting authorities in September 1994 and relied on in the detention order of 20 September 1994 justified a reasonable suspicion that the applicant had committed the offence of trading in children, which suspicion constituted a condition for ordering detention on remand, set forth in Article 209 of the 1969 Code of Criminal Procedure.

100. The Government further argued that another issue which was relevant for the assessment of the complaint under Article 5 § 1 of the Convention was whether the activities in which the applicant had been involved could, at the time of his arrest, be considered as trading in children, an offence penalised at the material time under Article IX of the transitional provisions of the 1969 Criminal Code. They stressed that the literal interpretation of this provision, in particular of its paragraph 2, must lead to a conclusion that it did not require that trading in children be undertaken to the detriment of victims of such trade. Such a prerequisite was expressly spelt out only in paragraph 1 of this provision, which provided for a criminal sanction against persons involved in delivering, enticing or abducting other persons for prostitution purposes. The Government relied in this respect on the decision of the Supreme Court of 29 November 1995 in which the court had stated that an intention on the part of the perpetrator to

coerce a victim of the offence into practising prostitution was not a constituent element of the offence. Thus, an intention to act to the detriment of a victim was not a prerequisite for the existence of the offence of trading in children.

101. In the Government's submission the only relevant prerequisite was that the perpetrator was involved in acts which could be regarded as trading, that is, as acting for commercial purposes. The Government were persuaded that the legal qualification of the acts committed by the applicant as an offence of trading in children as provided for by Polish law at the relevant time was justified. They stressed in this respect that the applicant had obviously not limited his activities to what would normally be understood as legal assistance in adoption proceedings, and that he had acted for profit.

102. The Government concluded that the acts committed by the applicant could reasonably be qualified as constituting the offence of trading in children penalised at the material time under Article IX of the transitional provisions of the 1969 Criminal Code. Thus, his detention in September 1994 was a "lawful detention ordered for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence" within the meaning of Article 5 § 1 (c) of the Convention.

103. The applicant submitted that, according to a decision given by the Cracow Regional Court on 11 January 1995, the acts with which he had been charged could not reasonably be qualified as trading in children within the meaning of Article IX of the transitional provisions of the 1969 Criminal Code. This decision, argued the applicant, amounted to a statement that his detention lacked a legal basis.

104. The applicant further referred to the case-law of the Polish courts concerning criminal cases in which charges of trading in children had been examined. Firstly, he relied on a decision given by the Supreme Court on 29 November 1995, in which that court had stated that an intent to coerce a victim of the offence of trading in children into practising prostitution was not a constituent element of this offence. However, in this decision the Supreme Court did not define the notion of "trading in children", as it failed to indicate what acts could be regarded as "trading". Consequently, in the absence of a clear definition of this notion, the charges of "trading in children", laid against him, could not be upheld.

105. The applicant also had regard to that part of the decision of the Warsaw Regional Court of 13 June 1995 in which the court had held that the notion of "trading in children" inherently involved trading in human beings with an intent to coerce them into practising prostitution. Further, in its judgment of 4 February 2000 the Warsaw Court of Appeal considered that the acts with which the accused had been charged, similar to those under consideration in the applicant's case, had not amounted to a criminal offence punishable under Article IX of the transitional provisions at the time of their commission. This judgment had become final as the prosecuting

authorities had not lodged a cassation appeal against it. The applicant emphasised that the Government had failed to take any position in respect of this judgment, which, in view of the fact that it contained a detailed interpretation of Article IX, was of direct relevance to the applicant's case.

106. The applicant further noted that family law, as applicable at the relevant time, did not set forth any limitations on adoption as regards the nationality and the place of residence of the prospective adoptive parents. It was the child's best interest which was a guiding principle for judicial decisions taken in adoption cases. It was only subsequent to the amendments of the Family Code, adopted in 1995, that the place of residence of the prospective adoptive parents became relevant. Thus, at the time of his detention, no legal distinction could be drawn between domestic and foreign adoptions.

107. The applicant finally argued that these legitimate considerations had been entirely disregarded by the prosecuting authorities. He submitted that the prosecution was motivated solely by extra-legal considerations of a political character as regards foreign adoption cases.

B. The Court's assessment

108. The Court recalls that Article 5 § 1 of the Convention contains an exhaustive list of permissible grounds for deprivation of liberty which must be interpreted strictly (see, for instance, the *Ciulla v. Italy* judgment of 22 February 1989, Series A no. 148, p. 18, § 41). A person may be detained under Article 5 § 1 (c) only in the context of criminal proceedings, for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offence (see *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX). A “reasonable suspicion”, referred to in Article 5 § 1 (c) of the Convention, that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence. As a rule, problems in this area arise at the level of the facts. The question then is whether the arrest and detention were based on sufficient objective elements to justify a “reasonable suspicion” that the facts at issue had actually occurred (see the *Fox, Campbell and Hartley v. the United Kingdom* judgment of 30 August 1990, Series A no. 182, pp. 16-18, §§ 32-34, and the *Murray v. the United Kingdom* judgment of 28 October 1994, Series A no. 300-A, pp. 24-29, §§ 50-63).

109. However, in addition to its factual side, the existence of a “reasonable suspicion” within the meaning of Article 5 § 1 (c) requires that the facts relied on can be reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code. Thus, there could clearly not be a “reasonable suspicion” if the acts or facts held against a detained person did not constitute a crime at the time when they occurred.

The issue involved in the present case is whether the applicant's detention was "lawful" within the meaning of Article 5 § 1. The Convention refers here essentially to national law, but it also requires that any measure depriving the individual of his liberty be compatible with the purpose of Article 5, namely to protect the individual against arbitrariness (see the *Bozano v. France* judgment of 18 December 1986, Series A no. 111, p. 23, § 54, and the *Lukanov v. Bulgaria* judgment of 20 March 1997, *Reports* 1997-II, pp. 543-44, § 41).

110. Where the Convention refers directly back to domestic law, as in Article 5, compliance with such law is an integral part of the obligations of the Contracting States and the Court is accordingly competent to satisfy itself of such compliance where relevant; the scope of its task in this connection, however, is subject to limits inherent in the logic of the European system of protection, since it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see, *inter alia*, the *Lukanov* judgment cited above, *ibid.*, and the *Kemmache v. France* (no. 3) judgment of 24 November 1994, Series A no. 296-C, p. 88, § 42).

111. The Court observes that in the present case the applicant's detention on remand was based on a suspicion that he had been involved in acts qualified as the offence of trading in children, punishable under Article IX of the transitional provisions of the 1969 Code, and also on the ground that he had been inciting certain persons to give false evidence in the judicial proceedings. The Court notes that until the material time this provision had never been applied by the Polish courts, either in the context of a pre-trial detention or in any proceedings on the merits of a criminal charge. Thus, this provision was then subject to serious difficulties of interpretation as regards the constituent elements of this offence. In particular, a crucial issue for the case was the designation of acts which could be deemed to constitute the offence of trading in children. The Court refers here in particular to the decision of 4 October 1994, in which the Cracow Regional Court stated that the case had no precedent and raised serious difficulties, both as to the facts and the law.

112. The Court observes that the relevant decisions, referred to by the parties, were given by the Polish courts in the period subsequent to the applicant's release on 11 January 1995 (see paragraphs 79-81 above). The most recent relevant judgment referred to by the parties was that given by the Warsaw Court of Appeal on 4 February 2000. The Court acknowledges that that case bears a certain resemblance to the applicant's case, in that the accused were also charged with trading in children. In that case, the Court of Appeal held that the activities in which the accused had been involved could only be construed as organising foreign adoptions, in certain cases for commercial motives, which acts, as in the applicant's case, were not punishable at the time of their commission.

113. However, the Court cannot speculate as to whether and, if so, in what way this judgment is likely to affect the future ruling in the criminal proceedings against the applicant, which remain pending.

114. Moreover, to assess whether the applicant's detention was in conformity with the requirements of Article 5 § 1 (c) of the Convention as regards its lawfulness, the Court must have regard to the legal situation as it stood at the material time. In the absence of any pertinent case-law, or unanimous opinion of legal scholars, which would clarify the issue of the applicability of Article IX of the transitional provisions to situations similar to that of the applicant, the Court observes that the national courts examined a number of elements which they deemed relevant for the assessment of this issue. Accordingly, they took into consideration the scope of the power of attorney given to the applicant by the parties to the adoption proceedings and analysed whether this scope and the actual measures undertaken by the applicant had been compatible with normally accepted practice. They further assessed whether the remuneration received by the applicant had been appropriate. The Court also notes that the domestic authorities referred extensively to the evidence gathered in the course of the investigations and considered that in the light of this evidence the factual aspects of the suspicion against the applicant were reasonably justified.

115. The Court finally notes that, had the applicant's detention been based solely on the suspicion concerning his alleged involvement in the offence of trading in children, the legality of such detention, considering the existing contradictions in the interpretation of the domestic law, would have been doubtful. However, it was also grounded upon the suspicion that he had committed an offence of inciting persons, who had participated in the adoption proceedings, to give false evidence with intent to mislead the courts.

116. On the whole, the Court considers that there is nothing to show that the interpretation of the legal provisions relied on by the domestic authorities in the applicant's case was arbitrary or unreasonable, so as to render his detention unlawful.

117. Consequently, there has been no violation of Article 5 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

118. The applicant complained that the proceedings concerning review of his detention on remand were not fully adversarial and therefore were not in compliance with Article 5 § 4 of the Convention, which reads:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. Arguments before the Court

119. The Government first referred to the applicant's submission that the proceedings conducted in October 1994 before the Cracow Regional Court, in which his appeal against the detention order of 20 September 1994 had been conducted were not in compliance with the requirements of Article 5 § 4 of the Convention since he did not participate in these proceedings and his lawyers were not present before the court. The Government stressed that in fact the applicant's lawyers, Mr M.G. and Mr W.P., had participated in the court's session and submitted to the court additional oral arguments in support of those advanced in writing in the appeal against the detention order.

120. During the applicant's detention, which lasted from 20 September 1994 until 11 January 1995, the lawfulness of his detention was examined twice by the Regional Court, on 4 October and 19 December 1994, and once by the Court of Appeal, on 11 January 1995. The Government acknowledge that the proceedings in December 1994 and January 1995 had not been conducted in a fully adversarial manner, as neither the applicant nor his defence counsel had been allowed to participate in the court sessions. However, the proceedings that took place upon the applicant's appeal against the detention order were unobjectionable as his lawyers had been allowed to address the court.

121. The Government concluded that the proceedings concerning review of the lawfulness of the applicant's pre-trial detention were in compliance with the requirements of Article 5 § 4 of the Convention.

122. The applicant submitted that the prosecutor participated *ex officio* in the proceedings in the Cracow Regional Court on 4 October 1994 in which his appeal against the detention order was considered. Under the laws applicable at that time, the applicant was not entitled to attend either the court session held in these proceedings, or any session held in subsequent detention proceedings. It was also relevant to note that the initial detention order had not only not been made by a court, as required by the Convention, but also had been made by the prosecuting authorities. Also, the applicant had not been questioned by the prosecutor either at the time of his arrest or at any later time preceding the court session of 4 October 1994. Therefore, it could not be excluded that the court, not having at its disposal any replies given by the suspect to questioning, had to accept as true the prosecutor's submissions, unknown to the suspect, in support of the applicant's detention. The applicant was thus deprived of the possibility of defending himself in an effective manner.

The applicant acknowledged that the Regional Court had, by way of exception, allowed his lawyers, Mr W.P. and Mr M.G., to attend the session on 4 October 1994. Even so, they had only had a possibility to address the court, stressing that they had not had access to the case file. Afterwards, the

court had ordered them to leave the courtroom. Thereafter the prosecutor had submitted his arguments to the court in the absence of both the applicant and his legal representatives.

The only elements known to the applicant's legal representatives at that time had been the detention order and the applicant's appeal against it. Neither they nor the applicant had at this time had any access to the case file. Consequently, not having any knowledge of the evidence contained in the case file, their arguments had to be limited to suppositions and guesses.

123. As regards the proceedings in December 1994 concerning the prosecutor's request for prolongation of the applicant's detention, this request had not been communicated either to the applicant or to his lawyers. Thus, they were not aware of the arguments on which the prosecution relied to justify the prolongation of the applicant's detention.

124. The applicant emphasised that as a result of the deficiencies of the proceedings in which the lawfulness of his detention on remand had been examined, the Cracow Regional Court twice gave, on 4 October and on 19 December 1994, decisions which were later, in the light of the decision of 11 January 1995 of the Cracow Court of Appeal, proved wrong.

The applicant concluded that the principle of equality of arms in proceedings concerning detention on remand could be said to be respected only in proceedings which were truly adversarial. In such proceedings a detained person would be questioned, his or her lawyers would have an opportunity to address the court, and the prosecuting authorities and the detainee would have the same access to the materials contained in the case file.

B. The Court's assessment

125. The Court recalls that by virtue of Article 5 § 4 an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness", in the sense of Article 5 § 1, of his or her deprivation of liberty (see the *Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 145-B, pp. 34-35, § 65). Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question. In order to determine whether proceedings provide the "fundamental guarantees of procedure applied in matters of deprivation of liberty" regard must be had to the particular nature of the circumstances in which such proceedings take place (see, among other authorities, the *Megyeri v. Germany* judgment of 12 May 1992, Series A no. 237-A, pp. 11-12, § 22).

126. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see the *Kampanis v. Greece* judgment of 13 July 1995, Series A no. 318-B, p. 45, § 47). In particular, in proceedings in which an appeal against a detention order is being examined, equality of arms between the parties, the prosecutor and the detained person must be ensured (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II).

127. The opportunity of challenging effectively the statements or views which the prosecution bases on specific documents in the file may in certain instances presuppose that the defence be given access to these documents (see the *Lamy v. Belgium* judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29).

128. The Court observes that in the case under consideration the applicant was remanded in custody under the warrant of arrest issued by the Cracow Regional Prosecutor on 19 September 1994. Later on, he lodged an appeal with the Cracow Regional Court against this decision. That court, having examined his appeal, dismissed it at the court session held on 4 October 1994. Further, on 19 December 1994, the Cracow Regional Court considered the prosecutor's request for the prolongation of the applicant's detention for a further three months. The Regional Court's scope of jurisdiction included assessment of the lawfulness of continued pre-trial detention in the light of progress in the case, and also whether the continued detention was still justified. Subsequently, on 11 January 1995, the Cracow Court of Appeal examined the applicant's appeal against the decision of 19 December 1994 to prolong his detention and ultimately dismissed the prosecutor's request.

129. The Court first observes that, according to the law on criminal procedure as it stood at the relevant time, detention on remand was ordered by decision of a public prosecutor. Against a detention order, an appeal lay to a court. The law did not entitle either the applicant himself or his lawyer to attend the court session held in proceedings instituted following such an appeal. The Court notes, however, that in the instant case, in such proceedings in the Cracow Regional Court on 4 October 1994, that court, apparently by way of exception, allowed the applicant's lawyers to be present before it, although the Government did not indicate the legal basis for this decision. The applicant's representatives were allowed to address the court and afterwards they were ordered to leave the courtroom. Thus, it was open to the prosecutor, who remained, to make in their absence any further submissions in support of the detention order, while neither the applicant nor his lawyers had any opportunity to become acquainted with them, to formulate any objections or to comment thereon.

130. The Court further notes that the applicant was informed of the reasons for suspicion against him in the written grounds of the detention order, issued on 29 September 1994. On the basis of the information

contained therein the applicant advanced, himself and through his defence counsel, arguments against his detention on remand. However, at this stage, the applicant and his counsel did not have any access to the case file.

131. In these circumstances, the Court is of the view that the proceedings in which the applicant's appeal against the detention order was examined cannot be said to have been compatible with the requirements of Article 5 § 4 of the Convention. While the proceedings appear to have been conducted “speedily” within the meaning of this provision, they did not provide the “fundamental guarantees of procedure applied in matters of deprivation of liberty”.

132. In the absence of such guarantees in those proceedings, it is therefore necessary to consider whether the subsequent proceedings in which the applicant had an opportunity of having the lawfulness of his detention on remand reviewed by a court were compatible with the requirements set forth in Article 5 § 4 of the Convention.

133. Article 5 § 4, in guaranteeing to persons that have been arrested or detained a right to institute proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see, for instance, the *Van der Leer v. the Netherlands* judgment of 21 February 1990, Series A no. 170-A, p. 14, § 35, and *Musiał v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II).

134. The Court observes in this respect that subsequent proceedings concerning review of the applicant's continued pre-trial detention were instituted by the request of 12 December 1994 of the Cracow Regional Prosecutor for prolongation of the applicant's detention until 28 February 1995. They took place on 19 December 1994 before the Cracow Regional Court, and later on, following the applicant's appeal against that court's decision given on that date, on 11 January 1995 before the Cracow Court of Appeal.

135. Therefore, even assuming that these proceedings satisfied the procedural requirements of Article 5 § 4 of the Convention, given the lapse of time between 20 September 1994, the date on which the applicant was deprived of liberty, and 19 December 1994, the date on which the Cracow Regional Court reviewed the lawfulness of his continued detention, they cannot be said to have led to a decision being taken “speedily”, as required by Article 5 § 4.

136. Having regard to the foregoing, the Court finds that there has been a violation of Article 5 § 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

137. The applicant further complained of the length of the criminal proceedings against him. He relied on Article 6 § 1 of the Convention, which provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

A. Arguments before the Court

138. In the Government's submission, the proceedings, which started on 19 September 1994, have so far lasted five years and ten months. The length of the proceedings, although excessive in itself, did not exceed a reasonable time within the meaning of Article 6 § 1 of the Convention.

139. The Government submitted that the investigative measures taken by the Cracow Regional Prosecutor in the investigation against the applicant were in fact not completed until the end of 1995. Also in 1995 the Italian and French authorities submitted to the prosecution a complete set of evidence taken following letters rogatory. However, since 1995 the Cracow Regional Prosecutor had been waiting for the evidence requested by letters rogatory sent to the United States authorities.

140. During the last five years the Polish prosecution authorities had requested the Ministry of Foreign Affairs eleven times to take appropriate steps to obtain compliance with the letters rogatory. The United States authorities had subsequently submitted the evidence taken from the nominated witnesses. Thus, on 17 October 1995 the Cracow Regional Prosecutor obtained evidence from the judicial authorities of Pennsylvania. On 8 January 1996 the evidence taken in the State of New Jersey was submitted to the prosecution. On 15 April 1997 the prosecution obtained the testimony of one further witness and on 8 October 1998 it obtained certain further pieces of evidence.

141. The Government further emphasised that the Polish authorities, notably the Cracow Regional Prosecutor, took all measures available to them in order to accelerate the execution of the letters rogatory. Accordingly, they could not be held responsible for delays in the investigations caused exclusively by prolonged execution of letters rogatory by foreign authorities. It had to be stressed that pursuant to Article 261 of the Code of Criminal Procedure applicable at the material time, the purpose of investigations in a criminal case was defined as “comprehensive clarification of the circumstances of the case”. Hence, the Cracow Regional Prosecutor was under a statutory obligation to collect all available evidence and could not terminate the investigations without having done so.

142. In the Government's opinion, the Cracow Regional Prosecutor conducted this very complex case with due diligence. No delays in taking evidence or pursuing investigative acts could be attributed to the Polish authorities.

143. The applicant submitted that the proceedings had started a long time before the date referred to by the Government, as was shown by the fact that by 19 September 1994 the prosecution already had at its disposal numerous pieces of evidence intended to support the charges against him, which must have been gathered earlier. He further emphasised that the Polish authorities had requested that evidence be taken in the United States, having erroneously informed that country's authorities that organising adoptions against payment was an offence punishable under the provisions of Polish law as applicable at the material time. The applicant further insisted that nothing justified the fact that the case had remained dormant for over six years, even if this was caused by delays in obtaining evidence under letters rogatory.

B. The Court's assessment

144. The Court first recalls that in criminal matters, the “reasonable time” referred to in Article 6 § 1 begins to run as soon as a person is “charged”; this may occur on a date prior to the case coming before the trial court (see, for example, the *Deweere v. Belgium* judgment of 27 February 1980, Series A no. 35, p. 22, § 42), such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted, or the date when preliminary investigations were opened (see the *Wemhoff v. Germany* judgment of 27 June 1968, Series A no. 7, pp. 26-27, § 19; the *Neumeister v. Austria* judgment of 27 June 1968, Series A no. 8, p. 41, § 18; and the *Ringeisen v. Austria* judgment of 16 July 1971, Series A no. 13, p. 45, § 110). “Charge”, for the purposes of Article 6 § 1, may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” (see the *Deweere* judgment cited above, p. 24, § 46).

145. In the present case, the Court observes that on 19 September 1994 the Cracow Regional Prosecutor brought charges against the applicant. No arguments were advanced to show that any acts or decisions had been given beforehand such as to affect the applicant's situation negatively. Accordingly, the period relevant for the assessment of the length of the proceedings began to run on that date. The proceedings are still pending. The period under examination is thus six years.

146. The Court recalls that the reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of

the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and that of the competent authorities, which in this instance call for an overall assessment (see, among many other authorities, the *Cesarini v. Italy* judgment of 12 October 1992, Series A no. 245-B, p. 26, § 17).

147. The Court considers that the subject matter of the case before the domestic courts was undoubtedly complex, as shown, *inter alia*, by the fact that in July 1995 the case file already comprised forty-six volumes. Establishing the facts of the case necessitated taking evidence from many witnesses in various countries. Moreover, a substantial amount of evidence had to be gathered from documents and decisions given in many sets of family-law proceedings.

148. On the other hand, the Court can find nothing to suggest that the applicant was responsible for prolonging the proceedings.

149. As regards the conduct of the authorities, the Court observes that the proceedings were prolonged mostly as a result of the fact that evidence had to be taken upon letters rogatory submitted to Italian, French and United States judicial authorities. The process of gathering evidence from the two former countries had been completed by the end of 1995. However, there were significant delays in obtaining evidence requested by letters rogatory from the American authorities.

150. The Court notes in this respect that the prosecution took measures to expedite the proceedings, by repeatedly requesting the competent Polish authorities to take appropriate steps to urge the United States authorities to accelerate the process of gathering evidence. However, their efforts were to no avail.

151. The Court accordingly considers that the responsibility for the protracted character of the proceedings cannot be ascribed to the Polish authorities. Accordingly, there has been no violation of Article 6 § 1 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

152. 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

153. The applicant sought an award of 600,000 zlotys (PLN) for pecuniary damage which he suffered as a result of his detention and of disturbances it had caused in his professional activity as a lawyer.

154. The applicant also requested that the Court award him a sum of PLN 100,000 as compensation for non-pecuniary damage he and his family suffered as a result of his detention and the criminal proceedings instituted against him.

155. The Government requested the Court to rule that a finding of a violation constituted sufficient just satisfaction. In the alternative, they asked the Court to assess the amount of just satisfaction on the basis of its case-law in similar cases, taking into account all relevant circumstances of the applicant's case, and having regard to national economic circumstances, in particular, the purchasing power of the national currency and the current minimum gross salary in Poland.

156. As regards the claim for alleged damage suffered as a result of a violation of Article 5 § 4 of the Convention, the Court recalls that in certain cases which concerned violations of Article 5 §§ 3 and 4 it has made modest awards in respect of non-pecuniary damage (see the *Van Droogenbroeck v. Belgium* judgment of 25 April 1983 (*Article 50*), Series A no. 63, p. 7, § 13, and the *De Jong, Baljet and Van den Brink v. the Netherlands* judgment of 22 May 1984, Series A no. 77, p. 29, § 65). However, in more recent cases, it has declined to make any such award (see the *Pauwels v. Belgium* judgment of 26 May 1988, Series A no. 135, p. 20, § 46; the *Brogan and Others v. the United Kingdom* judgment of 30 May 1989 (*Article 50*), Series A no. 152-B, pp. 44-45, § 9; the *Huber v. Switzerland* judgment of 23 October 1990, Series A no. 188, p. 19, § 46; the *Toth v. Austria* judgment of 12 December 1991, Series A no. 224, p. 24, § 91; the *Kampanis* judgment cited above, p. 49, § 66; *Hood v. the United Kingdom* [GC], no. 27267/95, §§ 84-87, ECHR 1999-I; *Nikolova v. Bulgaria* cited above, § 76; and *Niedbala v. Poland*, no. 27915/95, § 89, 4 July 2000, unreported). In some of these judgments the Court stated that just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the procedural guarantees of Article 5 of the Convention and concluded, according to the circumstances, that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage suffered.

157. In the present case, the Court cannot speculate as to whether the applicant would have been detained if the procedural guarantees of Article 5 § 4 of the Convention had been observed in his case. Consequently, the Court considers that the non-pecuniary damage is adequately compensated by the finding of a violation of this provision.

158. As regards the applicant's claim for pecuniary damage, the Court observes that there is no causal link between the facts in respect of which it has found a breach of the Convention and the pecuniary damage for which the applicant seeks compensation. The Court accordingly dismisses this claim.

B. Costs and expenses

159. The applicant sought reimbursement of costs and expenses he had paid in the domestic proceedings in the sum of PLN 100,000. He further requested that he be awarded costs which he had paid in the proceedings before the Convention organs in the sum of PLN 2,600.

160. The Government requested the Court to decide on an award of legal costs and expenses in so far as they had been actually and necessarily incurred and were reasonable as to quantum. They referred in this respect to the *Zimmermann and Steiner v. Switzerland* judgment of 13 July 1983 (Series A no. 66, p. 14, § 36).

161. According to the Court's established case-law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum. However, the Court notes in this respect that the applicant did not adequately substantiate that the costs he claimed were incurred in the domestic proceedings. His claims must therefore be rejected (see, *mutatis mutandis*, the *Belziuk v. Poland* judgment of 25 March 1998, *Reports* 1998-II, p. 573, § 49).

162. As regards the costs and expenses claimed in respect of the proceedings before the Convention institutions, the Court awards the sum of PLN 2,600, together with any value-added tax that may be chargeable.

C. Default interest

163. According to the information available to the Court, the statutory rate of interest applicable in Poland at the date of adoption of the present judgment is 21% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections;
2. *Holds* that there has been no violation of Article 5 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds* that there has been no violation of Article 6 § 1 of the Convention;
5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
6. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, PLN 2,600 (two thousand six hundred zlotys) for costs and expenses, plus any value-added tax that may be chargeable;
 - (b) that simple interest at an annual rate of 21% shall be payable from the expiry of the above-mentioned three months until settlement;
7. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 October 2000.

Vincent BERGER
Registrar

Georg RESS
President