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

FIRST SECTION

CASE OF KAWKA v. POLAND

(*Application no. 25874/94*)

JUDGMENT

STRASBOURG

9 January 2001

In the case of Kawka v. Poland,

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

Mrs E. PALM, *President*,
Mr L. FERRARI BRAVO,
Mr J. MAKARCZYK,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mr T. PANŢÎRU,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 14 December 2000,

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

PROCEDURE

1. The case originated in an application (no. 25874/94) 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 Jacek Kawka ("the applicant").

2. The case was referred to the Court by the European Commission of Human Rights on 30 November 1998 within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Poland recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 §§ 1 (c) and 4 of the Convention.

3. Before the Court, the applicant, who was granted legal aid, was represented by Mr Wiktor Celler, a lawyer practising in Łódź, Poland. The Polish Government ("the Government") were represented by their Agent, Mr Krzysztof Drzewicki, of the Ministry of Foreign Affairs.

4. On 14 January 1999 the panel of the Grand Chamber determined that the case should be decided by one of the Sections (Rule 100 § 1 of the Rules of Court). It was thereupon assigned to the First Section. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. The applicant and the Government each filed a memorial.

6. After consulting the Agent of the Government and the applicant's lawyer, the Chamber decided that it was not necessary to hold a hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. On 6 January 1994 the Zgierz District Prosecutor issued a warrant of arrest against the applicant and on the same day he was remanded in custody on suspicion of attempted manslaughter by assaulting the victims in their apartment with a knife and axe.

8. On 25 March 1994 the Łódź Regional Court granted the prosecutor's request for prolongation of the detention until 4 July 1994 in view of the need to take further expert opinions. On 5 April 1994 the Łódź Regional Court dismissed the applicant's request for release.

9. On 11 April 1994 the case was transferred to the Zgierz District Prosecutor.

10. On 26 April 1994 the Łódź Court of Appeal granted the applicant's request to have the decision of 25 March 1994 amended, and fixed the period for which the applicant's detention was authorised to 30 June 1994.

11. On 25 May 1994 the applicant requested his release. The Łódź Regional Court and, upon appeal, the Łódź Court of Appeal, dismissed his request.

12. On 15 June 1994 the applicant requested his release. On 17 June 1994 he underwent a psychiatric examination.

13. On 28 June 1994 the Łódź Regional Court, acting upon the motion of the Zgierz District Prosecutor, prolonged the applicant's detention from 30 June until 30 September 1994. The court considered that the reasons for which the detention had been ordered had not ceased to exist. There was sufficient suspicion based on the evidence that the applicant had committed the offence with which he had been charged. The applicant had to undergo a further time-consuming psychiatric examination and further investigatory measures and evidence had to be taken.

14. On 15 July 1994 an additional psychiatric opinion was submitted to the prosecutor's office.

15. On 19 July 1994 the Łódź Court of Appeal upheld the decision of 28 June 1994 considering that the detention had to be prolonged as the applicant's psychiatric examination had not been completed.

16. On 11 and 28 August 1994 the applicant requested to be released. His requests were on unspecified later dates dismissed by the Łódź Regional Court.

17. On 1 September 1994 the applicant requested the Regional Court to order his release.

18. On 5 September 1994 he was informed that the charges against him had been in part modified and he was given access to the case-file.

19. On 20 September 1994 the applicant was served with a bill of indictment. On the same day the prosecutor lodged the indictment to the Łódź Regional Court.

20. On 4 October 1994 the Łódź Regional Court dismissed the applicant's request for release of 1 September 1994, having examined it in the prosecutor's presence. The court considered that there was a reasonable suspicion that the applicant had committed a dangerous offence, supported by the evidence given, *inter alia*, by the two victims of the assault. The reasons for which the detention had been ordered still existed. The applicant had failed to indicate in his request any new circumstances capable of justifying this.

21. On 6 October 1994 the applicant's father appealed against this decision. He submitted that the period of detention had expired on 30 September 1994, whereas the applicant had not received any decision further prolonging his detention.

22. On 10 October 1994 the applicant's lawyer also lodged an appeal against the decision of 4 October 1994 with the Court of Appeal. He submitted that the court's conclusions as to the reasonableness of the suspicions against him were based on insufficient evidence as only the evidence given by the victims supported the charges laid against the applicant. The applicant's detention since 30 September 1994 lacked any legal basis, as the detention period had expired on this date, and no further decision relating to the prolongation of the detention had been issued by any authority.

23. On 25 October 1994 the Łódź Court of Appeal upheld the decision of 4 October 1994. The court first considered ill-founded the applicant's arguments that the suspicion against him lacked any legal or factual basis. The court further considered that the applicant's suggestion that his detention since 30 September 1994 was unlawful, was entirely erroneous. The applicant's lawyer must apparently have overlooked the fact that the bill of indictment had been lodged with the court on 21 September 1994. Therefore the time-limits provided for by Article 222 of the Code of Criminal Procedure of 1969 had ceased to apply, given that this provision applied only to the pre-trial stage of criminal proceedings. One might have thought, the court continued, that such manifestly obvious conclusion, which required only a cursory perusal of relevant provisions, should not have caused any interpretation difficulties.

24. The court fixed the date for the first hearing for 27 January 1995, but it was later adjourned. Subsequently, on 14, 16, 27 and 31 March 1995 and on 6 April 1995 the applicant requested to be released, but to no avail, as the Łódź Regional Court dismissed all his requests.

25. On 5 June 1995 the court convicted the applicant of attempted manslaughter and sentenced him to five years' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

26. At the material time, the domestic provisions governing detention on remand were contained in the Code of Criminal Procedure of 1969, which was later repealed and replaced by the new Code of Criminal Procedure of 6 June 1997 (hereafter referred to as the "new Code of Criminal Procedure), which entered into force on 1 September 1998.

27. Under the 1969 Code, the grounds for imposing detention on remand and competent authorities were governed by the following provisions:

Article 210:

"1. Preventive measures [i.e. detention on remand, bail and police supervision] shall be imposed by the court; before a bill of indictment is lodged with the court, those measures shall be ordered by the prosecutor (...)."

Article 212:

"1. A decision concerning preventive measures may be appealed [to a higher court] ....

2. A prosecutor's order on detention on remand may be appealed to the court competent to deal with the merits of the case...."

Article 213:

"A preventive measure (including detention on remand) shall be immediately quashed or altered if the basis therefor has ceased to exist or new circumstances have arisen which justify quashing or replacing a given measure with a more or less severe one."

Article 217:

"1. Detention on remand may be imposed if:

...

(2) there is a reasonable risk that an accused will attempt to induce witnesses to give false testimony or to obstruct the due course of proceedings by any other unlawful means;

...

(4) an accused has been charged with an offence which creates a serious danger to society."

28. Until 4 August 1996, when the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal

Statutes came into force, the national law did not set out any statutory time-limits concerning the length of detention on remand in court proceedings. However, pursuant to Article 222 of the Code of Criminal Procedure, 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 investigation could not be completed within three months, a detention on remand could, if necessary, be prolonged by either the court competent to deal with the merits of the case, at the prosecutor's request, for a period not exceeding one year, or by the Supreme Court, at the request of the Prosecutor General, for such further fixed term as was required to terminate the investigation.

29. Since 4 August 1996, and under the present criminal legislation, i.e. the new Code of Criminal Procedure, referred to above (see § 26), the courts have been, and are bound by the maximum statutory time-limits for which pre-trial detention can be imposed, during the entire course of the proceedings.

30. Under the provisions applicable at the material time, the courts, when ruling on a prosecutor's request submitted to it pursuant to Article 222 the Code, were obliged to determine the precise period for which detention could be prolonged. If they refused to prolong detention or if the prosecutor failed to submit a request for a further prolongation before or on the expiry of the last detention order (regardless of whether it had been made by him or by a court), the detainee had to be released immediately.

31. Presence of the parties at court sessions other than hearings on the merits was regulated at the relevant time in Articles 87 and 88 of the Code of Criminal Procedure of 1969 which provided, insofar as relevant:

Article 87:

"The Court pronounces its decisions at a hearing if the law provides for it; 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 provides for it."

However, no rule provided for the attendance of the accused or his or her lawyer before the court in any type of the proceedings concerning detention on remand.

32. At the relevant time there were no specific provision governing detention on remand after the bill of indictment was lodged with the competent court. In particular, there was no provision to the effect that lodging a bill of indictment automatically prolonged or replaced previous detention order, or that this event itself resulted in detention, which had

originally been prolonged by a court for a fixed period at the investigation stage, being continued either for an unlimited period, or until a judgment at first instance was given. Nor was there any case-law to that effect. Nevertheless, according to the domestic practice, once a bill of indictment had been lodged with the court competent to deal with the merits of the case, detention was assumed to be prolonged pending trial, without any further judicial decision being given.

33. Articles 295 and 296 of the Code of Criminal Procedure of 1969, referring to the formal requirements that a bill of indictment had to satisfy, stated, *inter alia*, that it should contain the first name and surname of the accused and information as to whether a preventive measure had been imposed on him or her. It also had to comprise a statement of the offence with which he or she had been charged, a detailed description of the facts of the case along with a statement of reasons for the accusation, an indication of the court competent to entertain the case, and the evidence upon which the accusation was founded.

34. On 6 February 1997 the Supreme Court, in an interpretative ruling of certain provisions of the Code of Criminal Procedure of 1969 as amended by the Law of 29 June 1995, addressed the problems posed by the practice of keeping an accused in detention under the bill of indictment. In its resolution (no. I KZP 35/96) the Supreme Court replied – in the affirmative – to the question whether, after lodging a bill of indictment with the court competent to deal with the merits of the case, that court was obliged to give a decision prolonging detention on remand, which had meanwhile exceeded the period fixed (or further prolonged) at the investigation stage. The relevant parts of the resolution read as follows:

> "Under the provisions of the Code of Criminal Procedure which applied before [4 August 1996, when] the amendment of 29 June 1995 took effect, an obligation to determine the period of detention imposed by a prosecutor at the investigation stage was laid down in Article 211 § 2. However, it did not emerge explicitly from Article 222 §§ 1 and 2 (1) of the code that, at the investigation stage, a prosecutor or the court competent to deal with the case had each time to determine the point until which detention should last. It was deemed to be obvious that, when prolonging detention at the investigation stage, both the prosecutor and the court competent to deal with the case had to determine the time until which detention was to last under a given decision. It was therefore assumed that the obligation to determine the period of detention arose if a decision on that matter was given before the expiry of the maximum statutory terms applicable at a given stage of the proceedings.
>
> Comparing the old legislation with the present one leads [this Court] to the conclusion that the legislator, when amending the code in June 1995, simply extended [the scope of] the rules applicable to continuing and prolonging detention on remand – which had previously applied only at the investigation stage – to the phase of court proceedings.
>
> Before the amendment, the legislation was based on the precept that a suspect should not be detained indefinitely as long as his case was not being dealt with by an

independent court. Now, the starting-point is that a suspect (and an accused) should not be detained indefinitely as long as a first-instance judgment is not rendered.

Under the previous legislation there was no need to determine the period of detention after a bill of indictment had been lodged with the court because at this point proceedings reached the phase in which there was no statutory time-limit [on this measure]. For this reason, the court concerned had no interest in [knowing] until when detention had been prolonged under the last decision[;] detention could continue because 'detention of limited duration' had become 'detention of unlimited duration'. There was therefore only a need to ascertain whether there were grounds for continuing detention under Article 213 of the code."

35. In its further resolution no. I KZP 23/97 of 2 September 1997, the Supreme Court confirmed that:

"If the case, in which detention on remand had been ordered, has been referred to a court with a bill of indictment and the period of detention which had previously been fixed expires, the court has a duty to consider whether detention needs to be continued and to give an appropriate decision on this matter."

Referring to the resolution of 6 February 1997, it also stressed that:

" … the *ratio legis* of the amendments to criminal legislation is based on the precept that a suspect (accused) should in no case be detained indefinitely until the first-instance judgment is rendered in his case …

It should be noted that, from the point of view of procedural safeguards for an accused, what is material is not how long his detention at the investigation stage has lasted and how long it has lasted at the stage of the court proceedings, but the total period of his detention and whether his detention and its length are subject to review. If there is such a review at the investigation stage (section 222 §§ 1 and 2), there is no reason why there should not be one at the stage of the court proceedings …"

36. A new Code of Criminal Procedure was enacted by the Sejm (Parliament) on 6 June 1997. Its Article 250, in its relevant part, reads:

"1. Detention on remand shall be imposed by a court order.

2. In the investigative stage of proceedings, detention on remand shall be imposed, on a prosecutor's request, by a district court in the jurisdiction of which investigations are being conducted. After a bill of indictment is lodged with a court, a decision to impose detention on remand shall be given by a court competent to deal with the merits of the case.

3. The prosecutor, when submitting to a court a request referred to in § 2, shall at the same time order that the suspect be brought before a court."

37. Pursuant to Article 249 of the new Code of Criminal Procedure, before deciding whether the preventive measures should be imposed, the court shall hear the person charged with offence. The lawyer of the detainee should be allowed to attend in the court session concerning review of the lawfulness of pre-trial detention, if he or she is present at the court. However, it is not mandatory to inform the lawyer of the date and time of

this session, unless the suspect so requests, and if it will not hinder the proceedings.

38. The court shall inform the lawyer of a detainee of the date and time of court sessions at which a decision, concerning prolongation of detention on remand or an appeal against a decision to impose or to prolong detention on remand, is to be taken. A failure on the part of the duly informed lawyer to attend the session does not prevent the court from pursuing examination of the issue.

PROCEEDINGS BEFORE THE COMMISSION

39. The applicant lodged his application with the Commission on 22 August 1994, alleging, *inter alia*, that the courts were arbitrary in their decisions relating to his detention. He complained in particular that for a certain unspecified period as from 30 September 1994 his detention on remand had lacked legal basis, as no decision of a competent authority had been given in order to prolong it beyond that date. The applicant complained that he had never been brought before a court in the proceedings concerning the review the lawfulness of his detention on remand. He finally complained that under domestic law applicable at the material time, neither he nor his lawyer had been entitled to attend any hearing in the proceedings concerning review of the lawfulness of his detention.

40. The application was declared partly admissible by the Commission on 17 May 1995. On 7 July 1997 the Commission declared admissible the applicant's complaints under Article 5 §§ 1 and 4 of the Convention. In its report of 8 September 1998 (former Article 31 of the Convention) it expressed the unanimous opinion that there had been a violation of Article 5 § 1 of the Convention in that the applicant's detention under the bill of indictment had been unlawful, and that there had been a violation of Article 5 § 4 of the Convention in that the proceedings concerning review of his detention on remand had not been truly adversarial.

THE LAW

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

41. The applicant submitted that his detention on remand, insofar as it had been effected under the bill of indictment of 21 September 1994 and after the detention order of 28 June 1994 had expired, had not been in compliance with Article 5 § 1 of the Convention, which states, insofar 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. Arguments before the Court

42. The applicant submitted that his detention from 30 September to 4 October 1994 lacked any legal basis, and requested the Court to accept the opinion expressed by the Commission in its report that there had been a violation of Article 5 § 1 (c) of the Convention.

43. The Government acknowledged that the situation complained of had arisen out of a common practice of the Polish courts, referred to as "placing a detainee at the disposal of a court", followed at the material time. This practice originated from the absence of any precisely formulated provision which would oblige the court to give, on its own motion, any further decision on the prolongation of detention after the bill of indictment had been submitted to the court.

44. The Government emphasised that this practice had been abandoned since 4 August 1996, when the amendments to the Code of Criminal Procedure of 1969, enacted on 29 June 1995, had entered into force. Under these provisions, statutory time-limits of pre-trial detention had been introduced. Subsequently, the relevant provisions of the new Code of Criminal Procedure, which entered into force on 1 September 1998, had put an end to this practice. Under the provisions of the new Code, as currently interpreted in accordance with the case-law of the Supreme Court, following an expiry of a detention order given in the investigative stage of the proceedings and after the bill of indictment had been lodged with a court, a case must be referred to a court for a decision on further detention. Following interpretation of the relevant provisions by the Supreme Court, the new practice has been implemented by the courts.

45. The Government did not contest that the applicant's detention had been maintained after 30 September 1994 without a judicial decision being given as to its prolongation after this date, fixed by the detention order of 28 June 1994. This detention, however, was in compliance with the substantive and procedural provisions of the Polish law applicable at the

material time. Pursuant to Article 213 of the Code of Criminal Procedure, the lawfulness of the applicant's continued detention had been subject to a permanent supervision by the Łódź Regional Court. Moreover, the applicant's request for release of 1 September 1994 had been examined by that court as early as 4 October 1994, i.e. merely four days after the preceding detention order had expired. The subsequent appeals, submitted by the applicant's father and by his counsel, had been dismissed by the Court of Appeal on 25 October 1994.

46. Finally, the Government stated that they would abstain from making their own assessment of the compatibility of the applicant's detention during the period under consideration with the requirements of Article 5 § 1 of the Convention. They emphasised that the applicant's detention had been prescribed by law and effected in accordance with common practice. This practice had developed on the basis of regulations, which had been accessible, sufficiently precise and foreseeable. On the other hand, these provisions were not admittedly specific enough, and this had led to the practice complained of.

B. The Court's assessment

47. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While, in the first place, it is normal for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court may, and should exercise a certain power to review whether national law has been observed (see, among other authorities, *Douiyeb v. the Netherlands* [G. C.], no. 31464/96, §§ 44-45).

48. However, the "lawfulness" of detention under domestic law is the primary, but not always a decisive element. The Court must, in addition, be satisfied that detention during the period under consideration, was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary manner. Moreover, the Court must ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see, among many other authorities, the *Winterwerp v. the Netherlands* judgment of 24 October 1979, Series A no. 33, pp. 19-20, § 45; and the *Erkalo v. the Netherlands* judgment of 2 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2477, § 52).

49. The Court stresses in this connection that where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty is satisfied. It is therefore essential that the conditions for

deprivation of liberty under domestic law should be clearly defined, and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law should be sufficiently precise to allow the person – if needed, to obtain the appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see the S.W. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-B, pp. 41–42, §§ 35–36, and, *mutatis mutandis*, the Sunday Times v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 31, § 49; the Halford v. the United Kingdom judgment of 25 June 1997, Reports 1997-III, p. 1017, § 49, and the Steel and Others v. the United Kingdom judgment of 23 September 1998, Reports 1998-VII, p. 2735, § 54).

50. Turning to the circumstances of the present case, the Court notes that the applicant's detention was prolonged, by an order of 28 June 1994, until 30 September 1994. On 1 September 1994 the applicant requested to be released. The bill of indictment was lodged with the Łódź Regional Court on 20 September 1994. On 30 September 1994 the detention order expired, but the applicant remained in detention in view of the fact that, following lodging of the bill of indictment with the Regional Court, he had been regarded as having been placed at the disposal of the latter. Subsequently, on 4 October 1994 the Regional Court dismissed the applicant's request for release of 1 September 1994. It is not in dispute that from 1 to 4 October 1994 the applicant's detention was maintained solely on the basis of the fact that a bill of indictment had in the meantime been submitted to the court competent to examine the merits of the case.

51. The Court recalls that it found a violation of Article 5 § 1 of the Convention in its recent judgment in the case Baranowski v. Poland (no. 28358/95, § 57), where, considering detention under the same legal framework, the Court stated as follows in §§ 54-57:

> "The Court observes that the domestic practice of keeping a person in detention under a bill of indictment was not based on any specific legislative provision or case-law but, as the Commission had found and the parties acknowledged before the Court, stemmed from the fact that Polish criminal legislation at the material time lacked clear rules governing the situation of a detainee in court proceedings, after the expiry of the term of his detention fixed in the last detention order made at the investigation stage.
>
> Against this background, the Court considers, first, that the relevant Polish criminal legislation, by reason of the absence of any precise provisions laying down whether – and if so, under what conditions – detention ordered for a limited period at the investigation stage could properly be prolonged at the stage of the court proceedings, does not satisfy the test of "foreseeability" of a "law" for the purposes of Article 5 § 1 of the Convention.
>
> Secondly, the Court considers that the practice which developed in response to the statutory lacuna, whereby a person is detained for an unlimited and unpredictable time

> and without his detention being based on a concrete legal provision or on any judicial decision is in itself contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law.
>
> In that context the Court also stresses that, for the purposes of Article 5 § 1 of the Convention, detention which extends over a period of several months and which has not been ordered by a court or by a judge or any other person "authorised … to exercise judicial power" cannot be considered "lawful" in the sense of that provision. While this requirement is not explicitly stipulated in Article 5 § 1, it can be inferred from Article 5 read as a whole, in particular the wording in paragraph 1 (c) ("for the purpose of bringing him before the competent legal authority") and paragraph 3 ("shall be brought promptly before a judge or other officer authorised by law to exercise judicial power"). In addition, the habeas corpus guarantee contained in Article 5 § 4 further supports the view that detention which is prolonged beyond the initial period foreseen in paragraph 3 necessitates "judicial" intervention as a safeguard against arbitrariness. In the Court's opinion, the protection afforded by Article 5 § 1 against arbitrary deprivations of liberty would be seriously undermined if a person could be detained by executive order alone following a mere appearance before the judicial authorities referred to in paragraph 3 of Article 5."

52. The Court observes that the facts, which had given rise to a violation of the Convention in the case quoted above, had occurred within the same legal framework as in the present case. The Court sees no grounds, which would justify a different conclusion in the instant case. The Court accordingly considers that the applicant's detention was not lawful within the meaning of Article 5 § 1 of the Convention. Consequently, there was a breach of this provision.

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

53. The applicant also asserted that the respondent State had breached 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."

54. The applicant submitted that the proceedings concerning review of his detention were in breach of procedural requirements of this provision in that they were not adversarial.

55. The Government first referred to the Court's case-law, according to which arrested or detained persons were entitled to a judicial review bearing upon the procedural and substantive conditions, essential for the lawfulness, in the Convention sense, of their deprivation of liberty. The competent court had to examine both compliance with the procedural requirements set out in domestic law, and the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.

56. The Government abstained from making their own assessment of the compliance of the proceedings concerned, with the requirements of the Convention and asked the Court to give its ruling in this respect. However, the Government emphasised that the provisions under which the applicant had been detained in the present case, had been repealed. Pursuant to the new Code of the Criminal Procedure, effective guarantees of equality of parties to the proceedings concerning review of pre-trial detention had been enacted. Therefore the question examined in the present case was only of a historical character.

57. 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. 154-B, p. 34, § 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 (see the Megyeri v. Germany judgment of 12 May 1992, Series A no. 237-A, p. 11, § 22), it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see the Schiesser v. Switzerland judgment of 4 December 1979, Series A no. 34, p. 13, §§ 30–31, the Sanchez-Reisse v. Switzerland judgment of 21 October 1986, Series A no. 107, p. 19, § 51, and the Kampanis v. Greece judgment of 13 July 1995, Series A no. 318-B, p. 45, § 47). In particular, in the proceedings in which an appeal against detention order is being examined, "equality of arms" between the parties, the prosecutor and the detained person, must be ensured (*Nikolova v. Bulgaria* [G.C.], no. 31195/96, 25.03.1999, § 59).

58. The Court notes the information provided by the Government about the extensive legislative amendments which were effected with a view to bringing the Polish Code of Criminal Procedure in line with the Convention. However, the Court's task is to assess the actual circumstances of the applicant's case.

59. The Court observes that in the case under consideration, the applicant lodged requests for release, firstly on an unspecified date, and later on 25 May 1994, 11 and 28 August 1994, and on 1 September 1994. The Łódź Regional Court dismissed these requests on 5 April 1994, on later two unspecified dates, and on 4 October 1994. The decision given on 4 October 1994 was, upon the applicant's appeal, examined by the higher court which gave its ruling on 25 October 1994.

60. The Court notes that it is not in dispute that the law, as it stood at that time, did not entitle either the applicant or his lawyer to attend the court

session held in any of these proceedings in which the courts examined whether his detention was lawful and remained justified. Moreover, the applicable provisions of law on criminal procedure did not require that the prosecutor's submissions in support of the applicant's detention be communicated, either to the applicant or to his lawyer. Consequently, the applicant did not have any opportunity to comment on those arguments in order to contest the reasons invoked by the prosecuting authorities to justify his detention, either by disputing them directly before the court or by way of written submissions. At the same time the Court notes that under applicable provisions it was open for the prosecutor to be present at any of court sessions, in which the court examined the lawfulness of the applicant's detention. It is also to be noted that the prosecutor in fact availed himself once of this opportunity by attending the session of the Łódź Regional Court on 4 October 1994, when it was examining the applicant's request for release of 1 September 1994, whereas neither the applicant nor his counsel was present before the court.

61. In conclusion, in the light of the above considerations, the Court finds that there has been a violation of Article 5 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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

63. The applicant claimed a sum of USD 50,000 (fifty thousand**)** as compensation for non-pecuniary damage resulting from his detention, in particular such as significant loss of health caused by his detention.

64. The Government considered that the applicant's claim is exorbitant and asked the Court to rule that a finding 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 and having regard to national economic circumstances, such as purchasing power of national currency and to current minimum gross salary in Poland.

65. As regards the claim for the alleged damage suffered as a result of 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 (Article 50) judgment of 30 May 1989, 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 v. Greece judgment cited above, p. 49, § 66; *Hood v. the United Kingdom* [G.C.], no 27267/95, 18.02.1999, §§ 84-87; and *Nikolova v. Bulgaria* cited above, § 76; *Niedbała v. Poland,* no. 27915/95*,* § 89). In certain of these judgments, for instance given in cases of Hood, Huber, Niedbała and Nikolova 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.

66. 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 respected in his case. Consequently, the Court considers that the non-pecuniary damage is adequately compensated by the finding of a violation of this provision.

67. The Court further considers that as a result of his detention in breach of the provisions of Article 5 § 1 of the Convention, the applicant suffered non-pecuniary damage, which would not be adequately compensated by the finding of a violation (*Baranowski v. Poland* cited above, § 82). Accordingly, making its assessment on an equitable basis, the Court awards the applicant PLN 4,000.

B. Costs and expenses

68. The applicant, who was granted legal aid by the Court, did not seek to be reimbursed for any costs or expenses in connection with the proceedings.

69. The Government requested the Court to decide on award of legal costs and expenses insofar as they had been actually and necessarily incurred and reasonable as to quantum. They relied in this respect on the Musiał v. Poland judgment (*Musiał v. Poland* [G.C.], no. 24557/94, § 61).

70. The Court, having regard to the fact that the applicant did not seek reimbursement of his legal costs, makes no award under this head.

C. Default interest

71. 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 30 % per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

2. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

3. *Holds*
(a) that the respondent State is to pay the applicant, within three months, 4,000 (four thousand) Polish zlotys in respect of non-pecuniary damage;
(b) that simple interest at an annual rate of 30 % shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English and notified in writing on 9 January 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President