



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

FOURTH SECTION

CASE OF MIGOŃ v. POLAND

(Application no. 24244/94)

JUDGMENT

STRASBOURG

25 June 2002

FINAL

25/09/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Migoń v. Poland,

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mrs E. PALM,

Mr J. MAKARCZYK,

Mrs V. STRÁŽNICKÁ,

Mr J. CASADEVALL,

Mr R. MARUSTE, *judges*

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 4 June 2002,

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

PROCEDURE

1. The case originated in an application (no. 24244/94) 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, Witold Migoń ("the applicant"), on 5 May 1994.

2. The applicant was represented before the Court by Mr Zginiew Cichoń, a lawyer practising in Kraków. The Polish Government ("the Government") were represented by their Agent, Mr Krzysztof Drzewicki.

3. The applicant alleged, in particular, that the proceedings to review his detention on remand had not been adversarial and that the equality of the parties in these proceedings had not been observed since neither he nor his counsel had been allowed to attend hearings before the Kraków Court of Appeal concerning the prolongation of his detention on remand, whereas the prosecutor had been able to do so. The applicant also complained that in the proceedings concerning the review of the lawfulness of his detention, neither he nor his counsel had been granted adequate access to the case-file of the investigation.

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). 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.

6. On 23 October 2001 the Chamber declared the application admissible.

7. On 7 January 2002 the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. In 1992 the Tarnów Regional Prosecutor instituted criminal proceedings against the applicant on suspicion of aggravated fraud, falsification of documents and issuing bad cheques. By a letter of 6 October 1993 the Tarnów Regional Prosecutor informed the applicant that the fact that summonses for questioning had been sent both to his new and to his old address did not in any way infringe his defence rights.

9. On 13 October 1993 the applicant informed the Tarnów Regional Prosecutor of a change of his address. On 15 October 1993 the Tarnów Regional Prosecutor issued a warrant for the applicant's arrest, considering that there were strong grounds for believing that he had committed an offence constituting a serious danger to society, and that there was a risk of collusion and absconding as the applicant had failed to comply with certain summonses and had changed his address several times. On the same day the applicant was remanded in custody.

10. The applicant appealed against that decision. He submitted that the nature of the offence was such that all the evidence was contained in documents belonging to his company, which had already been seized by the prosecutor or kept by the banks. The witnesses in the case had already been heard by the prosecuting authorities. Thus, there was no risk of collusion as the applicant was not in a position to alter or suppress evidence. The applicant had usually complied with summonses except on the rare occasions when he had been unwell and had submitted relevant medical certificates, including a certificate drawn up by the Kraków Forensic Medicine Institute. There was no risk of his absconding as he had informed the prosecutor of his change of address and could not leave the country as his passport had been confiscated by virtue of a decision given in November 1991. The applicant further submitted that the amount he was accused of embezzling was so high solely as a result of the high rate of interest at a time of hyperinflation and that the amount could not be used as an argument in support of the seriousness of the offence concerned.

11. On 25 October 1993 the Tarnów Regional Court dismissed the applicant's appeal against the detention order. The court first observed that the applicant had on several occasions failed to comply with the summonses

without justification. In particular, the case file did not contain any documents showing that there had been justified medical grounds for his absence. Even though he had informed the prosecutor of his change of address, the address he had given appeared to be false as there was a convent at that address. Moreover, it seemed that the applicant did not live there. The court considered that in the light of the financial documents in the case file, the offence of which the applicant was suspected was serious enough to warrant detention on remand, the more so as the value of the embezzled property had been assessed without regard to the sums of statutory interest, contrary to the applicant's submissions in his appeal.

12. On 6 November 1993 the prosecutor appointed an expert in accountancy to analyse certain financial documents belonging to the applicant's companies that related to his credit applications in order to assess the damage caused by the offences with which the applicant had been charged.

13. On 8 November 1993 the applicant submitted medical certificates stating that he had been ill from 1 August 1993 to 10 September 1993. On the same date he also requested to be granted access to the case-file.

14. On 15 November 1993 the Tarnów Regional Prosecutor refused to authorise the applicant to meet his counsel in the absence of a police officer, considering that the applicant had had an opportunity to see his lawyer in the presence of a police officer each time he had requested to do so. There were no grounds on which to accept that this amounted to an undue restriction on the exercise of his defence rights. The fact that the applicant had not been communicative when talking to his lawyer seemed to stem from the defence tactics which he had adopted in the proceedings.

15. On the same date the prosecutor refused to allow the applicant's lawyer access to the case-file.

16. The applicant filed an appeal, arguing, *inter alia*, that his defence rights had been unduly limited, in particular by the fact that neither he nor the lawyer had had any, albeit limited, access to the case-file, or to any of the evidence gathered so far in the proceedings. The only part of the file to which the applicant had been given access was the statement of charges and the arrest warrant. As a result, the role of his defence counsel had been rendered meaningless.

17. On 3 December 1993 the Tarnów Regional Prosecutor rejected the appeal, finding that no appeal lay against the contested decision, and considering that in any event this decision did not infringe the applicant's defence rights, given that he would be granted access to the case-file later in the proceedings, at the stage specified in Article 277 of the Code of Criminal Procedure.

18. The applicant appealed, arguing that the decisions infringed his defence rights. The case-file, which so far numbered thirteen volumes, had not been made accessible to him or to his lawyer. Any knowledge that they

had about the investigations stemmed from the decision to bring the charges against the applicant and from the decision to appoint the expert. This was clearly insufficient to enable them to conduct any effective defence.

19. On 8 December 1993 the Tarnów Regional Court quashed the refusal to allow the applicant to meet the counsel in the absence of a police officer. The court considered that the applicant had not given any ground on which to accept that he was seeking, by any unlawful methods, to jeopardise the investigations against him. Consequently, the contested decision had unduly limited his defence rights.

20. On 16 December 1993 the Tarnów Regional Prosecutor declined to consider the applicant's request to be released, holding that the grounds on which the detention warrant had been issued were still valid, and that no new grounds such as to justify his release had been invoked by the applicant.

21. On 21 December 1993 the Kraków Appellate Prosecutor, having regard to the proper conduct of the investigations, which concerned charges of a large-scale fraud and in which new charges had been brought against new suspects and further developments were to be expected, upheld the refusal to allow access to the case-file.

22. On 31 December 1993 the Regional Prosecutor prolonged the investigations as, in view of new circumstances which were coming to light, further evidence had to be taken.

23. On 10 January 1994 the Tarnów Regional Court prolonged the applicant's detention until 30 March 1994, considering, firstly, that the grounds on which the applicant had been detained were still valid, and, secondly, that a psychiatric examination had to be carried out, and an expert opinion had to be drafted by a certified accountant. The applicant appealed.

24. On 1 February 1994 the Kraków Court of Appeal dismissed the applicant's appeal. The court considered that, in the light of the material gathered so far during the investigations, there were serious grounds for believing that the applicant had committed the offences in question. It was emphasised that the applicant had not questioned this in his appeal. The court also had regard to the fact that the offences in which the applicant seemed to have been involved had been committed on a large scale. Moreover, the offences were serious enough to warrant detention on remand. There was also a risk of collusion.

25. On 25 March 1994 the Tarnów Regional Court further prolonged the applicant's detention until 31 May 1994. The court stated in its decision that neither the expert opinion nor the psychiatric report had yet been completed. The expert opinion had to be supplemented by further financial details, which would make it possible to assess the scale of the applicant's fraudulent banking operations. The court considered that the risk of collusion persisted as the applicant had on several occasions failed to comply with the summonses. The court referred in this connection to its own decision of 25 October 1993. The court further commented unfavourably on the

considerable delays that had occurred in interviewing the witnesses, as between 8 December 1993 and 25 March 1994 only four witnesses had been interviewed, whereas the prosecutor estimated in his submissions to the court that between one hundred and three hundred witnesses would have to be heard.

26. The applicant appealed, submitting, *inter alia*, that in the course of the preliminary investigations he had twice changed his address and had on the second occasion informed the prosecutor of the change, and that he in fact had complied with the summonses.

27. On 11 April 1994 the Tarnów Regional Prosecutor supplemented the charges against the applicant with further multiple charges of obtaining credit under false pretences, forgery of financial documents and issuing of bad cheques.

28. On 20 April 1994 the Kraków Court of Appeal dismissed the applicant's appeal against the decision of 25 March 1994 as it found that the Regional Court had been justified in reaching the conclusion that there had been a risk of absconding and collusion. The court pointed out that the applicant had changed his address and that he had been trying to obtain a passport from various passport offices. Thus, his past conduct suggested that, if released, he would jeopardise the proper course of the investigations. The court also noted that the serious number of charges brought so far against the applicant and the scale of the offences with which he had been charged, argued in favour of his continued detention. Those factors indicated that in his actions the applicant had overstepped the border between taking a justified business risk and carrying out fraudulent financial operations, punishable under criminal law.

29. On 28 April 1994 the applicant requested access to the case-file and to the expert opinion prepared by a certified accountant.

30. On 29 April 1994 the Tarnów Regional Prosecutor refused the applicant access to the expert opinion, stating that the conclusions of the opinion indicated that certain witnesses should be interviewed in connection with further possible offences which, according to the expert report, were likely to have been committed. It would also be essential to question the expert. Therefore, granting the applicant access to the report would be premature as it would be prejudicial to the interests of the investigations. The prosecutor also refused the applicant access to the case-file.

31. On 11 May 1994 the applicant filed an appeal against this decision, contending, *inter alia*, that the prosecuting authorities had not been expeditious enough in questioning the witnesses, and that his defence rights had been breached in that the opinion, which seemed at that stage of the proceedings to constitute an essential piece of evidence, had not been communicated to him. On 16 May 1994 the Tarnów Regional Prosecutor rejected this appeal on the ground that no appeal lay against the contested decision.

32. On 20 May 1994 the Regional Prosecutor refused to release the applicant, pointing out that he had been arrested as he had failed to comply with the summonses and had tried to obtain a new passport after the old one had been invalidated in connection with the criminal proceedings. The taking of evidence had not been completed and certain evidence essential for the case had still to be taken.

33. On 21 May 1994 the applicant's lawyer was served with the completed opinion of the accountancy expert.

34. On 26 May 1994 the Tarnów Regional Court prolonged the applicant's detention until 15 August 1994, holding in particular that the grounds on which the detention had been ordered and maintained, still applied. The court noted that 80 witnesses had to be interviewed and that documents relating to over 100 various bank loans, taken out by the applicant's companies had to be examined. The applicant appealed.

35. On 30 May 1994 one of the applicant's lawyers was granted access to the expert opinion.

36. On 13 June 1994 the Tarnów Regional Prosecutor refused access to the case-file, which numbered over 50 volumes, considering *inter alia* that the investigations were coming to end.

37. On 22 June 1994 the Kraków Court of Appeal dismissed the appeal against the decision of 26 May 1994, considering that the charges against the applicant had been sufficiently substantiated by the evidence that had been gathered both at the time of the applicant's arrest and later in the course of the proceedings. It was true that the investigations had not been conducted speedily enough, given that the applicant was in detention, which necessitated special diligence on the part of investigating authorities. That had also been the result of the particularly serious nature of the offence in question. However, the investigations had been unable to proceed for almost four months, while the proceedings concerning the review of the lawfulness of the applicant's detention had been conducted. The court further stressed that new evidence was coming to light gradually, revealing new aspects of the case and thereby prolonging the investigations. Had the applicant cooperated with the prosecuting authorities, the proceedings would have progressed more quickly. He was not under such an obligation, but he had to be aware that his failure to do so had further prolonged the proceedings.

38. On 5 July 1994 the Tarnów Appellate Prosecutor gave his permission to the applicant to access the case-file of the investigations, considering that this would undoubtedly contribute to the acceleration of the proceedings and would make it possible for the suspect to formulate possible requests for further evidence to be taken.

39. On 5 August 1994 the Tarnów Regional Court again prolonged the applicant's detention. The court noted that on 14 July 1994 certain evidence, concerning fraudulent transactions by the applicant's company had been obtained from one of the banks. New witnesses would have to be heard in

connection with these transactions. As new evidence had come to light, prolongation of his detention was necessary. Moreover, new charges had been brought against the applicant, which made it necessary to prolong his detention. The court further disagreed with the arguments advanced by the applicant that the charges against him had not been credible and considered that, quite to the contrary, the charges against him had been sufficiently substantiated to justify his further detention, which was also necessary to ensure the proper course of the proceedings. The court further noted that, contrary to the applicant's assertions, further documentary evidence had been taken in July 1994, even though it was true that no further witnesses had been interviewed.

40. On 18 August 1994 the Regional Prosecutor refused to release the applicant.

41. On 15 August 1994 the Kraków Court of Appeal upheld the decision of 5 August 1994.

42. On 2 September 1994 the Regional Prosecutor again refused to release the applicant. On an unspecified date in September 1994 the applicant's lawyer was informed that he could not have access to the case-file as it had been sent to the Supreme Court for the purposes of a decision to be given as to the prolongation of the applicant's detention.

43. On 30 September 1994 the prosecutor appointed an expert to examine further accounting documents in the case-file.

44. On 6 October 1994 the applicant's detention was prolonged by the Supreme Court.

45. On 14 October 1994 the Tarnów Regional Prosecutor informed the applicant's lawyer that from 21 October 1994 the applicant would be brought from prison to the prosecutor's office every day in order to have access to the case-file. The lawyer's attention was drawn to the fact that the lawyer had so far failed to make use of his right to consult the file.

46. On 24 October 1994 the Regional Prosecutor permitted the applicant to make copies of and take notes from numerous documents in the case-file. On 29 December 1994 the Regional Prosecutor refused to give the applicant the copies of the prosecutor's requests to have the applicant's detention prolonged which had so far been examined in the proceedings, considering that those documents had not been included into the principal case-file, and that the applicant's argument that he had to have access to them in order to exercise his defence rights was ill-founded.

47. On 11 January 1995 the bill of indictment was lodged with the Tarnów Regional Court. The applicant was charged with embezzling a sum of 80,000,000,000 (old) Polish zlotys to the detriment of six banks, issuing bad cheques and with other economic offences.

48. On 15 June 1995 the applicant was released.

II. RELEVANT DOMESTIC LAW

A. Preventive measures

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

50. 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 imposed by the prosecutor. The decision to detain a suspect could be appealed against, within a seven-day time-limit, to the court competent to deal with the merits of the case. Pursuant 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, be prolonged by the court competent to deal with the merits of the case, on an application by the prosecutor, for a period not exceeding one year. This decision could be appealed against to a higher court.

B. Grounds for detention on remand

51. 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 imposed if, *inter alia*, there was a reasonable risk that an accused would attempt to abscond or to induce witnesses to give false testimony or to obstruct the due course of proceedings by any other unlawful means, or if an accused had been charged with an offence creating a serious danger to society.

C. Proceedings to examine the lawfulness of detention on remand

52. 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, to obtain release. Under Article 221 § 2 of the 1969 Code of Criminal Procedure 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 the prosecutor’s request. Lastly, 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.

53. 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 judicial stage of proceedings.

54. The imposition and prolongation of preventive measures, including detention on remand, were examined by the courts in the course of proceedings held in camera. The presence of the parties at court sessions other than hearings, including sessions held in the proceedings concerning review of detention on remand, was governed by Articles 87 and 88 of the Code of Criminal Procedure, which, in so far as relevant, provided:

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 so provides.”

55. Access to the case file in the course of preliminary investigations was governed by Article 143 § 3 of the Code of Criminal Procedure, which provided, in so far as relevant, that permission to have access to and make copies of the documents in the case file in the course of preliminary investigations was granted only with the consent of the authority conducting the investigations.

56. Under Article 277 of the Code, after the preliminary investigations were completed and it was decided that there were grounds on which to prepare the bill of indictment, the prosecutor was to grant the suspect access to the case-file, inform him that he was entitled to avail himself of this right personally, and allow his counsel to have access to the file.

57. Until 4 August 1996, the date on which the 1973 Code of Criminal Procedure was extensively amended by the Law of 29 June 1995 on amendments to the Code of Criminal Procedure and other criminal statutes, the law did not fix any time-limits concerning detention on remand in judicial proceedings. During investigations, the prosecutor could order detention for up to three months. Prolongation of this period was possible by a court order, for a period not exceeding one year, and for any further periods, by a decision of the Supreme Court given at the request of the Prosecutor General.

THE LAW

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

58. The applicant complained that the proceedings concerning review of the lawfulness of his detention on remand had not been truly adversarial since neither he nor his counsel had been allowed to attend court hearings concerning the prolongation of his detention on remand, whereas the prosecutor had been able to do so.

He further complained that during the proceedings concerning review of the lawfulness of his detention on remand, held until 24 October 1994, neither he nor his counsel had had access to the case-file of the investigation. He submitted that this was in breach of 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. Applicability of Article 5 § 4 to the proceedings concerned

59. The applicant did not address this issue.

60. The Government submitted, firstly, that the law, as applicable at the material time, provided that proceedings concerning appeals against judicial decisions to prolong detention were to be held *in camera*. The purpose of such proceedings was to examine the lawfulness of detention, and therefore not all the guarantees of a fair hearing that were applicable to the proceedings on the merits of a criminal charge had to be observed. However, the competent court had 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 of the arrest and the ensuing detention.

61. The Court first notes that the applicability of Article 5 § 4 to the proceedings in issue was not contested by the Government. The Court does not find any grounds on which to hold otherwise. The Court observes in this connection that under domestic law the Court of Appeal, when examining the applicant’s appeal against the first-instance decision to prolong his detention, was not confined to setting out a framework within which the lower court was allowed to give the relevant decision. Its jurisdiction was much broader as it was empowered to assess itself whether the applicant’s further detention was justified in the light of the particular circumstances of the case (the *Toth v. Austria* judgment of 25 November 1991, Series A no. 224, p. 24, § 87, *a contrario*). Moreover, the Court recently held that

Article 5 § 4 was applicable in proceedings held under Polish law before the Supreme Court and concerning a request by a lower court to prolong detention on remand (*Jabłoński v. Poland*, application no. 33492/96, § 87). Lastly, in the light of the reasoning adopted by the Court in the *Włoch v. Poland* judgment, this provision should also be deemed applicable in proceedings relating to the prolongation of detention (*Włoch v. Poland*, application no. 27785/95, §§ 129-13).

62. In the light of the foregoing, the Court is of the view that Article 5 § 4 of the Convention was applicable to the proceedings concerned.

B. Compliance with Article 5 § 4

1. Equality of arms in the proceedings concerning the prolongation of the applicant's detention on remand

(a) Arguments before the Court

63. The applicant submitted that the law, as applicable at that time, did not allow a detainee to be brought before a judge at any time during the proceedings concerning his detention on remand. The principle of equality of arms had manifestly not been respected in these proceedings, as the prosecutor had at his disposal the case-file, had formulated his requests to have the applicant's detention prolonged on this basis, and had been authorised to attend the court sessions in the absence of the applicant and his lawyer.

64. In the Government's submission, it was true that under the applicable provisions the suspect, or later on the accused, and his or her lawyer were not allowed to attend court sessions held in the course of proceedings concerning the review of the lawfulness of his or her detention, including the proceedings to examine whether the detention should be prolonged. On the other hand, the prosecutor's attendance at such sessions was not mandatory, but only possible. Moreover, the court had had an opportunity to examine the written submissions made by the detainee in his appeal. Therefore, his arguments had been known and could be taken into consideration by the court deciding on detention.

65. In the present case a prosecutor of the Appellate Prosecutor's Office had been present at three sessions held before the Court of Appeal at which the applicant's appeals were examined. On all these occasions, the prosecutor's primary task had been to represent the public interest and, in this capacity, to support the decisions by the first-instance court to prolong the applicant's detention. The prosecutor had merely requested the court to uphold the first-instance decisions and had not put forward any new arguments in favour of the applicant's continued detention. Therefore, in the

proceedings in issue it had only been their secondary function to represent the prosecution.

66. The courts had before them the first-instance decisions and the applicant's appeals and had to take into consideration the prosecutor's submissions in support of the contested first-instance decisions. It must be concluded, according to the Government, that the proceedings had been adversarial.

(b) The Court's assessment

67. The Court recalls that Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of applications for release from detention. Nevertheless, a State which institutes such a system must in principle afford detainees the same guarantees on appeal as at first instance (see the *Toth v. Austria* judgment of 12 December 1991, Series A no. 224, p. 23, § 84).

68. A court examining an appeal against detention must provide guarantees of a judicial procedure. Thus, the proceedings must be adversarial and must adequately ensure "equality of arms" between the parties, the prosecutor and the detained (see the following judgments: *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33, p. 24, § 60; *Sanchez-Reisse v. Switzerland*, 21 October 1986, Series A no. 107; *Kampanis v. Greece*, 13 July 1995, Series A no. 318-B; *Nikolova v. Bulgaria* [G.C.], application no. 31195/96, ECHR 1999-II, § 63; *Trzaska v. Poland*, no. 25792/94, § 78, 11 July 2000, *Ilijkov v. Bulgaria*, no. 33977/96, 26 July 2001, § 103; *Lanz v. Austria*, no. 24430/94, 31 January 2002, § 40).

69. In the present case the applicant was remanded in custody under an arrest warrant issued by the prosecutor on 15 October 1993. He appealed to the Tarnów Regional Court, which examined his appeal at a session held in camera, and dismissed it. Later on, the Tarnów Regional Court, by a decision of 10 January 1994, at the prosecutor's request, prolonged the applicant's detention for a further period. The applicant's appeal was dismissed by the Kraków Court of Appeal on 1 February 1994. Later on, the Tarnów Regional Court prolonged the applicant's detention on 25 March 1994, on 26 May 1994 and on 5 August 1994. The applicant's appeals against these decisions were dismissed by the Kraków Court of Appeal on 20 April 1994, 22 June 1994 and 15 August 1994 respectively.

70. The Court first observes that, under the law on criminal procedure as it stood at the relevant time, detention on remand was imposed by a warrant of a public prosecutor. An appeal to the court lay against a detention order. The law did not entitle either the applicant himself or his lawyer to attend the court sessions held in proceedings instituted following such an appeal. Moreover, the law did not entitle either the applicant himself or his lawyer to attend court sessions held in any other kind of subsequent proceedings

concerning review of the lawfulness of detention, including proceedings in which the prolongation of his detention was being considered. What is more, the applicable provisions did not require the prosecutor's submissions in support of the applicant's detention to be communicated either to the applicant or to his lawyer. Thus, it was open to the prosecution to attend relevant court sessions and to make, in the absence of the suspect, any further submissions in support of the prolongation of the detention order, while neither the applicant nor his lawyers had any opportunity to be acquainted with them or to formulate any objections, or to comment thereon.

71. In these circumstances, and also having regard to the overall characteristics of proceedings to review the applicant's detention, the Court is of the view that the proceedings in which the prolongation of the applicant's detention was examined cannot be said to be compatible with the requirements of Article 5 § 4 of the Convention.

72. 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.

C. Access to the case-file

1. Arguments before the Court

73. The applicant submitted that the relevant regulation of the Polish law of criminal procedure at the material time had allowed the prosecuting authorities to prevent the suspect from taking cognisance of all the evidence until the investigations were completed. In the present case, on 15 November 1993, the prosecutor refused access to the case-file to the applicant's lawyer. Later on, on 29 April 1994, he also refused him access to the expert opinion, which had been drawn up in the meantime. As late as September 1994 the lawyer was refused access to the case file and was informed that the reason for the refusal was that the file was at the Supreme Court. It was only in November 1994 that the lawyer was able to have effective access to the file.

It was true that when the applicant had been arrested he was served with the statement of charges against him. However, this statement was brief and did not refer to any concrete pieces of evidence against him. Therefore, in the ensuing proceedings concerning his detention on remand, he had to prepare his arguments only on the basis of this document, as he did not have any knowledge of the case-file. Given the voluminous financial evidence obtained from his companies, relating to complex and extensive charges against him, which by that time had been gathered in the case-file, this document afforded an inadequate basis on which the applicant could formulate his submissions and advance sound arguments in his defence.

The courts, in their decisions concerning the applicant's detention, referred to various pieces of evidence which were unknown to him and to his lawyer.

74. The applicant acknowledged that domestic law at that time allowed the prosecutor to refuse access to the case-file until the end of the investigations. However, that very regulation ran counter to the requirements of the Convention, in particular those formulated by the Court in its *Lamy v. Belgium* judgment of 30 March 1989 (Series A no. 151).

75. The Government contended that the applicant and his lawyer had in principle had access to the case-file. They emphasised that a hypothetical legal regulation that was radically different from the solution adopted in Article 142 § 3 of the Code of Criminal Procedure would not ensure the interests of effective investigations. It was in the nature of things that the due course of such investigations often depended on keeping strictly secret certain circumstances of the case until it was established that there was a sufficient basis on which to bring the case before the criminal court. Under Polish law, in particular under Article 277 of the Code, there had been no impediment to allowing full access to the case-file from that moment on.

76. The Government further argued that the prosecuting authorities had first, by virtue of the decision of 29 April 1994, refused the applicant access to the expert report drawn by the certified accountant. However, access to the report had been granted by a decision of 30 May 1994.

77. The Government submitted that the applicant's defence rights had not been breached as regards access to the case file. It was impossible to ensure full equality of arms during investigations. There had been no conflict in the present case between the applicant's defence rights and the interests of an effective investigation. They stressed that the access given to the applicant and to his lawyer to the case-file had been sufficient to safeguard his defence rights, and access to the expert report was denied only for one month.

2. The Court's assessment

78. The Court refers at the outset to its case-law as to the requirements that proceedings concerning judicial review of detention must satisfy (see §§ 67-68 above).

79. More specifically, the Court reiterates that a certain degree of access to the case-file, if only to such an extent as to afford the detainee an opportunity of effectively challenging evidence on which his detention was based, may in certain instances be envisaged in proceedings concerning review of the lawfulness of detention on remand (see the *Lamy v. Belgium* judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29). These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence

adduced by the other party. According to the Court's case-law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of “criminal charge” – that this provision can be applied to pre-trial proceedings (see the *Imbrioscia v. Switzerland* judgment of 24 November 1993, Series A no. 275, p. 13, § 36). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon (see *Schops v. Germany*, no. 25116/94, 13 February 2001, § 44; *Garcia Alva v. Germany*, no. 23541/94, § 39; 13 February 2001; *Lietzow v. Germany*, no. 24479/94, 13 February 2001, § 44).

80. The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer. (see *Lietzow*, cited above, § 42).

81. Applying these principles to the present case, the Court first considers that the compliance of the detention proceedings with the above requirement must be assessed in the light of the particular circumstances of the case under the Court's scrutiny, regard being had to the nature of the documents available to the detained person, their number and their importance to the assessment of the lawfulness of the detention. The period during which the accused and detained person did not have access to the case-file is also of relevance in this connection.

82. The Court observes that the applicant, who was arrested on 15 October 1993, did not have effective access to the case-file until at least 14 October 1994, i.e. only one year later (see § 45 above). However, the prosecutor granted him permission for such access on 5 July 1994, but it seems that it was only in September 1994 that the applicant's lawyer made a request to avail himself of this right. Therefore, the period during which neither the applicant nor his lawyer were allowed to consult the case file came to an end on 5 July 1994.

83. The only documents with which they had been served during that period were, at the time of the applicant's arrest, the statement of charges against him and the warrant of arrest. Therefore, in the proceedings that

took place following the applicant's appeal against the arrest warrant the applicant and his lawyer did not have access to the case-file at all. In the further two sets of proceedings, concerning the review of the lawfulness of the applicant's detention, held before the Tarnów Regional Court and, subsequently, before the Kraków Court of Appeal, until 5 July 1994, the situation was identical.

84. It is true that under the decision of 30 May 1994 the applicant's lawyer was granted access to the expert report of 18 April 1994. However, no proceedings concerning the applicant's detention took place in June 1994. Accordingly, the applicant's access to this document did not affect his position in this connection.

85. It should be further noted that in the decisions given before 5 July 1994 concerning the prolongation of the applicant's detention, the courts repeatedly relied on various documents and evidence to which the applicant did not have access. For example, in its decision of 1 February 1994 the Krakow Court of Appeal had regard to the material gathered so far in the investigations. In its decision of 22 June 1994 the Krakow Court of Appeal referred to the evidence, both that available at the time of the applicant's arrest and that gathered later in the proceedings, which sufficiently substantiated the charges against the applicant. The court also stressed that new evidence had been coming to light gradually, revealing new aspects of the case.

86. The Court considers that the documents available to the applicant (see § 83 above) did not provide an adequate basis on which to address the arguments relied on both by the prosecution and by the courts in support of the decisions to prolong his detention, and secure thereby any effective defence in the detention proceedings, in particular in the light of the progress of the investigations, in which new evidence was gradually coming to light.

87. Accordingly, there has been a violation of Article 5 § 4 of the Convention also in this connection.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

88. 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

89. The applicant claimed that as a result of his arrest and detention he had suffered severe and continuing pecuniary damage, and had also suffered pain and distress as a consequence of the breaches of the Convention complained of. His detention ruined his family life, in particular as during this time he was unable to take care of his wife and newborn child. Moreover, as a result of his detention his business was destroyed and his reputation tarnished. He claimed just satisfaction in an amount equivalent to USD 300,000.

90. The Government submitted that a finding of a violation would constitute sufficient just satisfaction. In the alternative, the Government requested the Court to assess the just satisfaction with regard to its case-law in similar cases and to the national economic circumstances, such as the purchasing power of the national currency and the average minimum gross salary.

91. As regards the claim for the alleged damage suffered as a result of the 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; *Niedbala v. Poland*, no. 27915/95, § 89). In certain of these judgments, for instance in the cases of *Hood*, *Huber*, *Niedbala* 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.

92. 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 claimed is adequately compensated by the finding of a violation of this provision.

B. Costs and expenses

93. The applicant claimed 15,270 PLN for his costs and expenses borne in Poland. For his costs and expenses before the Convention institutions he claimed 45,000 PLN.

94. The Government submitted that the applicant's claims were excessive.

95. Having regard to the fact that the applicant quantified his claim for domestic costs and expenses, but failed to submit relevant fee notes or bills, the Court dismisses it (see the *Calogero Diana* judgment cited above, p. 1778, § 47, and the *Papageorgiou v. Greece* judgment of 22 October 1997, *Reports* 1997-VI, p. 2293, § 60). However, the Court acknowledges that the applicant must have incurred certain costs in connection with the proceedings before the Convention institutions. The Court considers it reasonable to award him, on an equitable basis, the sum of PLN 10,000, plus any tax that may be payable on that amount.

C. Default interest

96. 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 20% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention;
2. *Holds* by 6 votes to 1 that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, in respect of costs and expenses, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, PLN 10,000 (ten thousand zlotys), plus any tax that may be chargeable;
 - (b) that simple interest at an annual rate of 20% shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English, and notified in writing on 25 June 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr J. Casadevall is annexed to this judgment.

N.B.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE CASADEVALL

(Translation)

1. I do not agree with the opinion of the majority concerning the application of Article 41 of the Convention, or with its conclusion at point 2 of the operative provisions of the judgment that the finding of a violation in itself constituted sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

2. My disagreement is based in general on the points of principle which I stated in my partly dissenting opinion in the case of *Kingsley v. the United Kingdom* (appended to the judgment of 28 May 2002). When the Court finds a violation of the Convention, it is the violation itself which causes the applicant non-pecuniary damage, independently of any pecuniary damage and irrespective of the outcome of the proceedings. If the applicant has no prospect of obtaining reparation under internal law, then he or she must be awarded compensation for that non-pecuniary damage under Article 41.

3. In the particular circumstances of the instant case the Court found two violations of Article 5 § 4 (equality of arms in the proceedings relating to the applicant's continued pre-trial detention and access to the case file – see paragraphs 72 and 87 of the judgment) and, although it is not possible to speculate on what the outcome of the proceedings would have been if Article 5 § 4 had been complied with (see paragraph 92 of the judgment), it seems to me that, since the violations concerned individual rights to have detention supervised and reviewed, they were far more serious than mere breaches of Article 6 § 1 in length-of-civil-proceedings cases and an award of just satisfaction for non-pecuniary damage was called for.

4. Lastly, it should be noted the Government had implicitly accepted that just satisfaction was payable and should be assessed having regard to the case-law in similar cases, the national economic circumstances and purchasing power (see paragraph 90 of the judgment).