



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

FOURTH SECTION

CASE OF BAGIŃSKI v. POLAND

(Application no. 37444/97)

JUDGMENT

STRASBOURG

11 October 2005

FINAL

11/01/2006

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 Bagiński v. Poland,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mr J. BORRERO BORRERO, *judges*,

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

Having deliberated in private on 20 September 2005,

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

PROCEDURE

1. The case originated in an application (no. 37444/97) 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 Robert Bagiński ("the applicant"), on 9 September 1996.

2. The applicant, who had been granted legal aid, was represented by Mr W. Koncewicz, a lawyer practising in Wałbrzych. The Polish Government ("the Government") were represented by their Agents, Mr K. Drzewicki and subsequently, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that after having been arrested he had not been brought before a judge; that his detention pending trial had exceeded a "reasonable time"; that the proceedings designed to review the lawfulness of his detention had not been adversarial; that his right to respect for his family life had been violated.

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.

6. By a decision of 21 January 2003, the Court declared the application partly admissible.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1968 and lives in Wrocław, Poland.

A. Criminal proceedings against the applicant and his detention

9. In 1994 two sets of criminal proceedings were instituted against the applicant. The first involved a charge of theft, the second a charge of forgery. The second proceedings, which were the object of the present application, began on 14 January 1994. On that day the applicant was arrested and charged with forgery. He was released after 48 hours. As from 3 March 1994 the police unsuccessfully tried to summon him in order to take evidence from him.

10. On 13 October 1994 the applicant was arrested by the police under a warrant of arrest, issued on 22 June 1994 along with a “wanted” notice. He was then brought before the Wrocław District Prosecutor (*Prokurator Rejonowy*). The applicant made his escape while the prosecutor was taking evidence from him.

11. On 12 December 1994 the applicant was re-arrested by the police and brought before the Wrocław-Fabryczna District Prosecutor. He was charged with five counts of burglary and one count of escaping from lawful custody. On the same day the prosecutor detained him on remand for three months.

12. On 3 January 1995 the investigation was taken over by the Wrocław Regional Prosecutor (*Prokurator Wojewódzki*).

13. On 13 June 1995 the Regional Prosecutor charged the applicant with forgery, escaping from lawful custody and seven counts of burglary.

14. The investigation involved 6 suspects, including the applicant. The prosecution obtained evidence from several witnesses, 17 reports from experts in mechanics and evidence from experts in graphology.

15. During the investigation, at the request of the Wrocław Regional Prosecutor, the Wrocław Regional Court (*Sąd Wojewódzki*) on three occasions prolonged the applicant’s detention. The last of the relevant decisions was given on 30 August 1995 and extended the applicant’s detention until 10 December 1995.

16. In all those decisions the Regional Court relied on the reasonable suspicion that the applicant had committed the offences with which he had been charged and their serious nature. It also held that his detention was necessary to ensure the proper course of the proceedings, in particular as during the investigation evidence needed to be obtained from other suspects, experts and numerous witnesses.

17. On 8 December 1995 the Wrocław Regional Prosecutor lodged a bill of indictment with the Wrocław Regional Court. The applicant was indicted on charges of handling stolen goods, forgery of documents and escaping from lawful custody.

18. Between December 1995 and the end of 1996 the applicant lodged numerous applications for release. In particular, he asked to be released on bail. All those applications were dismissed, both at first instance and on appeal.

19. Neither the applicant, nor his lawyer participated in any of the sessions held by the courts in connection with his applications for release or his subsequent appeals. The sessions were held *in camera*. The prosecution authorities were informed of session dates and were represented either by a regional prosecutor or a prosecutor of appeal. It was recorded in the minutes of the sessions held on 19 February and 27 June 1996 before the Wrocław Regional Court and on 9 September 1996 before the Wrocław Court of Appeal that the courts made their decisions after having heard the prosecutor's arguments. The grounds invoked by the courts are stated below.

20. On 19 February 1996 the Wrocław Regional Court, ruling on the applicant's application of 12 February 1996, found that:

"... in the light of evidence there is a sufficient likelihood that [the applicant] committed the offences with which is charged [. A] serious danger to society represented by these offences and need to secure the proper conduct of the criminal proceedings, in particular as [he] absconded at the investigative stage of the proceedings, give grounds for his continuing detention."

21. The first hearing on the merits was to be held on 22 March 1996 but it was adjourned to 23 May 1996 since one of the applicant's co-defendants had failed to appear. On 23 May 1996 the trial was postponed to 8 August 1996 because 3 of the applicant's co-defendants had failed to appear.

22. On 27 June 1996, the Regional Court rejected two further applications for release, lodged by the applicant on 24 and 25 June 1996 respectively. It held the following:

"... in the light of evidence there is a sufficient likelihood that [the applicant] committed the offences with which he is charged [. A] serious danger to society created by these offences and need to secure the proper conduct of the criminal proceedings give grounds for continuing detention[;] on the other hand, having regard to the fact that [the applicant] absconded at the investigative stage of the proceedings, the possibility of varying the preventive measure cannot be taken into account."

23. On 8 August 1996, at the first hearing on the merits held in the applicant's case, the Regional Court rejected his subsequent application for release. On 9 September 1996 the Wrocław Court of Appeal (*Sąd Apelacyjny*) dismissed the applicant's appeal against this decision, holding that:

"In his appeal [the applicant] argues that he has already been detained for 20 months and considers that in view of the fact that the trial has begun, he should be released. He also refers to his arrears in child support obligations and to [the situation of] his mother, on whom he [previously] attended.

This court has taken account of the following:

The period spent by [the applicant] in detention is indeed very long. However, there is no error in [the lower] court's finding that this is not in itself a particular circumstance which would be a ground for not continuing his detention, as referred to in the first sentence of Article 218 of the Code of Criminal Procedure. There is no basis on which to refute the Regional Court's statements expressing its concern about the proper conduct of the trial without [detention] being imposed on [the applicant]. In the course of the investigation [he] was elusive for the investigating authority and he was twice searched for by a "wanted" notice (see p. 15, volume I). [The applicant's] detention still has a basis within the meaning of Article 217 § 1 of the [Code of Criminal Procedure] and the circumstances upon which he relies do not suffice for the Court of Appeal to question the decision of the Regional Court in respect of the preventive measure imposed on [him].

The case has now reached the stage of the opening of the trial and the subsequent hearings (the dates of which have already been fixed) will soon be held. Accordingly, it is likely that the case will in a short time be terminated which – still more – justifies [an opinion] that the contested decision of the Regional Court should be upheld. ..."

24. On 27 September 1996 the court held the second hearing. Subsequently, it listed hearings for 20 November 1996 (cancelled as two of the applicant's co-defendants failed to appear), 28 January 1997 (cancelled as the case-file had been sent to the Supreme Court) and 18 March 1997 (cancelled as one of the co-defendants failed to appear).

25. Meanwhile, on 31 December 1996 the Regional Court had made an application under Article 222 § 4 of the Code of Criminal Procedure to the Supreme Court (*Sąd Najwyższy*), asking it to prolong the applicant's detention until 24 June 1997. The application was posted to the Supreme Court on 10 January 1997.

26. On 24 January 1997 a panel of three judges, sitting *in camera* as the Criminal Chamber of the Supreme Court, after obtaining oral comments from the State Prosecutor (*Prokurator Krajowy*), who represented the prosecution, granted the application and prolonged the applicant's detention "from 24 January 1997 to 24 June 1997". The Supreme Court's decision contained exhaustive reasons, the relevant part of which may be summarised as follows:

The Supreme Court, noting that the application was filed on 31 December 1996 but posted as late as 10 January 1997, first considered what was the proper date of “lodging” such an application for the purposes of Article 222 § 4 of the Code of Criminal Procedure.

The Supreme Court next observed that, depending on the answer to this question, it would have to determine the legal consequences of a potential failure on the part of the Wrocław Regional Court to respect the rule laid down in section 10 (a) § 2 of the Interim Law of 1 December 1995, which stated that in cases where no application for a further prolongation of detention on remand had been “lodged”, detention had to be lifted no later than on 1 January 1997.

The Supreme Court considered that it should also deal with the question whether it was competent to rule on the application if it had been “lodged” after the deadline referred to in section 10 (a) of the Interim Law of 1 December 1995, i.e. after 1 January 1997.

Referring to the first question, the Supreme Court held that the proper date of “lodging” an application under Article 222 § 4 of the Code of Criminal Procedure had to be deemed to be either the date of posting the application or the date of submitting it to the registry of the Supreme Court since to hold otherwise would mean leaving a detainee without any guarantee that the Supreme Court was properly supervising his detention. Moreover, if the requesting court was not bound by any time-limits for submitting its request, detention, the most severe among the preventive measures, might continue for an unspecified and unlimited time outside the Supreme Court’s supervision. In consequence, an application under Article 222 § 4 of the Code of Criminal Procedure, a mere “proposal” to continue detention, would, for all practical purposes, transform into a basis for continuing detention. Clearly, it was not the intention of the legislator.

The Supreme Court therefore concluded that since in the applicant’s case no application for a further prolongation of his detention had been lodged before 1 January 1997, the order for his detention should have been quashed at latest on that day. Accordingly, his detention from that date to the date on which the Supreme Court was giving the present decision lacked any legal basis and was, consequently, unlawful. The court noted that such an “unlawful” detention might justify granting compensation for unlawful deprivation of liberty if this period were not deducted from the future sentence.

The Supreme Court went on to find that it was, nevertheless, competent to deal with the application. A lower court’s obligation to release a detainee in case of its failure properly to lodge an application under Article 222 § 4 of the Code of Criminal Procedure was one thing but its right to make such an application at any time was another. In the Supreme Court’s opinion, the application in question should be deemed a “fresh request” and be examined as such.

The Supreme Court then dealt with the application and found that further prolongation of the applicant’s detention was necessary. It relied on the likelihood that the applicant had committed the offences with which he had been charged and the risk of his absconding or going into hiding which, in its view, was justified by the fact that the applicant had already absconded after having been arrested and had been searched for by a “wanted” notice. Lastly, the Supreme Court stressed the complexity of the case.

27. On 16 May 1997 the court held a hearing and heard evidence from witnesses. On 18 June 1997 the Regional Court held the next hearing. On the same day it made the second application under Article 222 § 4 of the Code of Criminal Procedure to the Supreme Court, asking it to prolong the applicant's detention until 24 December 1997. On 8 August 1997 the Supreme Court granted the application. It held a session *in camera*. Before taking its decision, it heard arguments of the State Prosecutor. The decision read, in so far as relevant:

“... the principal charge laid against [the applicant] concerns the offence of handling stolen goods of a high value. A severe penalty, that is, a sentence of up to 10 years' imprisonment may be imposed for the commission of this offence ... The charges against the applicant have a degree of likelihood, as required by Article 209 of [the Code of Criminal Procedure], in particular in view of the testimonies given by the co-defendants Ł[...], L[...] and B[...] as well as [evidence] which has so far been heard from witnesses. Given that [the applicant], after having been arrested, had on one occasion fled and was then searched for by a “wanted” notice, there is a risk of his absconding or going into hiding. ... Accordingly, his detention has its basis under Article 217 § 1(1) and § 2. In the present case there is a need to take various evidence, in particular from witnesses. The process of obtaining evidence is lengthy and, as it emerges from the case-file, it has been extended because of [the obstacles] which the [trial] court, despite its efforts, could not overcome. Consequently, there are grounds for further prolongation of detention, as defined in Article 222 § 4 of the [Code of Criminal Procedure]. ...”

28. On 10 September 1997 the applicant applied to the Regional Court for his release. He relied on Article 5 § 3 of the Convention, submitting that his detention had clearly exceeded a “reasonable time”. On 11 September 1997 a panel of three judges, sitting *in camera* as the Wrocław Regional Court rejected the application. A.G., a regional prosecutor from the Wrocław Regional Prosecutor's Office took part in the session and the court heard her arguments. The relevant decision comprises a four-line reasoning, which reads as follows:

“Since the grounds for continuing detention, mentioned in the decision of the Supreme Court of 8 August 1997 file no. V K0 42/97, are still valid and as there are no circumstances militating in favour of not continuing the preventive measure imposed, it has been held [as in the operative part of the decision].”

29. On 18 September 1997 the court cancelled a hearing since one of the co-defendants had failed to appear. Further hearings were held on 30 September and 11 and 22 December 1997.

30. On 22 December 1997 the applicant was released.

31. A hearing listed for 17 March 1998 was cancelled due to the absence of one of the applicant's co-defendants. On 11 September 1998 the trial came to an end. On 14 September 1998 the Regional Court delivered judgment. The applicant was convicted as charged and sentenced to 3 years' and 2 months' imprisonment. The period spent by him in pre-trial detention was deducted from the sentence to be served.

32. On 24 September 1998 the applicant lodged a notice of appeal with the Regional Court. On 16 October 1998 the applicant's counsel informed the court that the applicant did not intend to contest the judgment and withdrew his notice of appeal. In consequence, the judgment became final on 10 November 1998.

33. On 2 December 1998 the applicant asked the Regional Court to grant him retrospective leave to appeal out of time. He maintained that his counsel had withdrawn the notice of appeal without his consent. On 25 February 1999 the court refused his application. The applicant later lodged two further appeals but, eventually, he withdrew his application for leave to appeal out of time on 2 September 1999.

B. The applicant's contact with his family during his detention

34. In his original submissions, the applicant maintained that for 17 months following the submission of the bill of indictment to the Regional Court (which took place on 8 December 1995) he had not, in principle, been allowed to maintain personal contact with his family. He asserted that particular restrictions had been placed on his personal contact with his mother.

35. As it transpires from a letter from the Director of Legal Department of the Central Board of Prisons dated 10 October 2000 and copies of visit permissions given to the applicant's brother and mother, from 4 February 1995 to 6 December 1995 the applicant's mother was allowed to visit him in prison on 9 occasions (4 February; 15 March; 23 June; 28 July; 17 August; 13 September; 20 October; 22 November and 6 December 1995). The applicant's brother was allowed to visit him in prison on 19 July and 27 December 1995.

36. On 18 December 1995 the applicant's mother asked the Regional Court to allow her to visit him in prison; in the same letter she stated that she would take advantage of her right to refuse to testify in the applicant's case. On 20 December 1995 the court rejected her request and held that, on account of the fact that she had been called as a witness by the prosecution, no such permission could be granted as long as evidence from her had not been heard or, alternatively, as long as she refused to give evidence on the ground that she was not qualified to testify as a close relative. The court further stated that the applicant's mother could refuse to testify only during a hearing in the case

37. On 21 December 1995 the applicant asked the court to allow his mother to visit him in prison. The court refused on 10 January 1996. On 23 May 1996 the court allowed the applicant's brother to visit him in prison. On 4 June 1996 the applicant again asked the court to allow his mother to visit him in prison. He also asked for permission to contact his family by

phone. The court allowed him to make two phone calls but refused to give a visit permission to his mother since she had not yet given evidence before it.

38. On 12 July 1996 the applicant asked the court to allow him to speak on the phone to his brother and son. In August, the court allowed him to make a phone call to the son but not to the brother. Overall, in 1996 the applicant was allowed to make three phone calls; two in June and one in August

39. The applicant submits that the court permission to make phone calls was delivered too late to the prison authorities and, as a result, he could not make use of it.

40. The applicant's mother was allowed to resume visits on 16 May 1997 and then, up to 21 November 1997, she visited him 9 times (16 and 25 May; 8 and 15 June; 29 August; 12 September; 3 and 24 October and 21 November 1997). The applicant's brother was allowed to visit him on 21 and 26 May 1996 and on 4 November 1997.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Amendments to Polish criminal legislation

41. Over the period to which the facts of the present case relate, i.e. from March 1995 to the beginning of 1999, Polish criminal legislation was amended on several occasions.

In so far as the present case is concerned, there were two relevant amendments to the Code of Criminal Procedure ("the 1969 Code"), a law which is no longer in force as it was repealed and replaced by the so-called "New Code of Criminal Procedure" of 6 June 1997 ("the 1997 Code"), which entered into force on 1 September 1998.

The first such amendment was made by the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes which entered into force on 1 January 1996, except the amendments relating to the imposition of detention on remand (in particular, those stating that only a judge was empowered to detain a suspect on remand); the entry into force of the latter amendments being postponed until 4 August 1996 (see below).

The second amendment, effected by the Law of 1 December 1995 on Amendments to the Law of 29 June 1995 ("the 1995 Interim Law") came into force on 1 January 1996. Section 10(a) of the Law introduced special interim rules governing the prolongation of detention on remand beyond the statutory time-limits laid down in Article 222 §§ 2 and 3 of the 1969 Code in cases where such detention had been imposed before 4 August 1996 (see below, 3. "*Statutory time-limits for detention on remand*").

B. Preventive measures, in particular detention on remand

42. At the material time the 1969 Code listed as “preventive measures” (*środki zapobiegawcze*), *inter alia*, detention on remand, bail and police supervision.

1 Imposition of detention on remand

Article 210 § 1 of the 1969 Code read (in the version applicable until 4 August 1996):

“Preventive measures shall be imposed by the court; before a bill of indictment has been lodged with the competent court, the measures shall be imposed by the prosecutor.”

Article 222 (in the version applicable until 4 August 1996) stated, in so far as relevant:

“1. The prosecutor may order detention on remand for a period not exceeding three months.

2. When, in view of the particular circumstances of the case, the investigation cannot be terminated within the period referred to in paragraph 1, detention on remand may, if necessary, be prolonged by:

(1) the court competent to deal with the case, upon the prosecutor’s request, for a period not exceeding one year;

(2) the Supreme Court, upon request of the Prosecutor General, for a further fixed term required to terminate the investigation.”

Under Article 212 § 2 a detainee could appeal against a detention order made by a prosecutor to the court competent to deal with his case; however, he was not entitled to be brought before the judge dealing with his appeal.

2. Grounds for applying preventive measures

43. Article 209 of the 1969 Code set out general grounds justifying imposition of preventive measures. That provision (as it stood at the material time) provided:

“Preventive measures may be imposed in order to ensure the proper conduct of proceedings if the evidence against the accused sufficiently justifies the opinion that he has committed a criminal offence.”

Article 217 § 1 defined grounds for detention on remand. That provision, in the version applicable until 1 January 1996 provided, in so far as relevant:

“Detention on remand may be imposed if:

(1) there is a reasonable risk that an accused will abscond or go into hiding, in particular when he has no fixed residence [in Poland] or his identity cannot be established; or

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

(3) an accused has been charged with a serious offence or has relapsed into crime in the manner defined in the Criminal Code; or

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

On 1 January 1996 paragraphs (3) and (4) were repealed. From that date on that provision read:

“(1) there is a reasonable risk that an accused will abscond or go into hiding, in particular when his identity cannot be established or he has no permanent abode [in Poland]; or

(2) [as it stood before 1 January 1996].”

Paragraph 2 of Article 217 then read:

“If an accused has been charged with a serious offence or an intentional offence [for the commission of which he may be] liable to a sentence of a statutory maximum of at least eight years’ imprisonment, or if a court of first instance has sentenced him to at least three years’ imprisonment, the need to continue detention in order to secure the proper conduct of proceedings may be based upon the likelihood that a heavy penalty will be imposed.”

The 1969 Code contained provisions governing the imposition of specific preventive measures. Articles 213 § 1, 218 and 225 of the Code were based on the precept that detention on remand, the most extreme among the preventive measures, should not be imposed if more lenient measures were adequate.

Article 213 § 1 provided:

“A preventive measure [including detention on remand] shall be immediately lifted or varied, if the basis therefor has ceased to exist or new circumstances have arisen which justify lifting a given measure or replacing it with a more or less severe one.”

Article 225 stated:

“Detention on remand shall be imposed only when it is mandatory; this measure shall not be imposed if bail or police supervision, or both of these measures, are considered adequate.”

The provisions of the 1969 Code providing for “mandatory detention” (for instance, pending an appeal against a sentence of imprisonment exceeding three years) were repealed on 1 January 1996 by the Law of 29 June 1995 referred to above.

Finally, Article 218 provided:

“If there are no special reasons to the contrary, detention on remand should be lifted, in particular, if:

(1)^o it may seriously jeopardise the life or health of the accused; or

(2) "it would entail excessively burdensome effects for the accused or his family."

3. *Statutory time-limits for detention on remand*

44. Until 4 August 1996, i.e. the date on which the relevant provisions of the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes entered into force, the law did not set out any time-limits on detention on remand in court proceedings; it did so only in respect of the investigative stage (see above, 1. "*Imposition of detention on remand*"; Article 222 in the version applicable until 4 August 1996).

Article 222 of the 1969 Code in the version applicable after 4 August 1996 provided, in so far as relevant:

"3. The whole period of detention on remand until the date on which the court of first instance gives judgment may not exceed one year and six months in cases concerning offences. In cases concerning serious offences [offences for the commission of which a person was liable to a sentence of a statutory minimum of at least 3 years' imprisonment] this period may not exceed two years.

4. In particularly justified cases the Supreme Court may, on an application made by the court competent to deal with the case, ... prolong detention on remand for a further fixed period exceeding the time-limits set in paragraphs 2 and 3, when it is necessary in connection with a suspension of the proceedings, a prolonged psychiatric observation of the accused, when evidence needs to be obtained from abroad or when the accused has deliberately obstructed the termination of the proceedings in the terms referred to in paragraph 3."

45. On 28 December 1996, by virtue of the Law of 6 December 1996, paragraph 4 of that Article was amended and the grounds for prolonging detention beyond the statutory time-limits included also:

"... other significant obstacles, which could not be overcome by the authorities conducting the proceedings..."

However, as already mentioned (see above A. "Amendments to Polish criminal legislation"), under section 10 (a) of the 1995 Interim Law, different rules applied to persons whose detention on remand started prior to 4 August 1996. That section provided:

"1. In cases where the total period of detention on remand which started prior to 1 August 1996 exceeds the [maximum] time-limits referred to in Article 222 §§ ... and 3 of the Code of Criminal Procedure [as amended by the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes], the accused shall be kept in detention until the Supreme Court gives a decision on an application for prolongation of his detention under Article 222 § 4 of the Code of Criminal Procedure.

2. In cases mentioned in paragraph 1, if no [such] application has been lodged, detention shall be lifted not later than 1 January 1997."

In cases where the Supreme Court dismissed an application under Article 222 § 4, a detainee had to be released. As long as it had not given its ruling, the application to the relevant court – which had the form of a decision (“*postanowienie*”) – was deemed to be a legal basis for the continued detention.

4 Proceedings for determination of the lawfulness of detention on remand

46. At the material time there were three different legal avenues enabling a detainee to challenge the lawfulness of his detention: appeal to a court against a detention order made by a prosecutor; proceedings in which courts examined applications for prolongation of detention made by a prosecutor at the investigation stage and proceedings set in motion by a detainee’s application for release.

As regards the last of these, Article 214 of the 1969 Code stated that an accused could at any time apply to have a preventive measure lifted or varied. Such an application had to be decided by the prosecutor or, after the bill of indictment had been lodged, by the court competent to deal with the case, within a period not exceeding three days.

Under Article 88 of the 1969 Code the participation of the parties at judicial sessions other than hearings was a matter for the discretion of the court. Sessions concerning an application for release, a prosecutor’s application for prolongation of detention or an appeal against a decision on detention on remand were held *in camera*. If the defendant asked for release at a hearing, the court made a decision either during the same hearing or at a subsequent session *in camera*.

At the material time the law did not give the detainee the right to participate – either himself or through his counsel – in any court session concerning his detention on remand. In practice, only the prosecutor was notified of, and could participate in, those sessions. If he was present, he was entitled to adduce arguments before the court. The prosecutor’s submissions were put on the record of the session (see also *Wloch v. Poland*, no. 27785/95, judgment of 19 October 2000, §§ 69-73).

Under all the relevant provisions read together a detainee was entitled to appeal against any decision prolonging his detention on remand, regardless of whether it had been made at the investigative or trial stage. However, no appeal lay in law either against a decision whereby the trial court applied, under Article 222 § 4, for prolongation of detention beyond the statutory time-limit, or against a decision of the Supreme Court prolonging detention under that provision.

5. Rules concerning a detainee's contact with the outside world

47. At the material time Articles 82-90 of the Code of Execution of Criminal Sentences of 1969 dealt with the execution of detention on remand. The Code is no longer in force; it was repealed and replaced by the “new” Code of Execution of Criminal Sentences of 6 July 1997, which entered into force on 1 September 1998.

Under section 89 § 2 of the Code a detainee was allowed to receive visits from his family, or could contact his family by phone, provided that he obtained permission in writing from the investigating prosecutor (at the investigative stage) or from the trial court (once the trial began). The authorities could order that a visit should take place in the presence of a prison guard. No appeal lay in law against decisions refusing to grant such permission.

THE LAW

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

48. The applicant alleged a breach of Article 5 § 1 of the Convention, in that from 1 to 24 January 1997 his detention on remand had lacked any legal basis. Article 5 § 1 of the Convention, in its relevant part, provides:

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

...

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

A. The parties' arguments

49. The applicant referred to the Supreme Court's decision of 24 January 1997, in which the court had explained why keeping him in custody throughout the period in question had been unlawful and consequently, incompatible with Article 5 § 1.

50. The Government agreed that from 1 to 24 January 1997, the applicant's detention had lacked a formal legal basis. However, it was obvious that the grounds for keeping him in custody had persisted, as

confirmed by the Supreme Court's decision on the prolongation of the measure. Moreover, the relevant period had later been validated retrospectively at the moment when the Wrocław Regional Court had imposed a penalty on the applicant and deducted it from the sentence to be served.

B. The Court's assessment

51. 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).

52. The Court notes that it is undisputed that the Supreme Court found that the applicant's detention from 1 to 24 January 1997 lacked any legal basis and was accordingly unlawful (see paragraph 26 above). Neither the factual basis for that finding nor the finding itself were contested by the Government (see paragraph 50 above).

53. According to the Supreme Court, the Regional Court's application for the applicant's detention to be prolonged was lodged outside the relevant time-limit, in breach of section 10(a) of the 1995 Interim Law. It thus follows that the applicant's detention during the period in question was contrary to national law (see paragraph 26 above).

54. Consequently, his deprivation of liberty was not "lawful" under the terms of Article 5 § 1 of the Convention, (cf. *Raninen v. Finland*, judgment of 16 December 1997, Reports of Judgments and Decisions 1997-VIII, p. 2819, § 46).

55. There has therefore been a violation of that provision in the present case.

II. ALLEGED VIOLATION OF THE RIGHT TO BE BROUGHT PROMPTLY BEFORE A "JUDGE" GUARANTEED UNDER ARTICLE 5 § 3 OF THE CONVENTION

56. The applicant complained under Article 5 § 3 that after having been detained he had not been brought promptly before a "judge or other officer authorised by law to exercise judicial power"

Article 5 § 3, in its relevant part, reads:

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

A. The parties’ arguments

57. The applicant alleged that the prosecutor could not be considered a “judge” or “officer authorised by law to exercise judicial power” within the meaning of Article 5 § 3.

58. The Government refrained from any comments as regards the issue whether the prosecutor who remanded the applicant in custody offered the attributes of impartiality and independence required under Article 5 § 3.

B. The Court’s assessment

59. The Court recalls that in a number of its previous judgments – for instance, those in the cases of *Niedbala v. Poland* (no 27915/95, judgment of 4 July 2000, §§ 48-57) and of *Dacewicz v. Poland* (no. 34611/97, judgment of 2 July 2002, § 21 et seq.) – it has already dealt with the question whether under the Polish legislation in force at the material time a prosecutor could be regarded as a “judicial officer” endowed with attributes of “independence” and “impartiality” required under Article 5 § 3.

60. The Court has found that a prosecutor did not offer these necessary guarantees because the prosecution authorities not only belonged to the executive branch of the State but also concurrently performed investigative and prosecution functions in criminal proceedings and were a party to such proceedings. Furthermore, it has considered that the fact that the prosecutors in addition acted as guardian of the public interest could not by itself confer on them the status of “officer[s] authorised by law to exercise judicial power”.

61. The Court finds that the present case is similar to the above-mentioned precedents. It sees no reasons to come to a different conclusion in this case. Consequently, it concludes that the applicant’s right to be brought “before a judge or other officer authorised by law to exercise judicial power” was not respected.

62. There has therefore been a violation of Article 5 § 3 of the Convention in that respect.

III. ALLEGED VIOLATION OF THE RIGHT TO TRIAL WITHIN A REASONABLE TIME OR TO RELEASE PENDING TRIAL GUARANTEED UNDER ARTICLE 5 § 3 OF THE CONVENTION

63. The applicant further complained that his detention on remand had been inordinately lengthy and, consequently, in breach of the reasonable time requirement laid down in Article 5 § 3

Article 5 § 3, in its relevant part, reads:

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

A. The parties' arguments

64. The applicant claimed that his detention had lasted exceptionally long.

65. The Government submitted that there had been valid reasons for holding the applicant in custody. It was true that he had spent 3 years and 10 days in detention, which was a considerable period. However, having regard to the fact that he had for the first time been arrested after having been searched for by a “wanted” notice and that, once arrested, he had escaped from lawful custody, the decision to keep him in detention in order to secure the proper conduct of the proceedings had been fully justified.

66. Furthermore, the Government added that the authorities had acted with due diligence in handling the applicant's case and the delays in the trial had been caused only by the absence of the applicant's released co-defendants. In sum, the applicant's detention had not exceeded a “reasonable time” as provided by Article 5 § 3 of the Convention.

A. The Court's assessment

1. Period to be taken into consideration

67. The applicant was detained on remand on 12 December 1994 and released on 22 December 1997 (see paragraphs 11 and 30 above). Accordingly, he spent 3 years and 10 days in detention pending trial.

2. Reasonableness of the length of detention

(a) General principles

68. The Court reiterates that the question of whether or not a period of detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed in each

case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 110-111 with further references, ECHR 2000-XI).

It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned requirement of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the well-documented facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see *Jabłoński v. Poland*, no. 33492/96 § 80, 21 December 2000, unreported).

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also be satisfied that the national authorities displayed “special diligence” in the conduct of the proceedings (*ibid.*)

(b) Application of the above principles to the present case.

69. The authorities gave several grounds for the applicant’s detention. Firstly, they relied on a reasonable suspicion that he had committed the serious offence with which he had been charged. They further added that his detention had been necessary to ensure the proper conduct of the proceedings, given the number of witnesses. (see paragraph 27 above).

70. The Court accepts that in view of the applicant’s behaviour at the initial stage of the proceedings (in particular his escape from the District prosecutor’s office and his going into hiding), keeping him in custody to secure the proper conduct of the proceedings was justified.

71. However, with the passage of time those grounds inevitably became less and less relevant. Nevertheless, when rejecting the applicant’s requests for release the domestic courts still relied on the same reasons (see paragraphs 16, 20, 22, 27 and 28).

The Court agrees that the suspicion against the applicant of having committed the offences with which he had been charged and the need to secure the proper conduct of the proceedings at their early stage may

initially have justified his detention. However, it does not consider that those grounds can suffice to justify the entire period in issue.

72. In this respect it should be also noted that during the entire period of the applicant's pre-trial detention, the authorities did not envisage the possibility of imposing on the applicant other measures – such as bail or police supervision – expressly foreseen by Polish law to secure the proper conduct of criminal proceedings.

73. In that context, the Court would emphasise that under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his appearance at trial. Indeed, that provision proclaims not only the right to “trial within a reasonable time or to release pending trial” but also lays down that “release may be conditioned by guarantees to appear for trial” (see the *Jabłoński* judgment cited above, § 83)

74. The Court accordingly concludes that the reasons given to justify the applicant's detention were not “sufficient” and “relevant”, as required under Article 5 § 3.

75. There has accordingly been a violation of Article 5 § 3 of the Convention in that the applicant's right to trial within a reasonable time or to release pending trial was not respected.

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

76. The applicant complained under Article 5 § 4 that neither he nor his lawyer had been entitled to participate in the proceedings relating to the lawfulness of his detention.

This provision of the Convention 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. The parties' arguments

77. The applicant maintained that there had been a violation of Article 5 § 4. However, he did not adduce any specific arguments in this respect.

78. The Government maintained that between 9 March 1996 and 22 December 1997, the date of the applicant's release, he had made 9 applications for release, most of which had been made at hearings held before the trial court. Those applications had, accordingly, been heard in a genuinely adversarial procedure and in compliance with the principle of equality of arms. The applicant could put forward any arguments he wished and could react to any arguments adduced by the prosecution.

79. The Government admitted that the applications made on 24 and 25 June 1996 and on 10 September 1997, as well as all his appeals against refusals to release him, had been examined in his absence.

80. Yet, in their view, that had not changed the fact that the applicant's right to "take proceedings by which the lawfulness of his detention [should] be decided speedily", as secured by Article 5 § 4, had been respected. They concluded from this that there had been no breach of Article 5 § 4 of the Convention.

B. The Court's assessment

81. The Court has already dealt with a number of Polish cases where the applicants made identical complaints about the lack of equality of arms in proceedings relating to their applications for release or to appeals against refusals to release them. In that regard, it would in particular refer to its judgments in the cases of *Niedbala v. Poland* (cited above §§ 48-57) and *Wloch v. Poland* (no. 27785/95, §§ 125-132; 19 October 2000, ECHR-2000-XI, p. 35-36; §§ 125-131), in which it has repeated the criteria established in its case-law in respect of the "fundamental guarantees of procedure applied in matters of deprivation of liberty" and has emphasised that one of the essential features of such a procedure is equality of arms between the prosecutor and the detained person.

In those judgments, the Court has also found that the impossibility for a detainee to attend the session of a court dealing with his detention, to respond to the prosecutor's submissions and to challenge – either himself or through his lawyer – grounds for his continued detention, an impossibility which was inherent in Polish legislation applicable at the material time, was incompatible with the requirements of Article 5 § 4.

82. The present case does not differ from the above-mentioned precedents. As acknowledged by the Government three applications for release had been examined in the applicant's absence (see paragraph 78 above). Furthermore, the procedure for the prolongation of his detention beyond the statutory time-limits under Article 222 § 4 of the Code of Criminal Procedure did not involve his participation either before the Regional Court, or before the Supreme Court (see paragraphs 26, 27 above).

83. In this connection the Court holds that the fact that the applicant could take part in some *habeas corpus* proceedings cannot make up for the lack of "equality of arms" in the remaining proceedings.

84. There has accordingly been a violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

85. The applicant also complained under Article 8 of the Convention that during his detention he had been deprived of personal contact with his family for a significant period of time.

This provision of the Convention reads, in so far as relevant:

“1. Everyone has the right to respect for his ...family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. The parties' arguments

86. The applicant argued that from 20 December 1995 to 16 May 1997 he had been allowed only to see his brother in May 1996. That had been not enough and had not changed the fact that for 17 months he had remained in a nearly complete isolation. Also, he had not eventually been allowed to make phone calls because the court permission had been delivered too late to the prison authorities.

87. The applicant further maintained that the reason for stopping his mother's visits was arbitrary. Despite the Government's conclusion it had not been necessary to ensure the proper conduct of the proceedings. In this respect he pointed out that his mother had been allowed to visit him during the investigation stage of the proceedings but subsequently, when the trial had commenced, the authorities had decided that visits could have negatively influenced the proceedings. The applicant further stressed that the authorities did not envisage other measures as specifically provided for in the Rules Governing the Execution of Detention, in particular, the possibility of arranging supervised visits in a prison officer's presence. This, in his opinion, had amounted to detention *incommunicado*. In conclusion, the authorities acted in a disproportionate way, as they had infringed the basic principle of the Convention system – proportionality.

88. The Government agreed that some interference with the applicant's right to respect for his family life had occurred in the case at issue. However, there had been no violation of Article 8 since, during the period in question, the Regional Court had allowed the applicant's brother to visit him twice in prison. The applicant had also been permitted to make two phone calls in June 1996 and one call in August 1996. In addition, the Government stressed that both the applicant's mother and his brother had been witnesses in the proceedings against him. In this respect they submitted that the restrictions imposed on the applicant's contact with his

mother had been justified by the need to secure the proper conduct of the proceedings. They averred that the applicant could have exchanged correspondence with his mother. Moreover, the restrictions imposed on the applicant had been quashed immediately after it had become clear that the applicant's mother would not testify as a witness in the judicial proceedings. In sum, the domestic authorities maintained a fair balance of proportionality between the need to secure the process of obtaining evidence and the applicant's right to respect for his family guaranteed under Article 8 of the Convention.

B. The Court's assessment

1. General principles

89. The Court reiterates that detention, likewise any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family (see, *mutatis mutandis*, *Messina v. Italy* (no. 2) no. 25498/94, § 61, 28 September 2000, unreported).

Such restrictions as limitations put on the number of family visits, supervision over those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special visit arrangements constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision (*ibid.* §§ 62-63; see also *X v. the United Kingdom*, no. 8065/77, Commission decision of 3 May 1978, Decisions and Reports 14, p. 246).

Nevertheless, any restriction of that kind must be applied "in accordance with the law", must pursue one or more legitimate aims listed in paragraph 2 and, in addition, must be justified as being "necessary in a democratic society". As to the latter criterion, the Court would further reiterate that the notion of "necessity" for the purposes of Article 8 means that the interference must correspond to a pressing social need, and, in particular, must remain proportionate to the legitimate aim pursued. Assessing whether an interference was "necessary" the Court will take into account the margin of appreciation left to the State authorities but it is a duty of the respondent State to demonstrate the existence of the pressing social need behind the interference (see, among other examples, *McLeod v. the United Kingdom*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, p. 2791, § 52; and *Płoski v. Poland*, no. 26761/95, § 35, 12 November 2002, unreported).

2. Application of the above principles to the present case

(a) Existence of interference

90. The Government did not contest before the Court that the restrictions on the applicant's personal contact with his family constituted an "interference" with his family life (see paragraph 88 above). The Court sees no reason to hold otherwise.

(b) Whether the interference was "in accordance with the law"

91. The Court notes that the contested measure was applied under Article 89 § 2 of the 1969 Code of Execution of Criminal Sentences (see paragraph 47 above). It consequently holds that the interference was "in accordance with the law".

(c) Whether the interference pursued a "legitimate aim"

92. The Government maintained that the restrictions in issue had been necessary in order to secure the proper conduct of the criminal proceedings against the applicant, in particular, as the applicant's mother had been a witness in the proceedings against the applicant.

93. The Court notes that the limitations on the applicant's contact with his mother were imposed after the judicial stage of the proceedings had begun on the grounds that the applicant's mother had been a witness called by the prosecution (see paragraphs 36 and 37 above). The impugned measure can, accordingly, be considered as having been taken in pursuance of "the prevention of disorder and crime", which is a legitimate aim under Article 8.

(d) Whether the interference was "necessary in a democratic society"

94. It remains for the Court to ascertain whether the authorities struck a fair balance between the need to secure the process of obtaining evidence in the applicant's case and his right to respect for his family life while in detention.

95. The Court observes at the outset that the applicant's mother was refused permission to visit the applicant on 20 December 1995. That restriction was maintained until 16 May 1997, i.e. for 17 months (see paragraphs 35-38 above). At the same time, the applicant's brother was allowed to visit him on 21 and 26 May 1996. Thus, during a period of 17 months the applicant had only been allowed two visits from his brother.

96. The Court accepts that, initially, the resort to that measure could be considered reasonably necessary from the point of view of the aims sought by the authorities, even though it inevitably resulted in harsh consequences for the applicant's family life.

However, with the passage of time and given the severity of those consequences, as well as the authorities' general obligation to assist the applicant in maintaining contact with his family during his detention, the situation called, in the Court's opinion, for a careful review of the necessity of keeping him in complete isolation from his mother.

97. In that regard, the Court notes that the applicant's mother had been frequently visiting the applicant when the case had been at the investigative stage (see paragraph 35 above). However, after the case had reached the trial stage these visits were stopped. The Government failed to provide a plausible explanation as to why during the investigation the domestic authorities had not seen any obstacle to the applicant's mother visiting him in prison. Moreover, the domestic court did not consider any alternative means of ensuring that the applicant's contact with his mother would not lead to any collusive action or otherwise obstruct the process of taking evidence, such as, for instance, subjection of their contact to supervision by a prison officer or to other restrictions on the nature, frequency and duration of contact (see, a contrario, *Kalashnikov v. Russia* (dec.), no. 47095/99, ECHR-2001).

98. In the circumstances, and having regard to the duration of the restrictions on the applicant's contact with his mother, the Court concludes that they went beyond what was necessary in a democratic society "to prevent disorder and crime". Indeed, the measure in question reduced the applicant's family life to a degree that can be justified neither by the inherent limitations involved in detention nor by the pursuance of the legitimate aim relied on by the Government. The Court therefore holds that the authorities failed to maintain a fair balance of proportionality between the means employed and the aim they sought to achieve.

3. Conclusion

99. There has accordingly, been a violation of Article 8 of the Convention in regard to the applicant's right to respect for his family life.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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."

101. Under the head of non-pecuniary damage the applicant claimed a sum of 80,000 Polish zlotys (PLN) [approx. EUR 20,000] for moral suffering and distress resulting from a violation of his Convention rights. In that regard, the applicant in particular referred to the anxiety and stress he

suffered because of his isolation from his family and the duration of the detention.

102. The Government considered that the sum in question was inordinately excessive. They requested the Court to rule that the finding of a violation would constitute in itself sufficient just satisfaction. In the alternative, they invited the Court to make an award of just satisfaction on the basis of its case-law in similar cases and national economic circumstances.

103. The Court accepts that the applicant certainly suffered non-pecuniary damage – such as distress and frustration resulting from his protracted detention and from the prolonged impossibility of having contact with his family – which is not sufficiently compensated by the findings of violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 7,000 (seven thousand euros) under this head.

B. Costs and expenses

104. The applicant, who received legal aid from the Council of Europe in connection with the presentation of his case, did not seek to be reimbursed for costs and expenses incurred in the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *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 § 3 of the Convention (right to be brought promptly before a judge)
3. *Holds* that there has been a violation of Article 5 § 3 of the Convention (right to trial within reasonable time or release pending trial)
4. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
5. *Holds* that there has been a violation of Article 8 of the Convention
6. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,000 (seven thousand euros) in

respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 11 October 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President