CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF DUDEK v. POLAND

(Application no. 633/03)

JUDGMENT

STRASBOURG

4 May 2006

FINAL

13/09/2006

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 Dudek 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 K. TRAJA,
Mr S.PAVLOVSCHI,
Mr L.GARLICKI,
Ms L. MIJOVIĆ, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 4 April 2006,

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

PROCEDURE

1. The case originated in an application (no. 633/03) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Bolesław Dudek ("the applicant"), on 26 November 2002.

2. The Polish Government were represented by their Agent, Mr J. Wołąsiewicz, of the Ministry of Foreign Affairs.

3. On 19 April 2005 the President of the Fourth Section Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1959 and lives in Hamburg, Germany.

5. On 25 July 2001 the applicant was arrested by the police. On 26 July 2001 the Katowice District Court (*Sąd Rejonowy*) ordered that the applicant be remanded in custody in view of the reasonable suspicion that, acting in an organised gang, he had been involved in the traffic of human beings and narcotics, had committed robberies and had derived profits from prostitution. The court considered that, given the fact that the applicant had been living in Germany, there was a real risk that he might go into hiding.

In addition, it found that the case was complex as it concerned an organised criminal group and that, once released, the applicant might tamper with evidence or otherwise obstruct the proceedings.

6. The applicant appealed against the detention order. However, on 22 August 2001 the Katowice Regional Court (*Sąd Okręgowy*) dismissed the appeal.

7. On 18 October 2001 and 16 January 2002 the Bielsko-Biała Regional Court prolonged the applicant's detention. The court repeated grounds given previously: the reasonable suspicion that he had committed the offences, the severity of the anticipated sentence, the complexity of the case and the risk that the applicant might go into hiding as he had no permanent residence in Poland. His appeals against both decisions were dismissed.

8. On 18 February 2002 the applicant and his accomplices were indicted before the Bielsko-Biała Regional Court.

9. On 16 April 2002, the Bielsko-Biała Regional Court again prolonged the applicant's detention until 31 October 2002. It reiterated the grounds that had been stated in the previous decisions.

10. On 3 and 24 June 2002 the Bielsko-Biała Regional Court dismissed his applications for release reiterating the previously given grounds for detention.

11. On 29 August 2002 the Bielsko-Biała Regional Court held the first hearing. Subsequently, several hearings were held, and the court fined the witnesses who failed to appear. The applicant and his lawyer were present at those hearings.

12. Subsequently, the applicant's detention on remand was prolonged and his applications for release dismissed.

13. On 18 June 2003 the Katowice Court of Appeal (*Sąd Apelacyjny*), on the application of the Bielsko-Biała Regional Court, further prolonged the applicant's detention. The court repeated the grounds originally given and stressed the fact that the case concerned an organised criminal gang.

14. On 1 August 2003 the Bielsko-Biała Regional Court gave judgment with respect to the applicant and twelve co-accused. The applicant was convicted as charged and sentenced to four years' imprisonment. The applicant requested a reasoned judgment to be prepared to enable him to lodge an appeal.

15. On 30 January 2004 the applicant was released from detention.

16. On 16 December 2004 the Katowice Court of Appeal partly allowed his appeal. The applicant was acquitted of the charges of being a member of an organised criminal group. The appellate court further quashed and remitted the part of the Regional Court's judgment which concerned his conviction for helping in the illegal crossing of the Polish borders and in the trading in human beings. The court upheld the remaining part of the impugned judgment, which concerned the running by the applicant of a

night club and possession of cannabis, and sentenced the applicant to one year and two months' imprisonment.

17. The applicant submitted that due to a mistake of his lawyer, he did not lodge a cassation appeal against this judgment. The judgment is final.

18. The remaining part of the proceedings, which was remitted by the Katowice Court of Appeal, is pending.

II. RELEVANT DOMESTIC LAW

19. The Code of Criminal Procedure of 1997, which entered into force on 1 September 1998, defines detention on remand as one of the so-called "preventive measures" (*środki zapobiegawcze*). The other measures are bail (*poręczenie majątkowe*), police supervision (*dozór policji*), guarantee by a responsible person (*poręczenie osoby godnej zaufania*), guarantee by a social entity (*poręczenie społeczne*), temporary ban on engaging in a given activity (*zawieszenie oskarżonego w określonej działalności*) and prohibition to leave the country (*zakaz opuszczania kraju*).

Article 249 § 1 sets out the general grounds for imposition of the preventive measures. That provision reads:

> "Preventive measures may be imposed in order to ensure the proper conduct of proceedings and, exceptionally, also in order to prevent an accused's committing another, serious offence; they may be imposed only if evidence gathered shows a significant probability that an accused has committed an offence."

20. Article 258 lists grounds for detention on remand. It provides, in so far as relevant:

> "1. 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 his identity cannot be established or when he has no permanent abode [in Poland];
>
> (2) there is a justified fear that an accused will attempt to induce [witnesses or co-defendants] to give false testimony or to obstruct the proper course of proceedings by any other unlawful means;
>
> 2. If an accused has been charged with a serious offence or an offence for the commission of which he may be liable to a statutory maximum sentence of at least 8 years' imprisonment, or if a court of first instance has sentenced him to at least 3 years' imprisonment, the need to continue detention to ensure the proper conduct of proceedings may be based on the likelihood that a severe penalty will be imposed."

21. The Code sets out the margin of discretion as to the continuation of a specific preventive measure. Article 257 reads, in so far as relevant:

> "1. Detention on remand shall not be imposed if another preventive measure is sufficient."

Article 259, in its relevant part, reads:

"1. If there are no special reasons to the contrary, detention on remand shall be lifted, in particular if depriving an accused of his liberty would:

(1) seriously jeopardise his life or health; or

(2) entail excessively harsh consequences for the accused or his family."

22. The 1997 Code not only sets out maximum statutory time-limits for detention on remand but also, in Article 252 § 2, lays down that the relevant court – within those time-limits – must in each detention decision determine the exact time for which detention shall continue.

Article 263 sets out time-limits for detention. In the version applicable up to 20 July 2000 it provided:

"1. Imposing detention in the course of an investigation, the court shall determine its term for a period not exceeding 3 months.

2. If, due to the particular circumstances of the case, an investigation cannot be terminated within the term referred to in paragraph 1, the court of first instance competent to deal with the case may – if need be and on the application made by the [relevant] prosecutor – prolong detention for a period [or periods] which as a whole may not exceed 12 months.

3. The whole period of detention on remand until the date on which the first conviction at first instance is imposed may not exceed 2 years.

4. Only the Supreme Court may, on application made by the court before which the case is pending or, at the investigation stage, on application made by the Prosecutor General, prolong detention on remand for a further fixed period exceeding the periods referred to in paragraphs 2 and 3, when it is necessary in connection with a stay of the proceedings, a prolonged psychiatric observation of the accused, a prolonged preparation of an expert report, when evidence needs to be obtained in a particularly complex case or from abroad, when the accused has deliberately prolonged the proceedings, as well as on account of other significant obstacles that could not be overcome."

On 20 July 2000 paragraph 4 was amended and since then the competence to prolong detention beyond the time-limits set out in paragraphs 2 and 3 has been vested with the court of appeal within whose jurisdiction the offence in question has been committed.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

23. The Government submitted that the application should be rejected as being an abuse of the right of petition, within the meaning of Article 35 § 3

of the Convention, regard being had to offensive remarks made by the applicant against the Agent of the Government.

24. While the use of offensive language in proceedings before the Court is undoubtedly inappropriate, the Court considers that, except in extraordinary cases, an application may only be rejected as abusive if it was knowingly based on untrue facts (see the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1206, §§ 53-54; *I.S. v. Bulgaria* (dec.), no. 32438/96, 6 April 2000, unreported; *Aslan v. Turkey*, application no. 22497/93, Commission decision of 20 February 1995, Decisions and Reports (DR) 80-A, p. 138; and *Assenov and Others v. Bulgaria*, application no. 24760/94, Commission decision of 27 June 1996, DR 86-A, pp. 54, 68). However, on the basis of the material in its possession, the Court is unable to conclude that the applicant based his allegations on information which he knew to be untrue and does not find any evidence of bad faith on his part (*Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X and *Popov v. Moldova*, no. 74153/01, §§ 36-50, 18 January 2005).

25. The Government's preliminary objection is therefore dismissed.

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

26. The applicant complained that the length of his detention on remand had been unreasonable. He relied on Article 5 § 3 of the Convention, which reads as follows:

> "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."

27. The Government contested that argument.

A. Admissibility

28. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments before the Court

29. The applicant submitted that he had been kept in detention for an unjustified period of time due to the incompetence of the domestic court which automatically prolonged his detention and superficially examined his

application for release. The applicant maintained that after the hearings had started and he had testified, the reasons for keeping him in detention ceased to exist. He contested the argument that detention was necessary as there was a risk of his tampering with evidence or inducing witnesses. Nor was the fact that he had double nationality a valid reason for his lengthy detention on remand.

The applicant pointed to the fact that he had been detained for a longer period of time than the term of imprisonment to which he had been sentenced. This fact showed a lack of respect for individual liberty in Poland.

30. The Government considered that the applicant's pre-trial detention satisfied the requirements of Article 5 § 3. It was justified by "relevant" and "sufficient" grounds. These grounds were, in particular, the gravity of charges against the applicant as well as the risk that he might obstruct the course of the proceedings. The latter was particularly justified as the applicant had been charged for being a member of an organised criminal group.

The Government further argued that the domestic authorities showed due diligence, as required in cases against detained persons. Finally, the Government referred to the complexity of the case, directed against 13 co-accused.

2. The Court's assessment

(a) Principles established under the Court's case-law

31. Under the Court's case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. 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 (see, among other authorities, *W. v. Switzerland*, judgment of 26 January 1993, Series A no. 254-A, p. 15, § 30, and *Kudła v. Poland* [GC], no. 30210/96, § 110, ECHR 2000-XI).

32. 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 examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned 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 of the Convention.

33. 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. In such cases, the Court must 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 ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV, and *Jablonski v. Poland*, no. 33492/96, § 80, 21 December 2000).

(b) Application of the principles to the circumstances of the present case

34. The Court first notes that the applicant was detained on remand on 25 July 2001 and that the first-instance judgment in his case had been given on 1 August 2003. Consequently, the period to be taken into consideration lasted two years and eight days.

35. The Court observes that in the present case the authorities initially relied on the reasonable suspicion that the applicant had committed the offences with which he had been charged.

36. The domestic courts further relied on the need to secure the proper conduct of the proceedings, the risk that the applicant might flee to Germany and the risk that he might interfere with the conduct of the proceedings since he had been accused of being a member of an organised criminal group. With regard to the latter, the Court considers that such a generally formulated risk flowing from the nature of the alleged criminal activities of the applicant may possibly be accepted as the basis for his detention at the initial stages of the proceedings (*Górski v. Poland*, no. 28904/02, § 58, 4 October 2005) and in some circumstances also for subsequent prolongations of the detention. In the instant case, the Court considers that the authorities were faced with a difficult task of determining the facts and the degree of the alleged responsibility of each of the defendants, who had been charged with acting in an organised criminal group. In these circumstances, the Court also accepts that the need to obtain voluminous evidence from many sources, coupled with the fact that in the course of the investigation new suspects had been identified, constituted relevant and sufficient grounds for the applicant's detention during the time necessary to terminate the investigation, to draw up the bill of indictment and to hear evidence from the accused.

37. The Court further notes that the applicant had been charged with involvement in the traffic of human beings and narcotics and deriving profits from prostitution. In these circumstances, and taking into consideration the particular vulnerability of the victims, the Court considers

that the risk of pressure being brought to bear on witnesses or other co-accused must have been high, as found by the domestic courts. Moreover, the Court agrees that there existed a risk of flight given the fact that the applicant had double nationality and was domiciled both in Germany and Poland.

38. In addition, the authorities heavily relied on the severity of the anticipated sentence which could have exceeded 8 years of imprisonment. In this respect, the Court notes that the severity of the possible sentence is a relevant element in the assessment of the risk of absconding or re-offending. Nevertheless, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand (see *Ilijkov v. Bulgaria*, no. 33977/96, §§ 80-81, 26 July 2001). However, taking into account the particular circumstances of the instant case, the Court considers that the severity of the anticipated penalty taken in conjunction with the other grounds relied on by the authorities were "sufficient" and "relevant" to justify holding the applicant in detention for two years and eight days.

39. It therefore remains to be ascertained whether the national authorities displayed "special diligence" in the conduct of the proceedings. In this regard, the Court firstly observes that the criminal case at issue was a complex one. The Court takes note of the seriousness of the charges brought against the applicant and the number of other persons charged in the same proceedings. A large amount of evidence had to be examined in the course of the proceedings. Such complexity of the case undoubtedly prolonged its examination and contributed to the length of the applicant's detention on remand.

The Court further notes that no significant periods of inactivity occurred on the part of the prosecution authorities and the trial court. The Court observes that the investigations were completed by the Regional Prosecutor within a relatively short period of time and the trial court held hearings at regular intervals. For these reasons, it considers that the domestic authorities cannot be criticised for a failure to observe "special diligence" in the handling of the applicant's case.

There has therefore been no violation of Article 5 § 3 of the Convention.

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

40. The applicant complained that he did not have a "fair trial" and that he was innocent. He relied on Article 6 of the Convention.

However, pursuant to Article 35 § 1 of the Convention:

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

41. The Court notes that the criminal proceedings against the applicant, as regards some of the charges against him, are still pending, following the partial remittal of the case by the Katowice Court of Appeal on 16 December 2004. Accordingly, the applicant still can, and should, put the substance of the complaint before the domestic authorities and ask for appropriate relief.

As regards the part of the proceedings which ended with the above-mentioned Court of Appeal's judgment, the Court notes that the applicant submitted that he had not lodged a cassation appeal with the Supreme Court. Therefore, the Court considers that the applicant failed to exhaust the available domestic remedies.

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

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning the length of the pre-trial detention admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been no violation of Article 5 § 3 of the Convention.

Done in English, and notified in writing on 4 May 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise ELENS-PASSOS
Deputy 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 Pavlovschi is annexed to this judgment.

N.B.
F.E.P.

DISSENTING OPINION OF JUDGE PAVLOVSCHI

On 4 April 2006 the Fourth Section, having examined the case of Dudek against Poland, found no violation of Article 5 § 3 of the Convention.

With all my due respect to my fellow judges it is impossible for me to subscribe to this finding because, in my view, the existence of a violation in the case under consideration is self-evident.

In general lines, my arguments, which stem from the factual circumstances of the case and the Court's case-law, are the following.

1. The applicant had spent two years and eight days, in pre-trial detention but in the result of all these proceedings he was sentenced to one year and two months' imprisonment.[1] So, a simple mathematical exercise shows that the applicant spent in pre-trial detention a period of time that exceeds by 10 months the period provided by the sentence as a punishment for the crime committed by him.

It is impossible for me to agree that in such a situation when a pre-trial detention is longer than a punishment itself "...the domestic authorities cannot be criticised for a failure to observe 'special diligence' in the handling of the applicant's case..."[2]

2. Under the Court's case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. 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 (see, among other authorities, *W. v. Switzerland*, judgment of 26 January 1993, Series A no. 254-A, p. 15, § 30, and *Kudła v. Poland* [GC], no. 30210/96, § 110, ECHR 2000-XI)

As it follows from "The circumstances of the case" part of the judgment "...on the 26 July 2001 the Katowice District Court ordered that the applicant be remanded in custody in view of the reasonable suspicion that, acting in an organised group, he had been involved in the traffic of human beings and narcotics, had committed robberies and had derived profits from prostitution..."[3]

At the same time, it is worth mentioning, the applicant was convicted finally only of "running ...of a night club and possession of cannabis"[4] and not of "...acting in an organised group, [being] involved in the traffic of human beings and narcotics, [committing] robberies and [deriving] profits from prostitution...". This conviction has nothing to do with the initial so-called "reasonable suspicion" and poses the question whether "running of a

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[1] see the present judgment paragraphs 16 and 34
[2] ibid, paragraph 39
[3] ibid, paragraph 5
[4] ibid, paragraph 16

night club and possession of cannabis" is such a socially dangerous act as to require two years' pre-trial detention. I doubt it very much. On the other hand, if all the Europeans states took the same approach, I am afraid that the majority of night club owners or managers would spend years and years in custody.

So, taking into consideration the results of the examination of the applicant's case, which, in practical terms, did not confirm the initial suspicions and charges, my conclusion is that the reasons given by the national judicial authorities while prolonging the applicant's pre- trial detention in no way justify its whole length.

3. The reasons given for the prolongation of the applicant's pre-trial detention by the national judicial authorities creates one more difficulty for me.

As it follows from the judgment, on 18 October 2001 and 16 January 2002 the Bielsko- Biała Regional Court prolonged the applicant's detention. The court reiterated grounds given previously.[5]

On 16 April 2002, the same court again prolonged the applicant's detention. It reiterated the grounds that had been stated in the previous decision.[6]

On 3 and 24 June 2002 the Bielsko-Biała Regional Court dismissed the applicant's requests for release reiterating the previously given grounds for detention.[7]

On 18 June 2003 the Katowice Court of Appeal further prolonged the applicant's detention, repeating the grounds given originally.[8]

In his arguments before the Court the applicant submitted that the domestic judicial authorities had "... automatically prolonged his detention and superficially examined his application for release..."[9]

I find this argument very persuasive and tend to agree with it, because it is fully based on the evidence shown above. Indeed, national judicial authorities prolonging the applicant's detention and rejecting his requests for release each and every time had been relying on the same grounds.

Unfortunately, the majority ruling on this case simply avoided providing any answer to the applicant's argument.

According to the Court's case-law, a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify the continued detention (see *Yağcı and Sargın v. Turkey*, judgment of 8 June 1995, Series A no. 319-A, § 52).

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[5] ibid, paragraph 7
[6] ibid, paragraph 9
[7] ibid, paragraph 10
[8] ibid, paragraph 13
[9] ibid, paragraph 29

Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Belchev v. Bulgaria*, no. 39270/98, § 82, 8 April 2004).

A further function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice (*see Suominen v. Finland*, no. 37801/97, § 37, 1 July 2003).

Arguments for and against release must not be "general and abstract" (see *Clooth v. Belgium*, judgment of 12 December 1991, Series A no. 225, § 44).

The Convention case-law has developed four basic acceptable reasons for detaining a person before judgment when that person is suspected of having committed an offence: the risk that the accused would fail to appear for trial (see *Stögmüller v. Austria*, judgment of 10 November 1969, Series A no. 9, § 15); the risk that the accused, if released, would take action to prejudice the administration of justice (see *Wemhoff*, cited above, § 14) or commit further offences (see *Matznetter v. Austria*, judgment of 10 November 1969, Series A no. 10, § 9) or cause public disorder (see *Letellier v. France*, judgment of 26 June 1991, Series A no. 207, § 51).

The danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial (*Yağcı and Sargın v. Turkey*, cited above, § 52). The risk of absconding has to be assessed in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted. The expectation of heavy sentence and the weight of evidence may be relevant but is not as such decisive and the possibility of obtaining guarantees may have to be used to offset any risk (*Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, § 10).

The danger of the accused's hindering the proper conduct of the proceedings cannot be relied upon *in abstracto*, it has to be supported by factual evidence (*Trzaska v. Poland*, no. 25792/94, § 65, 11 July 2000).

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 examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned

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 of the Convention.

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. In such cases, the Court must 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 ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV, and *Jablonski v. Poland*, no. 33492/96, § 80, 21 December 2000).

I accept that the suspicion that the applicant had committed the serious offences with which he had been charged may initially have justified his detention. Yet, it could not constitute a "relevant and sufficient" ground for his being held in custody for the entire relevant period.

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 Article lays down not only the right to "trial within a reasonable time or release pending trial" but also provides that "release may be conditioned by guarantees to appear for trial" (see, *mutatis mutandis*, the Neumeister v. Austria judgment of 27 June 1968, Series A no. 8, p. 3, § 3).

That provision does not give the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release – even subject to guarantees. Until conviction he must be presumed innocent, and the purpose of Article 5 § 3 is essentially to require his provisional release once his continuing detention ceases to be reasonable (see the Neumeister judgment cited above, § 4).

Turning to the circumstances of the present case, no consideration appears to have been given to the possibility of imposing on him other "preventive measures" – such as bail or police supervision – expressly foreseen by Polish law to secure the proper conduct of the criminal proceedings.

Repeating that the applicant should be kept in detention in order to ensure the proper conduct of the trial, the relevant courts did not take into account any other guarantees that he would appear for trial. They did not mention why those alternative measures would not have ensured his presence before the court or why, had the applicant been released, his trial would not have followed its proper course. Nor did they point to any evidence indicating that there was a risk of his absconding, going into hiding, or otherwise evading justice.

In that context, and bearing in mind the final charges on which the applicant was convicted, it became more and more obvious that keeping him

in detention no longer served the purpose of bringing him to "trial within a reasonable time".

In these circumstances, I am of the opinion that the applicant's prolonged detention could not be considered "necessary" from the point of view of ensuring the due course of the proceedings.[10]

I consider that the reasons relied on by the courts in their decisions were not sufficient to justify the applicant's being held in custody for the period of two years and eight days.

There was therefore in my view a violation of Article 5 § 3 of the Convention.

Lastly, in the judgment it is stated that "...the Court considers that the authorities were faced with a difficult task of determining the facts and the degree of alleged responsibility of each of the defendants, who had been charged with acting in an organised criminal group. In these circumstances, the Court also accepts that the need to obtain voluminous evidence from many sources, coupled with the fact that in the course of the investigation new suspects had been identified, constituted relevant and sufficient grounds for the applicant's detention during the time necessary to terminate the investigation, to draw the bill of indictment and to hear evidence from the accused..."[11]

I am really sorry to have to point out that neither of these arguments were relied on by the national courts while prolonging the applicant's detention, at least they are not reflected in paragraphs 5 to 13 of the judgment. And, if so, it is very difficult to me to accept that it is open to our Court - in justifying the applicant's detention - to rely on reasoning other than that used by the national courts. My understanding is that when judging the cases before us, we should rather assess whether the reasons given by the national courts were "relevant" and "sufficient" and not determine whether, in theory, such reasons could have been adduced.

This is where I respectfully disagree with the majority.

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[10]for all the above- mentioned references see the judgment in the case of *Jablonski v. Poland*, no. 33492/96, paragraphs 64-85

[11] see the present judgment, paragraph 36