



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

FOURTH SECTION

CASE OF KUSYK v. POLAND

(Application no. 7347/02)

JUDGMENT

STRASBOURG

24 October 2006

FINAL

24/01/2007

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 Kusiak 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 T.L. EARLY, *Section Registrar*,

Having deliberated in private on 8 December 2005 and 3 October 2006,

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

PROCEDURE

1. The case originated in an application (no. 7347/02) 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 Dariusz Kusiak ("the applicant"), on 7 February 2002.

2. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. On 19 May 2005 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the length of pre-trial detention to the Government. Under the provisions of Article 29 § 3 of the Convention, it 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 1964 and lives in Zawada, Poland.

5. The applicant was arrested by the police on 24 June 1999. On the following day the Lubartów District Court (*Sąd Rejonowy*) ordered his detention on remand for a period of three months on suspicion of armed robbery. It took into account the nature of the offence and the strong likelihood that the applicant would be given a heavy sentence. In addition, it

had regard to the fact that the applicant had been previously convicted of a violent crime.

6. On 14 September 1999 the Lublin Regional Court (*Sąd Okręgowy*) prolonged the applicant's detention until 23 December 1999, having regard to the strong suspicion that he had committed the offence in question. It also found that the applicant's detention was justified, given the gravity of the charge and the severity of the likely sentence. The court further held that the investigation could not be concluded within the period of three months because the applicant had to undergo a psychiatric examination.

7. The applicant underwent a psychiatric examination between 24 September and 1 October 1999. On 18 October 1999 a psychologist and two psychiatrists submitted their report. According to their findings, the applicant was able to understand his acts at the time of the commission of the alleged offence and could participate in the trial.

8. On 29 October 1999 the applicant was additionally charged with theft.

9. On 6 December 1999 the Lubartów District Prosecutor (*Prokurator Rejonowy*) terminated the investigation. On 8 December 1999 the prosecution filed a bill of indictment with the Regional Court. The applicant and his brother were charged with armed robbery and inflicting minor bodily harm. The applicant was additionally charged with theft. The bill of indictment specified that the applicant was subject to the rules on recidivism as in 1989 he had been convicted of assault with intent to rob and inflicting grievous bodily harm and had been sentenced to four years' imprisonment. In addition, in 1994 the applicant had been convicted of manslaughter and sentenced to eight years' imprisonment.

10. On 21 December 1999 the Regional Court ordered that the applicant be kept in custody until 30 June 2000. It observed that the evidence obtained in the proceedings indicated that there was a strong likelihood that the offences in question had been committed by the applicant. It further considered that continuation of his detention was necessary in order to secure the proper conduct of the proceedings, given the nature of the offence and the severity of the likely sentence in respect of the charge of armed robbery.

11. The applicant's detention was subsequently prolonged by the Regional Court on 16 June 2000 (until 1 September 2000) and on 30 August 2000 (until 31 December 2000). The court relied on the same grounds as invoked in its earlier decision.

12. The Regional Court held 7 hearings (6 April, 17 May, 16 June, 20 July, 14 September, 16 October and 16 November 2000). On 23 November 2000 it gave judgment. The applicant was convicted as charged and sentenced to 5 years' imprisonment. The applicant and the prosecution appealed against the Regional Court's judgment.

13. On 28 December 2000 the Regional Court ordered that the applicant be kept in custody until 28 March 2001. On 14 March 2001 the Lublin Court of Appeal (*Sąd Apelacyjny*) prolonged his detention until 29 June 2001.

14. On 5 April 2001 the Lublin Court of Appeal quashed the first-instance judgment and ordered a retrial.

15. It appears that in the course of the retrial the Regional Court ordered that the applicant be examined by a psychiatrist and psychologist. According to their report, at the relevant time the applicant was not suffering from diminished responsibility for his acts, although he was a mentally handicapped person with an unsound personality.

16. The Lublin Regional Court several times prolonged the applicant's detention. The relevant decisions were given on 12 June 2001 (prolonging his detention until 31 December 2001), on 11 December 2001 (ordering his continued detention until 30 April 2002), on 20 March 2002 (extending his detention until 20 June 2002), on 18 June 2002 (prolonging that period until 18 September 2002) and on 17 September 2002 (ordering his continued detention until 17 December 2002). In all those decisions, the Regional Court relied on the reasonable suspicion that the offences in question had been committed by the applicant, having regard to the evidence obtained in the proceedings. It further found that his continued detention was necessary in order to secure the proper conduct of the proceedings, given the nature of the charges and the severity of the sentence to which the applicant was liable. In the latter respect, the court found that the offence of armed robbery with which the applicant had been charged constituted a serious social danger and that the applicant was a recidivist offender.

17. The applicant's numerous requests for release and appeals against prolongation of his detention were to no avail. The courts, having regard to the relevant medical and court officers' reports, did not find any reason which would justify the applicant's release on the grounds specified in Article 259 § 1 of the Code of Criminal Procedure.

18. The Regional Court held 7 hearings (8 October and 28 November 2001, and 24 January, 27 February, 20 March, 29 May and 2 October 2002). It gave judgment on 8 October 2002. The applicant was convicted of armed robbery and theft and sentenced to 7 years' imprisonment. He appealed against that judgment.

19. On 27 May 2003 the Lublin Court of Appeal gave judgment. It acquitted the applicant of theft and upheld the remainder of the Regional Court's judgment. The applicant lodged a cassation appeal against the Court of Appeal's judgment. On 21 July 2004 the Supreme Court (*Sąd Najwyższy*) dismissed his cassation appeal as being manifestly ill-founded.

II. RELEVANT DOMESTIC LAW

A. Detention on remand

20. 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 on leaving the country (*zakaz opuszczania kraju*).

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

“1. 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 the evidence gathered shows a significant probability that an accused has committed an offence.”

22. 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 reasonable risk 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.”

23. The Code sets out the conditions governing 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.”

24. 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. When 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 an 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 of the first conviction at first instance 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, for the purpose of a prolonged psychiatric observation of the accused or a prolonged preparation of an expert report, when evidence needs to be obtained in a particularly complex case or from abroad or when the accused has deliberately prolonged the proceedings, as well as on account of other significant obstacles that could not be overcome.”

25. 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 in the court of appeal within whose jurisdiction the offence in question has been committed. In addition, new paragraph 5 was added. It provides:

“ A decision of the Court of Appeal taken pursuant to paragraph 4 may be appealed against to the Court of Appeal sitting in a panel of three judges.”

B. The rules on recidivism

Article 64 §§ 1 and 2 of the Criminal Code of 1997 included in Chapter VII of the Criminal Code of 1997 provide for special rules relating to the sentencing of habitual offenders. The finding that a person is subject to the rules on recidivism within the meaning of Article 64 of the Criminal Code, inevitably results in the sentence of imprisonment to which the accused was liable being increased.

THE LAW

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

26. The applicant complained that the length of his detention on remand had been excessive. 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 the application 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. *Period to be taken into consideration*

29. The Court notes that the applicant was remanded in custody on 24 June 1999. On 23 November 2000 the Lublin Regional Court convicted him of armed robbery and theft. As from that date he was detained “after conviction by a competent court”, within the meaning of Article 5 § 1 (a) and therefore that period of his detention falls outside the scope of Article 5 § 3 (cf. *Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI). On 5 April 2001 the Court of Appeal quashed the applicant’s conviction. Following that date his detention was covered by Article 5 § 3. It continued until 8 October 2002, when the trial court again convicted the applicant. Consequently, the period to be taken into consideration lasted 2 years and just over 11 months.

2. *The reasonableness of the length of detention*

(a) **The parties’ arguments**

30. The Government argued that the length of the applicant’s detention had not been excessive. They submitted that the courts had given relevant and sufficient reasons for holding the applicant in custody for the entire

period in question and had diligently supervised the need to keep him in custody. The Government maintained that the applicant's detention had been justified by the existence of a serious suspicion that he had committed the offences in question and the likelihood of a severe penalty being imposed on him. Furthermore, when examining the applicant's requests for release, the courts had carefully considered his family situation.

31. The Government further considered that the proceedings against the applicant could be regarded as complex on account of the volume of evidence obtained in the investigation and subsequently heard at the trial. In their opinion, the complexity of the case and the fact that the case had been heard twice by the trial court and the Court of Appeal constituted exceptional circumstances which in themselves considerably contributed to the length of the applicant's detention. Lastly, they argued that the authorities had displayed the requisite diligence in the present case.

32. The applicant submitted that the length of his detention had been unreasonable.

(b) The Court's assessment

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

33. 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).

34. 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, for example, *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV, and *Kudła*, cited above, § 110).

35. The persistence of a 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. The complexity and special characteristics of the investigation are factors to be considered in this respect (see, for example, *Scott v. Spain*, judgment of 18 December 1996, *Reports* 1996-VI, pp. 2399-2400, § 74, and *I.A. v. France*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2978, § 102).

(ii) *Application of the principles to the circumstances of the present case*

36. The Court observes that the judicial authorities relied, in addition to the reasonable suspicion against the applicant, on the need to secure the proper conduct of the proceedings. In this respect, they referred to the severity of the penalty to which the applicant was liable and the serious nature of the charges against him. Furthermore, the judicial authorities additionally relied on the fact that the applicant had been subject to the rules on recidivism (see paragraphs 5, 6, 9, 10 and 16 above). In addition, the Government submitted that the complexity of the case and the fact that the case had been heard twice by the trial court and the Court of Appeal justified the length of the applicant’s detention (see paragraph 31 above).

37. The Court accepts that the reasonable suspicion that the applicant had committed the offences with which he had been charged may have warranted his detention at the early stage of the proceedings. Moreover, having regard to the relative complexity of the case and the need to obtain a considerable amount of evidence, the Court is prepared to accept that there existed relevant and sufficient grounds for the applicant’s detention during the time needed to terminate the investigation, to draw up the bill of indictment and to hear evidence from the accused.

38. In respect of the subsequent period, the Court notes that the authorities relied on the likelihood that the applicant would be given a heavy sentence, given the nature of the charges against him. They also had regard to the fact that the applicant was a habitual offender and that the offence of armed robbery with which he had been charged constituted a serious social danger. In this respect, the Court notes that the severity of the possible sentence and the applicant’s criminal record are relevant elements in the assessment of the risk of absconding or re-offending. 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 likely penalty taken in conjunction with the fact that the applicant was a recidivist offender were “sufficient” and “relevant” to justify holding the applicant in detention for the entire pertinent period. In addition, the Court attaches certain weight to the fact that the applicant’s detention under consideration consisted not of one uninterrupted period, but of two separate periods, namely first one up to his first conviction and the second one following the quashing of the trial court’s judgment by the Court of Appeal (see paragraph 29 above).

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 notes that no significant periods of inactivity occurred on the part of the prosecution authorities and the trial court. The Court observes that the investigation was completed by the District Prosecutor within a relatively short period of time and the trial court held hearings at regular intervals. Furthermore, the Court notes that the criminal case at issue was a relatively complex one on account of the seriousness and number of charges against the applicant. A significant amount of evidence had to be examined in the course of the proceedings. In addition, the Court observes that the authorities examined the applicant’s numerous applications for release on health and family grounds, having obtained relevant medical or court officers’ reports. For these reasons, the Court considers that the domestic authorities handled the applicant’s case with relative expedition.

40. In view of the foregoing, the Court concludes that there has been no violation of Article 5 § 3 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the remainder of the application admissible;
2. *Holds* by five votes to two that there has been no violation of Article 5 § 3 of the Convention.

Done in English, and notified in writing on 24 October 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President

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

N.B.
T.L.E.

JOINT DISSENTING OPINION OF JUDGES BRATZA AND CASADEVALL

We are unable to agree with the view of the majority of the Chamber that there was no violation of Article 5 § 3 in the present case.

The applicant was detained on remand for periods totalling nearly 3 years. Particularly strong reasons were in our view called for to justify such a prolonged period of pre-trial detention. As noted in the judgment, the judicial authorities in Poland relied on a number of features of the case as justifying the continued detention of the applicant – the strong suspicion against the applicant, the seriousness of the charge against him, the severity of the penalty which he faced and the fact that he was subject to the rules on recidivism. In addition, the respondent Government placed emphasis on the complexity of the case and the fact that it had been before the trial court and the Court of Appeal on two occasions. In our view, none of these reasons, whether considered alone or in combination, are sufficient to justify a total period of detention of such length.

While we accept that the reasonable suspicion against the applicant may have warranted his detention at the early stage of the proceedings against him, it is well-established that, after a certain period of time, the persistence of a reasonable suspicion against an accused no longer suffices and that any justification for his continued detention must be founded on other “relevant” and “sufficient” grounds (see, for example, *Letellier v. France*, judgment of 26 June 1991, Series A, no. 207, p. 18, § 35).

The severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending. However, the degree of that risk cannot be gauged solely on the basis of the severity of the offence and anticipated sentence (see *Muller v. France*, judgment of 17 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 388, § 43). Moreover, as is noted in the judgment, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand. While the accusations against the applicant were of sufficient seriousness that the authorities could initially justifiably have considered that such a risk was established, we are unable to share the view of the majority that the gravity of the charges or the severity of the penalty to which the applicant was exposed served to justify his continued prolonged detention on remand.

The same applies to the reliance on the fact that the applicant was a recidivist and was subject to the rules on recidivism. The character of the accused and his previous behaviour are undoubtedly relevant factors for the domestic courts when they assess the risk of the applicant’s absconding or obstructing the proceedings (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 60, ECHR 2003-IX). Nevertheless, in the present case, even if we could accept that the fact that the applicant was a habitual offender gave

rise to the risk that he might abscond, this could not in our view of itself justify the applicant's detention throughout the entire period in question.

In this regard we recall that, when deciding whether a person should be released or detained, the judicial authorities are obliged under Article 5 § 3 to consider alternative measures of ensuring his appearance at trial. That provision not only proclaims 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 *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, p. 36, § 3; and *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000). In the present case it is notable that, during the entire period the applicant was kept in detention, and despite his applications for release, the authorities never appear to have envisaged any other guarantees for his appearance at trial. Nor do they appear to have given consideration to the possibility of imposing on him any other "preventive measures" expressly foreseen by Polish law to secure the proper conduct of criminal proceedings (see paragraph 20 of the judgment).

It is true that, as emphasised by the majority, the proceedings against the applicant were of a certain complexity and that two separate periods of detention on remand were involved, the applicant's original conviction having been quashed on appeal. However, neither factor is in our view of decisive importance. What is important is that, whether continuously or not, the applicant remained in detention as an unconvicted person for an exceptionally long period, for which no sufficiently strong grounds of justification have been advanced.