CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF DUDA v. POLAND

(Application no. 67016/01)

JUDGMENT

STRASBOURG

19 December 2006

FINAL

19/03/2007

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 Duda v. Poland,

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

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 28 November 2006,

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

PROCEDURE

1. The case originated in an application (no. 67016/01) 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 Jerzy Duda ("the applicant"), on 26 April 2000.

2. The applicant, who had been granted legal aid, was represented by Mr W. Hermeliński, a lawyer practising in Warszawa. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. On 13 September 2005 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the unreasonable length of the applicant's detention on remand and lack of equality of arms in the proceedings relating to the prolongation of his 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 1959 and lives in Olsztyn.

5. On 5 June 1997 the police started an investigation into the murder of a certain Z.K. It appears that between June and July 1997 the applicant had

been arrested in connection with this investigation but was released under police supervision.

6. On 7 January 1998 the Biskupiec District Court (*Sąd Rejonowy*) decided to detain the applicant on remand and subsequently an arrest warrant was issued against the applicant.

7. On 12 February 1998 the applicant was arrested by the police on suspicion of having killed Mr Z.K. with whom he had been drinking alcohol on the night of the crime.

8. On 19 February 1998 the Biskupiec District Court, at a hearing at which the applicant had been present, decided to detain him on remand in view of the reasonable suspicion that he had committed the homicide. The court further found that the applicant, who had been previously placed under police supervision, had violated the conditions of this preventive measure by leaving his place of residence without notification. Therefore, there was a real risk that he might abscond.

9. On 26 February 1998 the applicant was indicted before the Olsztyn Regional Court (*Sąd Wojewódzki*).

10. On 6 March 1998 the Olsztyn Regional Court dismissed the applicant's appeal against the decision ordering his pre-trial detention. The court further prolonged the applicant's detention relying in particular on the fact that the applicant had previously been in hiding.

11. In November and December 1998 the trial court held hearings. The court ordered that an expert opinion be prepared. Subsequently, the applicant was ordered to undergo psychiatric observation in order to prepare the expert opinion.

12. On 18 December 1998 and 14 May 1999 the Olsztyn Regional Court prolonged the applicant's detention finding that there was a strong suspicion that he had committed the offence in question. The court further noted that the fact that the applicant had been in hiding in the past justified the need to keep him in custody in order to secure the proper conduct of the proceedings. As regards the session of 14 May 1999, on 12 May 1999 the court informed the prosecutor and the applicant's lawyer that it had been scheduled for 14 May. Nevertheless, the applicant's lawyer failed to appear at the session.

13. In October 1999 the trial court held hearings. Subsequently, in November 1999 the court allowed the applicant's motion to obtain evidence by means of a DNA test.

14. Afterwards the applicant's pre-trial detention was prolonged on 28 October 1999. The applicant and his lawyer were absent although it appears from the court order given on 27 October 1999 that the lawyer had been notified about the session. The trial court established that the criminal proceedings against the applicant were pending and that most probably they would not finish before the end of 1999. The court then added:

> "The Regional Court cannot find any reason for [releasing the applicant from custody]."

15. At the hearing held on 9 November 1999, at which both the applicant and his lawyer were present, the court further prolonged his pre-trial detention.

16. Subsequently, as the length of the applicant's detention reached the statutory time-limit of 2 years as laid down in Article 263 § 3 of the Code of Criminal Procedure (*Kodeks postępowania karnego*) the Regional Court made applications to the Supreme Court (*Sąd Najwyższy*) asking for the applicant's detention to be prolonged beyond that term. On 8 February 2000 the Supreme Court granted the request.

> "The prolongation of the pre-trial detention is justified as a delay was caused by allowing evidence to be obtained from the DNA test that was very important for the case. However, the detention should not be prolonged without justification. Therefore, the Supreme Court finds that it is possible to terminate the proceedings before 31 August 2000."

It appears from the minutes of the session that the applicant's lawyer was absent but had been informed about it by telephone. The applicant appealed against this decision submitting, *inter alia*, that in 1997 he had been living in an institution for the homeless. He informed the local police about this and he was unaware about the arrest warrant issued against him. The appeal was rejected on 22 May 2000.

17. The applicant's application for release was dismissed on 12 May 2000 by the Olsztyn Regional Court.

18. The trial court held hearings on 20 June and 6 July 2000. On the latter date the Olsztyn Regional Court gave judgment. The court convicted the applicant and sentenced him to twelve years' imprisonment.

19. On 16 November 2000 the applicant lodged an appeal against the judgment.

20. The applicant's request to lift the detention order was dismissed on 19 December 2000. On 20 December 2000 and March 2001 the Warsaw Court of Appeal further prolonged the applicant's detention. His appeals against those decisions were dismissed on 30 January and 20 April 2001 respectively.

21. On 19 June 2001 the Warsaw Court of Appeal partly amended the impugned judgment. The applicant did not lodge a cassation appeal with the Supreme Court and the judgment became final.

II. RELEVANT DOMESTIC LAW

22. 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*).

Article 249 § 5 provides that the lawyer of a detained person should be informed of the date and time of court sessions at which a decision is to be taken concerning prolongation of detention on remand.

23. A more detailed rendition of the relevant domestic law provisions is set out in the Court's judgment in *Celejewski v. Poland*, no. 17584/04, §§ 22 and 23, 4 May 2006.

THE LAW

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

24. 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."

25. The Government contested that argument.

A. Admissibility

26. The Court firstly notes that the Government raised a preliminary objection that the applicant failed to exhaust the remedies provided for by Polish law as regards his complaint under Article 5 § 3 of the Convention in that he did not appeal against all the decisions prolonging his detention, particularly those issued between 6 March 1998 and 9 November 1999.

27. The applicant contested this argument and submitted that he had appealed against the majority of the decisions prolonging his detention on remand. He did not appeal against some of them, given that his other appeals had been unsuccessful.

28. The Court reiterates that it is well established in its case-law that an applicant must make normal use of those domestic remedies which are likely to be effective and sufficient. When a remedy has been attempted, use of another remedy which has essentially the same objective is not required (see *Yaşa v. Turkey* judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, § 71).

29. In the present case the applicant lodged appeals against some of the decisions prolonging his detention, including the decision taken in the final stage of the proceedings in 2000, when the length of the detention had reached its most critical point. He also lodged requests for the detention order to be lifted or for a more lenient preventive measure to be imposed,

and appealed against some of the rejections of his requests. The Court considers that the purpose of the remedies used by the applicant was to obtain a review of his detention pending trial. In the circumstances of the case these remedies constituted adequate and effective remedies within the meaning of Article 35 of the Convention as their aim was to obtain his release.

30. The Court further notes that the arguments raised by the Government are similar to those already examined and rejected in a previous case against Poland (see *Grzeszczuk v. Poland,* no. 23029/93, Commission decision of 10 September 1997) and that the Government have not submitted any new circumstances which would lead the Court to depart from that finding.

31. It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies. The Court further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments before the Court

32. The applicant submitted that he had been detained for an unjustifiably long period and that with the passage of time the authorities had failed to advance any new ground for prolonging the most serous preventive measure against him. The applicant also disagreed with the Government's argument that he had violated the terms of his release in 1997 and submitted that, according to those terms, he was not prevented from absenting himself from his place of residence. He also argued that the authorities had failed to consider the imposition of other preventive measures like bail or police supervision, despite being obliged to do so by Polish law and the Convention.

33. The Government considered that the applicant's pre-trial detention satisfied the requirements of Article 5 § 3. They submitted that his pre-trial detention was duly justified and that during the entire period the authorities had given relevant and sufficient reasons for prolonging it. The Government further submitted that the domestic courts acted diligently and speedily.

2. The Court's assessment

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

34. 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)

35. The presumption is in favour of release. As established in *Neumeister v. Austria* (judgment of 27 June 1968, Series A no. 8, p. 37, § 4), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable (see *McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006-...).

36. 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 established 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 (see *McKay,* cited above, § 43).

37. 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. 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

38. The Court firstly notes that the applicant was detained on remand on 12 February 1998 and that the first-instance judgment in his case was given on 6 July 2000. Consequently, the period to be taken into consideration lasted 2 years, 4 months and 23 days.

39. The Court observes that in the present case the authorities relied on the reasonable suspicion that the applicant had committed the offence with which he had been charged, on the severity of the sentence that might be

imposed and on the fact that after his detention in 1997 he went into hiding. They repeated those grounds in all their decisions. The authorities failed to advance any other justifications to prolong the applicant's detention.

40. The Court accepts that the suspicion against the applicant of having committed the offences and the need to secure the proper conduct of the proceedings might initially justify his detention. However, with the passage of time, these grounds became less relevant and cannot justify the entire period of 2 years and almost 5 months during which the most serious preventive measure against the applicant had been imposed (see *Malik v. Poland*, no. 57477/00, § 45, 4 April 2006).

41. As regards the risk of tampering with evidence or going into hiding, the Court observes that throughout the entire relevant period the judicial authorities based their findings on the fact that the applicant, shortly before his arrest, had changed his place of residence when he had been released under police supervision. The Court agrees that, assuming that the applicant had violated the conditions of his release, this factor justified keeping him in custody in the initial stages of the proceedings. However, the Court considers that that ground gradually lost its force and relevance as the proceedings progressed. In particular, given the absence of any further attempt on the part of the applicant to obstruct the proceedings, it is difficult to accept that this single incident could justify the conclusion that the risk of his tampering with evidence or going into hiding persisted during the entire period that he spent in custody (see *Harazin v. Poland*, no. 38227/02, § 42, 10 January 2006).

42. Moreover, the authorities relied heavily on the likelihood that a heavy sentence would be imposed on the applicant given the serious nature of the offences at issue. In this respect, the Court agrees that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending. However, 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).

43. The Court observes further that the applicant was detained on charges of homicide. The applicant acted without accomplices. It does not appear therefore that his case presented particular difficulties for the investigation authorities and for the courts to determine the facts and mount a case against the perpetrator as would undoubtedly have been the case had the proceedings concerned organised crime (see *Celejewski v. Poland*, no. 17584/04, § 37, 4 May 2006; *Dudek v. Poland*, no. 633/03, § 36, 4 May 2006).

44. The Court also notes that there is no specific indication that during the entire period in question the authorities envisaged the possibility of imposing other preventive measures on the applicant, such as bail or police supervision.

In this context the Court would emphasise that "other preventive measures" are expressly foreseen by Polish law to secure the proper conduct of criminal proceedings and that under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures for ensuring his appearance at the 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 *Jablonski,* cited above, § 83).

45. In the circumstances, the Court concludes that the grounds given by the domestic authorities were not "relevant" and "sufficient" to justify the applicant's being kept in detention for almost 2 years and 5 months.

There has therefore been a violation of Article 5 § 3 of the Convention.

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

46. The applicant complained about the procedure relating to the prolongation of his pre-trial detention, in particular that he and his lawyer had not attended the sessions at which his detention was prolonged. The Court will examine this complaint under Article 5 § 4 of the Convention, which reads as follows:

> "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."

47. The Government submitted that according to Article 249 § 1 of the Code of Criminal Procedure, the lawyer of the accused was notified of the court's sessions at which detention on remand was prolonged and was entitled to take part in them. The Government maintained that the applicant's lawyers were summoned to those sessions, although they were absent from some of them. The Government submitted that, taking into consideration all the proceedings devoted to the review of the lawfulness of the applicant's pre-trial detention, the principles guaranteed in Article 5 § 4 of the Convention had been respected in the present case.

48. The Court reiterates the following principles which emerge from the Court's case law on Article 5 § 4, in so far as relevant in the present case:

(a) Article 5 § 4 of the Convention entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty (see, among many others, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 34-35, § 65).

(b) Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under

Article 6 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (see, for instance, *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3302, § 162, and *Włoch v. Poland,* no. 27785/95, § 125, ECHR 2000-XI, both with reference to *Megyeri v. Germany*, judgment of 12 May 1992, Series A no. 237-A, p. 11, § 22).

(c) The proceedings must be adversarial and must always ensure "equality of arms" between the parties. In the case of a person whose detention falls within the ambit of Article 5 § 1(c) a hearing is required (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II; *Assenov and Others*, cited above, § 162, with references to *Schiesser v. Switzerland*, judgment of 4 December 1979, Series A no. 34, p. 13, §§ 30-31; *Sanchez-Reisse v. Switzerland*, judgment of 21 October 1986, Series A no. 107, p. 19, § 51; and *Kampanis v. Greece*, judgment of 13 July 1995, Series A no. 318-B, p. 45, § 47).

(d) Furthermore, Article 5 § 4 requires that a person detained on remand be able to take proceedings at reasonable intervals to challenge the lawfulness of his detention (see *Assenov and Others,* cited above, p. 3302, § 162, with a reference to *Bezicheri v. Italy*, judgment of 25 October 1989, Series A no. 164, pp. 10-11, §§ 20-21).

49. Turning to the circumstances of the instant case, the Court firstly notes that it cannot examine events complained of by the applicant which took place before 26 October 1999, that is more than six months before the date on which this complaint was submitted to the Court.

50. The procedure for the prolongation of the applicant's pre-trial detention during the period under consideration was based on Article 249 § 5 of the Code of Criminal Procedure which requires the domestic courts to inform the lawyer of a detained person of the date and time of court sessions at which a decision was to be taken concerning prolongation of detention on remand, or an appeal against a decision to impose or to prolong detention on remand was to be considered. It was open to the lawyer to attend such sessions.

51. The Court observes that on one occasion the decision to prolong the applicant's detention was given at a public hearing at which the applicant was present and was legally represented. He was therefore able to support in person his applications for release.

As regards the remaining two sessions at which his detention was prolonged, the Court notes that from the evidence submitted by the Government it appears that the domestic court had summoned the applicant's lawyer to the court sessions and that she had failed to appear. The applicant's assessment that the summons might not have reached the lawyer on time has not been substantiated. In this connection the Court reiterates that in cases where characteristics pertaining to the applicant's

personality and level of maturity and reliability are of importance in deciding on his dangerousness, Article 5 § 4 requires an oral hearing in the context of an adversarial procedure involving legal representation (see *Waite v. the United Kingdom*, no. 53236/99, § 59, 10 December 2002). The Court considers, however, that in the present case the question of the assessment of the applicant's character or mental state did not arise. His personal attendance at all of the sessions at which his detention on remand had been prolonged was therefore not required, and the presence of his lawyer would have ensured respect for equality of arms in those proceedings.

52. In view of the above, the Court is of the opinion that the proceedings in which the prolongation of his detention was examined satisfied the requirements of Article 5 § 4 (see *Telecki v. Poland*, (dec.), no. 56552/00, 3 July 2003 and *Celejewski v. Poland*, no. 17584/04, § 47, 4 May 2006).

53. It follows that this complaint must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

55. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

56. The Government considered this claim exorbitant.

57. The Court awards the applicant EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

58. The applicant, who was represented by a lawyer, also claimed EUR 2,000 for the costs and expenses incurred before the Court. This included 20 hours' work at an hourly rate of EUR 100.

59. The Government considered this amount excessive.

60. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, in the light of the applicant's

specification of the costs and expenses incurred in the proceedings before the Court, he should be awarded the amount claimed in full. Accordingly, the Court awards the applicant EUR 2,000 for his costs and expenses together with any value-added tax that may be chargeable, less EUR 850 received by way of legal aid from the Council of Europe, which makes a total of EUR 1,150.

C. Default interest

61. 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. *Declares* the complaint concerning the unreasonable length of the applicant's pre-trial detention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *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 1,000 (one thousand euros) in respect of non-pecuniary damage, and EUR 1,150 (one thousand one hundred and fifty euros) in respect of costs and expenses, 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 19 December 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President