CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF GRACKI v. POLAND

(Application no. 14224/05)

JUDGMENT

STRASBOURG

29 January 2008

FINAL

29/04/2008

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 Gracki v. Poland,

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

Nicolas Bratza, *President,*
Giovanni Bonello,
Kristaq Traja,
Lech Garlicki,
Ljiljana Mijović,
Ján Šikuta,
Päivi Hirvelä, *judges,*
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 8 January 2008,

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

PROCEDURE

1. The case originated in an application (no. 14224/05) 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 Jarosław Gracki ("the applicant"), on 18 March 2005.

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

3. On 15 September 2006 the President of the Fourth Section decided to give notice of 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 1966 and lives in Wrocław.

5. The applicant was arrested on 25 March 2003. On 27 March 2003 the Warsaw-Mokotów District Court ordered his detention on remand on suspicion of theft and burglary. It observed that there was a risk that the applicant would obstruct the investigation by exerting pressure on witnesses or tampering with other evidence. The court also invoked the severity of the anticipated penalty.

6. On 23 April 2003 the Warsaw-Mokotów District Prosecutor ordered the seizure of the applicant's car with a view to securing the payment of any fine which might be imposed on him. It appears that the applicant lodged an appeal against that decision. However, he has provided no further information about its outcome.

7. On 17 June 2003 the Warsaw-Mokotów District Court prolonged the applicant's detention until 25 September 2003, relying on the same grounds as given in its original decision.

8. On 18 September 2003 the District Court ordered that the applicant be remanded in custody until 25 December 2003. It invoked the risk that he would obstruct the investigation, having regard to the fact that the alleged offences had been committed jointly with other persons. It also noted that certain evidence and a psychiatric report concerning the applicant had not yet been obtained.

9. On 28 November 2003 the prosecution filed a bill of indictment with the Warsaw-Mokotów District Court. The applicant was charged with 8 counts of theft and burglary. The bill of indictment specified that the applicant was subject to the rules on recidivism in view of his previous convictions.

10. On 18 December 2003 the District Court prolonged the applicant's detention until 24 March 2004, invoking the same grounds as previously. The applicant appealed. On 17 February 2004 the Warsaw Regional Court dismissed his appeal. It observed that under Article 258 § 2 of the Code of Criminal Procedure the severity of the anticipated penalty could alone constitute a sufficient basis for the applicant's continued detention. On the other hand it agreed with the applicant's argument that the risk that he would obstruct the proceedings had not been substantiated by any concrete arguments.

11. On 23 February 2004 the bill of indictment was transmitted to the Warsaw District Court which, following an administrative reform, had become competent to hear the case.

12. On 11 March 2004 the Warsaw District Court extended the applicant's detention until 30 June 2004. It found that the anticipated heavy sentence was related to the number of charges and the fact that the applicant was a recidivist offender. It further noted that the prolongation of his detention was justified by administrative restrictions on the number of detained defendants who could be brought to court at any given time.

13. The trial started on 14 June 2004. On the same date the District Court ordered the applicant's continued detention until 30 September 2004.

14. On 26 August 2004 the District Court refused the applicant's request for release. It further extended his detention until 30 December 2004. Having regard to the likelihood that the applicant would be given a heavy sentence (cf. Article 258 § 2 of the Code of Criminal Procedure), the court found that his continued detention was necessary in order to secure the

proper conduct of the proceedings. The applicant appealed. On 19 October 2004 the Warsaw Regional Court upheld the decision. It relied on the fact that the applicant had partly confessed. Further, it had regard to the number of charges against the applicant and to the fact that he was a recidivist offender.

15. The second hearing was held on 3 November 2004.

16. On 26 November 2004 and 21 February 2005 the District Court refused the applicant's requests for release.

17. On 13 December 2004 the trial court ordered that the applicant be kept in custody until 28 February 2005, reiterating the grounds previously given. The applicant appealed unsuccessfully.

18. On 11 January 2005 the trial court had to adjourn the hearing due to the illness of a lay judge. On 14 February 2005 the Head of the VIII Criminal Division of the District Court ordered that the trial had to be restarted since the composition of the trial court had changed.

19. On 24 February 2005 the District Court prolonged the applicant's detention until 25 March 2005. It held that the reasons previously given for his detention remained valid. In addition, it found that there was a risk that the applicant would exert pressure on witnesses or obstruct the proceedings by other unlawful means. Thus, the District Court held that other, non-custodial, measures would not be sufficient to secure the proper conduct of the proceedings.

20. Since on 25 March 2005 the applicant's detention would have reached the statutory 2 years' time-limit laid down in Article 263 § 3 of the Code of Criminal Procedure, further prolongation of his detention had to be ordered by the Warsaw Court of Appeal. On 24 February 2005 the District Court applied to the Court of Appeal for prolongation of the applicant's detention until 25 August 2005. It referred to administrative restrictions affecting the possibility of bringing detained defendants to trial.

21. On 11 March 2005 the Court of Appeal ordered that the applicant be remanded in custody until 25 August 2005. It held that there was a risk that he would obstruct the proceedings, given the nature of the charges and the severity of the likely sentence. It also found that the prolongation of the applicant's detention beyond the statutory time-limit was justified under Article 263 § 3 of the Code of Criminal procedure on account of obstacles beyond the trial court's control. That decision was upheld on appeal on 29 April 2005.

22. The trial court held hearings on 5, 13 May, 30 June and 13 July 2005. The frequency of the hearings depended on the administrative restrictions on the number of detained accused who could be brought to court at any given time on account of the lack of police resources.

23. On 21 July 2005 the trial court refused the applicant's request for release. It noted, *inter alia*, that the risk that he would obstruct the proceedings was still valid despite the fact that most witnesses had already

been heard. A similar request was refused on 2 November 2005. The applicant unsuccessfully appealed against the latter decision.

24. On 23 August 2005 the applicant's detention was prolonged until 25 October 2005. The Court of Appeal referred in its decision to the fact that the trial had to commence *de novo*. That decision was upheld on appeal on 23 September 2005.

25. On 21 October 2005 the Court of Appeal ordered the applicant's continuous detention until 25 January 2006. It noted, however, the long intervals between the trial hearings. That decision was upheld on appeal on 15 November 2006.

26. On 12 January 2006 the trial court ordered the applicant's release under police supervision, finding that continuation of the custodial measure was not necessary at that stage of the trial.

27. The applicant failed to appear at the hearings scheduled for 23 June, 28 July and 5 October 2006. On 9 August 2006 the police informed the trial court that the applicant had not reported to the police station as required under his order for release.

28. On 11 October 2006 the Warsaw District Court convicted the applicant as charged and sentenced him to seven years' imprisonment. The appeal proceedings are pending following the applicant's appeal against the first-instance judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. The relevant domestic law and practice regarding the imposition of detention on remand (*tymczasowe aresztowanie*), the grounds for its prolongation, release from detention and rules governing other, so-called “preventive measures” (*środki zapobiegawcze*) at the material time are stated in the Court's judgments in the cases of *Gołek v. Poland*, no. 31330/02, §§ 27-33, 25 April 2006 and *Celejewski v. Poland*, no. 17584/04, §§ 22-23, 4 August 2006.

THE LAW

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

30. 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, in so far as relevant:

> "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."

31. The Government contested that argument.

A. Admissibility

32. The Government submitted that the applicant had not exhausted all the remedies provided for by Polish law in that he had failed to appeal against the decisions imposing or prolonging his detention of 27 March, 17 June and 18 September 2003 and the refusals to release him of 26 November 2004, 21 February and 21 July 2005. The applicant did not comment.

33. The Court observes that the applicant did not appeal against the decisions referred to by the Government. However, he lodged appeals against all or most of the other numerous decisions prolonging his detention on remand over a period of 2 years and nearly 10 months. He also requested on several occasions that his detention be replaced by a more lenient preventive measure. The Court has already considered that those remedies, i.e. an appeal against a detention order and/or a request for release, whether submitted to the prosecutor or to the court, depending on the stage of the proceedings, and also an appeal against a decision to prolong detention on remand, serve the same purpose under Polish law. Their objective is to secure a review of the lawfulness of detention at any given time of the proceedings, both in their pre-trial and trial stage, and to obtain release if the circumstances of the case no longer justify continued detention (see *Iwańczuk v. Poland* (dec.), no. 25196/94, 9 November 2000 and *Wolf v. Poland*, nos. 15667/03 and 2929/04, § 78, 16 January 2007). It follows from the Court's case-law that the applicant is not required to appeal against each and every decision prolonging his detention (see, *a contrario*, *Bronk v. Poland* (dec.), no. 30848/03, 11 September 2007). Furthermore, the Court considers that the applicant was not required to appeal against the refusals to release him in order to comply with the requirement of exhaustion of domestic remedies.

34. It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies. The Court further notes that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Period to be taken into consideration

35. The applicant's detention started on 25 March 2003, when he was arrested on suspicion of theft and burglary. It continued until 12 January 2006 when the applicant was released. Accordingly, the period to be taken into consideration amounts to 2 years, 9 months and 20 days.

2. The parties' submissions

(a) The applicant

36. The applicant argued that his nearly 3-year period of detention on remand had not been justified by relevant and sufficient reasons.

(b) The Government

37. The Government submitted that the applicant's detention had been duly justified over the entire period. They argued that, apart from the reasonable suspicion that he had committed the offences concerned, the applicant's detention had been justified by the severity of the anticipated penalty, the fact that he had been a recidivist offender and the risk that he would obstruct the proceedings. The Government emphasised in the latter respect that following his release under police supervision he had failed to appear at 4 out of 6 hearings and that the applicant had apparently changed his place of residence without having notified the authorities. That, in their view, confirmed that detention on remand had been the only remedy that could secure the proper conduct of the proceedings.

38. Furthermore, there had been a risk that the applicant would exert pressure on witnesses. The Government asserted that the necessity of the applicant's continued detention had been thoroughly examined by the courts which on each occasion had given sufficient reasons for their decisions. They finally submitted that the authorities had displayed due diligence in the conduct of the proceedings which they considered complex. In addition, certain procedural motions filed by the applicant towards the end of the trial had caused delays in the proceedings.

3. The Court's assessment

(a) General principles

39. The Court recalls that the general principles regarding the right "to trial within a reasonable time or to release pending trial, as guaranteed by Article 5 § 3 of the Convention were stated in a number of its previous judgements (see, among many other authorities, *Kudła v. Poland* [GC],

no. 30210/96, § 110 *et seq*, ECHR 2000-XI; and *McKay v. the United Kingdom* [GC], no. 543/03, §§ 41-44, ECHR 2006-..., with further references).

(b) Application of the above principles in the present case

40. In their detention decisions, the authorities, in addition to the reasonable suspicion against the applicant, relied principally on three grounds, namely (1) the severity of the penalty to which he was liable given that he was a habitual offender, (2) the risk that he might obstruct the proceedings by exerting pressure on witnesses and (3) the number of charges against the applicant.

41. The Court accepts that the reasonable suspicion against the applicant of having committed several counts of theft and burglary could initially warrant his detention. However, with the passage of time, that ground became less and less relevant. The Court must then establish whether the other grounds adduced by the courts were "relevant" and "sufficient" (see, *Kudła* cited above, § 111).

42. The Court notes that the judicial authorities continuously relied on the likelihood that a heavy sentence might be imposed on the applicant given the number of charges against the applicant and the fact that he was subject to the rules on recidivism. According to them, that likelihood created a presumption that the applicant would obstruct the proceedings (see paragraphs 10 and 14 above). In this respect, the Court recalls that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending. It acknowledges that in view of the seriousness of the accusations against the applicant the authorities could justifiably consider that such an initial risk was established. 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). Accordingly, the Court does not consider that the severity of the likely penalty, even taken in conjunction with the fact that the applicant was a recidivist offender, was a "sufficient" and "relevant" reason to justify holding the applicant in detention for the entire uninterrupted period of 2 years and nearly 10 months.

Having regard to the above, the Court cannot accept the position adopted by the judicial authorities in the present case, namely that the presumption referred to above would alone, after a certain lapse of time, justify the applicant's continued detention, without the need to indicate any concrete facts supporting the risk of obstruction of the proceedings (see *Szydłowski v. Poland*, no. 1326/04, § 55; *Malikowski v. Poland*, no. 15154/03, § 54 and *Osiński v. Poland*, no. 13732/02, § 53, all judgments delivered on 16 October 2007).

43. As regards the risk that the applicant might obstruct the proceedings, the Court notes that the authorities did not indicate any concrete

circumstance capable of showing that the anticipated risk went beyond a merely theoretical possibility. The Court is not, therefore, persuaded by that argument, especially as it appears that there was no indication that at any earlier stage of the proceedings the applicant tampered with evidence or made any attempt to induce witnesses to perjure themselves. In this respect the Court cannot but note that the Warsaw Regional Court in its decision of 17 February 2004 held that there had been no substance to the risk that the applicant would obstruct the proceedings (see paragraph 10 above). Nevertheless, the courts continued to invoke that risk without specifying any concrete grounds justifying their view.

44. The Court further observes that the applicant was detained on charges of theft and burglary. It appears that he was the sole defendant in the case. In these circumstances, the Court is not persuaded that the instant 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*, cited above, § 37 and *Kwiatek v. Poland*, no. 20204/02, § 46, 6 February 2007).

45. Having regard to the foregoing, the Court concludes that the grounds given by the domestic authorities could not justify the period of two years and nearly ten months of the applicant's detention. In addition, the Court cannot agree with the Government's argument that the fact that the applicant failed to appear before the trial court following his release could retrospectively justify the lack of relevant and sufficient reasons for his continued detention prior to his release.

46. That finding would, as a rule, absolve the Court from determining whether the national authorities displayed “special diligence” required under Article 5 § 3 in the conduct of the proceedings (see, *Mc Kay*, cited above, § 44). However, in that context the Court cannot but note that even though the bill of indictment was filed on 28 November 2003, the first hearing was held only on 14 June 2004 and the second hearing only five months later, on 3 November 2004. In this respect, the Court notes that the long intervals between the hearings were related to the administrative restrictions imposed on the trial court as to the number of detained defendants who, given limited police resources, could be brought to trial (see paragraphs 12 and 20 above). Although the trial court was not directly responsible for the resultant delays, the lack of a police escort to secure the applicant's presence at the trial can be attributed to the national authorities. On account of the above circumstances, the Court considers that it cannot be said that the authorities displayed “special diligence” in the conduct of the criminal proceedings against the applicant.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

48. The applicant further complained under Article 6 §§ 1 and 3 of the Convention about the unfairness of the proceedings and alleged that his requests to call certain witnesses had been refused. He also alleged a violation of Article 6 § 2 of the Convention. Lastly, the applicant complained under Article 1 of Protocol No. 1 to the Convention about the seizure of his car by the prosecution service.

49. The Court has examined the remainder of the complaints as submitted by the applicant. However, having regard to all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that the applicant has failed to substantiate his complaints. It follows that this part of the application must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicant claimed an unspecified amount in respect of non-pecuniary damage related to distress and frustration resulting from the excessive length of his detention on remand.

52. The Government invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant. Alternatively, they asked to assess the amount of just satisfaction on the basis of its case-law in similar cases and having regard to national economic circumstances.

53. The Court considers that the applicant has suffered non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. Considering the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

54. The applicant submitted no claim for costs and expenses.

C. Default interest

55. 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 excessive length of 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 2,000 (two thousand euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State 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;

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

Done in English, and notified in writing on 29 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President