



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

FOURTH SECTION

CASE OF KUCHARSKI v. POLAND

(Application no. 51521/99)

JUDGMENT

STRASBOURG

3 June 2008

FINAL

03/09/2008

This judgment may be subject to editorial revision.

In the case of Kucharski v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Mihai Poalelungi, *judges*

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 13 May 2008,

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

PROCEDURE

1. The case originated in an application (no. 51521/99) 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 Kucharski (“the applicant”), on 15 April 1999.

2. The Polish Government (“the Government”) were represented by their Agent, Ms S. Jaczewska, and subsequently Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that his detention on remand had exceeded a “reasonable time” within the meaning of Article 5 § 3 of the Convention. He also complained that the proceedings for review of the lawfulness of his detention had breached Article 5 § 4 of the Convention in that they had not been adversarial and had not ensured equality of arms, and that he had not been able to take any proceedings to contest the decisions to extend his detention on remand.

4. On 16 October 2003 the Court declared the application partly inadmissible and decided to communicate the complaints under Article 5 §§ 3 and 4 of the Convention 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

5. The applicant was born in 1959 and lives in Drwalew, Poland.

The facts of the case, as submitted by the applicant, may be summarised as follows.

6. On 20 November 1996 the applicant was arrested on suspicion of aggravated robbery, kidnapping, false imprisonment and other related offences. It was alleged that the applicant had committed those offences with two accomplices and while acting as a member of an organised criminal gang.

7. On 22 November 1996 the Warsaw District Court (*Sąd Rejonowy*) remanded him in custody. The decision was justified by the gravity of the charges against the applicant, a reasonable suspicion that he had committed the offences in question, the likelihood that a severe penalty would be imposed and the need to ensure the proper conduct of the proceedings.

8. The investigation, which was conducted by the Warsaw Regional Prosecutor (*Prokurator Wojewódzki*), lasted until the beginning of April 1998. Originally, the proceedings had involved twelve suspects and twenty-five various charges against them. At the beginning of 1998 the charges against six persons, including the applicant, were severed from the case and the investigation against the remaining suspects was discontinued.

9. In the course of the investigation, the applicant's detention was extended several times by decisions of the Warsaw Regional Court (*Sąd Wojewódzki*) of 17 February and 16 May 1997 and a decision of the Warsaw Court of Appeal (*Sąd Apelacyjny*) of 12 August 1997. In all their review of detention decisions the authorities repeatedly relied on the original grounds for the applicant's detention.

10. On 20 November 1997 the length of the applicant's detention reached one year, which at the material time was the maximum statutory time-limit for detention during investigation. On that date the Supreme Court (*Sąd Najwyższy*), upon an application by the Prosecutor General (*Prokurator Generalny*) under Article 222 § 4 of the 1969 Code of Criminal Procedure ("the 1969 Code"), extended the applicant's detention beyond the statutory period. The Supreme Court considered that the fact that a witness had partly changed his testimony coupled with the need to confront a number of witnesses with each other constituted "exceptional circumstances" within the meaning of Article 222 § 4 of the 1969 Code and justified the extension of the applicant's detention.

11. On 19 January 1998 the Supreme Court ordered a hearing to be held on 29 January 1998 to review the applicant's detention. Only the State

Prosecutor (*Prokurator Krajowy*) was informed about this decision. The applicant's lawyer was not summoned.

12. On 29 January 1998, having heard the arguments of the State Prosecutor, the Supreme Court decided to extend the applicant's pre-trial detention, relying on the need to carry out additional acts of investigation since one of the witnesses had partly changed his testimony.

13. On 15 April 1998 the applicant was indicted before the Warsaw Regional Court (*Sąd Okręgowy*) on charges of aggravated robbery and false imprisonment. The bill of indictment comprised twenty-five different charges, including attempted murder, brought against six defendants. The prosecution asked the court to hear evidence from more than 180 witnesses, including several anonymous witnesses, and to examine several expert reports.

14. On 26 October 1998 the Warsaw Regional Court made an application under Article 263 § 4 of the so-called "New Code of Criminal Procedure" of 1997 ("the 1997 Code"), which entered into force on 1 September 1998, and asked the Supreme Court to extend the applicant's detention until 31 March 1999. The Regional Court noted that in the light of the evidence before it, and in particular the testimonies of anonymous witnesses, there was a strong likelihood that the applicant had committed the offences he was charged with. The court further observed that the proceedings could not be completed before the expiry of the two-year time-limit for pre-trial detention laid down in Article 263 § 3 of the 1997 Code because the trial had had to be postponed due to the fact that three of the applicant's co-defendants were involved in separate trials which were being conducted concurrently.

15. On 19 November 1998 the Supreme Court granted the request. The Supreme Court shared the opinion of the Regional Court that the nature of the case and the fact that the applicant's co-defendants were involved in other criminal proceedings justified a further extension of the applicant's detention. The applicant's counsel and the State Prosecutor were present at the hearing.

16. The trial began on 7 December 1998. Subsequent hearings were listed for 8, 9, 15, 16, 17, 18 and 22 December 1998 and 11, 12, 19, 20 and 27 January 1999. However, all hearings scheduled between 11 and 20 January 1999 were cancelled due to the absence on sick-leave of one of the lay judges. The next hearing, listed for 24 February 1999, was cancelled for an unspecified reason. Subsequent hearings were listed for 14 June and 1 and 15 July 1999.

17. It appears that during the first-instance proceedings the Warsaw Regional Court scheduled forty-one hearings, of which sixteen were cancelled or adjourned.

18. On several occasions the Warsaw Regional Court asked the Supreme Court to extend the applicant's detention. The applicant, for his part, made

many unsuccessful applications for release from detention and appealed against the refusals to lift that measure.

19. On 5 March 1999 the Warsaw Regional Court once more requested the Supreme Court under Article 263 § 4 of the 1997 Code to extend the applicant's detention. The applicant's defence counsel had been informed of the date and time of the court session. He could not, however, present his arguments to the court because the case had been heard earlier than scheduled and prior to his arrival at the court. The court submitted that the applicant's trial would not be concluded by 31 March 1999, that being the deadline for holding the applicant in custody as fixed previously by the Supreme Court. The Warsaw Regional Court noted that it was still necessary to hear evidence from a significant number of witnesses including six anonymous witnesses. In the court's opinion, there were also other grounds that justified the request for the extension of the applicant's detention, such as a reasonable suspicion that he had committed the offences in question and the severity of the expected sentence. In this connection, the court stressed that the offence of aggravated robbery, with which the applicant had been charged, carried a maximum punishment of eight years' imprisonment.

20. On an unspecified date, presumably on 15 March 1999, the Supreme Court ordered a hearing to be held on 24 March 1999 to review the applicant's detention. The applicant's lawyer was successfully summoned.

21. On 15 March 1999 the applicant asked the Supreme Court to reject the application of the Regional Court of 5 March 1999. He argued that holding him in custody no longer served the interests of securing the proper conduct of the trial and that that purpose could be attained by other, less severe measures. He stressed that he had already spent more than two years in pre-trial detention. He also expressed serious doubts as to whether it would be possible for the trial court to complete the proceedings by 30 June 1999, given that the court had needed the whole of the previous year to hear evidence from forty witnesses and it still had 140 witnesses to examine. Furthermore, the applicant asserted that the procedure concerning the application to the Supreme Court made by the Regional Court had not been adversarial because he had not been informed about it. As a result, he had been unable to contest the court's findings in respect of the circumstances relevant to his detention or the submissions of the prosecutor. He also advanced arguments as to the general inadequacy of the procedure for the extension of detention beyond the statutory time-limit, emphasising that it was inherently non-adversarial and left a detainee without any opportunity to challenge effectively the grounds for holding him in custody.

22. On 18 March 1999 the applicant asked the Warsaw Court of Appeal to 'annul' the decision of the Warsaw Regional Court of 5 March 1999. His request was considered to be an appeal against the impugned decision and was referred to the Warsaw Regional Court. On 6 April 1999 the Warsaw

Regional Court refused to deal with the appeal, holding that it was inadmissible in law as no appeal could be lodged against a decision whereby a trial court had asked the Supreme Court to extend a defendant's detention beyond the statutory time-limit.

23. Meanwhile, on 24 March 1999 the Supreme Court held its hearing in the presence of the applicant's lawyer. The court fully endorsed the reasons adduced by the Warsaw Regional Court in its application of 5 March 1999 and decided to extend the applicant's detention until 30 June 1999.

24. On 14 June 1999 the Warsaw Regional Court made another request to the Supreme Court to extend the detention of the applicant and two co-defendants until 30 September 1999. The court maintained that the trial would not be completed by 30 June 1999, the deadline set previously, since many witnesses had not yet appeared before the court and there had been difficulties in ensuring their presence.

25. On 17 June 1999 the Supreme Court ordered a hearing to be held on 29 June 1999 to review the applicant's detention. The defendants' lawyers were successfully summoned.

26. On 29 June 1999 the Supreme Court agreed to extend the applicant's detention. The court considered that there were solid grounds for holding the applicant and his co-defendants, Z.R.R. and A.B., in detention. The court noted that even though the applicant's role in the commission of the aggravated robbery had not been significant, he nevertheless remained an accomplice to the offences charged. His detention was therefore necessary in view of the existence of a reasonable suspicion that he had committed the offence in question. Moreover, the Supreme Court observed that the trial was being conducted efficiently and only practical difficulties had prevented it from being concluded, namely the absence of witnesses and the fact that one of the co-defendants, Z.R.R., who had initially decided to make use of his right against self-incrimination, at a later stage of the proceedings had agreed to testify. Finally, the Supreme Court expressed the opinion that the Warsaw Regional Court was likely to finish the trial before the expiry of the applicant's newly extended period of detention. The applicant's counsel was present at the hearing.

27. The trial court failed to complete the proceedings within the period indicated. As a result, on 30 August 1999, the Warsaw Regional Court once more asked the Supreme Court to extend the detention of the applicant and his co-defendants on the ground that it would not be possible to terminate the proceedings by 30 September 1999. The trial court justified the delay by the fact that experts in psychiatry, who had meanwhile examined Z.R.R., had recommended that he be subjected to psychiatric observation for six weeks. In consequence, the court cancelled six out of ten hearings scheduled between 7 September and 8 December 1999. The trial court held hearings on 27 September, 22 October and 9 and 16 November 1999.

28. On 14 September 1999 the applicant filed with the Supreme Court his comments on the application of the Warsaw Regional Court to extend his detention. The applicant asserted that the Regional Court had already heard all evidence relevant for the assessment of his criminal responsibility. He contested the legal classification of the offences with which he had been charged as well as the testimonies given by some witnesses. He also argued that the charges against him had no reasonable basis. Furthermore, the applicant stressed that his detention, which would soon reach three years, had already been exceptionally long and was putting a severe strain on him and his family. He argued that the measure ought to be replaced by another, more lenient means of securing his presence in court. In the applicant's view, it was unlikely that the proceedings would be completed by 30 November 1999. In this connection, he submitted that the fact that Z.R.R. had been required to undergo psychiatric observation was not the only obstacle to the progress of the trial as most of the delays had been caused by the repeated absence of witnesses. The applicant asked the Supreme Court to consider the case in the light of all the available material and to reject the Warsaw Regional Court's application.

29. On 2 September 1999 the Supreme Court scheduled its hearing for review of the applicant's detention for 17 September 1999. The defendants' lawyers were summoned.

30. On 17 September 1999 the Supreme Court granted the Warsaw Regional Court's request and extended the applicant's detention. The Supreme Court considered that, in view of the importance of the psychiatric observation of Z.R.R., a further extension of the date for the trial to end and, in consequence, of the applicant's detention, was fully justified. The court held that, from the point of view of "general and specific grounds for detention", there were valid reasons for keeping all defendants in custody. It was not explained, however, which particular grounds listed in the relevant provisions applied in the case. Referring briefly to the applicant's pleadings of 14 September 1999, the Supreme Court observed that his arguments related essentially to the assessment and credibility of evidence, the legal classification of the offence and the likely sentence, all of which constituted circumstances which would be taken into account at the stage of conviction and sentencing. The applicant's lawyer was present at the Supreme Court's session.

31. On 22 October 1999 the Warsaw Regional Court rejected the applicant's request for release. The court relied on the existence of strong evidence against the applicant and the severity of the expected sentence. The Regional Court found no exceptional circumstances, as defined in Article 259 § 1 (2) of the 1997 Code, that would justify his release. Nevertheless, the court acknowledged the fact that the situation of the applicant's family, namely his partner and his child, was difficult but not severe enough to have very serious consequences for them.

32. On 2 November 1999 the applicant again applied for release, arguing that his detention, which had exceeded a reasonable time, was in breach of Article 5 § 3 of the Convention and, for all practical purposes, amounted to serving a prison sentence. The applicant stressed that the trial court had already heard all evidence relevant for the assessment of the charges against him and that his continued detention was putting a severe strain on him and his family.

33. On 9 November 1999, the Warsaw Regional Court asked the Supreme Court to extend the applicant's detention. The court submitted that the trial was not likely to be completed by 30 November 1999 because the experts in psychiatry had recommended that Z.R.R.'s psychiatric observation be continued for another six weeks. The court emphasised that hearings had already been scheduled for 14, 16 and 20 December 1999 and that the trial would continue through January 2000. However, given the extensive volume of evidence and the fact that the judges sitting in the applicant's case had also been assigned to try other cases, the trial could not be accelerated. Lastly, the court stated that the grounds for the applicant's detention were defined in Article 249 § 1 of the 1997 Code and they still applied.

34. At the hearing held before the trial court on 16 November 1999 the applicant asked for release. The Warsaw Regional Court rejected that request. The court found that the applicant ought to be kept in custody in view of the existence of a reasonable suspicion that he had committed the offences with which he had been charged and the severity of the likely sentence. The court further held that there were no circumstances, as defined in Article 259 § 1 (1) and (2) of the 1997 Code, which would justify his release.

35. On 25 November 1999 the Warsaw Regional Court rejected the applicant's application of 2 November 1999 for release. The court referred to the reasons previously relied on. Moreover, as to the applicant's family situation, the court observed that, while admittedly it was indeed "not too good", it was not exceptionally harsh, as defined in Article 259 of the 1997 Code.

36. Meanwhile, on 16 November 1999 the applicant asked the Supreme Court to dismiss the request of the Warsaw Regional Court to extend the preventive measure in question. He argued that his pre-trial detention had lasted three years and that he should be released in view of the difficult situation facing his family. His daughter suffered from a staphylococcal infection. Because his partner's income was very low and the medical expenses and the rent were high the family lived in poverty. The applicant referred to the Regional Court's decision of 22 October 1999, in which it had been acknowledged that his family situation was difficult.

37. On the same date the Supreme Court scheduled its hearing for review of the applicant's detention for 30 November 1999. The defendants' lawyers were successfully summoned.

38. On 30 November 1999 the Supreme Court, having heard the submissions of the State Prosecutor and of defence counsel, extended the detention of the applicant and other co-defendants until 31 January 2000. The court held that the grounds for keeping them in custody were still valid and that no exceptional circumstances existed to justify the applicant's release.

39. On 1, 2 and 5 December 1999 the applicant complained to different domestic courts that his basic constitutional and Convention rights, in particular his right to liberty and to a trial within a reasonable time, had been violated.

40. On 13 December 1999 the applicant lodged a constitutional complaint (*skarga konstytucyjna*) with the Constitutional Court (*Trybunał Konstytucyjny*), asserting that the rules governing pre-trial detention were contrary to the principles of the presumption of innocence and judicial impartiality in that they authorised detention if there was a degree of probability of guilt and a likelihood that a severe penalty would be imposed. It appears that the applicant's complaint was rejected for non-compliance with procedural requirements, namely for failure to have the complaint filed and signed by a lawyer.

41. Between 14 December 1999 and 31 January 2000 the Warsaw Regional Court scheduled hearings for 14, 16 and 20 December 1999 and 4, 10, 18, 25, 26 and 28 January 2000. The court held hearings on 14 December 1999 and 10, 18, 25 and 26 January 2000, the remaining hearings being cancelled.

42. At the hearing held on 14 December 1999 the applicant asked to be released. The court refused his request relying on the reasons previously given.

43. On 10 January 2000 the Regional Court asked the Supreme Court to extend the applicant's detention until 31 March 2000, submitting that the proceedings could not be terminated because the experts in psychiatry had submitted their report on Z.R.R. late, a witness had been ill, Z.R.R. had challenged the trial judges and hearings scheduled for 16 and 20 December 1999 had been cancelled.

44. On 17 January 2000 the Supreme Court scheduled its hearing for review of the applicant's detention for 25 January 2000 at 9 a.m. The applicant's lawyer was summoned.

45. On 25 January 2000 the Supreme Court held the hearing as scheduled with the State Prosecutor present and the defendants' lawyers absent. The court agreed to extend the applicant's detention. The reasons put forward by the Warsaw Regional Court were found to be convincing. Moreover, it was noted that the trial had reached the final stage and there

were grounds for believing that the judgment would be delivered by 31 March 2000.

46. At the hearing on 26 January 2000 the applicant asked the trial court to lift his detention. His request was refused on the same date.

47. The next hearing was scheduled for 25 February 2000.

48. On 29 March 2000 the Warsaw Regional Court acquitted the applicant of aggravated robbery, convicted him of false imprisonment and sentenced him to four years' imprisonment. It appears that the court held that the applicant had not acted as a member of an organised criminal gang. By the time the judgment was delivered the applicant had already spent three years, four months and nine days in detention, which meant that he had acquired the right to be released on probation. As a result, the court released him from detention.

49. On 22 February 2001 the Warsaw Court of Appeal heard the applicant's appeal and upheld the first-instance judgment.

50. The applicant did not lodge a cassation appeal.

51. On 22 October 2001 the Radom Regional Court ordered that the applicant be put on probation for two years as he had already served most of his sentence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

52. The relevant domestic law and practice concerning the imposition of detention on remand (*aresztowanie tymczasowe*), the grounds for its prolongation, release from detention and rules governing other, so-called "preventive measures" (*środki zapobiegawcze*) are stated in the Court's judgments in the cases of *Kudła v. Poland* [GC], no. 30210/96, §§ 75-79, ECHR 2000-XI; *Bagiński v. Poland*, no. 37444/97, §§ 42-46, 11 October 2005; *Celejewski v. Poland*, no. 17584/04, §§ 22-23, 4 August 2006; and *G.K. v. Poland*, no. 38816/97, §§ 64-67, 20 January 2004.

THE LAW

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

53. The applicant complained that the length of his detention on remand had been excessive. He relied on Article 5 § 3 of the Convention, which, in so far as relevant, 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.”

A. Admissibility

54. 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. Period to be taken into consideration

55. The applicant’s detention started on 20 November 1996, when he was arrested on suspicion of inter alia aggravated robbery and false imprisonment. On 29 March 2000 the Warsaw Regional Court convicted him of false imprisonment and sentenced him to four years’ imprisonment. On the same day the applicant was released from detention and put on probation. On 22 February 2001 the Warsaw Court of Appeal upheld the applicant’s conviction.

56. Accordingly, the period to be taken into consideration amounts to three years, four months and eight days.

2. The parties’ submissions

(a) The applicant

57. The applicant argued that the domestic authorities, namely the Supreme Court, had extended his pre-trial detention automatically, without assessing the need for the measure in the light of the changing circumstances. He also submitted that in its decisions ordering the measure to be continued, the Supreme Court had relied mainly on the likelihood that a severe penalty would be imposed on him for the offence of aggravated robbery. However, he was eventually acquitted of that charge. Finally, the applicant challenged the domestic courts’ argument that it had been necessary to extend his pre-trial detention because of the lengthy psychiatric observation of a co-defendant. He submitted that the authorities should have ordered the psychiatric observation during the investigation and not at the final stage of the trial.

(b) The Government

58. The Government argued that the applicant's pre-trial detention had been duly justified by relevant and sufficient grounds. The Government stressed that the applicant's criminal case had been complex and that it had been conducted with due diligence both by the prosecutor and the trial courts. The Government noted that the applicant had been charged with numerous serious offences and that the prosecutor had twice amended his decision concerning the charges against the applicant. They stressed that the applicant had initially been suspected of having committed two offences as a member of an organised criminal gang and that he was a habitual offender. That, in the Government's submission, justified the courts' fear that the applicant would obstruct the proceedings and would attempt to induce witnesses to give false testimony. The Government also observed that there had been six defendants in the applicant's case, over one hundred witnesses had been examined and several expert reports had been obtained. The Government concluded that all the above circumstances had been duly considered by the authorities when deciding whether to continue the applicant's pre-trial detention. That being said, the Government noted that the authorities had not always expressly stated all the grounds on which they had relied.

3. The Court's assessment

(a) General principles

59. The Court notes that the general principles regarding the right to a trial within a reasonable time or to release pending trial, as guaranteed by Article 5 § 3 of the Convention, have been stated in a number of its previous judgments (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

60. In their detention decisions, the authorities, in addition to the reasonable suspicion against the applicant, relied principally on two grounds, namely (1) the serious nature of the offences with which he had been charged and (2) the severity of the penalty to which he was liable. The applicant was charged with aggravated robbery, kidnapping, false imprisonment and other related offences. Two of the alleged offences were considered to have been committed as a member of an organised criminal gang (see paragraph 6 above).

61. The Court accepts that the reasonable suspicion against the applicant of having committed serious offences could initially warrant his detention.

The need to obtain voluminous evidence in order to determine the degree of the alleged responsibility of each of the defendants also constituted valid grounds for the applicant's initial detention. Likewise, in the Court's view, the fact that the case concerned a member of an organised criminal gang should be taken into account in assessing compliance with Article 5 § 3 (see *Bak v. Poland*, no. 7870/04, § 57, 16 January 2007).

62. Indeed, in cases such as the present, concerning an organised criminal gang, the risk that a detainee, if released, might bring pressure to bear on witnesses or other co-accused or might otherwise obstruct the proceedings often is, by the nature of things, high. According to the authorities, the likelihood of a severe sentence being imposed on the applicant and the fact that he had previous criminal convictions created a presumption that he would obstruct the proceedings. However, the Court notes that it does not transpire from the material submitted that the applicant made any attempts to intimidate witnesses during the proceedings or showed any obstructive behaviour. Moreover, the Court would reiterate that, while the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending, the gravity of the charges cannot by itself justify long periods of detention on remand (see, for instance, *Ilijkov v. Bulgaria*, no. 33977/96, §§ 80-81, 26 July 2001).

While all the above factors could justify even a relatively long period of detention, they did not give the domestic courts a unlimited power to prolong this measure. In this context, the Court would observe that by the date of his first-instance conviction the applicant had already spent three years and four months in pre-trial detention.

63. Having regard to the foregoing, the Court concludes that the grounds given by the domestic authorities could not justify the overall period of the applicant's detention. In these circumstances it is not necessary to examine whether the proceedings were conducted with special diligence.

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

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

64. The applicant further complained that the procedure for review of his pre-trial detention had not been adversarial in that it had not allowed him or his lawyer to participate in sessions at which the trial court decided to apply for an extension of his detention beyond the statutory time-limit, or at which the Supreme Court decided to extend the measure. Moreover, he complained that his lawyer had been misinformed about the date and time of the court sessions for review of his detention under the regime of the 1997 Code. Lastly, the applicant complained that he could not take any proceedings to contest the Regional Court's applications to the Supreme

Court for the extension of his detention or to appeal against the decisions of the Supreme Court to extend the measure in question.

He relied on Article 5 § 4 of the Convention, which provides:

“4. 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.”

65. These complaints fall to be examined under Article 5 § 4.

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

“1. The Court may only deal with the matter ... within a period of six months from the date on which the final decision was taken

...

3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded...”

66. The Court notes that the impugned procedure for review of the applicant’s pre-trial detention was regulated until 1 September 1998 by the 1969 Code, and from 1 September 1998 until the end of the applicant’s pre-trial detention by the 1997 Code.

For the most part, the relevant provisions of both codes had the same or similar wording. Both codes provided that detention which exceeded the relevant statutory period could, on the application of the trial court, be extended by the Supreme Court. Such an application took the form of a decision which, as long as the Supreme Court had not given a ruling, served as a basis for the continued detention (see *G.K. v. Poland*, no. 38816/97, § 92, 20 January 2004).

However, under the regime of the 1969 Code a detainee did not have the right to participate, whether in person or through his counsel, in any court session concerning his pre-trial detention (see *Bagiński v. Poland*, no. 37444/97, § 46, 11 October 2005). The 1997 Code brought about a significant change to the legislation and from 1 September 1998, when the new code entered into force, a detainee or his counsel could be summoned to attend the court sessions.

In addition, neither the 1969 Code nor the 1997 Code, as applicable throughout the applicant’s detention, provided for any opportunity to appeal against a decision whereby the trial court applied for extension of detention beyond the statutory time-limit or against the decisions of the Supreme Court extending the detention under that provision.

67. In the present case the applicant’s pre-trial detention was extended beyond its statutory time-limit under the regime of the 1969 Code by two decisions of the Supreme Court given on 20 November 1997 and 29 January 1998 (see paragraphs 10 and 12 above). Subsequently, the measure in question was extended under the regime of the 1997 Code by six

decisions of the Supreme Court delivered from 19 November 1998 onwards (see paragraphs 14-15; 19-20; 23-26; 29-30; 37-38; and 43-45 above).

A. Proceedings under the 1969 Code

68. The Court holds that the complaints under Article 5 § 4 of the Convention concerning the proceedings for review of the applicant's detention, as regulated by the 1969 Code, cannot be examined because the events complained of had taken place more than six months before the date on which this complaint was submitted to the Court.

69. It follows that this part of the application has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

B. Subsequent proceedings under the 1997 Code

70. In connection with the proceedings for review of the applicant's detention under the regime of the 1997 Code, the Court observes that the relevant principles had been stated in a number of its previous judgments (see *mutatis mutandis*, *Telecki v. Poland*, (dec.), no. 56552/00, 3 July 2003 and *Celejewski v. Poland*, no. 17584/04, § 47, 4 May 2006; *Depa v. Poland*, no. 62324/00, § 49, 12 December 2006). To reiterate, the Court notes that while Article 5 § 4 guarantees no right, as such, to an appeal against decisions ordering or extending detention – as it speaks of “proceedings” and not of appeals – a domestic procedure relating to those matters must, in order to be compatible with that provision, satisfy two indispensable conditions. First, the judicial procedure followed must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person. Second, it must give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question (*G.K. v. Poland*, cited above, § 91).

71. The Court observes that it transpires from the minutes of the hearings in question as submitted by the Government that the applicant's counsel was duly summoned to the six Supreme Court's sessions (held on 19 November 1998 and subsequent dates) at which the applicant's pre-trial detention was reviewed at a public hearing and eventually extended. The lawyer, although duly convened, was however absent from one session (see paragraph 19 above). However, the applicant has not furnished any explanation for the lawyer's absence. The applicant also contends that it was impossible for him to appeal against the rulings of the Supreme Court extending the period of his detention. However, the Court reiterates that Article 5 § 4 of the Convention does not guarantee as such a right to appeal against decisions ordering or extending detention – as it speaks of “proceedings” and not of appeals (see *G.K. v. Poland*, cited above, § 91).

72. In so far as the applicant contests the fairness of the procedure before the sessions of the Regional Court at which the latter court applied to the Supreme Court to have the applicant's pre-trial detention extended beyond the statutory two-year time-limit, it is to be noted that the Regional Court had no power to decide on the matter. It fell to the Supreme Court, in the presence of the applicant's lawyer and in the context of adversarial proceedings (see above), to rule on whether to lift or to extend the measure in question on the basis of the Regional Court's application. Accordingly, to the extent that the applicant is critical of the fact that at its session held on 5 March 1999 the Regional Court applied to the Supreme Court for an extension of the applicant's pre-trial detention in the absence of the applicant's lawyer, the Court would once again stress that the power to do so ultimately lay with the Supreme Court. It would further add that, in any event, the fact that the lawyer could not make submissions at that session was a result of an error on the part of the Regional Court rather than an indication that the authorities had departed from the general rule allowing detainees to attend or to be represented in those proceedings. Finally, despite the lack of any specific remedy to contest the application made to the Supreme Court by the trial court, it was open to the applicant at all stages to challenge the legality of holding him in custody by making an application for release. Recourse to that remedy as regulated by the 1997 Code would have enabled him to have the lawfulness of his detention examined in a procedure satisfying the requirements of Article 5 § 4 of the Convention.

73. The Court recalls that in its above-mentioned *G.K.* judgment, it found a violation of Article 5 § 4 of the Convention on account of a number of defects in the review of the lawfulness of detention inherent in the procedure laid down in the 1969 Code. For example, at the material time neither the applicant nor his counsel could be present and heard by the courts dealing with the matter. Nor was the applicant able to react, orally or in writing, to the prosecutor's submissions or contest the grounds for his continued detention given by the Regional Court. (§§ 92-94).

74. However, the Court observes that in the instant case the procedure in question, as regulated by the 1997 Code, in force from 1 September 1998 until the end of the applicant's pre-trial detention, had been adversarial and ensured the principle of equality of arms (*a contrario G.K.*, cited above, § 94).

75. In view of the above, the Court is of the opinion that there are no grounds on which to find that the proceedings concerning the review of the lawfulness of the applicant's detention, examined as a whole, fell short of the requirements of Article 5 § 4 (see *Telecki v. Poland*, (dec.) cited above and *Kozimor v. Poland*, no. 10816/02, § 41, 12 April 2007).

76. 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

77. The applicant did not submit any claims under Article 41 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* unanimously the complaint under Article 5 § 3 of the Convention regarding the length of the applicant's pre-trial detention admissible and the remainder of the application inadmissible;
2. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention.

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

Lawrence Early
Registrar

Nicolas Bratza
President