



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

1959 · 50 · 2009

FOURTH SECTION

CASE OF KULIKOWSKI v. POLAND

(Application no. 18353/03)

JUDGMENT

*This judgment was revised in accordance with Rule 80 of the Rules of Court
in a judgment of 21 December 2010*

STRASBOURG

19 May 2009

FINAL

19/08/2009

This judgment may be subject to editorial revision.

In the case of Kulikowski v. Poland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Giovanni Bonello,

Ljiljana Mijović,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 16 April 2009,

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

PROCEDURE

1. The case originated in an application (no. 18353/03) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Adam Kulikowski, on 18 May 2001.

2. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs. The applicant was represented by Ms B. Słupska-Uczkiewicz, a lawyer practising in Wrocław.

3. The applicant alleged, in particular, that his detention pending trial had exceeded a “reasonable time” within the meaning of Article 5 § 3 of the Convention. He further complained under Article 6 § 1 read together with Article 6 § 3 (c) of the Convention that he had been deprived of access to the Supreme Court. He also complained, relying on Article 8 of the Convention, of a breach of his right to respect for his family life and correspondence in that during his pre-trial detention he had not been allowed to see his minor sons and his correspondence with them had been withheld.

4. On 27 September 2007 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. The Government failed to submit their reply to the questions put to it by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1964. He is currently serving a prison sentence.

1. The applicant's pre-trial detention

7. On 22 March 2000 the applicant was arrested. On 24 March 2000 he was remanded in custody by the Gliwice District Court (*Sąd Rejonowy*) on suspicion that he had killed his mother. His pre-trial detention was subsequently extended by the Katowice Regional Court (*Sąd Okręgowy*) on 19 June 2000, by the Katowice Court of Appeal (*Sąd Apelacyjny*) on 6 September 2000, by decisions of the Gliwice Regional Court of 5 March and 13 July 2001, and by decisions of the Katowice Court of Appeal of 13 March, 29 May, 10 July and 28 August 2002.

8. The domestic courts justified the applicant's pre-trial detention in its initial phase by the existence of strong evidence against him and the likelihood that a severe penalty would be imposed, as well as by the need to secure the proper course of the proceedings. During that time, an autopsy, a number of unspecified biological tests and an inspection of the crime scene were carried out. At the later stage of the applicant's detention, the authorities referred to the severity of the sentence likely to be imposed on him. In addition, they emphasised that the investigation could not be completed for reasons beyond the prosecutor's control, namely delays in obtaining expert reports and in viewing the applicant's testimony recorded on video tape.

9. From 17 December 2001 until 2 January 2002 the applicant was concurrently serving a sentence of sixteen days' imprisonment, imposed on an unspecified date by the Zabrze District Court in another criminal case.

2. Criminal proceedings against the applicant

10. The applicant's minor sons and his wife were witnesses in the investigation. In May 2002 the prosecutor decided that a psychologist should be present when the younger son was to be interviewed by the prosecution. Apparently the older son was also interviewed by the prosecutor on an unspecified date. The applicant submitted that his wife and two sons were not allowed, for an unspecified period, to communicate with him in writing or to visit him in prison. The prosecution relied on Article 217 of the Code of Execution of Criminal Sentences (see paragraph 30 below).

11. The applicant was indicted on 20 November 2000. In the proceedings before the first- and second-instance courts he was represented by a legal-aid lawyer.

12. On 14 August 2002 the Gliwice Regional Court convicted the applicant of murder and sentenced him to twelve years' imprisonment.

13. On 19 December 2002 the Katowice Court of Appeal upheld that judgment. A copy of the judgment was served on the applicant on 17 January 2003.

3. Proceedings concerning the lodging of a cassation appeal against the judgment of the appellate court

14. On 21 February 2003 the Katowice Court of Appeal appointed a legal-aid lawyer for the purposes of the cassation proceedings.

15. A copy of the judgment of 19 December 2002 was served on the legal-aid lawyer on 3 March 2003.

16. By a letter of 20 March 2003 the lawyer informed the Katowice Court of Appeal that, in her opinion, a cassation appeal in the applicant's case lacked prospects of success and that she therefore refused to prepare and lodge one with the Supreme Court. By a letter of 27 March 2003 the Katowice Court of Appeal informed the applicant of the lawyer's refusal and, further, that no other legal-aid lawyer would be appointed for the purpose of lodging a cassation appeal in his case.

17. The court's letter was served on the applicant by the prison administration on 1 April 2003.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Detention on remand

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

2. Cassation appeal

19. Under the Law of 6 June 1997 - Code of Criminal Procedure ("the Code"), which entered into force on 1 September 1998, a party to criminal proceedings can lodge a cassation appeal with the Supreme Court against any final decision of an appellate court which had terminated criminal proceedings. The cassation appeal has to be lodged and signed by an

advocate, on pain of being declared inadmissible. The relevant part of Article 523 § 1 of the Code provides:

“A cassation appeal may be lodged only on the grounds referred to in Article 439 [these include a number of procedural irregularities, such as, for instance, incorrect composition of the trial court; lack of legal assistance in cases where such assistance was compulsory; breach of the rules governing jurisdiction in criminal matters; trying a person *in absentia* in cases where his presence was obligatory and thus depriving him of an opportunity to defend himself, etc.] or on the ground of another flagrant breach of law provided that the judicial decision in question was affected as a result of that breach. A cassation appeal shall not lie against the severity of the penalty imposed (*niewspółmierności kary*).”

20. Pursuant to Article 524 § 1 of the Code, a cassation appeal has to be lodged with the appellate court competent to carry out an initial examination of its admissibility within thirty days from the date of service of the judgment of the appellate court with its written grounds on the party or, if the party has been represented, on his or her lawyer.

3. *Legal assistance for the purposes of lodging a cassation appeal*

21. Under Article 83 of the Code, an accused may appoint a lawyer to represent him or her in criminal proceedings. If he or she cannot afford lawyers' fees, a request for legal aid may be made under Article 78 of the Code.

22. A grant of legal aid expires upon a judgment of an appellate court. A new decision on legal aid has to be made if the convicted person wishes to institute further proceedings in order to lodge a cassation appeal with the Supreme Court. The relevant part of Article 84 § 3 of the Code provides:

“A defence counsel appointed under the legal-aid scheme in the cassation proceedings ... shall prepare and sign a cassation appeal ... or shall inform the court, in writing, that he or she has not found any grounds for lodging a cassation appeal ... If a cassation appeal ... is lodged, the defence counsel is entitled to represent the defendant in the subsequent proceedings.”

23. In its decision of 17 June 1997 (V KX 57/97, OSNKW 1997/9-010/82) the Supreme Court stated that cassation proceedings had a special character in that the judgment essentially became final after it had been upheld by the appellate court. Bearing in mind the special character of these proceedings, the court was of the view that at this stage the mere fact that the convicted person was granted legal aid was sufficient to ensure an effective exercise of his or her defence rights. It was the lawyer's task to analyse the case and establish whether there were grounds on which to lodge a cassation appeal against the judgment of the appellate court. If the lawyer was of the opinion that there were no grounds on which to do so, there was no legal basis in the Code of Criminal Procedure that would either oblige the lawyer to prepare such an appeal against his or her better

judgment, or oblige the court to assign another lawyer to prepare such an appeal in the case.

24. In its decision of 25 March 1998 the Supreme Court stated that the refusal of a legal-aid lawyer to lodge a cassation appeal did not constitute a valid ground for granting retrospective leave to lodge such an appeal by another lawyer out of time (V KZ 12/98). It confirmed this ruling in a further decision of 1 December 1999. The Supreme Court observed that the court could only assign a new legal-aid lawyer to the case if it were shown that the first lawyer had been negligent in his or her task of assessing whether a cassation appeal had any prospects of success. If this were not the case, a court was not obliged to assign a new legal-aid lawyer to represent the convicted person and its refusal was not subject to appeal (III KZ 139/99).

25. In a later decision of 1 July 1999 the Supreme Court expressed the opinion that such negligence could be proved only in disciplinary proceedings instituted against a lawyer under the provisions of the Bar Act (V KZ 33/99).

26. In its decisions of 13 March and 17 September 2002 the Supreme Court expressed the view that when a legal-aid lawyer refused to represent a convicted person before the Supreme Court, the appellate court was not obliged to assign a new lawyer to the case (II KZ 11/02, II KZ 36/02).

27. On 26 February 2002 the Supreme Court changed its previous position concerning the date from which the time-limit for lodging of a cassation appeal started to run (see paragraph 20 above). It examined a particular situation where a legal-aid lawyer had refused to represent a convicted person for the purposes of cassation proceedings, finding that a cassation appeal would offer no prospects of success. It held that in such a situation the appellate court was obliged to instruct the defendant that the time-limit for lodging a cassation appeal started to run only on the date on which the defendant was served with the lawyer's refusal and not on the earlier date when the judgment of the appellate court was served on the defendant himself. It stated that it was not open to doubt that a defendant faced with the legal-aid lawyer's refusal had a right to take other measures to seek legal assistance necessary for an effective lodging of a cassation appeal (III KZ 87/01). The Supreme Court reiterated its position in a decision of 6 May 2008 and in a number of similar decisions given in 2008. It observed that there had been certain discrepancies in the judicial practice as to the manner in which the time-limit in such situations was calculated, but the strand of the case-law launched by the decision given in February 2002 was both dominant and correct, and also accepted by doctrine as providing to the defendants adequate procedural guarantees of access to the Supreme Court within a reasonable time-frame (II KZ 16/08).

4. *Detainees' correspondence and contacts with family*

28. Rules relating to means of controlling correspondence of persons involved in criminal proceedings are set out in the Code of Execution of Criminal Sentences (*Kodeks karny wykonawczy*) ("the 1997 Code") which entered into force on 1 September 1998.

29. Article 214 § 1 reads as follows:

"Unless exceptions are provided for in the present Chapter, a detainee shall enjoy at least the same rights as those secured to a convicted person serving a sentence of imprisonment under the ordinary regime in a closed prison. No restrictions shall be applied to him except such as are necessary to secure the proper conduct of criminal proceedings, to maintain order and security in a remand centre and to prevent demoralisation of detainees."

30. Article 217 § 1 reads, in so far as relevant, as follows:

"(...) detainee's correspondence shall be censored by [the authority at whose disposal he remains], unless the authority decides otherwise."

This provision further provides that a detainee is allowed to receive visitors, provided that he has obtained permission from the investigating prosecutor (at the investigative stage) or from the trial court (once the trial has begun).

31. On 1 September 1998 the Rules of Detention on Remand (*Rozporządzenie Ministra Sprawiedliwości w sprawie regulaminu wykonywania tymczasowego aresztowania*) entered into force. Paragraph 36 of the Rules provides:

"The detainee's correspondence ... is dispatched through the intermediary of the authority at whose disposal he remains."

III. RELEVANT NON-CONVENTION MATERIAL

32. In 1990, the UN adopted the Basic Principles on the Role of Lawyers (the Basic Principles). They provide, in particular:

"13. The duties of lawyers towards their clients shall include:

(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

(b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

(c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by

national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

33. A number of recommendations have been adopted by the Committee of Ministers of the Council of Europe with regard to access to justice and the provision of legal-aid services. In particular, Recommendation No. R (81) 7 on measures facilitating access to justice provides:

“4. No litigant should be prevented from being assisted by a lawyer. The compulsory recourse of a party to the services of an unnecessary plurality of lawyers for the need of a particular case is to be avoided. Where, having regard to the nature of the matter involved, it would be desirable, in order to facilitate access to justice, for an individual to put his own case before the courts, then representation by a lawyer should not be compulsory.”

34. The relevant parts of Recommendation No. R (93) 1 of the Committee of Ministers to Member States on effective access to the law and to justice for the very poor read as follows:

“Recalling that in addition to the right of access to the law and to justice provided for in Article 6 of the European Convention on Human Rights, the other provisions of the Convention and particularly Articles 2, 3 and 8 are equally applicable to the very poor, as are the other legal instruments of the Council of Europe such as the European Social Charter;

Considering that this recommendation is intended to improve, especially with regard to the very poor, existing legal advice and legal aid systems, and therefore to complement existing machinery with regard to the other categories of people for which the systems were designed.

Recommends that the governments of member states:

1. Facilitate access to the law for the very poor (“the right to the protection of the law”) by: ...

b. promoting legal advice services for the very poor; ...

3. Facilitate effective access to the courts for the very poor, especially by the following means:

c. recognising the right to be assisted by an appropriate counsel, as far as possible of one’s choice, who will receive adequate remuneration;

e. simplifying the procedure for granting legal aid to the very poor, [...]”

35. In 2000 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (2000) 21. The Recommendation further developed the Basic Principles at European level. In particular, it

emphasised access for all persons to lawyers as well as the role and duties of lawyers. More specifically, it provided:

“The Committee of Ministers, under the terms of Article 15.b of the Statue of the Council of Europe, [...]

Underlining the fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms; [...]

Considering that access to justice may require persons in an economically weak position to obtain the services of lawyers,

Recommends the governments of member States to take or reinforce, as the case may be, all measures they consider necessary with a view to the implementation of the principles contained in this Recommendation.

1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.

1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers,

2. Lawyers should be encouraged to provide legal services to persons in an economically weak position.

3. Governments of member States should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty.

4. Lawyers’ duties towards their clients should not be affected by the fact that fees are paid wholly or in part from the public funds.”

IV. THE RESOLUTION OF THE COUNCIL OF EUROPE’S COMMITTEE OF MINISTERS

A. The Committee of Ministers

36. On 6 June 2007 the Committee of Ministers adopted an Interim Resolution concerning the judgments of the European Court of Human Rights in 44 cases against Poland relating to the excessive length of detention on remand (“the 2007 Resolution”). Noting that the number of cases in which the European Court had found violations of Article 5 § 3 of the Convention against Poland was constantly increasing, it concluded that

this revealed a structural problem. A more detailed rendition of the 2007 Resolution can be found in the Court's judgment given in the case of *Kauczor v. Poland* (see *Kauczor v. Poland*, no. 45219/06, § 34, 3 February 2009; not final).

B. The Council of Europe's Commissioner for Human Rights

37. On 20 June 2007 the Council of Europe's Commissioner for Human Rights released a Memorandum to the Polish Government concerning, among other issues, the use of the detention measure in Poland, stressing that examples of cases brought to the Court where pre-trial detention had lasted between 4 to 6 years were not uncommon. The Commissioner urged the Polish authorities to review the application and functioning of pre-trial detention in Polish law. A more detailed rendition of the relevant parts of the Memorandum can be found in the above mentioned *Kauczor* judgment (see *Kauczor v. Poland*, cited above, § 35).

THE LAW

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

38. The applicant complained that the length of his detention pending trial 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

39. 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*

40. The applicant's detention started on 22 March 2000, when he was arrested. From 17 December 2001 until 2 January 2002 the applicant was concurrently serving a sentence of 16 days' imprisonment, imposed on him in another criminal case. This period, being covered by Article 5 § 1 (a), must therefore be subtracted from the period of the applicant's pre-trial detention for the purposes of Article 5 § 3.

41. On 14 August 2002 the Gliwice Regional Court convicted him as charged. As from that date he was detained "after conviction by a competent court", within the meaning of Article 5 § 1 (a) and, consequently, that period of his detention falls outside the scope of Article 5 § 3 (see *Kudła v. Poland* [GC], no. 30210/96, § 104). Accordingly, the period to be taken into consideration amounts to two years, four months and six days.

2. *The Court's assessment*

42. The applicant submitted that his detention pending trial had been excessively long.

43. The Court observes 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 have been stated in a number of its previous judgments (see, among many other authorities, *Kudła*, cited above, § 110 *et seq.*, ECHR 2000-XI; and *McKay v. the United Kingdom* [GC], no. 543/03, §§ 41-44, ECHR 2006-..., with further references).

44. In their detention decisions, the authorities, in addition to the reasonable suspicion against the applicant, relied principally on three grounds, namely, the serious nature of the offence with which he had been charged, the severity of the penalty to which he was liable and on the need to secure the proper conduct of the proceedings.

45. The Court accepts that the reasonable suspicion against the applicant of having committed a serious offence could initially warrant his detention. Also, the need to secure the proper conduct of the proceedings, in particular the process of obtaining evidence from witnesses constituted valid grounds for the applicant's initial detention.

46. However, with the passage of time, those grounds became less and less relevant. The Court must then establish whether the other grounds adduced by the courts – namely, the severity of the anticipated sentence – were "relevant" and "sufficient" (see, *Kudła* cited above, § 111).

47. According to the authorities, the likelihood of a severe sentence being imposed on the applicant created a presumption that the applicant would obstruct the proceedings. They relied on that ground of the applicant's detention during its entire duration. However, 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 pending trial (see *Michtha v. Poland*, no. 13425/02, §§ 49, 4 May 2006).

48. The Court further emphasises that, when deciding whether a person is to be released or detained, the authorities are obliged under Article 5 § 3 to consider alternative means of guaranteeing 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 *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000). In the present case, the Court notes that there is no express indication that during the entire period of the applicant’s pre-trial detention the authorities envisaged any other guarantees designed to secure his appearance at the trial. Nor did they give any consideration to the possibility of ensuring his presence at trial by imposing on him other “preventive measures” expressly intended to secure the proper conduct of criminal proceedings.

49. The Court further notes that the applicant was detained on charges of murder. It does not appear therefore that his case presented particular difficulties for the investigation authorities, especially since it had been committed in a family setting, 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; *Bąk v. Poland*, no. 7870/04, § 64, ECHR 2007-... (extracts)).

50. Lastly, the Court observes that the difficulties involved in the taking of the expert evidence on which the authorities relied at the later stage of the proceedings (see paragraph 8 above) cannot justify the lengthy period of the applicant’s detention. The Court sees no cause in the circumstances of the present case for departing from the usual principle that the primary responsibility for delays resulting from the provision of expert opinions rests ultimately with the State (see, *mutatis mutandis*, *Capuano v. Italy*, 25 June 1987, § 32, Series A no. 119; *Musiał v. Poland* [GC], no. 24557/94, § 46, ECHR 1999-II).

51. 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 6 § 1 IN CONJUNCTION WITH ARTICLE 6 § 3 (c) OF THE CONVENTION

52. The applicant further complained that as a result of the legal-aid lawyer's refusal to draft a cassation appeal he had been denied effective access to the Supreme Court. He relied on Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention. Those provisions, insofar as relevant, read:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

3. Everyone charged with a criminal offence has the following minimum rights: ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”

A. Admissibility

53. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

54. The applicant submitted that the legal-aid lawyer's refusal to prepare a cassation appeal and the court's refusal to assign a new legal-aid lawyer to the case rendered the proceedings unfair. He had thereby been deprived of the possibility of having the shortcomings of the proceedings examined by the Supreme Court and of access to that court. The mere fact that he had been granted legal aid should not have been regarded by the domestic authorities as offering him an effective guarantee that his defence rights would be duly observed. The applicant further criticised the case-law of the Supreme Court to the effect that the court could only assign a new legal-aid lawyer to the case if it had been shown that the first lawyer had been negligent in his or her task of assessing whether a cassation appeal had any prospects of success. This approach had been followed *de facto* in his case. The applicant concluded, referring to the Court's judgments in the cases of *Siałkowska v. Poland*, no. 8932/05, 22 March 2007 and *Staroszczyk v. Poland*, no. 59519/00, 22 March 2007, that he could not effectively enjoy

his right to defend himself with the benefit of legal assistance, including before the Supreme Court.

2. Principles established by the Court's case-law

a) The scope of the State's liability *ratione personae* under the Convention

55. The Court first notes that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial in criminal proceedings as set forth in paragraph 1 of the same Article. Accordingly, the applicant's complaint will be examined under these provisions taken together (see, among other authorities, *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 755, § 52; *Bobek v. Poland*, no. 68761/01, § 55, 17 July 2007).

56. The Court observes at the outset that the responsibility of the Contracting Parties is incurred by the actions of their organs. A lawyer, even if officially appointed, cannot be considered to be an organ of the State. Given the independence of the legal profession from the State, the conduct of the case is essentially a matter between the defendant and his or her counsel, whether counsel be appointed under a legal-aid scheme or be privately financed, and, as such, cannot, other than in special circumstances, incur the State's liability under the Convention (see *Artico v. Italy*, judgment of 30 May 1980, Series A no. 37, p. 18, § 36; *Daud v. Portugal* judgment of 21 April 1998, *Reports* 1998-II, p. 749, § 38; *Tuziński v. Poland* (dec), no. 40140/98, 30.03.1999; *Rutkowski v. Poland* (dec.), no. 45995/99, ECHR 2000-XI; *Cuscani v. the United Kingdom*, no. 32771/96, § 39, 24 September 2002).

57. Nevertheless, assigning counsel to represent a party to the proceedings does not in itself ensure the effectiveness of the assistance (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, § 38). There may be occasions when the State should act and not remain passive when problems of legal representation are brought to the attention of the competent authorities. It will depend on the circumstances of the case whether, taking the proceedings as a whole, the legal representation may be regarded as practical and effective (see, *mutatis mutandis*, *Artico*, cited above, § 33; *Goddi v. Italy*, judgment of 9 April 1984, Series A no. 76, p. 11, § 27; *Rutkowski*, cited above; *Staroszczyk v. Poland*, cited above, §§ 121-122, *Siałkowska v. Poland*, cited above, §§ 99-100).

b) Access to court

58. The Court further emphasises the importance of the right of access to a court, having regard to the prominent place held in a democratic society

by the right to a fair trial (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 12-13, § 24). A restrictive interpretation of that right would not be consonant with the object and purpose of this provision (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, § 30). However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State (see *Edificaciones March Gallego S.A. v. Spain*, judgment of 19 February 1998, 1998-I, § 34 and *Garcia Manibardo v. Spain*, no. 38695/97, § 36). In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 24, § 57; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 44, ECHR 2001 – VIII, *mutatis mutandis*).

59. The Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with. The manner in which this provision applies to courts of appeal or of cassation depends on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them. Given the special nature of the court of cassation's role, which is limited to reviewing whether the law has been correctly applied, the Court is able to accept that the procedure followed in such courts may be more formal (see *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 41, ECHR 2002-VII; *Staroszczyk v. Poland*, cited above, § 25 and *Siałkowska v. Poland*, cited above, § 104). However, the Court must satisfy itself that the method chosen by the domestic authorities in a particular case is compatible with the Convention. (see, *mutatis mutandis*, *Artico*, cited above, § 33; *Goddi v. Italy*, judgment of 9 April 1984, Series A no. 76, p. 11, § 27; *Rutkowski*, cited above; *Staroszczyk v. Poland*, cited above, §§ 121-122, *Siałkowska v. Poland*, cited above, §§ 99-100).

In discharging its obligation to provide parties to criminal proceedings with legal aid, when this is provided for by domestic law, the State must, moreover, display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6 (see *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 44, 18 December 2001).

3. *Application of the principles to the facts of the case*

60. Turning to the circumstances of the present case, the Court observes that the Polish law of criminal procedure requires that a person whose conviction has been upheld by an appellate court should be assisted by a lawyer in the preparation of his or her cassation appeal against a judgment given by that court. The Court reiterates that the requirement that an appellant be represented by a qualified lawyer before a court of cassation cannot, in itself, be seen as contrary to Article 6. This requirement is clearly compatible with the characteristics of the Supreme Court as the highest court in Poland examining appeals on points of law and it is a common feature of the legal systems in several member States of the Council of Europe (see *Vacher v. France*, judgment of 17 December 1996, *Reports* 1996-VI, pp. 2148-49, §§ 24 and 28; *Staroszczyk v. Poland*, cited above, § 128).

61. The Court further notes that in the present case the Court of Appeal allowed the applicant's request for legal aid for the purposes of cassation proceedings. The lawyer subsequently advised the court, by a letter dated 20 March 2003 that, in her view, a cassation appeal against the judgment of the appellate court did not offer reasonable prospects of success.

62. The Court notes that the Polish Supreme Court, in its decision of 17 June 1997, stated that the role of a legal-aid lawyer had to be understood as obliging him or her to provide comprehensive legal advice to the party, including as to the prospects of success offered by a cassation appeal in a given individual case. It concluded that it was permissible for a legal-aid lawyer assigned to a criminal case to refuse to prepare and lodge a cassation appeal and reiterated this conclusion in its subsequent case-law (see paragraphs 23–26 above). From the standpoint of Article 6 of the Convention and bearing in mind the nature of a cassation appeal in the context of criminal proceedings, the Court cannot but endorse this conclusion (see *Staroszczyk v. Poland*, cited above, § 113, *mutatis mutandis*).

63. In this connection, the Court emphasises that it is the responsibility of the State to ensure the requisite balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other (see *Siałkowska v. Poland*, cited above, § 112; *Staroszczyk v. Poland*, cited above, § 133). The mere fact that a legal-aid lawyer can refuse to represent a defendant in proceedings before the highest court cannot be said to be, of itself, tantamount to a denial of legal assistance which is incompatible with the State's obligations under Article 6 of the Convention.

64. The Court further reiterates that although admissibility conditions for appeals are necessary to ensure legal certainty and a proper administration of justice and litigants should normally expect those rules to be applied, a particularly strict interpretation of a procedural rule may deprive an

applicant of the right of access to a court (see *Běleš and others v. Czech Republic*, no. 47273/99, § 60, 12 November 2002; *Zvolský and Zvolská v. Czech Republic*, no. 46129/99, 12 November 2002; *Kemp and Others v. Luxembourg*, no. 17140/05, § 42, 24 April 2008, *mutatis mutandis*).

65. In this connection, the Court notes that the Supreme Court in a series of decisions noted the difficulties which could arise for the defendant in securing an effective access to the cassation court where the grant of legal aid for the purposes of cassation proceedings had been made but the legal-aid lawyer subsequently concluded that a cassation appeal offered no prospects of success. The Supreme Court has examined the manner in which the beginning of the relevant time-limit should be determined in such special circumstances. It held, in its decision of 26 February 2002, that following a legal-aid lawyer's refusal to prepare a cassation appeal the event triggering the running of the relevant time-limit should be established in such a way as to accommodate the defendant's situation so as not to deprive him of a practical possibility of having his or her case examined by the Supreme Court. Hence, it held that the time-limit for lodging a cassation appeal started to run only on the date on which the defendant was informed of the lawyer's refusal, not when the lawyer was served with the judgment of the second-instance court.

66. The Court further notes that in 2008 the Supreme Court stated that this strand of the case-law was not only correct as providing adequate procedural guarantees to the defendant, but also represented a clear reflection of the prevailing judicial practice.

67. In the present case the applicant was served with the lawyer's refusal on 1 April 2003 and in the light of the case-law of the Supreme Court referred to above the thirty-day time-limit started to run on that date. It cannot therefore be said that the applicant was put in a position where he was left with so little time to have a cassation appeal prepared that he was denied a realistic opportunity of having her case brought to and argued before the cassation court (compare and contrast with *Siałkowska v. Poland*, no. 8932/05, §§ 114-115, 22 March 2007, where the time-limit started to run when the legal-aid lawyer was served with the judgment and the applicant was informed of the lawyer's refusal only three days before the expiry of the time-limit). It has not been shown or argued that in these circumstances it would have been impossible for the applicant to find a new lawyer to represent him.

68. In this connection, the Court notes that the applicant had been found eligible for assistance by a legal-aid lawyer. The court thereby acknowledged that he could not bear the costs of a privately hired lawyer (see paragraphs 11 and 14 above). The Court is aware that under the case-law of the Supreme Court the mere refusal of a legal-aid lawyer to prepare a cassation appeal did not constitute a sufficient ground for a new lawyer to be assigned to the case under the legal-aid scheme (see paragraphs

23–24 and 26 above). However, the Court is of the view that Article 6 of the Convention does not confer on the State an obligation to ensure assistance by successive legal-aid lawyers for the purposes of pursuing legal remedies which have already been found not to offer reasonable prospects of success. In the present case the first lawyer appointed under the legal-aid scheme found no legal grounds on which to prepare a cassation appeal. In the absence of indications of negligence or arbitrariness on the lawyer's part in discharging her duties, the State can be said to have complied with its obligations to provide effective legal aid to the applicant in connection with the cassation proceedings.

69. However, the Court further notes that under the case-law of the Supreme Court (see paragraph 27 above) the Katowice Court of Appeal was obliged to instruct the applicant that the time-limit for lodging a cassation appeal started to run only on the date when he was served with the lawyer's refusal. The court failed to comply with that obligation.

70. The Court is therefore of the view that, to that limited but crucial extent, the relevant procedural framework available under Polish law as from February 2002 was deficient in the applicant's case. The failure of the Katowice Court of Appeal to inform the applicant, who was not represented by a lawyer, of his procedural rights meant that he had no way of knowing that he had a new time-frame within which to find a lawyer who might be persuaded to file a cassation appeal on his behalf. The Court notes in this connection that the procedural framework governing the making available of legal aid for a cassation appeal in criminal cases, as described above, is within the control of the appellate courts. When notified of a legal-aid lawyer's refusal to prepare a cassation appeal, it is entirely appropriate and consistent with fairness requirements, that an appeal court indicate to an appellant what further procedural options are available to him or her. The Supreme Court's case-law stresses this point. However, in the instant case this requirement was not complied with, with the result that the applicant's right of access to the Supreme Court was not secured in a "concrete and effective manner".

71. Accordingly, having regard to the above deficiency, there has been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

72. The applicant complained, relying on Article 8 of the Convention, about the restrictions imposed on his correspondence and contacts with his children during his detention. Article 8 of the Convention, in so far as relevant, reads:

"1. Everyone has the right to respect for his ... family life ... and correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

73. The applicant complained of the breach of his right to respect for his family life and correspondence in that his minor sons had not been allowed to visit him in the remand centre after his arrest and that the correspondence between him and the children had been withheld, the authorities relying on the need to ensure the effective conduct of the proceedings. He submitted that under the applicable provisions of Polish law it was for the parent or legal guardian to decide whether their minor child could testify in court. In the applicant’s case he had never been given an opportunity to give his opinion on that matter. It had simply been assumed that his sons should be interviewed by the prosecuting authorities, despite the fact that the applicant had had full parental powers. The law did not provide for any mechanism by which the interests of a parent charged with a criminal offence could be reconciled with the need to conduct criminal proceedings against him by interviewing his children as witnesses. The applicant concluded that the restrictions on his contacts with his sons had therefore been unlawful and unjustified.

74. The Court reiterates that detention, like any other measure depriving a person of his liberty, entails inherent limitations on private and family life. Such restrictions as limitations on the number of family visits, supervision of those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special arrangements for visits constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision (see *Kucera v. Slovakia*, no. 48666/99, §§ 127-128, 17 July 2007 and *Lorsé and Others v. the Netherlands*, no. 52750/99, § 72). However, it is an essential part of a detainee’s right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family (see, *mutatis mutandis*, *Messina v. Italy* (no. 2) no. 25498/94, § 61, 28 September 2000).

75. Any restriction of that kind must be “in accordance with the law”, pursue one or more legitimate aims listed in paragraph 2 and, in addition, must be justified as being “necessary in a democratic society”. As to the latter criterion, the Court would further reiterate that the notion of “necessity” for the purposes of Article 8 means that the interference must correspond to a pressing social need, and, in particular, must be proportionate to the legitimate aim pursued. When assessing whether an interference was “necessary” the Court will take into account the margin of appreciation left to the State authorities but it is a duty of the respondent State to demonstrate the existence of the pressing social need motivating the

interference (see, among other authorities, *McLeod v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2791, § 52; *Płoski v. Poland*, no. 26761/95, § 35, 12 November 2002; and *Baginski v. Poland*, no. 37444/97, § 89, 11 October 2005).

76. The Court considers that the decisions complained of amounted to “interference” with the exercise of the applicant’s rights guaranteed by Article 8 of the Convention. The contested measures were applied under Article 217 of the Code of Execution of Criminal Sentences. It consequently holds that the interference was “in accordance with the law”. The Court notes that the limitations on the applicant’s contact with his family and on his correspondence with them were imposed on the grounds that they had been witnesses in the proceedings against him (see paragraph 10 above). The impugned measure can accordingly be considered as having been taken in pursuance of “the prevention of disorder and crime”, which is a legitimate aim under Article 8. It remains for the Court to ascertain whether the authorities struck a fair balance between the need to secure the process of obtaining evidence in the applicant’s case and his right to respect for his family life while in detention.

77. The Court notes that no information was submitted by the applicant as to the exact scope of the restrictions imposed on his contacts and correspondence with his family. In particular, it has not been shown when the relevant decisions were given by the domestic authorities and on what grounds they held that the restrictions were justified. Nor did the applicant specify the periods during which these restrictions remained in force. In the absence of detailed factual submissions in support of this complaint, it is impossible for the Court to examine, in particular, whether the authorities considered any alternative means of ensuring that the applicant’s contact with his children would not obstruct the process of taking evidence. Such alternative restrictions could entail, for example, supervision of their visits by a prison officer or possibly also other restrictions on the nature, frequency and duration of contact (see *Klamecki (no.2) v. Poland*, no. 31583/96, § 151, 3 April 2003). In this context the Court notes that it is reasonable to assume that different restrictions were called for during the investigation and, later on, when the proceedings entered their judicial stage. However, an examination of the restrictions imposed on the applicant’s contacts and correspondence with his family from the angle of their proportionality with the legitimate aim sought would only have been possible had the applicant made sufficiently detailed submissions as to the facts. In the light of the information before it the Court considers that it has not been shown that the measures complained of went beyond what was necessary in a democratic society “to prevent disorder and crime” in the context of family visits in prison during pre-trial detention and an on-going criminal investigation.

78. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

79. Lastly, the applicant complained under Article 6 § 1 of the Convention essentially about the outcome of the proceedings. He also complained under Article 6 § 3 (c) of the ineffectiveness of his defence in that his defence counsel did not win the case.

80. However, the Court reiterates that, in accordance with Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references).

81. In the present case the applicant did not allege any particular failure on the part of the relevant courts to respect his right to a fair hearing. Indeed, his complaints are limited to challenging the result of the proceedings leading to his allegedly wrongful conviction. Assessing the circumstances of the case as a whole, the Court finds no indication that the impugned proceedings were conducted unfairly.

82. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 46 OF THE CONVENTION

83. Article 46 of the Convention provides:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

84. Recently in the case of *Kauczor v. Poland* (see *Kauczor*, cited above, paragraphs 58 *et seq.*, with further references, the Court referred to the above-mentioned 2007 Resolution of the Committee of Ministers taken together with the number of judgments recently delivered and concluded:

“60. The Court thus concludes, as the Committee of Ministers did, that for many years, at least as recently as in 2007, numerous cases have demonstrated that the excessive length of pre-trial detention in Poland reveals a structural problem consisting of “a practice that is incompatible with the Convention” (see *mutatis mutandis Broniowski v. Poland* [GC], no. 31443/96, §§ 190-191, ECHR 2004-V; *Scordino v. Italy (no. 1)* [GC], no. 36813)”.

85. The Court notes that, as in other numerous similar detention cases, the authorities did not justify the applicant’s continued detention by relevant and sufficient reasons (see paragraph 51 above). Moreover, as demonstrated by the ever increasing number of judgments in which the Court has found Poland to be in breach of Article 5 § 3, the present case is by no means an isolated example of the imposition of unjustifiably lengthy detention but a confirmation of a practice found to be contrary to the Convention (see, among many other examples, *Celejewski v. Poland*, no. 17584/04, 4 May 2006; *Kąkol v. Poland*, no. 3994/03, 6 September 2007; *Malikowski v. Poland*, no. 15154/03, 16 October 2007). Consequently, the Court sees no reason to diverge from its findings made in the *Kauczor* case as to the existence of a structural problem and the need for the Polish State to adopt measures to remedy the situation (see *Kauczor*, cited above, §§ 60-62).

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. 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

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

88. The Court accepts that the applicant has suffered non-pecuniary damage as a result of the violation found. Making its assessment on the equitable basis and having regard to the circumstances of the case, the Court awards the applicant EUR 3,000 under this head.

B. Costs and expenses

89. The applicant, who received legal aid from the Council of Europe in connection with the presentation of his case, sought reimbursement of EUR 3,600 for costs and expenses incurred in the proceedings before the Court.

90. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court notes that the applicant was paid EUR 850 in legal aid by the Council of Europe. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 for the proceedings before it, less the amount received by way of legal aid from the Council of Europe. The Court thus awards EUR 1,150 for costs and expenses.

C. Default interest

91. 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* admissible the complaints concerning the unreasonable length of the applicant's detention and the lack of effective access to the Supreme Court and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c);
4. *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, the following amounts, to be converted into Polish zlotys at the rate applicable at the date of settlement:
 - (i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
 - (ii) EUR 1,150 (one thousand one hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
 - (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;

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

Done in English, and notified in writing on 19 May 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinions of Judges Bonello and Mijović are annexed to this judgment.

N.B.
T.L.E.

CONCURRING OPINION OF JUDGE BONELLO

1. The facts of this case disclose that the applicant, a defendant in a criminal trial, had requested his legal-aid lawyer to lodge a cassation appeal against the judgement of the appellate court. The lawyer, barely two days before the lapse of the original period allowed by law for filing the appeal, informed the applicant that his case “lacked prospects of success and that she therefore refused to prepare and lodge one with the Supreme Court”.¹ I am dissatisfied with the reasoning the Court adopted to find a violation of Article 6. In my view, the applicant’s rights were violated not solely because the Katowice Court of Appeal failed in its obligation to inform him of an extended time limit to file a cassation appeal, as the Court found, but for far more radical reasons.

2. To me the facts in themselves reveal a grievous violation of the applicant’s right of access to a court. Once the Polish legal system has put in place an ultimate recourse to cassation in criminal proceedings, to signify anything at all, this right has to be a meaningful (“practical and effective”) one, and not one dependent exclusively on the unfettered and unreviewable caprice of one single non-judicial person.² If the right to have recourse to the Court of Cassation exists in the Polish system, the guarantees of Article 6 had to be complied with. Moreover, when the state is under an obligation to provide legal aid, this must be done in a manner that secures the beneficiaries “the genuine and effective enjoyment of the rights guaranteed under Article 6”.³

3. This Court has acknowledged the importance of not making the lodging or non-lodging of cassation appeals in civil proceedings depend exclusively on the whims of legal-aid lawyers. It has found a violation of Article 6 when the applicants’ right of access to a court for a cassation review in civil litigation was thwarted by last-minute refusals of legal-aid lawyers to proceed with the appeal.⁴ I see as inconsequential the expectation of high standards in civil proceedings and of lower ones in criminal trials. If anything, what applies to civil proceedings should apply more forcefully still to criminal ones.

4. The Polish legal system establishes (a) the *right* of a cassation appeal in criminal trials; (b) that this *right* can only be exercised through the patronage of legal counsel; (c) the *right* of appellants to the Court of Cassation of restricted means to a legal-aid lawyer. In this case, the Polish courts accepted that the applicant’s indigence justified his request to be assisted by a legal-aid lawyer to prepare and plead his cassation appeal.

¹ At § 16.

² At § 54: “A lawyer, even if officially appointed, cannot be considered to be an organ of the state”.

³ *R.D. v. Poland*, 18 December, 2001.

⁴ *Sialkowska v. Poland*; *Staroszczyk v. Poland*, 22 March 2007.

5. The Polish courts have attached such a determining value to criminal cassation appeals that they have extended the time limit (30 days) for lodging such an appeal when the appellant is assisted by a legal-aid lawyer. It starts running not from the date the lawyer is served with the judgment by the second-instance court, but only from the date on which the defendant was informed of the lawyer's refusal.¹ The motivation behind this reasoning may have been admirable. Its factual consequences – giving the appellant sufficient time to employ a private lawyer against payment – disastrous, as I will suggest in paragraph 11.

6. In my view the present judgement has emptied of any real substance the right of access to a court. Cumulatively, the three *rights* established by the Polish legal order (v. paragraph 4) have, in practice, morphed into the more overriding right of any legal-aid lawyer to have the first and the last word, and all the other words in between. From today onwards it is not the Court of Cassation that decides on the validity or otherwise of the grounds for cassation. That has been left exclusively – and irrevocably – to the more-or-less inspired fancies of any legal-aid lawyer. The ultimate bulwark of cassation review, willed by the Polish legal system, has been irretrievably weakened by delegating the destiny of impecunious and often petulant clients to the benevolence or otherwise of underpaid and sometimes resentful lawyers.

7. The fundamental right of access to a court hangs solely on the goodwill of a lawyer almost coerced to work for a pittance, rather than on any objective evaluation of merit conducted by an independent and impartial authority. This right has been forsaken to the often merciless mercy of one legal-aid adviser, cheerfully unrestrained by the most minimal checks and balances. The legal-aid lawyer, solo, determines all of this, and some lawyers are known not to be immune from a well-crafted commercial sense of humour. It has not been pointed out by the respondent Government that any legal-aid lawyer has ever been sanctioned for a capricious refusal to lodge a cassation appeal in a criminal trial. Untouchable if they decide well, equally untouchable if they decide irresponsibly. The twentieth century has removed infallibility from the Holy Roman Pontiff and bestowed it on Polish legal-aid lawyers.

8. This delegation of the very ultimate line of defence to the unchallenged discretion of legal-aid lawyers appears more than merely threatening. In refusing to prepare and to lodge a cassation appeal, lawyers are not bound to provide explanations. Their line of reasoning, if it can be charitably so called, may forever remain a well-kept secret. You can't appeal because the legal-aid lawyer says you can't. And why does he say you can't? Because he says you can't, stupid. The domestic courts have

¹ At § 63.

absolutely no say in it. Nor does the European Court of Human Rights want any.

9. In the present case, the lawyer was allowed to shield her inaction by relying on a formula as hackneyed as it is meaningless: “in her opinion, a cassation appeal lacked prospects of success”. No reference to stringent argument, to authoritative precedent, no judicial doctrine to comfort her conclusions – just her unsupported ‘opinion’, and next one please. Was her discretion subject to any review? No. Did she give any reasons? No. Did the Cassation Court have any input in her decision? No. Did the applicant have any redress? No. Is she the one and ultimate arbiter? Yes. Only a small minority of the Court seems to have been upset by this concentrate of approved arbitrariness. I *was* upset, but then, I confess, I am sometimes guilty of the unpleasant misdemeanour of straying from the paths of legalism and intruding into reality.

10. What rules is the dictatorship of the legal-aid lawyer. What governs is the tyranny of the unfettered discretion of a person not answerable to anyone. The domestic Court of Cassation exhausts its liability by the mere appointment of a legal-aid lawyer. How those legal-aid lawyers, assigned for the specific purpose of lodging a cassation appeal, discharge their responsibilities, is then nobody’s business. If they discharge it properly, fine. If not, tough luck, but fine all the same. Their whimsy reigns supreme, and this Court of human rights is happy it should be so. It is happy that legal-aid lawyers have absolute power, and no commensurate responsibility. A totality of power that would not disgrace anyone proud to be totalitarian.

11. I find less than convincing the reasoning that, if informed in good time, the would-be appellants to the Court of Cassation can get themselves a private lawyer against payment, if the legal-aid lawyer deserts the cause. An applicant is granted legal aid *only* because the domestic court is satisfied he does not have the means to hire a paid lawyer. Then, after being officially certified indigent by the state, that state invites the appellant to hire and pay for a lawyer to safeguard his rights. A wonderfully consequent way for a state to follow through its own findings - in the view of those who believe that saying white and black in the same breath demonstrates the virtues of versatility.

12. Once the Court of Cassation had acknowledged the applicant’s right to legal aid, arguing that paid services are an acceptable fall-back, is bringing consistency into disrepute and wrecking the very basic architecture of legal aid. Is there a whiff of plutocratic discrimination in all this? Wealthy defendants who pay their lawyer have access to the Court of Cassation for their ultimate defence. Those of limited means, only if their lawyer wakes up in a good mood.

13. This appears to me to have been the right occasion in which, if an equitable solution contrasted with some previous case-law of the Court, the

Chamber should have relinquished jurisdiction in favour of the Grand Chamber.¹

14. Of course, we can all agree that the right of access to a court - the core issue in this complaint - is not absolute, and may be subject to limitations. But the Court “must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired”. Oh holy, noble, and meaningless mantras. I do not see that the essence of the right of access of the applicant to the Court of Cassation was “impaired”. It was totally and completely wiped out. The legal community would be eternally thankful to anyone who pointed out what scraps of the right of access to the Court of Cassation were left to the applicant. I have looked for them hard and with plenty of perseverance at the beginning, and I am still looking for them now.

¹ Article 30.

CONCURRING OPINION OF JUDGE MIJOVIĆ

While I fully support Judge Bonello's arguments expressed in his concurring opinion, I feel compelled to emphasise a few further points since I see the problem of the refusal of lawyers appointed under the legal-aid scheme to represent legally-aided persons on the ground that a claim has no reasonable prospects of success as the general one. Additionally, I do not see this problem as related exclusively to criminal proceedings. It also concerns both civil¹ and administrative ones, although the facts of this case do not allow me to extend my opinion to such proceedings.

Proceedings concerning the lodging of a cassation appeal against the judgment of the appellate court in this case started with the Katowice Court of Appeal's appointment of a legal-aid lawyer for the purposes of the cassation proceedings. The letter containing both the legal-aid lawyer's decision not to lodge a cassation appeal and the court's decision not to appoint another legal-aid lawyer was served on the applicant only two days before the time-limit for lodging a cassation appeal was to expire. The main reason for the Chamber to find a violation of Article 6, in accordance with the Court's case-law², was "that the relevant procedural framework available under Polish law as from February 2002 was not applied in the applicant's case in such a manner as to afford him a realistic opportunity of taking further steps to have his cassation appeal lodged with and argued before the Supreme Court and to have thereby his access to a court secured in an effective manner". However, in my view, the refusal by a lawyer appointed under a legal-aid scheme to prepare grounds of appeal for consideration by the Supreme Court, as well as the requirements for lodging a cassation appeal, are issues that represent a breach of the applicant's right of access to the court and reflect the existence of a serious problem in the legal-aid scheme set up by the Polish legislation in general.

While there are no doubts that it is legitimate for the State to determine that legal aid should be available for some types of proceedings and not for others, the limitations applied must not restrict the access left to the individual in such a way that the very essence of the rights guaranteed by Article 6 is impaired. The applicant in this case complained that as a result of the legal-aid lawyer's refusal to lodge a cassation appeal he had been denied effective access to the Supreme Court. The provisions of Article 6 stipulate that everyone charged with a criminal offence has, among other rights, a right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

¹ There are more than 120 such cases pending before the European Court of Human Rights

² *Siałkowska v. Poland*, no. 8932/05, 22 March 2007

As far as I understand the practice of the Supreme Court, once the legal-aid lawyer refuses to lodge a cassation appeal the court could assign a new legal-aid lawyer only if it had been shown that the first lawyer had been negligent in his task of assessing whether a cassation appeal had any prospect of success. The negligence of the first legal-aid lawyer, additionally, had to “be shown” in separate civil proceedings against the lawyer for compensation, the applicant being required to prove that the court should, in the circumstances, have assigned a new legal-aid lawyer. To my mind, this part of the legal-aid scheme is simply too far removed from what I would consider sufficient to ensure effective access to the court.

While it is true that the right to a court, of which the right of access constitutes one aspect¹ is not absolute but may be subject to limitations, and that the States in these matters surely enjoy a certain margin of appreciation², these limitations are not compatible with Article 6 provisions if there is no legitimate aim at issue and if there is a lack of proportionality between the means employed and the aim sought to be achieved³. The Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with.⁴

These principles of the Court’s case-law are correctly stated in the Chamber’s judgment. Nevertheless, in my opinion, they should have been further developed and taken a step further in order to criticise the conceptual confusion surrounding the domestic provisions governing the legal-aid scheme, namely the fact that under the applicable domestic regulations the legal-aid lawyer is not obliged to prepare a written legal opinion on the prospects of success of the appeal and, moreover, the law does not set any standards as to the quality of the legal advice that has to be given to justify the lawyer’s refusal to lodge the appeal.

Furthermore, I strongly believe that the decision whether a case offers reasonable prospects of success should not be taken by a legal-aid lawyer. I would stress in this connection that the right of access to the Supreme Court should be based on the idea that each and every individual should be granted the right to state his case before a last-instance jurisdiction if she or he considers that the law has been violated or misinterpreted by the lower courts. Giving a right to a legal-aid lawyer to decide on the fate of the case even before it is brought before the Supreme Court and without any written reasons for that decision, is, for me, arbitrary, even, as Judge Bonello pointed out, capricious. Of course, a legal-aid lawyer’s opinion should matter. However, I see legal-aid more in terms of free legal *representation*

¹ *Golder v. the United Kingdom*, judgment of 21 February 1975

² *Vasilakis v. Greece*, judgment of 17 January 2008

³ *Ashingdane v. the United Kingdom*, judgment of 28 May 1985; *Edificaciones March Gallego S.A. v. Spain*, judgment of 19 February 1998

⁴ *Staroszczyk v. Poland*, judgment of 22 March 2007

than legal advice or, even worse, only the legal (and very personal) *attitude* of an individual having no judicial status. Additionally, as a Judge, I find the formula “in a legal-aid lawyer’s opinion, a cassation appeal lacked prospects of success” not only arbitrary, but offensive and prejudicial, especially bearing in mind the fact that the Court of Appeal in this case relied on this “opinion” by refusing the applicant’s requests for the appointment of a new legal-aid lawyer and thereby finally preventing the applicant from having his case decided by the highest judicial authority. That is what I see as the essence of this problem and that is why I think that the European Court’s case-law should have dealt with this situation more carefully instead of finding a violation of Article 6 for the sole reason that the time-limits set by the Polish legislation had not been respected.