CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 39510/98
by A.S.
against Poland

The European Court of Human Rights (Third Section), sitting on 9 October 2003 as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr P. KŪRIS,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mr K. TRAJA,
Mr L. GARLICKI, *judges*,
and Mr M. VILLIGER, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 22 February 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is a Polish national, who was born in 1958. He is currently detained in a prison in Strzelin, Poland. The respondent Government were represented by Mr K. Drzewicki, of the Ministry of Foreign Affairs.

A. The circumstances of the case

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

On 22 February 1996 the applicant was arrested on suspicion of drug trafficking. The next day he was remanded in custody by the Wrocław Regional Prosecutor (*Prokurator Wojewódzki*). His appeal against the remand order was dismissed on 22 March 1996 by the Jelenia Góra Regional Court (*Sąd Wojewódzki*).

In March 1996 the prosecutor ordered expert opinions on tool mark identification and microtraces.

On 16 May 1996 the Jelenia Góra Regional Court prolonged the applicant's detention until 31 August 1996, considering, *inter alia*, that the number of suspected persons and translation of certain documents from German into Polish made it impossible to complete the proceedings within the originally fixed three months' time-limit. On 5 June 1996 the Wrocław Court of Appeal (*Sąd Apelacyjny*) dismissed the applicant's appeal against that decision.

On 26 August 1996 the Wrocław Court of Appeal prolonged his detention until 30 September 1996, referring to the applicant's connections with certain individuals residing abroad and expert opinions which had to be obtained.

On 30 September 1996 the same court prolonged the detention until 31 December 1996. It pointed out that the case was very complex and several items of evidence had to be examined. The court further noted that there was a reasonable suspicion that he had committed the offence in question. On 14 November 1996 the Supreme Court (*Sąd Najwyższy*) dismissed the applicant's appeal against that decision, observing, however, that the need to obtain expert opinions on pyrotechnics and forged documents could not constitute a ground for the prolongation of the applicant's detention, as it did not relate to the counts of which he was suspected.

On 19 December 1996 the Wrocław Court of Appeal prolonged the applicant's detention until 22 February 1997, relying, *inter alia*, on a fear that he would induce witnesses to give false testimony and a risk of absconding if the applicant were to be released. It noted that further expert opinions had to be ordered. The Supreme Court upheld that decision.

On 17 February 1997 the Supreme Court prolonged the applicant's detention until 30 April 1997. It found that although the proceedings could have been conducted more speedily, the need to obtain evidence in Germany had significantly affected their length. The court further noted that the applicant and other suspected persons' frequent petitions contesting decisions concerning their detention contributed to the delay, as they had resulted in transferring the case file to the courts, thus making it impossible for the prosecutor to continue investigations. It finally observed that the risk that the applicant would induce witnesses to give false testimony was serious and there was evidence that he had already attempted to do so.

On 1 April 1997 the Wrocław Regional Prosecutor refused the applicant's request for release, pointing out that he was suspected of a serious offence and it was quite likely that he would be sentenced to imprisonment. On 17 and 22 April 1997 the Wrocław Appellate Prosecutor (*prokurator Prokuratury Apelacyjnej*) dismissed the applicant and his lawyer's appeals, relying, *inter alia*, on the findings of the investigations that the applicant and his brother had had a leading role in the organisation of a drug trafficking network.

On 24 April 1997 the Wrocław Regional Prosecutor submitted the bill of indictment to the Jelenia Góra Regional Court. It contained charges against ten persons. Twenty witnesses were to be heard and 224 pieces of evidence to be examined.

At the beginning of May 1997, the applicant's counsel requested the applicant's immediate release, submitting that the last detention order had expired on 30 April 1997 and had not been extended.

On 27 May 1997 the Jelenia Góra Regional Court prolonged the applicant's detention until 22 February 1998, relying on the grounds invoked by the courts in the previous decisions.

On 2 June 1997 the court dismissed the request for release lodged by the applicant's counsel, considering that it had not been obliged to take an earlier decision because, before the expiry of the previous detention order, the bill of indictment had been issued.

On 26 June 1997 the Wrocław Court of Appeal dismissed an appeal against the Regional Court's decision of 27 May 1997.

From 12 to 14 November 1997 the applicant was given access to the case file in the remand centre where he was detained. The file was made available to him also from 8 to 12 December 1997.

The first hearing before the Jelenia Góra Regional Court, scheduled for 17 November 1997, was adjourned due to the absence of one of the accused.

At the hearing held on 15 December 1997 the court refused the request for release lodged by the applicant's counsel.

On 22 December 1997 it ordered a psychiatric examination of one of the accused. The court adjourned the examination of the case because of the

absence of two of the accused, one of whom was being searched for by a "wanted" notice.

Hearings were held on 19 January and 9 February 1998.

On 10 February 1998 the Supreme Court granted the request of the Jelenia Góra Regional Court to prolong the applicant's detention, relying on the complexity of the case and the reasonable suspicion that he had committed the offence in question. The court prolonged the applicant's detention until 31 July 1998, instead of 31 December 1998, as requested by the Regional Court, considering that detention on remand is a preventive measure and should not become actual imprisonment.

On 9 March 1998 the court held a hearing. It adjourned the examination of charges against two accused persons to another set of proceedings.

Hearings were held on 23 March, 30 March, 6 April, 11 May, 18 May, 1 June and 15 June 1998. The applicant was given access to the case file on two occasions in April and from 19 to 29 May 1998.

The hearing scheduled for 22 June 1998 was adjourned because of an illness of one of the accused.

On 3 July 1998 the Jelenia Góra Regional Court requested the Supreme Court to prolong the applicant's detention until 31 December 1998. On 30 July 1998 the Supreme Court granted that request, pointing out that the delay in the proceedings had been caused by difficulties in assembling all the persons concerned at the hearings. It further noted that the accused had contributed to the delay by their petitions challenging the judges. The court finally reminded the trial court that it could use all appropriate measures in order to speed up the proceedings.

The hearing scheduled for 17 August 1998 was adjourned due to the absence of three of the accused. The court held hearings on 24 August and 14 September, as well as on 5 and 19 October 1998. The applicant was given access to the case file from 25 September to 2 October 1998.

Hearings were held on 26 October, 9 November and 30 November 1998.

On 7 December 1998 the Regional Court submitted to the Supreme Court a request for prolongation of the applicant's detention.

On 14 December 1998 a hearing was held.

On 22 December 1998 the registry of the Supreme Court sent a fax to the remand centre where the applicant was detained with the information that it would deal with the Regional Court's request on 6 January 1999. The registry stated that until that date the applicant's detention would be based on Article 2 § 2 of the Law of 6 December 1996, in conjunction with Article 3 § 2 of the Interim Law of 6 June 1997, regardless of the fact that the previous detention order would expire on 31 December 1998.

On 31 December 1998 the applicant requested that he be either provided with a court decision prolonging his detention, or immediately released. His lawyer submitted a similar request. On the same day the applicant was informed about the fax from the Supreme Court.

At the hearing held on 4 January 1999 the applicant's counsel requested that the applicant and the other accused be immediately released, because their detention lacked any legal basis. The Regional Court rejected the request.

On 6 January 1999 the Supreme Court prolonged the applicant's detention until 30 April 1999. It observed, however, that the Regional Court could have conducted the proceedings more speedily.

On 11, 18 and 25 January, as well as 8 February and 1 March 1999 the court held hearings. At the hearing held on 8 March 1999 it ordered an expert opinion on graphology.

At the hearing of 15 March 1999 the court imposed fines on two witnesses for their failure to appear before it.

Hearings were held on 22 and 29 March, as well as 6, 12, 13, 19 and 20 April 1999. The hearings scheduled for 26 and 27 April 1999 were adjourned due to the illness of one of the accused's counsel. The hearings scheduled for 30 April and 4 May 1999 were adjourned because of, *inter alia*, the illness of the applicant's counsel.

On 29 April 1999 the Supreme Court granted the Regional Court's request for the prolongation of the applicant's detention until 15 June 1999, relying, *inter alia*, on the necessity to question a witness. It noted that after its previous decision of 6 January 1999 the proceedings had accelerated and were likely to end by 15 June 1999.

The Jelenia Góra Regional Court held further hearings on 17 and 20 May 1999.

On 31 May 1999 the court gave judgment on the merits of the case. The applicant was convicted of drug trafficking and sentenced to ten years' imprisonment and a fine of PLN 250,000.

On 31 May 1999 the same court prolonged the applicant's detention until 30 September 1999. On 24 June 1999 the Wrocław Court of Appeal dismissed his appeal against that decision.

On 6 September 1999 the Regional Court informed the applicant that the reasoning of the judgment of 31 May 1999 could not be completed within the time-limit laid down in the Code of Criminal Procedure and submitted to the applicant, because of the complexity of the case. It also observed that that time-limit had only an instructional character. On 21 September 1999 a copy of the judgment with the reasoning was sent to the applicant. Subsequently, he lodged an appeal.

On 16 February 2000 the Wrocław Court of Appeal in part amended and in part upheld that judgment. It observed, *inter alia*, that, contrary to the applicant's allegations, he had had access to the case file. With reference to the applicant's complaint that certain pieces of evidence proposed by him had not been examined, the Court of Appeal noted that that evidence did not relate to the subject matter of the proceedings. The court was of the opinion that the applicant's petitions concerning that evidence had been aimed at the

prolongation of the proceedings. It observed that the applicant had requested the preparation of expert opinions on issues already exhaustively examined by experts. The applicant's counsel lodged with the Supreme Court a cassation appeal against the Court of Appeal's judgment. He referred, *inter alia*, to the trial court's refusal to admit and examine certain items of evidence, as well as its failure to provide the applicant with the possibility to examine certain witnesses at a hearing.

On 30 October 2001 the Supreme Court dismissed that appeal, as well as cassation appeals lodged by two other convicted persons. It observed that witness D. M. had gone into hiding in the course of the proceedings and despite "wanted" notices had not been found. Therefore, the trial court's decisions rejecting the counsel's requests to have that witness examined and authorising reliance on testimony given by her at an earlier stage of the proceedings had been justified. The Supreme Court noted that another witness, W. M., had been on a number of occasions examined by the defence counsel and only at the end of the trial he had refused to further testify.

B. Relevant domestic law and practice

1. Decision to impose detention on remand

At the relevant time, the authorities competent to decide on detention on remand were specified in Articles 210 and 212 of the Code of Criminal Procedure of 1969, which read as follows:

Article 210

"1. Preventive measures [i.e. detention on remand, bail and police supervision] shall be imposed by the court; before a bill of indictment is lodged with the court, they shall be ordered by the prosecutor (...)."

Article 212

"1. A decision concerning preventive measures may be appealed [to a higher court] ...

2. A prosecutor's order for detention on remand may be appealed to the court competent to deal with the merits of the case ... ."

These provisions were amended on 29 June 1995 by the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes, which entered into force on 4 August 1996. Thereafter, detention on remand could only be imposed by a court order.

A new Code of Criminal Procedure was enacted by the Sejm (Parliament) on 6 June 1997. Its Article 250, in its relevant part, reads:

"1. Detention on remand shall be imposed by a court order.

2. In the investigative stage of proceedings, detention on remand shall be imposed, at a prosecutor's request, by a district court in the jurisdiction of which investigations are being conducted. After a bill of indictment is lodged with a court, a decision to impose detention on remand shall be given by a court competent to deal with the merits of the case.

3. The prosecutor, when submitting to a court a request referred to in § 2, shall at the same time order that the suspect be brought before a court."

2. Position of prosecutors

At the time of the applicant's arrest, the relations between the organs of the Polish State were set out in interim legislation, i.e. the Constitutional Act of 17 October 1992 (*Mała Konstytucja*). Article 1 of the Act laid down the principle of the separation of powers in the following terms:

"The legislative power of the State shall be vested in the Sejm and the Senate of the Republic of Poland; the executive power shall be vested in the President of Poland and the Council of Ministers, and judicial power shall be vested in the independent courts."

Pursuant to Article 1 of the Act of 20 June 1985 (*Ustawa o sądach powszechnych*), the courts are entrusted with the administration of justice in the Republic of Poland. The courts are courts of appeal, regional courts and district courts. Under Article 9 of the Law, the Supreme Court exercises supervisory jurisdiction over lower courts.

Article 1 of the Act of 20 June 1985 on Prosecuting Authorities (*Ustawa o Prokuraturze*) which determines general principles concerning the structure, functions and organisation of prosecuting authorities, at the material time read as follows:

"1. The prosecuting authorities shall be the Prosecutor General, prosecutors and military prosecutors. Prosecutors and military prosecutors shall be subordinate to the Prosecutor General.

2. The Prosecutor General shall be the highest prosecuting authority; his functions shall be carried out by the Minister of Justice."

Article 2 of the Act reads:

"The prosecuting authorities shall ensure the observance of the rule of law and the prosecution of criminal offences."

Under Article 7 of the Act, in carrying out his statutory duties, a prosecutor shall abide by the principles of impartiality and equality of citizens before the law. Pursuant to Article 8 of the Act, a prosecutor is independent in carrying out his or her duties, within the limits set out in this Article. A prosecutor shall abide by the instructions, guidelines and orders of his superiors. However, if an order relates to the substance of any action

to be taken in proceedings, a prosecutor may request his superior to issue the order concerned with reasons in writing, to alter the order, to relieve him from performing an act prescribed by that order, or to remove him from the case in question.

Chapter III of the Code of Criminal Procedure of 1969, applicable at the material time, entitled "Parties to proceedings, defence counsel, representatives of victims and representatives of society", described a prosecutor as a party to criminal proceedings. According to all the relevant provisions of the Code read together, a prosecutor performed investigative and prosecuting functions in the course of criminal proceedings. In particular, after completing the investigation, he drew up a bill of indictment and represented the prosecuting authority before the court competent to deal with the case.

3. Decisions concerning detention and the lodging of a bill of indictment with the courts

Until 1 September 1998 there were no specific provisions governing detention on remand after the bill of indictment was lodged with the competent court. In particular, there were no provisions to the effect that lodging a bill of indictment automatically prolonged or replaced a previous detention order, or that this event itself authorised detention for an unlimited period, or until a judgment at first instance was given. Nor was there any case-law to that effect. Nevertheless, according to the domestic practice, once a bill of indictment had been lodged with the court competent to deal with the merits of the case, detention was assumed to be prolonged pending trial, without any further judicial decision being given.

On 6 February 1997 the Supreme Court, in an interpretative ruling of certain provisions of the Code of Criminal Procedure of 1969 as amended by the Law of 29 June 1995, addressed the problems posed by the practice of keeping an accused in detention under the bill of indictment. In its resolution (no. I KZP 35/96) the Supreme Court replied – in the affirmative – to the question whether, after lodging a bill of indictment with the court competent to deal with the merits of the case, that court was obliged to give a decision prolonging detention on remand, which had meanwhile exceeded the period fixed (or further prolonged it) at the investigation stage. The relevant parts of the resolution read as follows:

> "Under the provisions of the Code of Criminal Procedure which applied before [4 August 1996, when] the amendment of 29 June 1995 took effect, an obligation to determine the period of detention imposed by a prosecutor at the investigation stage was laid down in Article 211 § 2. However, it did not emerge explicitly from Article 222 §§ 1 and 2 (1) of the Code that, at the investigation stage, a prosecutor or the court competent to deal with the case had each time to fix the length of the detention. It was deemed to be obvious that, when prolonging detention at the investigation stage, both the prosecutor and the court competent to deal with the case had to determine the time until which detention was to last under a given decision. It was therefore assumed that

the obligation to determine the period of detention arose if a decision on that matter was given before the expiry of the maximum statutory terms applicable at a given stage of the proceedings.

Comparing the old legislation with the present one leads [this Court] to the conclusion that the legislator, when amending the code in June 1995, simply extended [the scope of] the rules applicable to continuing and prolonging detention on remand – which had previously applied only at the investigation stage – to the phase of court proceedings.

Before the amendment, the legislation was based on the precept that a suspect should not be detained indefinitely as long as his case was not being dealt with by an independent court. Now, the starting-point is that a suspect (and an accused) should not be detained indefinitely as long as a first-instance judgment has not been rendered.

Under the previous legislation there was no need to determine the period of detention after a bill of indictment had been lodged with the court because at this point proceedings reached the phase when there was no statutory time-limit [for that measure]. For this reason, the court concerned had no interest in [knowing] until when detention had been prolonged under the last decision[;] detention could continue because 'detention of limited duration' had become 'detention of unlimited duration'. There was therefore only a need to ascertain whether there were grounds for continuing detention under Article 213 of the code."

4. Time-limits for detention on remand

Until 4 August 1996, when the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes came into force, the national law did not set out any statutory time-limits concerning the length of detention on remand in criminal proceedings in their judicial phase. However, pursuant to Article 222 of the Code of Criminal Procedure in force before 4 August 1996, the prosecutor could order detention on remand for a period not exceeding three months. When, in view of the particular circumstances of the case, the investigation could not be completed within three months, detention on remand could, if necessary, be prolonged by either the court competent to deal with the merits of the case, at the prosecutor's request, for a period not exceeding one year, or by the Supreme Court, at the request of the Prosecutor General, for such further fixed term as was required to terminate the investigations.

The courts, when ruling on a prosecutor's request under Article 222 of the Code, were obliged to fix the precise period for which detention could be prolonged. If they refused to prolong detention, or if the prosecutor failed to submit a request for a further prolongation before or on the expiry of the last detention order (regardless of whether it had been made by him or by a court), the detainee had to be released immediately.

The above mentioned Law of 29 June 1995 was supposed to enter into force on 1 January 1996. However, as it was apparent that the Supreme Court would not be able to process all requests for prolongation before the

expiry of previous detention orders, on 1 December 1995 a law was enacted which provided that the part of the Law of 29 June 1995 concerning detention on remand would only come into force on 4 August 1996. That part related to, *inter alia*, time-limits concerning detention on remand in criminal proceedings and the exclusive jurisdiction of the Supreme Court to issue decisions prolonging detention beyond those limits.

According to Article 10 (a) of the Law of 29 June 1995, as amended by the Law of 1 December 1995, different rules applied in respect of persons whose detention on remand started before 4 August 1996. This article provided:

> "1. In cases where the total period of detention on remand which started before 1 August 1996 exceeds the time-limits referred to in Article 222 §§ ... and 3 of the Code of Criminal Procedure, the accused shall be kept in detention until the Supreme Court gives a decision on a request for prolongation of such detention under Article 222 § 4 of the Code of Criminal Procedure.
>
> 2. In cases referred to in § 1, if no [such] request has been lodged, detention shall be quashed not later than 1 January 1997."

Article 2 § 2 of the Law of 6 December 1996, which added certain new grounds for prolonging detention beyond the time-limits, provided:

> "In cases where a request for prolongation of detention imposed before 4 August 1996 is lodged on the basis of Article 222 § 4, as amended by Article 1 of this law, the detention shall continue until that request has been examined by the Supreme Court."

On 6 June 1997 Parliament enacted a new Code of Criminal Procedure. It entered into force on 1 September 1998, pursuant to the Interim Law of 6 June 1997. That law stipulated that all provisions relating to the matters regulated by the new Code, in particular, the provisions of the 1969 Code, were to be repealed on its entry into force. Article 3 § 2 of the Interim Law reads, however:

> "Previous provisions relating to matters regulated in the [new] Code of Criminal Procedure remain in force if they have the character of a *lex specialis* (*mają charakter przepisów szczególnych*)."

COMPLAINTS

1. The applicant complained under Article 5 § 1 of the Convention that he was unlawfully deprived of his liberty between 1 and 27 May 1997, and between 1 and 6 January 1999.

2. He also complained under Article 5 § 1 of the Convention that on 31 May 1999 the Jelenia Góra Regional Court unlawfully prolonged his detention until 30 September 1999, whereas only the Supreme Court was empowered to do that in his case.

3. The applicant complained under Article 5 § 3 of the Convention that he had been remanded in custody by a prosecutor who was not "a judge or other officer authorised by law to exercise judicial power".

4. He also complained under Article 5 § 3 of the Convention that his detention on remand had been prolonged beyond a reasonable time and that he had not been released pending trial.

5. The applicant complained under Article 6 § 1 of the Convention that the criminal proceedings against him had exceeded a reasonable time.

6. He next complained under Article 6 § 3 (b), (c) and (d) of the Convention that he had had only limited access to the case file and that his petitions concerning important items of evidence had been rejected. The applicant further complained that he had not been able to defend himself in person and have witnesses on his behalf found and examined.

7. Finally, the applicant complained that Articles 5 § 5 and 13 of the Convention had been violated in his case.

THE LAW

1. The applicant complained that his detention had been on two occasions effected in breach of Article 5 § 1 of the Convention, which provides, in so far as relevant:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ..."

a) The period between 1 and 27 May 1997

The Government made reference to the judgment in the case of *Baranowski v. Poland* (see no. 28358/95, ECHR 2000-III) and forbore from expressing their opinion on the issue. They noted, however, that the time spent by the applicant in detention on remand had been deducted from his imprisonment sentence and therefore damage sustained in connection with the detention in the period in question had been compensated.

The applicant did not agree.

b) The period between 1 and 6 January 1999

The Government were of the view that the applicant's detention in that period was lawful. It was based on Article 2 § 2 of the Law of 6 December 1996, in conjunction with Article 3 § 2 of the Interim Law of 6 June 1997. The Government observed that the Supreme Court had contacted the remand centre before the expiry of the preceding detention order.

The applicant disagreed. He relied on the Supreme Court's resolution of 30 September 1998 concerning an interim provision which provided that the trials that had commenced before the entry into force of the new Code of Criminal Procedure had to be conducted in accordance with the old Code. The Supreme Court considered that that principle did not pertain to provisions regulating preventive measures, such as detention on remand. The applicant submitted a copy of an article by professor Ewa Łętowska, the former Ombudsman, published in "*Polityka*" on 6 February 1999. In her article, entitled "Fax interpretation, *de facto* in force" (*"*Wykładnia faksowa, faktycznie obowiązująca*"*), Ewa Łętowska noted that the new amendments to the criminal procedure provided for a maximum limit of two years for detention on remand, beyond which it could be prolonged only by the Supreme Court. She mentioned the provision authorising the practice of prolonging detention until that court gave its decision, existing before the entry into force of the new Code of Criminal Procedure. The author quoted a letter from one of the Presidents of the Supreme Court to the management of the detention centres informing them about an established practice of considering, also after 1 September 1998 (the date of the entry into force of the new code), detention prolonged "on the strength of the law" until the examination of an application for prolongation. At the end, Ewa Łętowska wrote:

> "But a procedure is a procedure, a law is a law and an established practice is an established practice. And they should not be used interchangeably."

The Court considers, in the light of the parties' submissions, that the complaint in respect of both periods raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore 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.

2. The applicant complained under Article 5 § 1 of the Convention about the allegedly unlawful prolongation of his detention on 31 May 1999.

The Court observes that on 31 May 1999 the Jelenia Góra Regional Court gave judgment. Thereafter the applicant was lawfully detained "after

conviction by a competent court" within the meaning of Article 5 § 1 (a) of the Convention. It follows that his detention for the period in question falls within a category of permissible exceptions to the right to liberty laid down by Article 5 of the Convention.

This complaint must therefore be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicant complained that his detention on remand had been ordered by a prosecutor, in breach of Article 5 § 3 of the Convention, which reads in so far as relevant:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ..."

The Government decided not to express any opinion on the issue, relying on the Court's judgment in *Niedbała v. Poland* (no. 27915/95, 4 July 2000).

The applicant found the Government's submissions inconsistent.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore 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.

4. The applicant complained about the length of his detention on remand, relying on Article 5 § 3 of the Convention, the relevant part of which provides:

> "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) The parties' submissions

The Government submitted that the Regional Prosecutor had decided to detain the applicant on remand on the basis of evidence justifying reasonable suspicion that the applicant had committed an offence. They were of the view that "relevant" and "sufficient" grounds for his detention had existed. The Government mentioned a risk of absconding and criminal collusion. They noted that some of the applicant's accomplices had been at large and there had been a risk that he would attempt to contact them in order to jeopardise the proceedings. The Government further referred to the seriousness of the charges against the applicant.

They pointed out that the lawfulness of the applicant's detention had been under constant judicial supervision. The Government observed that eighteen court decisions had been given in that connection, seven of which

by the Supreme Court. They recalled the grounds for the prolongation of the applicant's detention, relied on by the domestic courts.

The Government made reference to their observations on the length of the proceedings in connection with the complaint under Article 6 § 1 of the Convention.

The applicant submitted that there had been no grounds to consider that he would abscond. He observed that he had not been previously convicted of an offence and had had permanent residence. The applicant was of the view that the proceedings had not been conducted with requisite diligence while he had been detained on remand.

b) The Court's assessment

The Court notes that the period to be taken into consideration began on 22 February 1996, when the applicant was arrested, and ended on 31 May 1999, when he was convicted. It therefore lasted three years, three months and nine days.

The Court recalls that it falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention.

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, §§ 152 and 153, ECHR 2000-IV).

The Court observes that the applicant did not contest the Government's contention that his detention on remand had been initially justified by reasonable suspicion that he had committed a criminal offence. It finds no reason to hold otherwise.

The Court further notes that in deciding on the prolongation of the applicant's detention and his applications for release the domestic courts relied on a fear that he would induce witnesses to give false testimony. In its decision of 17 February 1997 the Supreme Court referred to the existence of

evidence that the applicant had actually attempted to do so. The courts further mentioned a risk of absconding. The Court is not persuaded by the applicant's statement that the fact that he was not previously convicted and had permanent residence proved that no such risk existed.

The Court observes that in deciding on the applicant's detention the courts also made reference to a leading role that the applicant had in the organisation of a drug trafficking network. On a number of occasions they prolonged the detention because of the necessity to take further evidence.

In view of that, the Court considers that the grounds given by the domestic courts for the applicant's continued detention were "relevant" and "sufficient".

As regards the conduct of the proceedings, the Court firstly observes that the criminal case at issue can be regarded as complex. The Court takes note of the seriousness of the charges brought against the applicant and the number of other persons charged in the same proceedings. The large amount of evidence had to be examined in their course. Such complexity of the case undoubtedly prolonged its examination and contributed to the length of the applicant's detention on remand.

The Court further notes that no significant periods of inactivity occurred on the part of the prosecution authorities and the trial court, except for the period between 24 April and 17 November 1997. However, as the Government noted, a number of procedural decisions concerning the applicant's detention on remand were taken in that period. The Court observes that the investigations were completed by the Regional Prosecutor within a relatively short period of time and the trial court held hearings at regular intervals. For these reasons, it considers that the domestic authorities displayed "special diligence" in the handling of the applicant's case.

Consequently, in the light of the foregoing findings and the above-mentioned case-law, the Court considers that the complaint under Article 5 § 3 of the Convention is manifestly ill-founded, within the meaning of Article 35 § 3. This complaint must be therefore rejected in accordance with Article 35 § 4.

5. The applicant complained about the alleged breach of Article 5 § 5 of the Convention, which stipulates:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The Government submitted that the applicant had at his disposal a claim for compensation for manifestly unjustified detention, provided by Articles 488 and 489 of the then in force Code of Criminal Procedure. They stated that he should have availed himself of that remedy in respect of his detention effected from 1 and 27 May 1997. The Government pointed out that a decision that the detention had been unlawful was not a prerequisite to

institute compensation proceedings. They further made reference to the Supreme Court's ruling of 6 February 1981, according to which compensation could be awarded, *inter alia*, when the challenged detention lacked a legal basis. The Government recalled that the applicant's allegations concerning his detention on remand in May 1997 and January 1999 were based on that ground and therefore he should have lodged a compensation claim under the provisions referred to by them. The Government submitted that on 1 September 1998 a new Code of Criminal Procedure entered into force, which extended the scope of application of the compensation procedure by replacing the word "obviously" with "undoubtedly" before "unjustified detention" (Article 552 § 4 of the new Code).

The applicant did not comment on this issue.

Having regard to its above findings in respect of the complaint under Article 5 § 1 concerning the detention effected after 31 May 1999 and the complaint under Article 5 § 3 relating to the allegedly unreasonable length of detention, the Court finds that no issue arises under paragraph 5 of that Article in relation to these complaints of the applicant (cf. *O'Hara v. the United Kingdom*, no. 37555/97, § 50, ECHR 2001-X).

As far as this complaint relates to the remaining allegations made under Article 5 §§ 1 and 3, the Court considers, in the light of the parties' submissions, that this part of the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is in this part not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

6. The applicant complained about the allegedly unreasonable length of the criminal proceedings against him, relying on Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

a) The parties' submissions

The Government were of the opinion that the case was particularly complex, mainly because of the amount of evidence and the number of accused persons. They submitted that the translation of the case file of proceedings carried out by German courts and a number of expert opinions had been ordered. The Government noted that some of the accused persons, as well as certain witnesses, on several occasions had failed to appear before the trial court, which had entailed the necessity to adjourn hearings. The

Government further mentioned an illness of one of the accused and the fact that another one had gone into hiding.

They stated that the proceedings had been conducted with due diligence and 32 hearings had been held in their course. The Government submitted that although no hearings were held in the period between 24 April and 17 November 1997, a number of procedural decisions concerning the applicant's detention on remand were taken by the Regional Court and Court of Appeal.

The Government were of the view that the applicant had significantly contributed to the delay in the examination of his case. They noted that the hearings scheduled for 30 April and 4 May 1999 had to be adjourned because of the absence of the applicant's counsel. Only at the beginning of 1999 the applicant requested the examination of new witnesses. The Government pointed out that some of his requests or appeals had been manifestly ill-founded and by filing them he had prolonged the proceedings.

The applicant did not agree. He pointed out that seven months had passed from the day when the bill of indictment had been submitted to the trial court to the day when that court had held the first hearing. In the applicant's opinion, the preparation of the written reasoning of the judgment of the Regional Court had lasted too long. He submitted that the case file had been sent to the Supreme Court only fifteen months after the Court of Appeal had given its judgment.

The applicant denied having contributed to the prolongation of the proceedings. He stated that none of the hearings had been adjourned because of him.

b) The Court's assessment

The Court notes that the proceedings began at the latest on 22 February 1996 and ended on 30 October 2001. They therefore lasted 5 years, 8 months and 8 days.

The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the criteria established by its case-law, particularly the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI).

The Court agrees with the Government that the case was complex and the domestic courts dealt with it with sufficient consciousness (cf. *Sałapa v. Poland* concerning the same set of proceedings, no. 35489/97, §§ 84-87, 19 December 2002).

As regards the applicant's conduct, the Court observes that in the course of the proceedings he filed a number of motions, the examination of which undoubtedly delayed the procedure. It will forbear from assessing whether

they were manifestly ill-founded, as the Government maintained. The applicant seems to have made use of his procedural rights. The Court considers, however, that he had to be aware that his motions could lead to delays the consequences of which he would have to bear (see *Malicka-Wąsowska v. Poland* (dec.), no. 41413/98, 5 April 2001). It further notes that two hearings were adjourned because of the absence of the applicant's lawyer.

In view of that, the Court finds that the applicant's conduct contributed to the delay in the examination of his case.

Assessing the circumstances of the case as a whole, the Court considers that an overall period of over 5 years and 8 months does not exceed a reasonable time. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

7. The applicant alleged a violation of the guarantees of a fair trial, set out in Article 6 § 3 of the Convention, which reads, in so far as relevant:

> "Everyone charged with a criminal offence has the following minimum rights: ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (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;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ..."

(a) As far as the applicant complains that his access to the case file was limited, the Court observes that that issue was not raised in the cassation appeal lodged with the Supreme Court by his counsel. It notes, however, that, in any event, it transpires from the facts of the case that he was enabled to consult that file on a number of occasions. He did not supply any evidence that that access was limited in such a way as to raise an issue under the provisions relied on by him.

(b) Further, as regards the rejection of the applicant's motions concerning evidence, the Court notes that the proposed pieces of evidence were not examined because the trial court found them irrelevant to the case. According to the Court of Appeal, some of the applicant's petitions related to evidence already exhaustively examined in the proceedings. The Court finds that the reasons for non-examination of the applicant's petitions were sufficiently explained by the Court of Appeal. There is no appearance of arbitrariness on the part of that court.

(c) Finally, the applicant's allegation that he could not defend himself in person and have witnesses on his behalf found and examined has not been

supported by any evidence. In addition, the Court notes that he was represented by a lawyer throughout the whole proceedings.

It is true that witness D. M. could not be found and examined before the trial court. The Court, however, reiterates that Article 6 § 3 (d) only requires the possibility to cross-examine witnesses the testimony of whom was not adduced before the trial court in situations where this testimony plays a main or decisive role in securing the conviction (see *Visser v. the Netherlands*, no. 26668/95, § 45, 14 February 2002). The applicant does not maintain that his conviction was based solely or to a great extent on the basis of the testimony given by D. M. Nor such a conclusion can be drawn from the facts of the case. Further, the Court finds no appearance of negligence on the part of the domestic authorities in their attempts to ensure the attendance of D. M. before the trial court (cf. *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, p. 10, § 21). In view of that, the Court considers that the impossibility to obtain the attendance of that witness and her examination at a hearing did not breach the applicant's rights guaranteed by Article 6 § 3 (d).

It follows that the complaints raised under Article 6 § 3 are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4.

8. The applicant alleged a breach of Article 13 of the Convention, which reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court, however, observes that the applicant did not make any specific complaint or provide any explanation in this connection. In particular, he did not specify in respect of which alleged breach of the Convention he had no effective remedy at his disposal. The Court is unable to examine purported complaints formulated in such an unsubstantiated manner. It therefore rejects this complaint as manifestly ill-founded pursuant to Article 35 §§ 3 and 4.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints concerning the detention effected in the periods from 1 to 27 May 1997 and from 1 to 6 January 1999, as well as the complaints relating to the prosecutor's order of detention on remand and compensation for allegedly unlawful detention;

Declares the remainder of the application inadmissible.

Mark VILLIGER
Deputy Registrar

Georg RESS
President