CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37444/97
by Robert BAGIŃSKI
against Poland

The European Court of Human Rights (Fourth Section), sitting on 21 January 2003 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mrs E. PALM,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr R. MARUSTE,
Mr L. GARLICKI, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 9 September 1996,

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, Robert Bagiński, is a Polish national, who was born in 1968 and lives in Wrocław, Poland. In the proceedings before the Court the applicant was not legally represented. The respondent Government were represented by their Agent, 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.

1. Criminal proceedings against the applicant and his detention

In 1994 two sets of criminal proceedings were instituted against the applicant. The first involved a charge of theft, the second a charge of forgery. The second proceedings, which were the object of the present application, began on 14 January 1994. On that day the applicant was arrested and charged with forgery. He was released after 48 hours. As from 3 March 1994 the police unsuccessfully tried to summon him in order to hear evidence from him.

On 13 October 1994 the applicant was arrested by the police under a warrant of arrest, issued on 22 June 1994 along with a "wanted" notice. He was then brought before the Wrocław District Prosecutor (*Prokurator Rejonowy*). The applicant made his escape while the prosecutor was hearing evidence from him.

On 12 December 1994 the applicant was re-arrested by the police and brought before the Wrocław-Fabryczna District Prosecutor. He was charged with five counts of burglary and one count of escaping from lawful custody. On the same day the prosecutor detained him on remand for three months.

On 3 January 1995 the investigation was taken over by the Wrocław Regional Prosecutor (*Prokurator Wojewódzki*).

On 13 June 1995 the Regional Prosecutor charged the applicant with forgery, escaping from lawful custody and seven counts of burglary.

The investigation involved 6 suspects, including the applicant. The prosecution obtained evidence from several witnesses, 17 reports from experts in mechanics and evidence from experts in graphology.

During the investigation, at the request of the Wrocław Regional Prosecutor, the Wrocław Regional Court (*Sąd Wojewódzki*) on three occasions prolonged the applicant's detention. The last of the relevant decisions was given on 30 August 1995 and extended the applicant's detention until 10 December 1995.

In all those decisions the Regional Court relied on the reasonable suspicion that the applicant had committed the offences with which he had

been charged and their serious nature. It also held that his detention was necessary to ensure the proper course of the proceedings, in particular as during the investigation evidence needed to be obtained from other suspects, experts and numerous witnesses.

On 8 December 1995 the Wrocław Regional Prosecutor lodged a bill of indictment with the Wrocław Regional Court. The applicant was indicted on charges of handling stolen goods, forgery of documents and escaping from lawful custody.

Between December 1995 and the end of 1996 the applicant lodged numerous applications for release. In particular, he asked to be released on bail.

All those applications were dismissed, both at first instance and on appeal.

Neither the applicant, nor his lawyer participated in any of the sessions held by the courts in connection with his applications for release or his subsequent appeals. The sessions were held *in camera*. The prosecution authorities were informed of session dates and were represented either by a regional prosecutor or a prosecutor of appeal. It was recorded on the minutes of the sessions held on 19 February and 27 June 1996 before the Wrocław Regional Court and on 9 September 1996 before the Wrocław Court of Appeal that the courts made their decisions after having heard the prosecutor's arguments. The grounds invoked by the courts are stated below.

On 19 February 1996 the Wrocław Regional Court, ruling on the applicant's application of 12 February 1996, found that:

> "... in the light of evidence there is a sufficient likelihood that [the applicant] had committed the offences with which was charged [. A] serious danger to society represented by these offences and need to secure the proper conduct of the criminal proceedings, in particular as [he] absconded at the investigative stage of the proceedings, give grounds for his continuing detention."

The first hearing on the merits was to be held on 22 March 1996 but it was adjourned to 23 May 1996 since one of the applicant's co-defendants had failed to appear. On 23 May 1996 the trial was postponed to 8 August 1996 because 3 of the applicant's co-defendants had failed to appear.

On 27 June 1996, the Regional Court rejected two further applications for release, lodged by the applicant on 24 and 25 June 1996 respectively. It held the following:

> "... in the light of evidence there is a sufficient likelihood that [the applicant] had committed the offences with which he was charged [. A] serious danger to society created by these offences and need to secure the proper conduct of the criminal proceedings give grounds for continuing detention[;] on the other hand, having regard to the fact that [the applicant] absconded at the investigative stage of the proceedings, the possibility of varying the preventive measure cannot be taken into account."

On 8 August 1996, at the first hearing on the merits held in the applicant's case, the Regional Court rejected his subsequent application for release. On 9 September 1996 the Wrocław Court of Appeal (*Sąd Apelacyjny*) dismissed the applicant's appeal against this decision, holding that:

> "In his appeal [the applicant] argues that he has already been detained for 20 months and considers that in view of the fact that the trial began, he should be released. He also refers to his arrears in child support obligations and to [the situation of] his mother, on whom he [previously] attended.
>
> This court has taken account of the following:
>
> The period spent by [the applicant] in detention is indeed very long. However, there is no error in [the lower] court's finding that this is not in itself a particular circumstance which would be a ground for not continuing his detention, as referred to in the first sentence of Article 218 of the Code of Criminal Procedure. There is no basis on which to refute the Regional Court's statements expressing its concern about the proper conduct of the trial without [detention] being imposed on [the applicant]. In the course of the investigation [he] was elusive for the investigating authority and he was twice searched for by a "wanted" notice (see p. 15, volume I). [The applicant's] detention has still its basis within the meaning of Article 217 § 1 of the [Code of Criminal Procedure] and the circumstances upon which he relies do not suffice for the Court of Appeal to question the decision of the Regional Court in respect of the preventive measure imposed on [him].
>
> The case has now reached the stage of the opening of the trial and the subsequent hearings (the dates of which have already been fixed) will soon be held. Accordingly, it is likely that the case will in a short time be terminated which – still more – justifies [an opinion] that the contested decision of the Regional Court should be upheld. ..."

On 27 September 1996 the court held the second hearing. Subsequently, it listed hearings for 20 November 1996 (cancelled as 2 of the applicant's co-defendants had failed to appear), 28 January 1997 (cancelled as the case-file had been sent to the Supreme Court) and 18 March 1997 (cancelled as one of the co-defendants had failed to appear).

Meanwhile, on 31 December 1996 the Regional Court had made an application under Article 222 § 4 of the Code of Criminal Procedure to the Supreme Court (*Sąd Najwyższy*), asking it to prolong the applicant's detention until 24 June 1997. The application was posted to the Supreme Court on 10 January 1997.

On 24 January 1997 a panel of three judges, sitting *in camera* as the Criminal Chamber of the Supreme Court, after obtaining oral comments from the State Prosecutor (*Prokurator Krajowy*), who represented the prosecution, granted the application and prolonged the applicant's detention "from 24 January 1997 to 24 June 1997". The Supreme Court's decision contained exhaustive reasons, the relevant part of which may be summarised as follows:

The Supreme Court, noting that the application was filed on 31 December 1996 but posted as late as 10 January 1997, first considered what was the proper date of "lodging" such an application for the purposes of Article 222 § 4 of the Code of Criminal Procedure.

The Supreme Court next observed that, depending on the answer to this question, it will have to determine the legal consequences of a potential failure on the part of the Wrocław Regional Court to respect the rule laid down in section 10 (a) § 2 of the Interim Law of 1 December 1995, which stated that in cases where no application for a further prolongation of detention on remand had been "lodged", detention had to be lifted no later than on 1 January 1997.

The Supreme Court considered that it should also deal with the question whether it was competent to rule on the application if it had been "lodged" after the deadline referred to in section 10 (a) of the Interim Law of 1 December 1995, i.e. after 1 January 1997.

Referring to the first question, the Supreme Court held that the proper date of "lodging" an application under Article 222 § 4 of the Code of Criminal Procedure had to be deemed either the date of posting the application or the date of submitting it to the registry of the Supreme Court since to hold otherwise would mean leaving a detainee without any guarantee that the Supreme Court was properly supervising his detention. Moreover, if the requesting court was not bound by any time-limits for submitting its request, detention, the most severe among the preventive measures, might continue for an unspecified and unlimited time outside the Supreme Court's supervision. In consequence, an application under Article 222 § 4 of the Code of Criminal Procedure, a mere "proposal" to continue detention, would, for all practical purposes, transform into a basis for continuing detention. Clearly, it was not the intention of the legislator.

The Supreme Court therefore concluded that since in the applicant's case no application for a further prolongation of his detention had been lodged before 1 January 1997, the order for his detention should have been quashed at latest on that day. Accordingly, his detention from that date to the date on which the Supreme Court was giving the present decision lacked any legal basis and was, consequently, unlawful. The court noted that such an "unlawful" detention might justify granting compensation for unlawful deprivation of liberty if this period would not be deducted from the future sentence.

The Supreme Court went on to find that it was, nevertheless, competent to deal with the application. A lower court's obligation to release a detainee in case of its failure properly to lodge an application under Article 222 § 4 of the Code of Criminal Procedure was one thing but its right to make such an application at any time was another. In the Supreme Court's opinion, the application in question should be deemed a "fresh request" and be examined as such.

The Supreme Court then dealt with the application and found that further prolongation of the applicant's detention was necessary. It relied on the likelihood that the applicant had committed the offences with which he had been charged, the risk of his absconding or going into hiding which, in its view, was justified by the fact that the applicant had already absconded after having been arrested and had been searched for by a "wanted" notice. Lastly, the Supreme Court stressed the complexity of the case.

On 16 May 1997 the court held a hearing and heard evidence from witnesses.

On 18 June 1997 the Regional Court held the next hearing. On the same day it made the second application under Article 222 § 4 of the Code of Criminal Procedure to the Supreme Court, asking it to prolong the applicant's detention until 24 December 1997.

On 8 August 1997 the Supreme Court granted the application. It held a session *in camera*. Before taking its decision, it heard arguments of the State Prosecutor. The decision read, in so far as relevant:

> "... the principal charge laid against [the applicant] concerns the offence of handling stolen goods of a high value. A severe penalty, that is, a sentence of up to 10 years' imprisonment may be imposed for the commission of this offence ... The charges against the applicant have a degree of likelihood, as required by Article 209 of [the Code of Criminal Procedure], in particular in view of the testimonies given by the co-defendants Ł[...], L[...] and B[...] as well as [evidence] which has so far been heard from witnesses. Given that [the applicant], after having been arrested, had on one occasion fled and was then searched for by a "wanted" notice, there is a risk of his absconding or going into hiding. ... accordingly, his detention has its basis under Article 217 § 1(1) and § 2. In the present case there is a need to take various evidence, in particular from witnesses. The process of obtaining evidence is lengthy and, as it emerges from the case-file, it has been extended because of [the obstacles] which the [trial] court, despite its efforts, could not overcome. Consequently, there are grounds for further prolongation of detention, as defined in Article 222 § 4 of the [Code of Criminal Procedure]. ..."

On 10 September 1997 the applicant asked the Regional Court for release. He relied on Article 5 § 3 of the Convention, submitting that his detention had clearly exceeded a "reasonable time".

On 11 September 1997 a panel of three judges, sitting *in camera* as the Wrocław Regional Court rejected the application. A.G., a regional prosecutor from the Wrocław Regional Prosecutor's Office took part in the session and the court heard her arguments. The relevant decision comprises a four-line reasoning, which read as follows:

> "Since the grounds for continuing detention, mentioned in the decision of the Supreme Court of 8 August 1997 file no. V K0 42/97, are still valid and as there are no circumstances militating in favour of not continuing the preventive measure imposed, it has been held [as in the operative part of the decision]."

On 18 September 1997 the court cancelled a hearing since one of the co-defendants had failed to appear.

Further hearings were held on 30 September and 11 and 22 December 1997.

On 22 December 1997 the applicant was released.

A hearing listed for 17 March 1998 was cancelled due to the absence of one of the applicant's co-defendants.

On 11 September 1998 the trial came to an end. On 14 September 1998 the Regional Court delivered judgment, The applicant was convicted as

charged and sentenced to 3 years' and 2 months' imprisonment. The period spent by him in pre-trial detention was deducted from the sentence to be served.

On 24 September 1998 the applicant lodged a notice of appeal with the Regional Court.

On 16 October 1998 the applicant's counsel informed the court that the applicant did not intend to contest the judgment and withdrew his notice of appeal. In consequence, the judgment became final on 10 November 1998.

On 2 December 1998 the applicant asked the Regional Court to grant him retrospective leave to appeal out of time. He maintained that his counsel had withdrawn the notice of appeal without his consent. On 25 February 1999 the court refused his application.

The applicant later lodged 2 further appeals but, eventually, he withdrew his application for leave to appeal out of time on 2 September 1999.

2. The applicant's contact with his family during his detention

(a) Facts as related by the applicant

In his original submissions, the applicant maintained that during 17 months following the submission of the bill of indictment to the Regional Court (which took place on 8 December 1995) he had not, in principle, been allowed to maintain personal contact with his family. He asserted that particular restrictions had been placed on his personal contact with his mother.

According to the applicant, the judge presiding over his trial ordered that she be not permitted to visit him in prison because she was a witness called by the prosecution. The judge considered that such contact could not be maintained as long as evidence from her had not been heard. For that reason, the applicant's requests for his mother and other close relatives to be allowed to see him in prison were for the most part rejected. Only on two occasions did the presiding judge allowed J.B., his brother, to visit him in prison.

(b) Facts as related by the Government

On 18 December 1995 the applicant's mother asked the Regional Court to allow her to visit him in prison. On 20 December 1995 the court refused and held that, on account of the fact the she had been called as a witness by the prosecution, no such permission could be granted as long as evidence from her had not been heard or, alternatively, as long as she had refused to give evidence on the ground of being not qualified to testify as a close relative.

On 21 December 1995 the applicant asked the court to allow her to visit him in prison. The court refused on 10 January 1996.

On 23 May 1996 the court allowed the applicant's brother to visit him in prison.

On 4 June 1996 the applicant asked the court to allow his mother to visit him in prison. He also asked for permission to contact his family by phone. The court allowed him to make two phone calls but refused to give a visit permission to his mother since she had not yet gave evidence before it.

On 12 July 1996 the applicant asked the court to allow him to speak on the phone to his brother and son. In August, the court allowed him to make a phone call to the son but not to the brother.

The applicant submits that the court permission to make phone calls was delivered too late to the prison authorities and, as a result, he could not make use of it.

(c) Documentary evidence produced by the Government

The Government produced a letter from the Director of Legal Department of the Central Board of Prisons dated 10 October 2000 and copies of visit permissions given to the applicant's brother and mother. It transpires from those documents that from 4 February 1995 to 6 December 1995 the applicant's mother was allowed to visit him in prison on 9 occasions (4 February; 15 March; 23 June; 28 July; 17 August; 13 September; 20 October; 22 November and 6 December 1995).

She was allowed to resume visits on 16 May 1997 and then, up to 21 November 1997, she visited him 9 times (16 and 25 May; 8 and 15 June; 29 August; 12 September; 3 and 24 October and 21 November 1997).

The applicant's brother was allowed to visit him in prison on 19 July, and 27 December 1995, on 21 and 26 May 1996 and on 4 November 1997.

In 1996 the applicant was allowed to make 3 phone calls; 2 in June and 1 in August.

B. Relevant domestic law and practice

1. Amendments to Polish criminal legislation

Over the period to which the facts of the present case relate, i.e. from March 1995 to the beginning of 1999, Polish criminal legislation was amended on several occasions.

In so far as the present case is concerned, there were two relevant amendments to the Code of Criminal Procedure ("the 1969 Code"), a law which is no longer in force as it was repealed and replaced by the so-called "New Code of Criminal Procedure" of 6 June 1997 ("the 1997 Code"), which entered into force on 1 September 1998.

The first such amendment was made by the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal

Statutes which entered into force on 1 January 1996, except the amendments relating to the imposition of detention on remand (in particular, those stating that only a judge was empowered to detain a suspect on remand); the entry into force of the latter amendments being postponed until 4 August 1996 (see below).

The second amendment, effected by the Law of 1 December 1995 on Amendments to the Law of 29 June 1995 ("the 1995 Interim Law") came into force on 1 January 1996. Section 10(a) of the Law introduced special interim rules governing the prolongation of detention on remand beyond the statutory time-limits laid down in Article 222 §§ 2 and 3 of the 1969 Code in cases where such detention had been imposed before 4 August 1996 (see below, 2 c) "Statutory time-limits for detention on remand").

2. Preventive measures, in particular detention on remand

At the material time the 1969 Code listed as "preventive measures" (*środki zapobiegawcze*), *inter alia*, detention on remand, bail and police supervision.

(a) Imposition of detention on remand

Article 210 § 1 of the 1969 Code read (in the version applicable until 4 August 1996):

> "Preventive measures shall be imposed by the court; before a bill of indictment has been lodged with the competent court, the measures shall be imposed by the prosecutor."

Article 222 (in the version applicable until 4 August 1996) stated, in so far as relevant:

> "1. The prosecutor may order detention on remand for a period not exceeding three months.
>
> 2. When, in view of the particular circumstances of the case, the investigation cannot be terminated within the period referred to in paragraph 1, detention on remand may, if necessary, be prolonged by:
>
> (1) the court competent to deal with the case, upon the prosecutor's request, for a period not exceeding one year;
>
> (2) the Supreme Court, upon request of the Prosecutor General, for a further fixed term required to terminate the investigation."

Under Article 212 § 2 a detainee could appeal against a detention order made by a prosecutor to the court competent to deal with his case; however, he was not entitled to be brought before the judge dealing with his appeal.

(b) Grounds for applying preventive measures

Article 209 of the 1969 Code set out general grounds justifying imposition of preventive measures. That provision (as it stood at the material time) provided:

> "Preventive measures may be imposed in order to ensure the proper conduct of proceedings if the evidence against the accused sufficiently justifies the opinion that he has committed a criminal offence."

Article 217 § 1 defined grounds for detention on remand. That provision, in the version applicable until 1 January 1996 provided, in so far as relevant:

> "Detention on remand may be imposed if:
>
> (1) there is a reasonable risk that an accused will abscond or go into hiding, in particular when he has no fixed residence [in Poland] or his identity cannot be established; or
>
> (2) there is a reasonable risk that an accused will attempt to induce witnesses to give false testimony or to obstruct the proper conduct of proceedings by any other unlawful means; or
>
> (3) an accused has been charged with a serious offence or has relapsed into crime in the manner defined in the Criminal Code; or
>
> (4) an accused has been charged with an offence which creates a serious danger to society."

On 1 January 1996 paragraphs (3) and (4) were repealed. From that date on that provision read:

> "(1) there is a reasonable risk that an accused will abscond or go into hiding, in particular when his identity cannot be established or he has no permanent abode [in Poland]; or
>
> (2) [as it stood before 1 January 1996]."

Paragraph 2 of Article 217 then read:

> "If an accused has been charged with a serious offence or an intentional offence [for the commission of which he may be] liable to a sentence of a statutory maximum of at least eight years' imprisonment, or if a court of first instance has sentenced him to at least three years' imprisonment, the need to continue detention in order to secure the proper conduct of proceedings may be based upon the likelihood that a heavy penalty will be imposed."

The 1969 Code set out the margin of discretion as to maintaining a specific preventive measure. Articles 213 § 1, 218 and 225 of the Code were based on the precept that detention on remand, the most extreme among the preventive measures, should not be imposed if more lenient measures were adequate.

Article 213 § 1 provided:

> "A preventive measure [including detention on remand] shall be immediately lifted or varied, if the basis therefor has ceased to exist or new circumstances have arisen which justify lifting a given measure or replacing it with a more or less severe one."

Article 225 stated:

> "Detention on remand shall be imposed only when it is mandatory; this measure shall not be imposed if bail or police supervision, or both of these measures, are considered adequate."

The provisions of the 1969 Code providing for "mandatory detention" (for instance, pending an appeal against a sentence of imprisonment exceeding three years) were repealed on 1 January 1996 by the Law of 29 June 1995 referred to above.

Finally, Article 218 provided:

> "If there are no special reasons to the contrary, detention on remand should be lifted, in particular, if:
>
> (1)º it may seriously jeopardise the life or health of the accused; or
>
> (2) ºit would entail excessively burdensome effects for the accused or his family."

(c) Statutory time-limits for detention on remand

Until 4 August 1996, i.e. the date on which the relevant provisions of the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes entered into force, the law did not set out any time-limits on detention on remand in court proceedings; it did so only in respect of the investigative stage (see above, 2a) Imposition of detention on remand; Article 222 in the version applicable until 4 August 1996).

Article 222 of the 1969 Code in the version applicable after 4 August 1996 provided, in so far as relevant:

> "3. The whole period of detention on remand until the date on which the court of first instance gives judgment may not exceed one year and six months in cases concerning offences. In cases concerning serious offences [offences for the commission of which a person was liable to a sentence of a statutory minimum of at least 3 years' imprisonment] this period may not exceed two years.
>
> 4. In particularly justified cases the Supreme Court may, on an application made by the court competent to deal with the case, ... prolong detention on remand for a further fixed period exceeding the time-limits set in paragraphs 2 and 3, when it is necessary in connection with a suspension of the proceedings, a prolonged psychiatric observation of the accused, when evidence needs to be obtained from abroad or when the accused has deliberately obstructed the termination of the proceedings in the terms referred to in paragraph 3."

On 28 December 1996, by virtue of the Law of 6 December 1996, paragraph 4 of that Article was amended and the grounds for prolonging detention beyond the statutory time-limits included also:

> "... other significant obstacles, which could not be overcome by the authorities conducting the proceedings..."

However, as already mentioned (see above 1. "Amendments to Polish criminal legislation"), under section 10 (a) of the 1995 Interim Law, different rules applied to persons whose detention on remand started prior to 4 August 1996. That section provided:

> "1. In cases where the total period of detention on remand which started prior to 1 August 1996 exceeds the [maximum] time-limits referred to in Article 222 §§ ... and 3 of the Code of Criminal Procedure [as amended by the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes], the accused shall be kept in detention until the Supreme Court gives a decision on an application for prolongation of his detention under Article 222 § 4 of the Code of Criminal Procedure.
>
> 2. In cases mentioned in paragraph 1, if no [such] application has been lodged, detention shall be lifted not later than 1 January 1997."

In cases where the Supreme Court dismissed an application under Article 222 § 4, a detainee had to be released. As long as it had not given its ruling, the application of the relevant court – which had a form of a decision (*"postanowienie"*) – was deemed to be a legal basis for the continued detention.

(d) Proceedings for determination of the lawfulness of detention on remand

At the material time there were three different legal avenues enabling a detainee to challenge the lawfulness of his detention: appeal to a court against a detention order made by a prosecutor; proceedings in which courts examined applications for prolongation of detention made by a prosecutor at the investigation stage and proceedings set in motion by a detainee's application for release.

As regards the last of these, Article 214 of the 1969 Code stated that an accused could at any time apply to have a preventive measure lifted or varied. Such an application had to be decided by the prosecutor or, after the bill of indictment had been lodged, by the court competent to deal with the case, within a period not exceeding three days.

Under Article 88 of the 1969 Code the participation of the parties at judicial sessions other than hearings was a matter for discretion of the court. Sessions concerning an application for release, a prosecutor's application for prolongation of detention or an appeal against a decision on detention on remand were held *in camera*. If the defendant asked for release at a hearing, the court made a decision either during the same hearing or at a subsequent session *in camera*.

At the material time the law did not give the detainee the right to participate – either himself or through his counsel – in any court session concerning his detention on remand. In practice, only the prosecutor was notified of, and could participate in, those sessions. If he was present, he was entitled to adduce arguments before the court. The prosecutor's submissions were put on the record of the session (see also *Włoch v. Poland*, no. 27785/95, judgment of 19 October 2000, §§ 69-73).

Under all the relevant provisions read together a detainee was entitled to appeal against any decision prolonging his detention on remand, regardless of whether it had been made at the investigative or trial stage. However, no appeal laid in law either against a decision whereby the trial court applied, under Article 222 § 4, for prolongation of detention beyond the statutory time-limit, or against a decision of the Supreme Court prolonging detention under that provision.

3. Rules concerning a detainee's contact with the outside world

At the material time Articles 82-90 of the Code of Execution of Criminal Sentences of 1969 dealt with the execution of detention on remand. The Code is no longer in force; it was repealed and replaced by the "new" Code of Execution of Criminal Sentences of 6 July 1997, which entered in to force on 1 September 1998.

Under section 89 § 2 of the Code a detainee was allowed to receive visits from his family, or could contact his family by phone, provided that he obtained permission in writing from the investigating prosecutor (at the investigative stage) or from the trial court (once the trial began). The authorities could order that a visit should take place in the presence of a prison guard. No appeal laid in law against decisions refusing to grant such permission.

COMPLAINTS

1. The applicant complained under Article 5 § 1 of the Convention that from 1 to 24 January 1997 his detention on remand had lacked any legal basis and that during that period he had been kept in detention without any judicial decision prolonging this measure.

2. Relying on Article 5 § 3, he maintained that, after having been detained, he had not been brought promptly before a "judge or other officer authorised by law to exercise judicial power" but before the district prosecutor, a party to the proceedings.

3. The applicant also alleged that the length of his detention on remand had exceeded a "reasonable time" within the meaning of Article 5 § 3 of the Convention.

4. Under Article 5 § 4 of the Convention, he complained that neither he nor his lawyer had been entitled to participate in the proceedings relating to the lawfulness of his detention on remand.

5 The applicant further submitted that his right to a "hearing within a reasonable time", guaranteed by Article 6 § 1 of the Convention, had not been respected.

6. Lastly, he submitted that, during his detention, the judge presiding over his trial had deprived him of virtually any personal contact with his family for 17 months lasting from 20 December 1995 to 16 May 1997. He alleged a breach of Article 8 of the Convention.

THE LAW

1. The applicant alleged a breach of Article 5 § 1 of the Convention in that from 1 to 24 January 1997 his detention on remand had lacked any legal basis.

Article 5 § 1, in its relevant part. reads:

> "1. 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:
>
> ...
>
> (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; ..."

The Government admitted that, from 1 to 24 January 1997, the applicant's detention had lacked a formal legal basis. However, it was obvious that the grounds for keeping him in custody had persisted, as confirmed by the Supreme Court's decision on the prolongation of the measure. Moreover, the Government considered that the relevant period had later been validated retrospectively at the moment when the Wrocław Regional Court had imposed a penalty on him and deducted it from the sentence to be served.

In short, the Government concluded that the applicant's detention had been "lawful" within the meaning of Article 5 § 1.

The applicant disagreed and referred to the Supreme Court's decision of 24 January 1997, in which it had been explained why keeping him in custody throughout the period in question had been unlawful and, consequently, incompatible with Article 5 § 1.

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 should depend on an examination of the merits. The Court concludes therefore that the 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 further alleged a breach of Article 5 § 3. He maintained that, after having been detained, he had not been brought promptly before a "judge or other officer authorised by law to exercise judicial power".

Article 5 § 3, in its relevant part, reads:

> "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 first maintained that the applicant had failed to respect the six-month term referred to in Article 35 § 1 of the Convention. In that regard, they pointed out that the Wrocław District Prosecutor remanded the applicant in custody on 12 December 1994, whereas he lodged his application with the Commission on 9 September 1996, which was 1 year and 9 months later.

The applicant submitted that he had complied with that requirement.

The Court has already dealt with a number of similar cases against Poland that arose out of the fact that under domestic criminal legislation applicable at the material time there was no possibility for a person detained at the investigative stage to be brought before anyone other than a prosecutor (see, among many other examples, *G.K. v. Poland* (dec.), no. 38816/97, 8 December 1998, unreported)

In those cases the Court has held that that created a continuing situation in which an individual could – for a long time – be deprived of his right to be brought before an authority which the Court might deem, without prejudging the merits, a "judge or other officer authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention.

It has also held that, for the purposes of Article 35 § 1 of the Convention, the point at which the running of the six-month period started was the date on which an applicant was for the first time personally present before a person clearly acting in a judicial capacity, that is to say, when he was brought before the judge to stand trial.

It appears to be common ground that the applicant's trial was to begin on 22 March 1996 and that it was eventually postponed to 8 August 1996, when the Wrocław Regional Court held the first hearing on the merits.

It is not clear whether the applicant was personally present before a judge already on 22 March 1996 or only on 8 August 1996. That is, however, immaterial because even if he appeared before the judge already on the first of those dates, the six-month period would not have expired before 22 September 1996. Since the applicant lodged his petition on 9 September 1996, the time-limit of six months was observed.

Accordingly, the Government's objection on non-compliance with the six-month term fails.

As regards the substantive issue of whether the prosecutor who remanded the applicant in custody offered the attributes of impartiality and independence required under Article 5 § 3, the Government refrained from any comments.

The applicant maintained that the prosecutor could not be considered a "judge or other officer authorised by law to exercise judicial power" within the meaning of that provision.

The Court, having regard to the criteria established in its case-law in respect of a "judge" or "officer authorised by law to exercise judicial power" for the purposes of Article 5 § 3 and, more particularly, to its judgment in the case of *Niedbała v. Poland,* (no. 27915/95, §§ 48-57, 4 July 2000, unreported), considers that an examination of the merits of the complaint is required.

3. The applicant also alleged that the length of his detention on remand had exceeded a "reasonable time" within the meaning of Article 5 § 3 of the Convention.

That provision reads, in so far as relevant:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The Government submitted that there had been valid reasons for holding the applicant in custody. It was true that he had spent in detention 3 years and 10 days, which was a considerable period. However, having regard to the fact that he had for the first time been arrested after having been searched for by a "wanted" notice and that, once arrested, he had escaped from lawful custody, the decision to keep him in detention in order to secure the proper conduct of the proceedings had been fully justified.

Furthermore, the Government added, the authorities had acted with due diligence in handling his case and any delays in the trial had been caused only by the absence of the applicant's released co-defendants.

In sum, the Government considered that the applicant's detention had not exceeded a "reasonable time" within Article 5 § 3 of the Convention.

The applicant disagreed and maintained that his detention had been exceptionally lengthy.

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 should depend on an examination of the merits. The Court concludes therefore that the 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. Under Article 5 § 4 of the Convention, the applicant complained that neither he nor his lawyer had been entitled to participate in the proceedings relating to the lawfulness of his detention.

Article 5 § 4 reads:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government, referring to their preliminary objection on non-compliance with the six-month term, submitted that they would make their observations only in relation to the period that had started on 9 March 1996, that is to say, 6 months before the date on which the applicant had lodged his application with the Commission.

They further maintained that between 9 March 1996 and 22 December 1997, the date of the applicant's release, he had made 9 applications for release, of which most had been made at hearings held before the trial court. Those applications had, accordingly, been heard in a genuinely adversarial procedure and in compliance with the principle of equality of arms. The applicant could put forward any arguments he had wished and could react to any arguments adduced by the prosecution.

The Government admitted that the applications made on 24 and 25 June 1996 and on 10 September 1997, as well as all his appeals against refusals to release him, had been examined in his absence.

Yet, in their view, that had not changed the fact that the applicant's right to "take proceedings by which the lawfulness of his detention [should] be decided speedily", as secured by Article 5 § 4, had been respected.

The applicant considered that there had been a violation of that Article. However, he did not adduce any specific arguments.

The Court, having regard to the criteria established in its case-law in respect of the procedural requirements of Article 5 § 4 and, more particularly, to its judgments in the cases of *Niedbała v. Poland* (no. 27915/95, §§ 48-57, 4 July 2000) and *Włoch v. Poland* (no. 27785/95, §§ 125-132; 19 October 2000, ECHR-2000-X), considers that an examination of the merits of the complaint is required.

5. The applicant further maintained that his right to a "hearing within a reasonable time", guaranteed by Article 6 § 1 of the Convention, had not been respected.

Article 6 § 1, in its relevant part, reads:

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

The Government maintained that the length of the proceedings, which was 4 years and some 10 months, had not exceeded a "reasonable time". In their opinion, the case had been complex as it had involved 6 co-defendants and concerned numerous charges of forgery of documents and handling

stolen goods of a high value. In that connection, they also pointed out that during the investigation the prosecution had obtained 17 reports from experts in mechanics and several reports from experts in graphology. Also, the prosecution had asked the Regional Court to hear evidence from 51 witnesses.

The Government considered that the authorities had shown due diligence in dealing with the case. The investigation lasted 1 year and 11 months but, given the magnitude and complexity of evidence collected by the prosecution, that period could not be considered excessive. At the trial stage, the judicial authorities had done everything possible to ensure that the proceedings followed their proper course. The Regional Court had listed 17 hearings in all and the trial had never been adjourned for any other cause than the absence of the applicant's co-defendants, who had repeatedly failed to appear before the court.

In the Government's view, the applicant had contributed significantly to the length of the proceedings, especially at their initial stage when he had absconded and had gone into hiding.

In conclusion, the Government asked the Court to find that the "reasonable time" requirement had been complied with.

The applicant considered that the criminal charge against him had not been determined within a "reasonable time", as required by Article 6 § 1 of the Convention. He did not advance that argument in any detailed manner.

The Court will assess the reasonableness of the length of the impugned proceedings in the light of the particular circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR-2000-X).

It notes at the outset that the period to be taken into consideration began on 14 January 1994, when the applicant was arrested and charged with forgery, and ended on 10 November 1998, when the Wrocław Regional Court's judgment of 14 September 1998 became final. It accordingly lasted 4 years and nearly 10 months.

The Court accepts the Government's argument that the case was complex. That is clearly shown by the volume of evidence obtained and heard during the proceedings.

It also accepts that the behaviour of the applicant, notably the lack of co-operation on his part when the police tried to summon him to give evidence during investigation, his escape from lawful custody and his going into hiding, certainly delayed the proceedings. While the Court will not speculate how exactly long was the resultant hold-up, it cannot but note that nearly 1 year elapsed between 14 January 1994, when the applicant was charged with forgery and 12 December 1994, when he was found by the police and re-arrested in connection with further charges.

In contrast, as regards the conduct of the authorities, the Court finds no discernible delays for which they may be held responsible. It is true that the Regional Court had to adjourn several hearings but the postponement was exclusively caused by events attributable to the applicant's co-defendants, namely their repeated failure to appear at trial.

In the circumstances, the Court concludes that the proceedings complained of do not disclose an unreasonable delay within the meaning of Article 6 § 1.

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

6. Lastly, the applicant complained that, during his detention, he had been deprived of personal contact with his family for 17 months. He alleged a breach of Article 8 of the Convention, which reads, in so far as relevant:

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

The Government considered that there had been no violation of that Article since, during the period in question, the Regional Court had allowed his brother to visit him in prison. The applicant had also been permitted to make 2 phone calls in June 1996 and 1 call in August 1996.

Furthermore, the Government stressed that both his mother and his brother had been witnesses in the proceedings against him.

As regards the prohibition on receiving visits from his mother, the Government further submitted that she had been an important witness called by the prosecution. For instance, the material gathered during the investigation had shown that the applicant had used her name and personal data without her consent. The prosecution had also produced several contracts for sale of stolen goods that had been signed with her name although she had maintained that she had never seen them. Thus, the restrictions imposed on the applicant's contact with his family had been justified by the need to secure the proper conduct of the trial and, as such, had been necessary in a democratic society and had pursued a legitimate aim of "prevention of disorder or crime".

The applicant opposed that contention and argued that from 20 December 1995 to 16 May 1997 he had been allowed only to see his brother in May 1996. That had not been enough and had not changed the fact that during 17 months he had remained in a nearly complete isolation. He also claimed that he had not eventually been allowed to make phone calls because the court permission had been delivered too late to the prison authorities.

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 should depend on an examination of the merits. The Court concludes therefore that the 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.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints concerning the unlawfulness and length of his detention; the alleged breach of his right to be brought before a "judge"; the non-adversarial nature of the proceedings relating to his applications for release and the restrictions imposed on his personal contact with family during his detention;

Declares the remainder of the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President