CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 35833/03
by Zygmunt DZITKOWSKI
against Poland

The European Court of Human Rights (Fourth Section), sitting on 18 October 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Ms L. MIJOVIĆ, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 22 October 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Zygmunt Dzitkowski, is a Polish national who was born in 1943 and lives in Sopot.

A. The circumstances of the case

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

1. The first set of criminal proceedings against the applicant

On 4 April 1991 the applicant was arrested on suspicion of having committed a number of robberies. On 6 April 1991 the Gdańsk Regional Prosecutor remanded him in custody for a period of three months. His detention was subsequently prolonged on several occasions by the Gdańsk Regional Court.

On 11 February 1992 the applicant was indicted before the Gdańsk Regional Court on four counts of robbery, one count of forgery, one count of giving false evidence and one count of fraud.

On 12 December 1994 the applicant was released from detention.

On 24 April 2002 the Gdańsk Regional Court delivered its judgment. It convicted the applicant of four counts of robbery and one count of forgery and sentenced him to six years' imprisonment and a fine. The applicant appealed against that judgment.

On 4 February 2004 the Gdańsk Court of Appeal quashed the first-instance judgment and remitted the case. It appears that the proceedings are still pending.

2. The second set of criminal proceedings against the applicant

The applicant was arrested on 22 or 23 October 2000 on suspicion of armed robbery.

On 24 October 2000 the Gdańsk District Court remanded the applicant in custody for a period of three months in view of the reasonable suspicion that he had committed armed robbery. That suspicion was supported by evidence obtained in the course of the investigation. The District Court further held that there was a reasonable risk that the applicant would obstruct the investigation and go into hiding. It also had regard to the severity of the anticipated penalty.

Later, several other persons were detained and charged in connection with the same investigation conducted by the Department of Organised Crime of the Gdańsk Regional Prosecutor's Office.

On 9 January 2001 the Gdańsk Regional Court prolonged his detention until 31 March 2001. It found that the grounds previously relied on were

still valid. In addition, it held that the prolongation of his detention was justified by the need to obtain evidence, including expert reports, from many sources.

On 15 March 2001 the Gdańsk Regional Court extended the applicant's and his four co-suspects' detention until 31 May 2001. In addition to the grounds previously invoked, it considered that there was a reasonable risk that the applicant would induce the witnesses and victims to give false testimonies.

On 10 May 2001 the Gdańsk Regional Prosecutor terminated the investigation. On 15 May 2001 the applicant was indicted before the Gdańsk Regional Court on one count of armed robbery which had been committed in an organised armed criminal group. The bill of indictment listed 120 charges brought against 19 defendants, who all were detained on remand. The case-file comprised 114 volumes. The prosecution asked the court to hear evidence from 366 witnesses. The principal witness was a certain A.Ł., who was indicted together with all the defendants but gave evidence against them.

On 17 May 2001 the Gdańsk Regional Court ordered that the applicant be detained until 31 October 2001, finding that it was necessary in order to prevent him – and his other 12 detained co-defendants – from evading justice or tampering with evidence. It also referred to the complexity of the case stemming from the number of defendants and the number of witnesses to be heard.

On 16 October 2001 the Gdańsk Regional Court prolonged the applicant's detention until 31 March 2002, considering that the grounds originally given for remanding him in custody were still valid. In respect of the danger of pressure being brought to bear on witnesses, the Regional Court held, having regard to evidence given by a witness R.G., that some of the defendants had attempted to induce witnesses to give false testimonies.

The trial began on 28 December 2001. However, as of April 2002 the reading out of the bill of indictment by the prosecution still continued. Initially, the trial court held three hearings per month.

Further prolongation of the applicant's detention were ordered by the Gdańsk Regional Court on 27 March 2002 (up to 30 September 2002) and on 26 September 2002 (up to 24 October 2002). In both those decisions, the Regional Court considered that the applicant's detention was the only measure which could prevent him from interfering with the proceedings.

Since on 24 October 2002 the applicant's detention had reached the statutory time-limit of 2 years laid down in Article 263 § 3 of the Code of Criminal Procedure, further prolongation of the applicant's detention was ordered by the Gdańsk Court of Appeal. The relevant decisions were given on 2 October 2002 (extending his detention until 31 December 2002), on 18 December 2002 (prolonging that period until 30 June 2003), on 25 June

2003 (extending his detention up to 31 December 2003) and on 17 December 2003 (ordering his continued detention until 30 June 2004).

In all those decisions the Court of Appeal considered that the original grounds given for the applicant's detention were still valid. It stressed that the applicant's detention was the only measure which could secure the proper conduct of the proceedings in that particularly complex case, given the nature of the charges, the number of the defendants and the connections between them. In addition, it referred to the volume of evidence to be heard.

In its decision of 2 October 2002 prolonging the applicant's detention, the Court of Appeal considered that holding him in custody was necessary at least until he had given evidence.

In its decision of 25 June 2003 extending the applicant's detention, the Court of Appeal observed that the trial could not have been terminated due to obstructiveness on the part of the defendants who filed numerous requests challenging the trial court. It further considered that although the applicant and other defendants were free to make use of their procedural rights, the abuse of those rights had undoubtedly led to delays in the trial. It also noted that the trial court had taken various procedural steps in order to accelerate the proceedings.

In its decision of 29 January 2004 dismissing the applicant's appeal against the decision of 17 December 2003 prolonging his detention, the Court of Appeal held that Article 258 § 2 of the Code of Criminal Procedure established a presumption to the effect that the likelihood of a severe penalty being imposed on the applicant might induce him to obstruct the proceedings[1]. It added that the risk of tampering with witnesses which existed in the present case did not have to be supported by any concrete facts, but resulted from the above presumption.

On 15 January 2003 the applicant and 17 of his co-defendants unsuccessfully challenged the judges and lay members of the trial court.

In the course of the proceedings the applicant made numerous, unsuccessful applications for release, including on the ground that his detention entailed harsh consequences for his family. He appealed, likewise unsuccessfully, against refusals to release him and decisions extending his detention.

It appears that on 31 August 2004 the applicant was released.

By June 2005 the trial court held over 150 hearings and heard more than 400 witnesses.

[1] The Court of Appeal relied on the decision of the Supreme Court of 19 November 1996, no. IV KZ 119/96, published in OSP 1997 no. 4, item 74.

B. Relevant domestic law and practice

1. Preventive measures, including detention on remand

The Code of Criminal Procedure of 1997, which entered into force on 1 September 1998, defines detention on remand as one of the so-called "preventive measures" (*środki zapobiegawcze*). The other measures are bail (*poręczenie majątkowe*), police supervision (*dozór policji*), guarantee by a responsible person (*poręczenie osoby godnej zaufania*), guarantee by a social entity (*poręczenie społeczne*), temporary ban on engaging in a given activity (*zawieszenie oskarżonego w określonej działalności*) and prohibition on leaving the country (*zakaz opuszczania kraju*).

Article 249 § 1 sets out the general grounds for imposition of the preventive measures. That provision reads:

> "1. Preventive measures may be imposed in order to ensure the proper conduct of proceedings and, exceptionally, also in order to prevent an accused's committing another, serious offence; they may be imposed only if the evidence gathered shows a significant probability that an accused has committed an offence.

Article 249 § 5 of the 1997 Code, in the version applicable at the relevant time, provides:

> "The court shall inform the detainee's lawyer of the time of a court session at which a decision is to be taken on the prolongation of detention on remand or at which an appeal against a decision imposing or prolonging detention on remand is to be examined."

Article 258 lists grounds for detention on remand. It provides, in so far as relevant:

> "1. 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 his identity cannot be established or when he has no permanent abode [in Poland];
>
> (2) there is a reasonable risk that an accused will attempt to induce [witnesses or co-defendants] to give false testimony or to obstruct the proper course of proceedings by any other unlawful means;
>
> 2. If an accused has been charged with a serious offence or an offence for the commission of which he may be liable to a statutory maximum sentence of at least 8 years' imprisonment, or if a court of first instance has sentenced him to at least 3 years' imprisonment, the need to continue detention to ensure the proper conduct of proceedings may be based on the likelihood that a severe penalty will be imposed."

The Code sets out the margin of discretion as to the continuation of a specific preventive measure. Article 257 reads, in so far as relevant:

> "1. Detention on remand shall not be imposed if another preventive measure is sufficient."

Article 259, in its relevant part, reads:

> "1. If there are no special reasons to the contrary, detention on remand shall be lifted, in particular if depriving an accused of his liberty would:
>
> (1) seriously jeopardise his life or health; or
>
> (2) entail excessively harsh consequences for the accused or his family."

The 1997 Code not only sets out maximum statutory time-limits for detention on remand but also, in Article 252 § 2, lays down that the relevant court – within those time-limits – must in each detention decision determine the exact time for which detention shall continue.

Article 263 sets out time-limits for detention. In the version applicable up to 20 July 2000 it provided:

> "1. Imposing detention in the course of an investigation, the court shall determine its term for a period not exceeding 3 months.
>
> 2. If, due to the particular circumstances of the case, an investigation cannot be terminated within the term referred to in paragraph 1, the court of first instance competent to deal with the case may – if need be and on the application made by the [relevant] prosecutor – prolong detention for a period [or periods] which as a whole may not exceed 12 months.
>
> 3. The whole period of detention on remand until the date on which the first conviction at first instance is imposed may not exceed 2 years.
>
> 4. Only the Supreme Court may, on application made by the court before which the case is pending or, at the investigation stage, on application made by the Prosecutor General, prolong detention on remand for a further fixed period exceeding the periods referred to in paragraphs 2 and 3, when it is necessary in connection with a stay of the proceedings, a prolonged psychiatric observation of the accused, a prolonged preparation of an expert report, when evidence needs to be obtained in a particularly complex case or from abroad, when the accused has deliberately prolonged the proceedings, as well as on account of other significant obstacles that could not be overcome."

On 20 July 2000 paragraph 4 was amended and since then the competence to prolong detention beyond the time-limits set out in paragraphs 2 and 3 has been vested in the court of appeal within whose jurisdiction the offence in question has been committed. In addition, new paragraph 5 was added. It provides:

> " A decision of the Court of Appeal taken pursuant to paragraph 4 may be appealed against to the Court of Appeal sitting in a panel of three judges."

COMPLAINTS

1. The applicant complains under Article 5 § 3 of the Convention about the excessive length of his pre-trial detention in the first set of criminal proceedings against him.

2. The applicant also complains under Article 5 § 3 of the Convention about the excessive length of his pre-trial detention in the second set of criminal proceedings against him.

3. The applicant further complains under Article 6 § 1 of the Convention about the unreasonable length of both sets of the criminal proceedings against him.

4. He also complains under Articles 6 § 3(b) of the Convention that he was not afforded sufficient time for consultation of the case-files and thus did not have adequate time for the preparation of his defence in respect of both sets of the criminal proceedings against him.

THE LAW

1. The applicant complains under Article 5 § 3 of the Convention about the excessive length of his pre-trial detention in the first set of criminal proceedings against him.

The Court notes that the applicant was arrested on 4 April 1991 on suspicion of having committed a number of robberies and subsequently detained. He was released from detention on 12 December 1994.

However, the Court recalls that Poland's declaration recognising the right of individual petition took effect on 1 May 1993. Thus, the period of the applicant's detention before 1 May 1993 lies outside its jurisdiction *ratione temporis*.

In respect of the subsequent period, the Court notes that the applicant introduced his application on 22 October 2003, while his detention ended on 12 December 1994. Thus, this part of his complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

It follows that the complaint under Article 5 § 3 of the Convention made in respect of the first set of proceedings is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicant also complains under Article 5 § 3 of the Convention about the excessive length of his pre-trial detention in the second set of criminal proceedings against him.

The Court considers that it cannot, on the basis of the file, determine the admissibility of this complaint and that it is therefore necessary to give notice of this part of the application to the respondent Government.

3. The applicant further complains under Article 6 § 1 of the Convention about the unreasonable length of both sets of the criminal proceedings against him.

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

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."

The Court observes that the present application was lodged with the Court when both sets of the proceedings complained of were pending before the domestic courts and that they are still pending before them.

It further observes that, pursuant to section 18 of the 2004 Act, it was open to persons such as the applicant in the present case whose case was pending before the Court to lodge, within six months from 17 September 2004, a complaint about the unreasonable length of the proceedings with the relevant domestic court, provided that their application to the Court had been lodged in the course of the impugned proceedings and that it had not yet been declared admissible. Moreover, given that the proceedings complained of are still pending, nothing prevents the applicant from lodging such a complaint even after the expiry of the time-limit set by the transitional rule, in accordance with the general provisions of the 2004 Act.

The Court has already examined those remedies for the purposes of Article 35 § 1 of the Convention and found them effective in respect of complaints about the excessive length of judicial proceedings in Poland. In particular, it considered that they were capable both of preventing the alleged violation of the right to a hearing within a reasonable time or its continuation, and of providing adequate redress for any violation that has already occurred (see *Charzyński v. Poland* (dec.), no. 15212/03, §§ 36-42).

However, the applicant, despite having been informed by the Registrar of the possibility of lodging a complaint about the length of the proceedings under the 2004 Act, has chosen not to avail himself of this remedy.

It follows that the complaint under Article 6 § 1 about the unreasonable length of both sets of the criminal proceedings must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

4. The applicant also complains under Articles 6 § 3(b) of the Convention that he was not afforded sufficient time for consultation of the case-files and thus did not have adequate time for the preparation of his defence in respect of both sets of the criminal proceedings against him.

The Court considers that this complaint falls to be examined under Article 6 § 1 read in conjunction with Article 6 § 3 (b) of the Convention.

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

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ... "

The Court notes that both sets of the criminal proceedings against the applicant are still pending. Accordingly, the applicant still can, and should, put the substance of the complaint before the domestic authorities and ask for appropriate relief.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaint concerning the excessive length of his pre-trial detention in respect of the second set of the criminal proceedings against him;

Declares the remainder of the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President