AS TO THE ADMISSIBILITY OF

Application No. 27913/95
by Mieczyslaw FIECEK
against Poland

The European Commission of Human Rights (Second Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA
A. ARABADJIEV

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 10 January 1994 by Mieczyslaw FIECEK against Poland and registered on 20 July 1995 under file No. 27913/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Polish citizen born in 1964, is a locksmith by trade and resides in Gliwice, Poland. He is currently detained in Racibórz prison.

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

Particular circumstances of the case

By judgment of 12 March 1987 the Gliwice District Court (S*d Rejonowy) sentenced the applicant to five years and six months' imprisonment. The applicant served this sentence during the following periods: between 23 April 1986 and 6 September 1988; between 2 and 16 November 1988; between 4 February 1993 and 8 October 1993; between 24 November 1993 and 22 April 1996.

On 5 October 1993 the Bielsko-Biala Regional Court (S*d Wojewódzki) granted the applicant's request to be released on probation for one month. In the meantime, the applicant requested the court to prolong his release on probation for a further, unspecified term.

On 24 November 1993 the applicant was arrested by police officers on suspicion of having committed robbery. On the same day he appealed to the Gliwice District Court against the arrest. By a decision of 25 November 1993 the court dismissed the applicant's appeal, finding that the arrest was lawful (i.e. imposed under Section 206 of the Code of Criminal Procedure) and justified, since in the light of the existing evidence there was a reasonable suspicion that he had committed the offence in question.

On 26 November 1993 the applicant was brought before the Gliwice District Prosecutor (Prokurator Rejonowy), charged with robbery and detained on remand in view of the reasonable suspicion of having committed the offence in question.

On the same day the Bielsko-Biala Regional Court rejected the applicant's request to prolong his release on probation, on the ground that he had been detained on remand on the same day on suspicion of having committed a further offence.

On 6 December 1993 the Katowice Regional Court, upon the applicant's appeal, upheld the detention order of 26 November 1993 in view of the reasonable suspicion that he had committed the serious offence charged and the need to ensure the due course of proceedings.

On 13 December 1993 the applicant filed a request for release, arguing that his detention was unjustified since the prosecutor had not called evidence requested by him. This was dismissed on 22 December 1993 by the Gliwice District Prosecutor and, on appeal, by the Katowice Regional Prosecutor (Prokurator Wojewódzki) on 8 January 1994 in view of the reasonable suspicion that the applicant had committed the offence in question and the need to ensure the due course of proceedings.

On 20 January 1994 the applicant again filed a request for release. This was dismissed on 9 March 1994 by the Gliwice District Prosecutor and, on appeal, by the Katowice Regional Prosecutor on 30 March 1994 because the grounds which had previously been given for the applicant's detention had not ceased to exist.

On 16 February 1994 the Katowice Regional Court prolonged the applicant's detention on remand until 23 March 1994. On 21 March 1994 the court prolonged the applicant's detention until 23 April 1994. These decisions, upon the applicant's appeal, were upheld by the Katowice Court of Appeal on 27 April 1994.

On 4 March and again on 27 April 1994 the Gliwice District Prosecutor, upon the applicant's request, confronted the applicant with his co-suspects. On 4 March 1994 the applicant complained to the investigating prosecutor that correspondence from the European Commission of Human Rights to him was being opened and censored.

On 21 June 1994 the Gliwice District Prosecutor dismissed the applicant's request to call two witnesses and to view the place in which the offence in question had been committed.

On 22 June 1994 a bill of indictment was lodged with the Katowice Regional Court.

In the meantime, on an unspecified date, the applicant filed two further requests for his release. The requests were dismissed on 24 October and 14 November 1994 by the Katowice Regional Court and on 30 November 1994 by the Katowice Court of Appeal (S*d Apelacyjny). The courts held that the seriousness of the offence charged and a risk of collusion justified the continuing detention.

Subsequently, on an unspecified date, the applicant was granted

legal aid, i.e. an official defence counsel was appointed for him.

On 6 February 1995 the Katowice Regional Court dismissed the applicant's subsequent request for release. This decision was upheld on appeal on 22 March 1995. The courts referred to the previous grounds given for justifying the applicant's detention.

On 9 May 1995 the Katowice Regional Court convicted the applicant of robbery and sentenced him to four years and six months' imprisonment, a fine and deprivation of his civic rights for a period of four years.

In the meantime, on an unspecified date, the applicant again requested the court to release him. The request was dismissed on 27 September 1995 in view of the term of imprisonment imposed by the judgment of the court of first instance.

On 10 October 1995 the Katowice Court of Appeal, upon the applicant's appeal, quashed the judgment of the court of first instance in view of the existing doubts as to whether the applicant had committed the offence in question. The court remitted the case to the court of first instance in order to call further evidence and to re-hear evidence from the applicant's co-defendants and certain witnesses.

On 12 February 1996 the applicant's case was transferred to the Gliwice District Court since, according to amendments to the Code of Criminal Procedure, as from 1 January 1996 a district court was competent to deal with such cases. On 25 and 26 March 1996 the court held a hearing.

On 27 June 1996 the Gliwice District Court convicted the applicant of robbery and sentenced him to four years and six' months imprisonment, a fine and deprivation of his civic rights for a period of four years. The court deducted the period of the applicant's detention on remand between 22 April 1996 and 27 June 1996 from his sentence.

On 23 July 1996 the applicant requested the Gliwice District Court to quash the detention order. The request was dismissed on 31 July 1996.

On 3 December 1996 the Katowice Regional Court, upon the applicant's appeal, upheld the judgment of the court of first instance.

On an unspecified date in December 1996 the applicant filed his cassation appeal and requested the Katowice Regional Court to appoint a defence lawyer for him in order to assist him in respect of the cassation proceedings. He submitted that he had no occupation and income, and that he could not bear the costs of his defence. He apparently relied on a provision of domestic law according to which a cassation appeal must be filed and signed by a lawyer.

On 15 January 1997 the court rejected his request finding that the applicant had not proved that he could not afford legal assistance, i.e. that the costs of legal assistance would entail a substantial reduction of his and his family's standard of living.

Relevant domestic law and practice

1. Arrest and detention on remand

The Polish Code of Criminal Procedure provides that under Section 206 the police [the Civic Militia in the original, still unamended version] is authorised to arrest a suspect for a period not exceeding forty-eight hours. After the expiry of this period, according to Section 207 of the Code (in the version applicable at the material time), the person concerned had to be released if in the meantime no detention order was made by the prosecutor.

Section 206 of the Code of Criminal Procedure, insofar as relevant, provides:

> "1. The Civic Militia shall be authorised to arrest a suspect if there is a reasonable suspicion that he has committed an offence and there is a risk that such person may go into hiding or destroy evidence. The time of and reason for the arrest shall be recorded in writing and communicated to the suspect. The person concerned shall be informed of his right to appeal to the court against the arrest imposed. ..."

According to Section 210 of the Code of Criminal Procedure (in the version applicable at the material time) the prosecutor was authorised to detain a suspect on remand, provided that such person had previously been charged and heard by that prosecutor.

According to Section 214 of the Code of Criminal Procedure, an application for release must be decided by the relevant authority within a period not exceeding three days.

2. Legal assistance

According to Section 69 of the Code of Criminal Procedure a court may assign a lawyer for an accused who has proved that he cannot afford legal assistance, i.e. that the costs of such assistance would entail a substantial reduction in his and his family's standard of living.

Under Section 75 para. 1 of the Code of Criminal Procedure the official appointment of a lawyer shall be valid for the entire proceedings. However, according to domestic practice following 1 January 1996 (the date on which a new cassation appeals procedure was introduced into the existing system of criminal justice), a lawyer must be officially appointed again in the cassation proceedings. There is no appeal against the court's refusal to grant legal assistance.

3. Cassation appeal

As from 1 January 1996, i.e. the date on which the relevant provisions of a new Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes entered into force, a party to criminal proceedings may lodge a cassation appeal with the Supreme Court against any final decision of an appellate court which has terminated the criminal proceedings.

Section 463a para. 1 of the Code of Criminal Procedure, insofar as relevant, provides:

> "1. A cassation appeal may be lodged only on the grounds referred to in Section 388 [these include a number of procedural irregularities] or on the ground of another flagrant breach of law provided that the judicial decision in question was affected as a result of such breach. ..."

Section 464 of the Code of Criminal Procedure provides:

> "1. Parties to criminal proceedings shall be entitled to lodge a cassation appeal.
>
> 2. A cassation appeal which has been lodged by a party other than a prosecutor shall be filed and signed by a lawyer.
>
> 3. Notice of a cassation appeal must be lodged with the court which has given a decision within seven days from the date on which such decision was pronounced. The appeal itself must be lodged within thirty days from the date on which the decision was served on the party concerned."

Under Section 467 para. 2 of the Code of Criminal Procedure, a court which has given the decision in question is competent to decide whether the formal requirements of a cassation appeal were complied with. If an accused's appeal has not been filed and signed by a lawyer, it must be rejected. If an appeal has complied with the formal requirements, the case shall be transferred to the Supreme Court (S*d Najwyzszy). According to para. 4 of the above-mentioned provision, the Supreme Court shall grant leave to appeal or declare the cassation appeal inadmissible.

COMPLAINTS

1. The applicant complains under Article 5 para. 1 of the Convention that his arrest of 24 November 1993 was unlawful.

2. He also complains under Article 5 para. 2 of the Convention that he was not charged until two days after his arrest.

3. In a letter of 23 January 1995 the applicant stated that in his letter of 10 October 1994 he had failed to submit a further complaint under Article 5 para. 3 of the Convention about the fact that on 26 November 1993 he had been detained on remand by a prosecutor who had not been "an officer authorised by law to exercise judicial power" within the meaning of this provision.

4. Under Article 5 para. 3 of the Convention he complains that his detention on remand, lasting from 26 November 1993 until 3 December 1996, exceeded a "reasonable time" within the meaning of this provision.

5. Under Article 5 para. 4 the applicant raises the following complaints:

a) that the Gliwice District Court examined his appeal against the arrest of 24 November 1993 in a stereotyped fashion and that it did not order his release;

b) that his requests for release were not decided "speedily" as required under this provision.

6. The applicant also raises various complaints under Article 6 para. 1 and subparas. 3(c) and (d) of the Convention, in particular:

a) about the unfairness of the criminal proceedings instituted against him in view of the courts' refusal to take evidence requested by him;

b) about the refusal to grant him legal assistance in the cassation proceedings;

7. In a letter of 10 October 1994 the applicant submitted that during the investigations correspondence from the Commission to him had been opened and censored by the investigating prosecutor. In this respect he contends that this amounted to a violation of his right to respect for his correspondence guaranteed under Article 8 of the Convention.

8. Finally, he complains under Articles 3, 9, 10, 11, 13, 14 and 17 of the Convention about the generally unfair conduct of his case and the fact that the courts found against him in view of his previous criminal record.

THE LAW

1. The applicant complains under Article 5 para. 1 (Art. 5-1) of the Convention that his arrest on 24 November 1993 was unlawful.

The Commission recalls, first, that in determining whether the detention in question was "lawful", including whether it complied with "a procedure prescribed by law", the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 (Art. 5), namely to protect individuals from arbitrariness (see Eur. Court HR, Van der Leer v. the Netherlands judgment of 21 February 1990, Series A no. 170-A, p. 12, para. 22).

In this respect the Commission notes that the applicant was arrested by the police under Section 206 of the Polish Code of Criminal Procedure on suspicion that he had committed the offence of robbery. Thus, his arrest was imposed "in accordance with a procedure prescribed by law" within the meaning of Article 5 para. 1 (Art. 5-1) of the Convention.

The Commission further recalls that Article 5 para. 1 (c) (Art. 5-1-c) requires that the purpose of the arrest and detention should be to bring the person concerned before the competent legal authority. Also, this provision does not presuppose that the police should obtain sufficient evidence to bring charges, either at the point of arrest or while the person concerned is in custody (see Eur. Court HR, Brogan and Others judgment v. the United Kingdom of 29 November 1988, Series A no. 145-B, p. 29, para. 53).

In the present case the applicant was arrested for the purpose of being brought before the prosecutor. He was eventually charged by the prosecutor on 26 November 1993 and detained on remand on the same day.

Therefore, his arrest was effected for the purpose specified in Article 5 para. 1 (c) (Art. 5-1-c) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains under Article 5 para. 2 (Art. 5-2) of the Convention that he was not charged until two days after his arrest.

The Commission recalls that in accordance with paragraph 2 of Article 5 (Art. 5-2) of the Convention any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph. 4 of this provision. However, whether the content and promptness of the information conveyed were sufficient must be assessed in each case according to its special features (see Eur. Court HR, Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182, p. 19, para. 40).

In the present case the applicant was able to challenge the lawfulness of his arrest as early as on the day on which this measure was imposed on him, i.e. on 24 November 1993, the date on which he also appealed against his arrest to the Gliwice District Court. There is, therefore, no ground for supposing that the way in which the reasons of the applicant's arrest were presented to him was such as to prevent him from challenging the lawfulness of his arrest or from preparing his defence at this stage of the proceedings.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant further complains under Article 5 para. 3 (Art. 5-3) of the Convention that he was deprived of his liberty by the decision of the prosecutor who was not "a judge or other officer authorised by law to exercise judicial power" within the meaning of this provision.

The Commission notes that the applicant introduced his application on 10 January 1994. Subsequently, on 23 January 1995 he supplemented his complaints, submitting that he also invoked a breach of Article 5 para. 3 (Art. 5-3) of the Convention in that he had been deprived of his liberty by the investigating prosecutor who was neither "a judge" nor "other officer authorised by law to exercise judicial power".

In this respect the Commission recalls that it is the introduction of an application which has to take place within a period of six months from the final domestic decision (No. 8299/78, Dec. 10.10.80, D.R. 22, p. 51). However, the mere submission of certain documents is not in itself sufficient for the purposes of Article 26 (Art. 26) of the Convention. The related complaints must be raised in express terms or implicitly within six months from the final domestic decision (No. 9314/81, Dec. 7.12.82, D.R. 31, p. 200).

In the present case the Gliwice District Prosecutor detained the applicant on remand on 26 November 1993. This decision, upon the applicant's appeal, became final on 6 December 1993, the date on which the Katowice Regional Court upheld the detention order in question. The applicant raised this part of his complaints on 23 January 1995 which is more than "six months from the date on which the final decision was taken" within the meaning of Article 26 (Art. 26) of the Convention.

It follows that this part of the application has been lodged out of time and must be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

4. The applicant further complains under Article 5 para. 3 (Art. 5-3) of the Convention that his detention on remand lasting from 26 November 1993 until 3 December 1996 exceeded a "reasonable time" within the meaning of this provision.

The Commission finds that the applicant was arrested on 24 November 1993 during his release on probation in respect of the previous conviction of 12 March 1987. He was convicted at first instance on 9 May 1995 and his conviction was quashed at second instance on 10 October 1995. Subsequently, the applicant was again convicted at first instance on 27 June 1996 and, upon appeal, at second instance on 3 December 1996. Moreover, the applicant's release on probation was terminated on 26 November 1993 (see the decision of the Bielsko-Biala Regional Court).

According to the Convention organs' case-law, a person convicted at first instance and detained pending an appeal by him cannot be considered to be detained "for the purposes of bringing him before the competent legal authority on reasonable suspicion of having committed an offence" within the meaning of Article 5 para. 3 (Art. 5-3) of the Convention (see Eur. Court HR, B. v. Austria judgment of 28 March 1990, Series A no. 175, p. 15, para. 39). Furthermore, the period between 26 November 1993 and 22 April 1996 must be subtracted from the total period of the applicant's detention since during this time he was serving a sentence resulting from another conviction.

In these circumstances, the period of the applicant's detention

on remand to be considered under Article 5 para. 3 (Art. 5-3) of the Convention must be calculated from 24 to 26 November 1993 and from 22 April 1996 until 27 June 1996. Accordingly, it lasted two months and seven days.

The Commission has examined the applicant's complaints in the light of the criteria relating to the determination of the "reasonableness of the length of detention on remand" set out in the Convention organs' case-law (see Eur. Court HR, Toth v. Austria judgment of 12 December 1991, Series A no. 224, p. 18, para. 67).

However, having regard to the fact that there was a reasonable suspicion that the applicant had committed the offence in question, and that the authorities assumed that the need to ensure the due conduct of the proceedings militated in favour of his detention, the Commission finds that the length of the applicant's detention does not exceed a "reasonable time" within the meaning of Article 5 para. 3 (Art. 5-3) of the Convention.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant complains under Article 5 para. 4 (Art. 5-4) of the Convention that the Gliwice District Court examined his appeal against the arrest of 24 November 1993 in a stereotyped fashion as it did not order his release.

The Commission has examined the applicant's complaints as they have been submitted by him. In this context, the Commission observes that it cannot be said that under Article 5 para. 4 (Art. 5-4) of the Convention the person concerned is entitled to an affirmative decision on the lawfulness of his custody. Nevertheless, this provision requires that such a decision be taken "speedily" by the relevant domestic authorities (see, inter alia, Eur. Court HR, Sanchez-Reisse v. Switzerland judgment of 21 October 1986, Series A no. 107, p. 20 et seq., para. 50 et seq.).

In the present case the applicant appealed against his arrest on 24 November 1993 and the Gliwice District Court examined his appeal on the next day, i.e. on 25 November 1993. The court referred in particular to the fact that in the light of the evidence there existed a reasonable suspicion that the applicant had committed an offence, eventually finding that his arrest was lawful and justified. Assessing the facts as a whole, the Commission finds no indication that in the course of the proceedings complained of the applicant's rights guaranteed under Article 5 para. 4 (Art. 5-4) of the Convention were not respected.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

6. The applicant complains under Article 6 para. 1 and para. 3 (d) (Art. 6-1, 6-3-d) of the Convention that the criminal proceedings instituted against him were conducted unfairly, in view of the courts' refusals to take evidence requested by him.

The Commission notes that the applicant failed to file a cassation appeal as he was refused legal assistance in this respect. An issue arises, therefore, whether the applicant has complied with the requirements under Article 26 (Art. 26) of the Convention as to the exhaustion of domestic remedies. However, the Commission need not resolve this question since this part of the application is in any event inadmissible for the following reasons:

The admissibility of evidence is primarily a matter for

regulation by national law. As a rule, it is for the national courts to assess the evidence before them, whereas it is the Commission's task to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair (see Eur. Court HR, Asch v. Austria judgment of 26 April 1991, Series A no. 203, p. 10, para. 26).

In the present case the Commission finds no elements which would indicate that the courts went beyond their discretion to refuse to take evidence in the course of the proceedings complained of. Nor is there any indication that they acted unfairly or arbitrarily with respect to the presentation, admissibility or assessment of evidence or that the courts in question lacked impartiality or independence.

It follows that this part of the application is inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

7. The applicant complains under Articles 3, 9, 10, 11, 13, 14 and 17 (Art. 3, 9, 10, 11, 13, 14, 17) of the Convention about the generally unfair conduct of his case and the fact that the courts found against him in view of his previous criminal record.

The Commission has examined the applicant's complaints as they have been submitted by him. However, after considering the case as a whole, the Commission finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

8. The applicant also complains under Article 5 para. 4 (Art. 5-4) of the Convention about the conduct of the proceedings relating to the lawfulness of his detention on remand. He further complains under Article 6 (Art. 6) of the Convention about the refusal to grant him legal assistance in the cassation proceedings. He submits that during the investigations correspondence from the Commission to him was opened and censored by the prosecutor and invokes a breach of Article 8 (Art. 8) of the Convention.

The Commission considers that it cannot, on the basis of the file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Commission's Rules of Procedure, to give notice of these complaints to the respondent Government.

For these reasons, the Commission,

DECIDES TO ADJOURN the examination of the applicant's complaints under Article 5 para. 4 of the Convention about the conduct of the proceedings relating to the lawfulness of his detention, his complaint under Article 6 of the Convention about the refusal to grant him legal assistance in the cassation proceedings and his complaint under Article 8 of the Convention about the opening and censoring of the correspondence from the Commission;

unanimously,
DECLARES INADMISSIBLE the remainder of the application.

M.-T. SCHOEPFER	G.H. THUNE
Secretary	President
to the Second Chamber	of the Second Chamber