CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 30865/96
by Marek JASIŃSKI
against Poland

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

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mr A. PASTOR RIDRUEJO,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
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 19 March 1995,

Having regard to the Commission's partial decision of 19 October 1998,

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, Marek Jasiński, is a Polish national, who was born in 1958 and lives in Brzeszcze, Poland. In the proceedings before the Court he was represented by Mr. W. Hermeliński, a lawyer practising in Warsaw, Poland. 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.

On 8 January 1994 the applicant was arrested by the police on suspicion of having committed burglary. On 10 January 1994 he was brought before J.K., a district prosecutor from the Pszczyna District Prosecutor's Office (*Prokuratora Rejonowa*), charged with six counts of burglary and detained on remand. The prosecutor considered that there was a reasonable suspicion that the applicant had committed the offences in question because he had been arrested *in flagrante delicto*. He also relied on the serious nature of the offences in question.

On 2 February 1994 the Pszczyna District Prosecutor prolonged the applicant's detention until 8 March 1994 on the ground that it was necessary to secure the proper conduct of the proceedings. The prosecutor stressed that in the light of evidence gathered during the investigation it was likely that the applicant had also committed other, similar offences and that, in turn, justified a risk that he might obstruct the process of obtaining evidence from witnesses.

On 25 February 1994 the District Prosecutor prolonged the applicant's detention until 8 April 1994, considering that it was necessary to secure the conduct of the investigation, especially as fresh evidence needed to be obtained.

On 30 March 1994, on an application made by the Pszczyna District Prosecutor, the Pszczyna District Court (*Sąd Rejonowy*) prolonged the applicant's detention until 8 June 1994 in view of the reasonable suspicion that he had committed the offences with which he had been charged and the fact that the investigation could not be completed because evidence from a fingerprint expert and yet another forensic expert needed to be obtained.

On 30 May 1994, on the subsequent application by the District Prosecutor, the Pszczyna District Court prolonged the applicant's detention until 8 August 1994. It found that such further prolongation was necessary to secure the process of obtaining fresh evidence, especially as several new charges of burglary had in the meantime been laid against the applicant. Moreover, evidence from an expert-valuer needed to be obtained to determine the damage caused by the offences.

On 4 August 1994, on a further, similar application by the District Prosecutor, Z.R., a single judge sitting as the Pszczyna District Court, prolonged the applicant's detention until 8 September 1994. The reasons for that decision read, in so far as relevant:

> "[The applicant] was charged with the offence defined in Article 208 read in conjunction with Article 60 § 1 of the Criminal Code. In the light of the material gathered in the case, that charge has a sufficient degree of verisimilitude (*zarzut ten został w wystarczającym stopniu uprawdopodobniony*). As it emerges from the case-file, new circumstances have arisen which might indicate that it would be necessary to obtain evidence from psychiatrists in order to establish the suspect's criminal responsibility. That being so and since in this court's opinion the grounds given for [the applicant's] detention have not ceased to exist but new circumstances have appeared that make it impossible [for the prosecution] to terminate the investigation, it has been held as in the operative part of the decision."

On 29 August 1994 the Pszczyna District Prosecutor lodged a bill of indictment with the Pszczyna District Court. The applicant was indicted on 22 charges of burglary.

On 19 September 1994 the applicant made an application for release to the Pszczyna District Court.

On 20 September 1994 judge Z.R., sitting as the Pszczyna District Court, dismissed the application. The reasons for this decision read, in so far as relevant:

> "The accused, asking [the court] for the preventive measure [imposed on him] to be varied, submitted that the mother of his minor son was not providing the child with the proper care. This court dismisses his application since the charged deed of the accused is characterised by a high degree of danger to society ("*zarzucany czyn oskarżonego charakteryzuje się wysokim stopniem społecznego niebezpieczeństwa"*) – the accused is amenable to the law under the rules governing relapse into crime defined in Article 60 § 1 of the Criminal Code. The likelihood of the facts adduced by the accused [in his application] has by no means been shown by him. The court could not, therefore, verify those facts. ..."

The applicant appealed. He maintained that he should be released in view of the difficult situation of his family. On 21 October 1994 the Katowice Regional Court (*Sąd Wojewódzki*) dismissed his appeal. It found that there were no valid reasons to release the applicant because his child had already been placed under the care of the grandparents.

The applicant's trial was to begin on 7 December 1994 but it was postponed because the applicant, having found out that Z.R. had been appointed to sit as the presiding judge, challenged his impartiality. In the applicant's submission, the judge – who had dealt with his applications for release at the investigation stage – had actively participated in the investigation, and had consequently become a party to the proceedings. In particular, the applicant stressed that Z.R. had made the decision of 4 August 1994 prolonging his detention. On 20 September 1994 he had also dealt with, and dismissed, his application for release. On these occasions the

judge had evaluated the charges against him and concluded that they had been justified. He had also referred to such aggravating circumstances as the serious nature of the offences in question and the applicant's criminal record. All those findings were closely related to the assessment of his guilt, criminal liability and to the anticipated sentence. In view of that, the applicant considered that it was clear that the judge had already formed a preconceived opinion on his guilt.

On 9 December 1994 a panel of three judges, sitting as the Pszczyna District Court, dismissed the applicant's challenge as being groundless. The court stressed that the taking decisions on prolongation of detention made at a prosecutor's application under Article 222 § 2 (1) of the Code of Criminal Procedure was not tantamount to the taking part in an investigation.

Subsequently, the applicant again asked the Pszczyna District Court to release him under police supervision in view of the difficult situation of his family. He also complained that Z.R. lacked impartiality.

On 12 December 1994 Z.R., sitting as the Pszczyna District Court, dismissed the application. The reason for that decision read, in so far as relevant:

> "The arguments presented by the accused in relation to his family situation are identical to those adduced in his application of 19 September 1994. They were already examined by the courts at first and second instance. The Regional Court, in its decision of 21 October 1994, indicated to the applicant the way in which care over his child could be secured. Since in this court's opinion there are no circumstances listed in Article 218 of the Code of Criminal Procedure and the arguments relating to the disqualification of the presiding judge were already dealt with in the [District] Court's decision of 9 December 1994 - it should be held as in the operative part of the decision."

On 21 December 1994 judge Z.R., sitting as the Pszczyna District Court, dismissed the applicant's fresh application for release on bail. The reasons for the decision read, in so far as relevant:

> "The accused has been charged with numerous counts of burglary committed in the circumstances of relapse into crime specified in Article 60 § 1 of the Criminal Code. The offence with which he was charged is characterised by a high degree of danger to society. Bail proposed by the accused cannot, in this court's opinion, secure the proper conduct of the trial.
>
> It should be pointed out that both the fact that an offence has been committed in the circumstances of relapse into crime and the serious danger to society [represented by the offence] are autonomous prerequisites for imposing detention on remand (cf. Article 217 § 1 (3) and (4) of the Code of Criminal Procedure) - in respect of the accused those prerequisites exist cumulatively. ..."

On 13 January 1995, on the applicant's appeal, the Katowice Regional Court upheld the above decision, finding that his detention was justified under Article 217 § 1 (3) and (4) of the Code of Criminal Procedure and that no special circumstances militated in favour of his release.

On 25 January 1995 the applicant asked the Pszczyna District Court to quash the detention order. In his view, his detention had become unlawful as the statutory-time limit of one year for detention on remand (laid down in Article 222 § 2 (1) of the Code of Criminal Procedure) had expired.

On 31 January 1995 judge Z.R. dismissed the application as groundless and informed the applicant that the time-limits for detention on remand applied only to the investigative stage of criminal proceedings but there were no such statutory terms for detention pending trial. That decision was upheld on appeal on 1 March 1995.

On 31 January 1995 the applicant asked the court allow him time to read the case-file in order to prepare his defence for a hearing listed for 16 February 1995. On 6 February 1995 the presiding judge ordered that the applicant be granted access to the case-file on the hearing day before the hearing itself.

On an unspecified date, the applicant again challenged the presiding judge. He repeated his previous arguments. The challenge was dismissed by the Pszczyna District Court on 13 February 1995. In the court's opinion, the arguments adduced by the applicant did not justify disqualifying the presiding judge from dealing with the case.

Later, the applicant asked the District Court to quash the detention order made by the Pszczyna District Prosecutor on 10 January 1994. He argued that that decision was valid only for a period of one year. He also submitted that he should be released on account of the difficult situation of his family.

On 6 March 1995 judge Z.R. dismissed the application and upheld the impugned detention order. Referring to the applicant's family situation, the judge observed that such arguments as the fact that the applicant's son was not – allegedly – being provided with the proper care had to be rejected because the child was under the care of his grandmother. Finally, Z.R. stressed that the reasons previously given to justify the applicant's detention were still valid.

In the meantime, on 1 March 1995, the applicant had complained to the court that, despite the fact that he had asked for access to the case-file already in February 1995, there had so far been no reaction to his application. He again asked for access to the file in order to prepare his defence.

On 15 March 1995 a panel consisting of Z.R., the presiding judge, and two lay judges, sitting as the Pszczyna District Court, opened a trial in the applicant's case. Before the hearing, the applicant asked Z.R. to allow him time to read certain material contained in the case-file (which comprised four volumes and thousand pages in all) in order to prepare his defence. The applicant maintained that several months had already elapsed since the end of August 1994, when he had read the case-file after the termination of the investigation. The judge allowed the applicant 10 minutes preceding the main hearing.

On 14 April 1995 the final hearing was held. The prosecution was represented by J.K., who had detained the applicant on remand on 10 January 1994. After hearing the parties' final submissions, the court gave judgment. It convicted the applicant of 23 counts of burglary and sentenced him to 4 years' imprisonment and a fine of 2,000 Polish zlotys, convertible into 20 days' imprisonment.

On 13 July 1995 the applicant's lawyer appealed against that judgment. The appeal was directed against the sentence imposed and the conviction was not as such contested. Although the author of the appeal submitted that the trial court had committed a number of errors of fact and had wrongly assessed evidence in respect of many counts of the burglaries attributed to the applicant, he did not allege, even in general, a breach of his defence rights. In conclusion, he maintained that the alleged errors of fact had resulted in an excessively severe sentence having been imposed on the applicant.

On 18 July 1995 the applicant appealed. In his appeal, he alleged that the trial court had breached a number of substantive and procedural provisions. He submitted that the court had – without any sound reasons – refused to attribute any evidentiary value to his testimony, that his conviction was not based on convincing evidence but on assumptions and suppositions and that the court's findings relating to the *modus operandi* were incorrect. He went on to argue that the court had violated the principles of the presumption of innocence and *in dubio pro reo* because the presiding judge Z.R. had considered him guilty and had had a preconceived view on his criminal liability long before the end of the trial, i.e. already on 4 August 1994, when he had prolonged his detention at the District Prosecutor's request. In his appeal the applicant did not refer to, or complain of, the refusal to grant him sufficient access to the case-file or any other breach of his defence rights. In conclusion, he asked for a verdict of acquittal.

The appeals were heard on 3 October 1995 before the Katowice Regional Court. The applicant was represented by an officially-appointed lawyer. The presiding judge read out the applicant's appeal. The applicant's counsel maintained arguments contained in both appeals. On the same day the Regional Court upheld the first-instance judgment.

B. Relevant domestic law and practice

1. Detention on remand

At the material time the rules governing detention on remand were contained in Chapter 24 of the Law of 19 April 1969 Code of Criminal Procedure ("the Code") (*Kodeks postępowania karnego*) entitled "Preventive measures" (*Środki zapobiegawcze*). The Code is no longer in force. It was repealed and replaced by the Law of 6 June 1997 (commonly

referred to as the "New Code of Criminal Procedure"), which entered into force on 1 September 1998.

a. Imposition of detention

Until 4 August 1996 (i.e. the date on which the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes ("the 29 June 1995 Law") entered into force) at the investigation stage of criminal proceedings detention on remand was imposed by a prosecutor.

Article 210 §§ 1 and 2 of the Code (in the version applicable at the material time) stated:

> "1. 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.
>
> 2. A prosecutor may impose a preventive measure only with respect to a person who has been questioned in the case as a suspect. Before ordering detention on remand or deciding on bail the prosecutor shall personally hear the suspect."

Under Article 212 § 2 of the Code 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 detention and other "preventive measures"

The Code listed as "preventive measures", *inter alia*, detention on remand, bail and police supervision.

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

> "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. The relevant part of that provision, in the version applicable at the material time, provided:

> "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 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 course 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.

..."

Paragraph 2 of Article 217 provided:

"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 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 for it 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 those measures, are considered adequate."

Finally, Article 218 stipulated:

"If there are no special reasons to the contrary, detention on remand should be lifted, in particular, if:

(1) it may seriously jeopardise the life or health of the accused; or

(2) it would have serious repercussions for the accused or his family."

2. Judicial authorities and prosecution

At the material time the relations between the authorities of the Polish State were set out in interim legislation, i.e. the Constitutional Act of 17 October 1992 (*Mała Konstytucja*).

Article 1 of that Act affirmed the principle of the separation of powers in the following terms:

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

The Law of 20 June 1985 (as amended) on the Structure of Courts of Law (*Ustawa o ustroju sądów powszechnych*) in the version applicable at the material time provided, in Section 1:

> "1. Courts of law shall dispense justice in the Republic of Poland.
>
> 2. Courts of law shall be courts of appeal, regional courts and district courts."

The Law of 20 June 1985 (as amended) on Prosecution Authorities (*Ustawa o Prokuraturze*) set out general principles concerning the structure, functions and organisation of prosecution authorities.

Section 1 of the Law, in the version applicable at the material time, stipulated:

> "1. The prosecution authorities shall be the Prosecutor General, prosecutors and military prosecutors. Prosecutors and military prosecutors shall be subordinate to the Prosecutor General.
>
> 2. The Prosecutor General shall be the highest prosecution authority; his functions shall be carried out by the Minister of Justice."

Chapter III of the Code entitled: "Parties to proceedings, defence counsel, representatives of the victims and representatives of society" described a prosecutor as a party to criminal proceedings. Under all the relevant provisions of the Code taken together, a prosecutor performed investigative and prosecuting functions in the course of criminal proceedings. As regards the general position of the prosecution, at the material time they were not independent from the executive since the Minister of Justice carried out the duties of the Prosecutor General.

3. Concept of "relapse into crime"

At the material time Chapter VIII of the Criminal Code of 1969 (which was repealed on the same date as the 1969 Code of Criminal Procedure referred to above), entitled "Relapse into crime" (*Powrót do przestępstwa*), contained special rules relating to sentencing repeat offenders (in Poland, they are more commonly referred to as "recidivists", i.e. *"recydywiści"*).

The finding that a person "relapsed into crime" within the meaning of Articles 60 and 61 of the Criminal Code (provisions which constituted, for all practical purposes, sentencing guidelines in respect of recidivists), inevitably resulted in the sentence of imprisonment to which the accused was liable being increased.

Article 60 § 1 of the Criminal Code, in the version applicable at the material time, provided:

> "1. If an offender, who has already been convicted of an intentional offence and, as a result, has served a sentence of at least six months' imprisonment, commits another similar offence within five years following [the date on which] he has ended the service of the whole or part of his previous sentence of imprisonment, the court shall

impose on him a sentence of imprisonment of between twice the minimum and one-and-a-half times the maximum sentence applicable."

4. Concept of "danger to society"

The term was (and still is) related to the assessment of the gravity of criminal offences. If the "danger to society" represented by a given offence was considered by the court to have been "serious" or "of a high degree", the court had to take that factor into account as an aggravating circumstance when imposing a sentence under the general rules of sentencing set out in Article 50 of the Criminal Code. That provision, in its relevant part, read:

"1. The court shall impose the punishment at its discretion, within the limits set out by the law, assessing the degree of danger to society [represented by] an offence and taking into account the purposes of the punishment in the sphere of retribution as well as the preventive and reformative purposes it is to achieve in respect to the convicted person.

2. Following the guidelines mentioned in paragraph 1, the court shall particularly take into account the kind and amount of damage caused by an offence, the intentions and the manner of acting of an offender, his personal qualifications and situation, as well as the way he lived before, and the behaviour after, the commission of an offence and [as the case may be], complicity with a minor person in the commission of an offence.

..."

COMPLAINTS

1. The applicant complained under Article 5 § 3 of the Convention that, after having been arrested, he had not been brought before a "judge" but before the investigating prosecutor.

2. He further alleged that his right to trial within a reasonable time or to release pending trial, guaranteed by Article 5 § 3 of the Convention, had not been respected.

3. Relying on Article 6 § 1 of the Convention, the applicant submitted that he had not had his case heard by an "impartial tribunal" because the judge presiding over his trial had on many occasions dealt with his applications for release and had formed a preconceived view on his future conviction and sentence.

4. Lastly, the applicant alleged a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (b) in that he had not been allowed adequate time to prepare his defence before the main hearing.

THE LAW

1. The applicant alleged a breach of Article 5 § 3 of the Convention in that after having been arrested he had not been brought before a "judge". 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 brought promptly before a judge or other officer authorised by law to exercise judicial power..."

The Government submitted that, given the position of a prosecutor in criminal proceedings and the fact that prosecutors were under a general legal duty to remain impartial in such proceedings, the application should be rejected as being manifestly ill-founded.

The applicant, for his part, maintained that there could be no doubt that a prosecutor could not be considered a "judge" because he could not act in judicial capacity. Accordingly, the prosecutor who had detained him on remand and, what is more, had later represented the prosecution before the trial court had not offered guarantees of independence from the executive and the parties, as required under Article 5 § 3.

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 judgments in the case of *Niedbała v. Poland* (no. 27915/95, §§ 48-57, 4 July 2000) and *Dacewicz v. Poland* (no. 34611/97, §§ 21-23, 2 July 2002) considers that the examination of the merits of the complaint is required.

2. The applicant also alleged a violation of Article 5 § 3 of the Convention in that his pre-trial detention had exceeded a "reasonable time". The relevant part of this provision reads:

> "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 the period of the applicant's detention falling within the scope of Article 5 § 3 had lasted from 10 January 1994, when he had been detained on remand, to 14 April 1995, when he had been convicted at first instance. It accordingly amounted to some 15 months which, having regard to the criteria for the "reasonableness of detention" established by the Court's case-law, could not be considered excessive.

The Government also stressed that that there had been valid reasons for holding the applicant in custody. First of all, there had been a reasonable suspicion that he had committed numerous counts of burglary, which was a serious offence. Secondly, the applicant had already had a previous criminal record and had been criminally liable under the rules applicable to recidivists. That, in turn, had given a sufficient basis to believe that, had he been released, he might have committed another offence or obstructed the

process of obtaining evidence. In view of that, the authorities had rightly considered that keeping him in detention had been necessary to ensure the proper conduct of the proceedings.

The authorities, the Government added, had shown due diligence in handling the case. Given the complexity of the issues involved and, in particular, the magnitude of the charges laid against the applicant, they had efficiently proceeded with the case. Neither at the investigation, nor at the trial stage had there been any discernible delays that might be attributed the conduct of the authorities. In contrast, the Government argued, the applicant, who had made numerous applications for release and had on several occasions challenged the impartiality of the presiding judge, had caused the prolongation of the proceedings and of his detention.

In conclusion, the Government maintained that there had been no breach of Article 5 § 3.

The applicant replied that the period he had spent in detention was not compatible with the requirements of "reasonable time" for the purposes of that provision.

Referring to the decisions on prolongation of his detention made by the Pszczyna District Court, the applicant maintained that that court had not given sufficient and relevant reasons for his detention. The detention decisions were laconic, vague and sketchy. The authorities had repeatedly relied on the argument that the grounds originally given to justify keeping him in custody – that is to say, the reasonable suspicion that he had committed an offence, the serious nature of the offence and the need to secure the proper conduct of the proceedings – had still been valid. However, the courts had never explained on which basis they had formed that conclusion. Nor had they indicated evidence showing that the due course of the proceedings had indeed been jeopardised. There had, in the applicant's view, been no requirement of public interest that could justify his continued detention.

In sum, the applicant asked the court to find a violation of Article 5 § 3 of the Convention.

The Court reiterates that the question whether a period of detention is reasonable cannot be assessed in the abstract but must be considered in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 110-111, ECHR 2000-X).

Under Article 5 § 3 the national judicial authorities must ensure that the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for a departure from the rule in

Article 5 and must set them out in their decisions on the applications for release.

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings (ibid.).

The Court observes at the outset that, in contrast to the Government submission, the period of the applicant's detention to be considered under Article 5 § 3 started not on 10 January 1994, when he was detained on remand by the investigating prosecutor but already on 8 January 1994, when he was arrested by the police on suspicion of having committed burglary. That period came to an end on 14 April 1995, the date of his first-instance conviction. It accordingly lasted 1 year, 3 months and 6 days in all.

In respect of the grounds for the applicant's detention, the Court notes that the domestic authorities first of all relied on the reasonable suspicion that he had committed the offence with which he had been charged and the serious nature of that offence. Taking into account the fact that the applicant was arrested *in flagrante delicto*, that ground appears to have sufficiently justified his initial detention.

As the investigation proceeded, the prosecution authorities also found that keeping the applicant in custody was necessary to secure the process of obtaining evidence, in particular in connection with a number of new charges laid against him. Again, the Court finds that argument relevant for the purposes of Article 5 § 3.

Later, at the trial stage, the District Court and the Regional Court repeatedly held that the applicant's detention was justified under Article 217 § 1 (3) and (4) of the Code of Criminal Procedure because he was not only charged with a serious offence but also relapsed into crime in the manner defined in the Criminal Code. In the courts' view, both circumstances militated against releasing the applicant.

The Court accepts that those grounds, if taken together with the original reasons for keeping the applicant in custody, warranted his continued detention.

As to the question whether the proceedings were conducted with special diligence required under Article 5 § 3, the Court notes that the applicant was prosecuted for a series of burglaries, which necessitated the taking of evidence from various sources. That included expert evidence. Having regard to the fact that the prosecution gathered the relevant material and prepared the bill of indictment within some 8 months following the start of

the investigation, the Court does not find any failure to act with due diligence on their part.

It further notes that the indictment was submitted to the District Court on 29 August 1994. The trial ended on 14 April 1995, that is to say within eight months. Given the nature of the case and the volume of evidence, the Court finds no indication that the relevant authorities failed to display the necessary diligence.

In the circumstances, the Court finds that the length of the applicant's detention was reasonable within the meaning of Article 5 § 3 of the Convention.

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

3. Invoking Article 6 § 1 of the Convention, the applicant further submitted that the judge presiding over his trial had not been impartial. That provision, in its relevant part, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law."

The Government submitted that the existence of impartiality for the purposes of Article 6 § 1 had to be determined according to a subjective test, that is to say on the basis of the decisions taken by judge Z.R. in the applicant's case, and also according to an objective test, that is establishing whether that judge offered sufficient guarantees of impartiality.

As to the subjective test, the Government pointed out that that in a given case there always had to be a presumption that a judge was impartial until there was proof to the contrary. In their opinion, in the present case there was no indication that judge Z.R. had acted with personal bias against the applicant.

As to the objective test, the Government stressed that Z.R., who had in all taken 6 decisions on the applicant's detention, had merely applied Article 217 § 1 (3) and (4) of the Code of Criminal Procedure. That provision had at the material time obliged a judge to remand in custody a person who had been a recidivist and had been charged with an offence that had constituted a serious danger to society. The judge had accordingly had to ascertain the relevant circumstances and to state them in his decisions.

Moreover, in prolonging the applicant's detention or in refusing his applications for release, the judge had relied on a number of factors, such as the danger that the applicant would obstruct the conduct of the proceedings. The applicant was a habitual offender and his offences had constituted a serious social danger. It had therefore been necessary to keep him in detention in order to protect the society and diminish the possibility of his committing further offences.

In sum, the Government considered that there was indication that the applicant's right to an "impartial tribunal" had been violated.

The applicant maintained that judge Z.R. had not been impartial because he had prolonged his detention at the investigation stage and had subsequently dealt with, and dismissed, his numerous applications for release. In his decisions, Z.R. had expressed a preconceived view on the circumstances relating to the assessment of his guilt and criminal liability.

In particular, the applicant referred to the decision of 4 August 1994, in which the judge had stated that the charges against him had "had a sufficient degree of verisimilitude" ("*zarzut ten został w wystarczającym stopniu uprawdopodobniony"*). He argued that that statement, if considered together with the fact that also in the decision of 20 September 1994 Z.R. had assesssed the charges against him and had found that they had been confirmed, gave sufficient reasons to believe that the impartiality of the judge had been opened to doubt. In consequence, the applicant's fear that the presiding judge would not be impartial had objectively been justified.

In view of the foregoing, the applicant asked the Court to find that his right to have a hearing by an impartial tribunal had been violated.

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. Lastly, the applicant complained under Article 6 § 1 read in conjunction with Article 6 § 3 (b) that he had not been allowed adequate time to prepare his defence.

The Government first pleaded that in regard to that complaint the applicant had failed to exhaust domestic remedies, as required under Article 35 § 1 of the Convention.

That Article, in its relevant part, provides:

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

As to the specific basis of their preliminary objection, the Government stated that the applicant had not attempted to bring the issue of the alleged breach of his defence rights before the relevant domestic authority.

In their submission, the applicant should have raised the question of the lack of adequate time to prepare his defence in his appeal against the first-instance conviction, which he had filed with the Katowice Regional Court on 18 July 1995.

The applicant did not address the exhaustion issue.

The Court reiterates that the purpose of the rule of exhaustion of domestic remedies referred to in Article 35 § 1 is to afford Contracting

States an opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. The respondent State must have a chance to put matters right through its own legal system before having to answer before an international body for its acts. In consequence, complaints intended to be brought subsequently before the Court in Strasbourg should first have been made – at least in substance – to the appropriate domestic body. In that way Article 35 § 1 obliges the applicant to try available remedies that relate to the breach alleged by him (see, among many other examples, *Selmouni v. France* [GC], §§ 74-76, ECHR 1999-VII; *H.D. v. Poland* (dec.), no. 33310/96, 7 June 2001; unreported).

In the present case the Court finds that, in their appeals, neither the applicant himself, nor his defence counsel, alleged – even in passing – a breach of the applicant's defence rights. It accordingly concludes that the applicant failed to discharge his obligation under Article 35 § 1 of the Convention. The Government's preliminary objection must therefore be upheld.

It follows that the remainder of the application is inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints concerning the lack of independence and impartiality on the part of the prosecutor who ordered his detention and the lack of impartiality on the part of the judge presiding over his trial;

Declares inadmissible the remainder of the application.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President