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. 7478/03
by Jacek KAMIŃSKI
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 K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 29 January 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Jacek Kamiński, is a Polish national who was born in 1964 and lives in Lublin.

A. The circumstances of the case

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

1. The applicant's pre-trial detention

The applicant was arrested on 31 January 2001 on suspicion of fraud.

On 2 February 2001 the Warsaw District Court ordered the applicant's detention for a period of three months in view of the reasonable suspicion that he had committed aggravated fraud. The District Court relied on the severity of the anticipated penalty which might have been imposed on the applicant who had been previously convicted. In addition, it found that there was a reasonable risk that the applicant would abscond, given that he had no permanent abode in the country.

On 27 April 2001 the District Court prolonged the applicant's detention until 30 July 2001, relying on the same grounds as in the first detention order.

On 20 July 2001 the District Court extended the applicant's detention, invoking the same grounds as previously. In addition, it held that the prolongation of his detention was justified by the need to obtain further evidence. In its decision of 18 September 2001 prolonging the applicant's detention until 30 November 2001, the District Court relied for the first time, in addition to the other grounds, on the reasonable risk that the applicant might interfere with the proceedings and attempt to influence witnesses.

On 22 November 2001 the District Court ordered that the applicant be held in detention until 30 April 2002. It considered that no other preventive measure could secure the proper conduct of the proceedings, having regard to the severity of the penalty faced by the applicant and the fact that he had no permanent abode in Poland.

In November 2001 the Regional Prosecutor filed with the Warsaw District Court a bill of indictment against the applicant and one other suspect. The applicant was indicted on two charges of fraud and two charges of aggravated fraud.

On 25 April 2002 the Warsaw District Court extended the applicant's detention until 30 August 2002. In addition to the grounds previously

invoked, it held that there was a risk that the applicant might attempt to influence some of the witnesses who had been in close personal or business relations with him. The detention was subsequently prolonged until 31 January 2003 by a decision of 28 August 2002.

In the meantime the applicant's detention pending trial exceeded the two-year time-limit set out in Article 263 § 3 of the Code of Criminal Procedure. Consequently, on 28 January 2003 the Warsaw Court of Appeal ordered that the applicant be kept in custody until 31 July 2003. It found, *inter alia*, that the nature of the charge against the applicant might prompt him to influence the witnesses. In addition, it observed that the trial could not be concluded on account of the accused's conduct, and not for reasons attributable to the trial court.

The applicant appealed against that decision. His appeal was dismissed by the Court of Appeal on 4 March 2003. The Court of Appeal found, in addition to the grounds previously relied on, that the applicant had attempted to influence the testimony of his wife. Furthermore, it considered that the prolongation was justified by the complexity of the case and the volume of evidence to be heard.

On 25 July 2003 the Court of Appeal extended the applicant's detention until 31 October 2003, invoking the same grounds as previously. That decision was upheld on appeal on 22 August 2003.

On 24 October 2003 the Court of Appeal prolonged the applicant's detention until 30 November 2003. It found that a judgment could not be delivered before 31 October 2003 because of the illness of a lay member of the trial court and the impossibility to summon an important witness.

The trial court held hearings on the following dates: 20 June, 28 August, 2 and 30 October, 22 November and 17 December 2002 and on 4, 14 and 25 February, 14 March, 9 and 16 April, 21 and 22 May, 12, 16 and 23 June, 7, 8, 11 and 17 July 2003. Four hearings (on 10 March, 15 April, 7 and 13 May 2003) were adjourned because the applicant had not been brought to the trial court from a detention centre. On 20 and 26 March 2003 the hearings were adjourned due to the absence of the applicant's lawyer. On 23 April 2003 the trial court adjourned the hearing due to absence of the summoned witnesses.

On 27 October 2003 the Warsaw District Court convicted the applicant of three counts of fraud and sentenced him to six years' and six months' imprisonment and a fine. On the same date the District Court ordered that the applicant be released on bail. However, it appears that the applicant remained in detention.

The applicant appealed against the judgment of the Warsaw District Court. On 3 August 2004 the Warsaw Regional Court upheld the first-instance judgment. The applicant has not provided any information as to whether he lodged a cassation appeal with the Supreme Court.

2. The applicant's complaint against the length of proceedings

On 29 November 2004 the applicant filed with the President of the Warsaw Regional Court a complaint about a breach of the right to a trial within a reasonable time and asked for compensation. He relied specifically on Section 18 of the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) ("the 2004 Act") which entered into force on 17 September 2004.

However, on 13 January 2005 the Warsaw Regional Court decided not to take cognisance of the applicant's complaint, pursuant to Section 5 of the 2004 Act. It held that the complaint about the unreasonable length of the proceedings had to be lodged during the course of the impugned proceedings. However, in the applicant's case the complaint could not be examined since the impugned proceedings were terminated by the judgment of the Warsaw Regional Court of 3 August 2004.

B. Relevant domestic law

1. Provisions concerning 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 to leave 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 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 with the court of appeal within whose jurisdiction the offence in question has been committed.

2. Remedies against unreasonable length of the proceedings[1]

On 17 September 2004 the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) ("the 2004 Act") entered into force. It lays down various legal means designed to counteract and/or redress the undue length of judicial proceedings.

Section 2 of the 2004 Act reads, in so far as relevant:

> "1. A party to proceedings may lodge a complaint that their right to a trial within a reasonable time has been breached [in the proceedings] if the proceedings in the case last longer than is necessary to examine the factual and legal circumstances of the case ... or longer than is necessary to conclude enforcement proceedings or other proceedings concerning the execution of a court decision (unreasonable length of proceedings)."

Section 5 reads, in so far as relevant:

> "1. A complaint about the unreasonable length of proceedings shall be lodged while the proceedings are pending. ..."

Section 12 provides for measures that may be applied by the court dealing with the complaint. It reads, in so far as relevant:

> "1. The court shall dismiss a complaint which is unjustified.
>
> 2. If the court considers that the complaint is justified, it shall find that there was an unreasonable delay in the impugned proceedings.
>
> 3. At the request of the complainant, the court may instruct the court examining the merits of the case to take certain measures within a fixed time-limit. Such instructions shall not concern the factual and legal assessment of the case.
>
> 4. If the complaint is justified the court may, at the request of the complainant, grant ... just satisfaction in an amount not exceeding PLN 10,000 to be paid by the State Treasury. If such just satisfaction is granted it shall be paid out of the budget of the court which conducted the delayed proceedings."

Section 18 lays down transitional rules in relation to the applications already pending before the Court. It reads, in so far as relevant:

> "1. Within six months after the date of entry into force of this law persons who, before that date, had lodged a complaint with the European Court of Human Rights ... complaining of a breach of the right to a trial within a reasonable time guaranteed by Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ..., may lodge a complaint about the unreasonable length of the proceedings on the basis of the provisions of this law if their complaint to the Court had been lodged in the course of the impugned proceedings and if the Court has not adopted a decision concerning the admissibility of their case.

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1 For a more detailed rendition of the relevant domestic legal provisions see *Charzyński v. Poland* (dec.) no. 15212/03, §§ 12-23; and *Michalak v. Poland* (dec.) no. 24549/03, §§ 12-23, to be published in ECHR 2005-…; also available on the Court's Internet site: www.echr.coe.int.

...”

On 18 January 2005 the Supreme Court (*Sąd Najwyższy*) adopted a resolution (no. III SPP 113/04) in which it ruled that while the 2004 Act produced legal effects as from the date of its date of entry into force (17 September 2004), its provisions applied retroactively to all proceedings in which delays had occurred before that date and had not yet been remedied.

COMPLAINTS

1. The applicant complains under Article 6 of the Convention about the excessive length of his detention on remand.

2. The applicant also alleges a breach of his right to a trial within a reasonable time under Article 6 § 1 of the Convention.

3. He further alleges a breach of Article 6 § 2 of the Convention in that the trial court when ordering his detention relied on the reasonable suspicion of his having committed the offence before he had been proved guilty.

4. The applicant also complains under Article 6 § 3(c) of the Convention that for a certain time during the trial he was represented by a legal aid counsel who acted to his detriment.

5. Lastly, the applicant complains under Article 7 of the Convention that he was charged with an act which did not constitute a criminal offence.

6. In his letter of 19 January 2005, the applicant complains about a violation of his rights in respect of the decision of the Regional Court of 13 January 2005. He does not invoke any provision of the Convention in that respect.

THE LAW

1. The applicant complains under Article 6 of the Convention about the length of his detention on remand. The Court finds that this complaint falls to be examined under Article 5 § 3 of the Convention.

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.

2. The applicant also alleges a breach of his right to a trial within a reasonable time under Article 6 § 1 of the Convention.

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. He further alleges a breach of Article 6 § 2 of the Convention in that the trial court when ordering his detention relied on the reasonable suspicion of his having committed the offence before he had been proved guilty.

Leaving aside the issue of the exhaustion of domestic remedies, the Court finds that the complaint under Article 6 § 2 lacks substantiation. In particular, it cannot be said that a detention order made by the court and based on the reasonable suspicion of having committed an offence breaches *per se* the principle of the presumption of innocence.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

4. The applicant also complains under Article 6 § 3(c) of the Convention that for a certain time during the trial he was represented by a legal aid counsel who acted to his detriment.

The Court notes that this complaint has not been substantiated by the applicant. In any event, it appears that the applicant has failed to lodge a cassation appeal against the judgment of the Warsaw Regional Court of 3 August 2004.

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

5. Lastly, the applicant complains under Article 7 of the Convention that he was charged with an act which did not constitute a criminal offence.

However, it appears that the applicant has failed to lodge a cassation appeal against the judgment of the Warsaw Regional Court of 3 August 2004.

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

6. In his letter of 19 January 2005, the applicant complains about a violation of his rights in respect of the decision of the Regional Court of 13 January 2005. He does not invoke any provision of the Convention in that respect.

The Court notes that the Regional Court in its decision of 13 January 2005 ruled that it could not take cognisance of the applicant's complaint about a breach of his right to a trial within a reasonable time. The Court considers that the applicant's complaint in relation to the impugned decision of the Regional Court falls to be examined under Article 13 of the Convention.

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.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning the length of his detention, the unreasonable length of the

proceedings and the lack of an effective remedy in respect of the undue length of proceedings;

Declares the remainder of the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President