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. 59526/00
by Leszek KASZCZYNIEC
against Poland

The European Court of Human Rights (Fourth Section), sitting on 1 April 2003 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application introduced on 16 June 2000,

Having deliberated, decides as follows:

THE FACTS

The applicant, Leszek Kaszczyniec, is a Polish national, born in 1951 and living in Szczecin, Poland. He is represented before the Court by Mr L. Cyrson and Mr W. Michalski, lawyers practising in Poznań, Poland.

A. The circumstances of the case

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

1. The trial

On 23 September 1996 the applicant was brought before the Szczecin District Court (*Sąd Rejonowy*) and charged with obtaining property of a significant value by fraud. On that day the court also ordered that he be detained on remand in view of the reasonable suspicion that he had committed the offence in question and the need to secure the proper conduct of the criminal proceedings against him.

Later, on an unknown date, he was indicted before the Szczecin Regional Court (*Sąd Okręgowy*).

On 20 July 1998 the court gave judgment. It convicted the applicant as charged and sentenced him to 9 years' imprisonment. The court further ordered that the period spent by him in pre-trial detention from 23 September 1996 up to the date of his conviction be set off against the sentence imposed.

On 15 April 1999, on an appeal lodged by the applicant, the Szczecin Court of Appeal (*Sąd Apelacyjny*) quashed the first-instance judgment and remitted the case.

The retrial was to begin on 28 March 2000 but was adjourned to 9 May 2000. On that day it was again postponed to a further unknown date.

On 11 August 2000 the Szczecin Regional Court dismissed the applicant's challenge to the impartiality of all the judges sitting in the Criminal Division of that court.

It appears that the proceedings are still pending.

2. The applicant's detention

It seems that some time after 23 September 1996 the applicant had been released because on a later unknown date the authorities ordered that he be searched for by a "wanted" notice.

On 29 November 1996 the applicant was arrested in Hamburg under an international warrant of arrest issued together with a "wanted" notice. However, on the material before the Court, it is not clear whether the

relevant warrants were issued in the framework of the proceedings described above.

In the course of his original trial, i.e. up to 20 July 1998, the date of his first-instance conviction, the applicant lodged numerous unsuccessful applications for release and appealed – likewise unsuccessfully – against refusals to lift the detention. In his applications, he argued that his detention was excessive and had, for all practical purposes, amounted to serving a prison sentence. He asked the courts to release him either on bail, or under police supervision, or to accept guarantee from a responsible person or persons who would undertake to ensure his presence at trial, or to order him to surrender his passport, or to subject his release to all those conditions.

Following 15 April 1999, i.e. the date on which the Court of Appeal ordered a retrial, the applicant filed further applications for release and challenged each court decision extending his detention. The relevant applications, decisions and appeals are summarised below.

On 20 May 1999 the Poznań Court of Appeal dismissed the applicant's application for release on bail or under police supervision, or under guarantee by a responsible person or under the condition that he surrender his passport. The court found that there was a considerable likelihood that he had committed the offence with which he had been charged. The court further noted that the applicant had already been detained on remand for some 30 months but it considered that, given that he had previously been searched for by a "wanted" notice and that he was liable to a severe sentence of imprisonment, there was a real risk that he might obstruct the proper conduct of the trial. In the court's view, that risk justified his being still kept in custody. That decision was upheld on appeal

On 27 May 1999 the Court of Appeal gave a decision under Article 251 § 2 of the so-called "New Code of Criminal Procedure" ("the 1997 Code"; see also "Relevant domestic law and practice" below) and prolonged the applicant's detention pending trial until 30 November 1999.

The applicant appealed, invoking, *inter alia*, Article 5 § 3 of the Convention. He submitted that his right to trial within a reasonable time or to release pending trial was not respected. He also maintained that his detention was so excessive that it amounted in reality to serving a sentence of imprisonment.

On 4 August 1999 the Court of Appeal upheld the contested order. Repeating the grounds previously given for the applicant's detention, the court stressed that he had already evaded justice and that, for that reason, he had been searched for by a "wanted" notice. It considered that the trial had not progressed because of his conduct. In the court's opinion, those circumstances clearly indicated that there was a considerable risk that the applicant might again upset the proper conduct of the proceedings. Lastly, the court held that he faced in reality an exceptionally severe sentence,

which had already been shown by the gravity of the penalty originally imposed at first instance.

On 27 August 1999 the Szczecin Regional Court dismissed an application for release on bail or subject to other guarantees or conditions filed by the applicant on an unknown date. The court repeated the previous grounds given for the applicant's detention, attaching particular importance to the fact that he had earlier been searched for by a "wanted" notice and had already been sentenced to 9 years' imprisonment. In view of the severity of the sentence to which he was liable, the court considered that neither bail, nor police supervision nor any other guarantee would secure the proper course of the trial.

On 16 November 1999 the Regional Court made the next decision under Article 251 § 2 of the 1997 Code and prolonged the applicant's detention until 30 April 2000. It repeated the grounds mentioned in the previous decisions.

The applicant appealed, maintaining, among other things, that there was no legal basis for keeping him in custody and that, pursuant to Article 263 §§ 3 and 4 of the 1997 Code, his detention could have been prolonged only by the Supreme Court (*Sąd Najwyższy*) because it had exceeded the maximum statutory period of 2 years laid down in paragraph 3 of that provision.

On 11 January 2000 the Poznań Court of Appeal rejected the appeal. It stressed that both the fact that the applicant had earlier evaded justice and the nature of his, in the court's words, "criminal relations" with certain witnesses involved in the case, indicated that detention was the only preventive measure (*środek zapobiegawczy*) which would effectively secure the proper course of the trial. As regards the legal basis for his detention, the court pointed out that – as had already been mentioned in the previous detention decisions – his detention continued on the grounds listed in Article 258 §§ 1 (2) and 2 of the 1997 Code as there was a risk that he might obstruct the proper course of the trial and a severe sentence was likely to be imposed on him. Lastly, as to the question of which court was competent to prolong his detention, the Court of Appeal stated that the applicant had misconstrued Article 263 §§ 3 and 4 of the 1997 Code. That provision, the court added, indeed put a statutory time-limit of 2 years on pre-trial detention and laid down that only the Supreme Court could prolong it beyond that term. However, that rule applied only as long as there had been no conviction at first instance. Since the applicant had already been convicted at first instance, no time-limit for detention applied to his case, even though his original conviction had subsequently been quashed on appeal.

On 4 February 2000 the Szczecin Regional Court dismissed a further application for release filed by the applicant in January 2000. It reiterated the grounds cited in the previous detention decisions and added that, in the

light of the material before it, there was a considerable likelihood that the applicant had committed the offence with which he had been charged.

On 25 February 2000 the Regional Court dismissed the applicant's subsequent application for release. It recalled that it had already on numerous occasions ruled on his detention. Considering that the applicant had not adduced any new relevant circumstances, the court found it unnecessary to address his arguments.

On 26 April 2000 the Regional Court prolonged the applicant's detention until 30 October 2000. It considered that the material gathered in the case justified the opinion that the applicant had committed the offence in question. It observed that a severe penalty (up to 9 years' imprisonment) might be imposed on him. Stressing that the applicant had evaded justice at the initial stage of the proceedings, the court also pointed out that his detention served the purposes of securing the proper conduct of the trial. Furthermore, the court found it necessary to extend detention until 30 October 2000 because the summer holidays were approaching, which, for all practical purposes, meant that the examination of the case would be postponed.

On 15 September 2000 the Regional Court dismissed the applicant's next application for release. It found that there were no circumstances militating in favour of his release and that the previous grounds for his detention were still valid.

On 18 October 2000 the Szczecin Regional Court prolonged the applicant's detention until 30 January 2001. It reiterated all the grounds already given for his detention. The applicant's appeal, based on Article 5 § 3 of the Convention, was rejected by the Poznań Court of Appeal on 31 October 2000.

The applicant has not supplied information of further developments in his case.

B. Relevant domestic law and practice

1. Amendments to criminal legislation

During the time to which the fact of the present case relate, Polish criminal legislation was amended on several occasions.

The applicant was detained on remand under the provisions of the Code of Criminal Procedure of 1969 ("the 1969 Code"). The 1969 Code is no longer in force as it was repealed and replaced the 1997 Code, which entered into force on 1 September 1998.

2. Detention on remand and other "preventive measures"

Both Codes define detention as one of the so-called "preventive measures". Those measures are, in addition to detention on remand, 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*).

(a) 1969 Code

Article 209 provided:

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

Article 217 defined grounds for detention on remand. That provision, provided, 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 he has no permanent abode [in Poland]; or
>
> (2) there is a reasonable risk that an accused will attempt to induce witnesses to give false testimony or to obstruct the proper conduct of proceedings by any other unlawful means;
>
> 2. 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 8 years' imprisonment, or if a court of first instance has sentenced him to at least 3 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."

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 stated:

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

Article 225 stated:

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

Article 218 provided:

"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 entail excessively burdensome effects for the accused or his family."

Article 222 of the 1969 Code set out statutory time-limits for detention on remand. It provided, in so far as relevant:

"3. The whole period of detention on remand until the date on which the court of first instance gives judgment may not exceed 1 year and 6 months in cases concerning offences. In cases concerning serious offences [offences for the commission of which a person was liable to a sentence of a statutory minimum of at least 3 years' imprisonment] this period may not exceed two years.

4. In particularly justified cases the Supreme Court may, on an application made by the court competent to deal with the case, ... prolong detention on remand for a further fixed period exceeding the time-limits set in paragraphs 2 and 3, when it is necessary in connection with a suspension of the proceedings, a prolonged psychiatric observation of the accused, when evidence needs to be obtained from abroad or when the accused has deliberately obstructed the termination of the proceedings in the terms referred to in paragraph 3."

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

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

(b) 1997 Code

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

"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 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 justified fear 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. It provides, in so far as relevant:

"1. Imposing detention in the course of an investigation, the court shall determine its term for a period not exceeding 3 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 the application made by the court before which the case is pending or, at the investigation stage, on the 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."

In the light of opinions expressed by legal writes and domestic practice, the *ratio legis* for Article 263 is based on the precept that an accused should not indefinitely be kept in pre-trial detention until at least the first judgment

at first instance is given. It is common ground that, following his first conviction, an accused may be kept in custody as long as the relevant courts consider it necessary because the statutory time-limits no longer apply to his detention, regardless of whether the conviction has been upheld or quashed on appeal (see, for instance, *Kodeks Postępowania Karnego - Komentarz,* edited by Z. Gostyński, *Dom Wydawniczy ABC ,* 1998 , vol. I , p.709).

That point of view has fully been supported by the Supreme Court. In its decision of 22 September 1998 no. V KO 72/98 (publ. in *OSNKW 1998/9-10, p. 47*) the Supreme Court interpreted Article 263 § 4 of the 1997 Code in the following way:

> "...the Supreme Court's competence to prolong detention on remand deriving from Article 263 § 4 read in conjunction with Article 263 §§ 2 and 3 of the 1997 Code concerns only situations where no first judgment has yet been given at first instance."

COMPLAINTS

1. The applicant complains under Article 5 § 1 of the Convention that his detention on remand was unlawfully extended by the Regional Court and the Court of Appeal beyond the statutory time limit of 2 years laid down in Article 263 § 3 of the 1997 Code. He submits that after the expiry of that term his detention could have been prolonged only by the Supreme Court and only in the circumstances exhaustively listed in Article 263 § 4 of the 1997 Code. Since no such a decision was given in his case, his detention lacked a legal basis in the form of a decision issued by the appropriate authority and was no longer "lawful".

2. Without invoking any particular provision of the Convention, the applicant also submits that his pre-trial detention has been inordinately excessive.

3. The applicant also alleges a breach of Article 6 § 1 of the Convention in that his right to have a criminal charge against him determined "within a reasonable time" has not been respected.

THE LAW

1. The applicant in substance alleges a breach of Article 5 § 3 of the Convention in that his pre-trial detention has been inordinately lengthy. He also complains that the criminal charge against him has not been determined within a "reasonable time", as required under Article 6 § 1 of the Convention.

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

2. The applicant complains under Article 5 § 1 of the Convention that his detention on remand, in so far as it was extended by the Regional Court and the Court of Appeal beyond the statutory time limit of 2 years laid down in Article 263 § 3 of the 1997 Code, was no longer "lawful" because it lacked a legal basis in the form of a decision issued by the appropriate authority, namely the Supreme Court.

Article 5 § 1, in its relevant part, states:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ..."

The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof.

The "lawfulness" of detention under domestic law is the primary but not always a decisive element. The relevant domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. That emerges from the concept underlying the terms "lawful" and "in accordance with a procedure prescribed by law" – which is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary (see, among other authorities, *Baranowski v. Poland* no. 28358/95, §§ 50-57, ECHR 2000-III; and the *Winterwerp v. the Netherlands* judgment of 24 October 1979, Series A no. 33, pp. 19-20,§§ 45 et seq.).

In that context, the Court has also stressed that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under national law be clearly defined and that the law itself be foreseeable in its application (see the *Baranowski v. Poland* judgment cited above, ibid.).

In the present case, the applicant relies on two arguments: first, that his detention continued beyond the maximum term set by law and, second, that

the Polish courts, when prolonging his detention beyond that term, did not follow the procedure prescribed by law because, in his view, the only authority which had the power to extend his detention was the Supreme Court.

However, the Court notes that the prolongation of the applicant's detention beyond the period in question was based on Article 263 §§ 3 and 4 of the 1997 Code and, more particularly, on the interpretation of that provision made by the Court of Appeal, an interpretation which was fully supported by the case law of the Supreme Court (cf. the decision of 22 September 1998). The Supreme Court's decision also resolved the second issue raised by the applicant, namely that of which national authority was competent to prolong his detention pending retrial.

The Court is therefore satisfied that the decisions extending the applicant's detention were issued by the appropriate authority and, accordingly, complied with the requirements of "fair and proper procedure" for the purposes of Article 5 § 1.

Furthermore, the Court does not see any element that would suggest that the legal basis for the applicant's detention pending retrial was not clearly defined and, in consequence, lacked the necessary foreseeability required under the Convention, the more so as the terms of Article 263 §§ 3 and 4 of the 1997 Code were clarified in the Supreme Court's decision.

Against that background, the Court concludes that the applicant's detention was "lawful" within the meaning of Article 5 § 1 of the Convention.

It follows that the remainder 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 paragraph 4 of that Article.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints about the unreasonable length of his detention on remand and of his trial;

Declares inadmissible the remainder of the application.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President