AS TO THE ADMISSIBILITY OF

Application No. 33863/96
by Janusz KAZIMIERCZAK
against Poland

The European Commission of Human Rights (Second Chamber) sitting in private on 27 October 1998, the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. ŠVÁBY
E. BIELIŪNAS
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 30 April 1996 by Janusz KAZIMIERCZAK against Poland and registered on 18 November 1996 under file No. 33863/96;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 8 September and 3 November 1997 and the observations in reply submitted by the applicant on 6 and 7 October, and on 8 December 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Polish citizen born in 1950, is a painter by trade. At present, his whereabouts are unknown.

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

A. Particular circumstances of the case:

On 24 July 1995 the applicant, who at the same time was being searched for by a wanted notice issued in other criminal proceedings against him, was arrested by the police on suspicion of having battered J.U. with a piece of concrete, plucked out one of his eyeballs and thrust two pieces of wood into his throat, which resulted in the latter's death. Subsequently, he was brought before the Otwock District Prosecutor, charged with homicide committed with an accomplice and detained on remand since, in the light of the confession of his co-suspect and the post-mortem examination of the victim's body, there was a very strong suspicion that he had committed the offence with which he had been charged. Moreover, both the grave nature of the offence in question and the fact that the applicant had no permanent residence in Poland (and might, therefore, abscond) were, in the prosecutor's opinion, other factors justifying the applicant's detention.

Shortly after being arrested the applicant was interrogated by police officers and allegedly beaten, kicked and assaulted by several officers who also intimidated him in an attempt to extract a confession from him. On 4 August 1995 the applicant complained to the Otwock District Prosecutor (Prokurator Rejonowy) that he had been subjected to torture during the interrogation of 24 July 1995. Subsequently, on 7 September 1995, the prosecutor instituted an investigation relating to the applicant's complaint but, on 30 October 1995, discontinued the proceedings since there was no evidence that the offence had been committed. On 29 January 1996 the applicant appealed against the decision discontinuing the investigation but lodged his appeal outside the prescribed time-limit, which resulted in the appeal being rejected.

After 24 July 1995 the investigation concerning the applicant was continued and, inter alia, evidence was taken from various experts, including a pathologist, a forensic medical expert and a fingerprint expert.

On an unspecified date in October 1995 the Otwock District Prosecutor requested the Warsaw Regional Court (Sąd Wojewódzki) to prolong the applicant's detention on remand until 24 January 1996 in view of the need to obtain further evidence. On 19 October 1995 the court granted the request. On 24 October 1995 the applicant complained about the decision of 19 October 1995 to the Prosecutor General (Prokurator Generalny), arguing that his detention was unjustified. This was deemed to be an appeal against the decision in question and transferred to the Warsaw Regional Court and, subsequently, to the Warsaw Court of Appeal (Sąd Apelacyjny). On 14 December 1995 the Warsaw Court of Appeal dismissed the appeal in view of the reasonable suspicion

that the applicant had committed the offence with which he had been charged, the serious nature of the offence and the need to supplement the existing expert evidence by, inter alia, obtaining evidence from biological experts.

On an unspecified date in January 1996 the Otwock District Prosecutor requested the Warsaw Regional Court to prolong the applicant's detention on remand until 30 May 1996 as, in order to establish whether or not the applicant and his co-suspect had acted in a state of diminished responsibility, it was necessary to obtain evidence from psychiatric experts and, therefore, place both of them under psychiatric observation for at least six weeks. On 18 January 1996 the court granted the request in view of the need to obtain such evidence in the course of the investigation.

On 29 May 1996 the Otwock District Prosecutor lodged a bill of indictment with the Warsaw Regional Court. Shortly afterwards, the court commenced preparations for the trial and scheduled first hearings for 4 and 5 February 1997.

On an unspecified date the applicant requested the Warsaw Regional Court to release him. The request was dismissed on 1 July 1996. The applicant did not appeal against this decision.

On unspecified dates, in August and then in October or November 1996, the applicant requested the Warsaw Regional Court to alter the preventive measure imposed on him, submitting that his health was very bad. On 5 August and 7 November 1996, respectively, the court dismissed those requests in view of the reasonable suspicion that the applicant had committed the serious offence with which he had been charged and the need to secure the due course of the proceedings, in particular in view of the likelihood of a severe penalty being imposed. The court also found that the grounds which had previously been given to justify his detention had not ceased to exist. The applicant did not appeal against either of these decisions.

On 9 January 1997 the Warsaw Regional Court dismissed a further request for release filed by the applicant on an unspecified date. The applicant did not appeal against this decision.

On 4 February 1997 the court adjourned the trial to 14 and 16 April and 16 May 1997. During the hearings on these dates it heard evidence from the applicant and his co-defendant and some part of the expert evidence. In order to call witnesses and other experts, i.e. a psychologist and psychiatrists, the court adjourned the trial and scheduled the next hearings for 21, 22 and 26 August 1997 when it heard further evidence from lay and expert witnesses.

In the meantime, on 26 June 1997, the Warsaw Regional Court lodged a request under Section 222 para. 4 of the Code of Criminal Procedure with the Supreme Court (Sąd Najwyższy), submitting that, in view of the volume of evidence which was to be heard or obtained during the trial, it was not possible to terminate the proceedings at first instance within the two-year time-limit set out in this provision. However, it was

necessary to ensure the applicant's presence during the hearings, so that the need to secure the due course of the proceedings justified prolonging his detention beyond the statutory time-limit of two years. Therefore, the court of first instance requested the Supreme Court to prolong the applicant's detention on remand until 31 December 1997, stressing that, by then, crucial evidence would have been obtained and the proceedings at first instance would be terminated.

On 2 October 1997 the Supreme Court granted the request, finding that even though the Warsaw Regional Court was proceeding with the applicant's case in a prompt and efficient manner, it had met serious difficulties in ensuring the appearance before it of some lay and expert witnesses. Furthermore, the proper course of the proceedings had still to be secured by the applicant's continued detention until at least 31 December 1997.

The next hearing took place on 30 October 1997. The court heard evidence from experts but adjourned the hearing as several lay witnesses, including [...]. G., a witness proposed by the applicant, had failed to appear.

On 3 December 1997 the court heard evidence from lay witnesses and a forensic medical expert; it adjourned the trial since [...]. G., had again failed to appear. The next hearing was scheduled for 29 January 1998.

On 29 December 1997 the Warsaw Regional Court made a further request under Section 222 para. 4 of the Code of Criminal Procedure to the Supreme Court, submitting that the applicant's detention should be prolonged until 31 March 1998 since the proceedings had not come to an end due to the fact that several witnesses had failed to appear before the court. On the other hand, the need to secure the due course of the proceedings still militated against the applicant's release.

On 28 January 1998 the applicant was released.

B. Relevant domestic law and practice

1. Preventive measures, in particular detention on remand.

The Polish Code of Criminal Procedure lists as preventive measures, inter alia, detention on remand, bail and police supervision.

Section 209 of the Code of Criminal Procedure provides:

"Preventive measures may be imposed in order to secure the due course of proceedings if the evidence against the accused sufficiently justifies the opinion that he has committed a criminal offence."

The Code of Criminal Procedure sets out the scope of the discretion as to maintaining the preventive measures. Detention on remand is regarded as the most extreme measure among the preventive measures and the domestic law lays down that in principle it should not be imposed if more lenient measures are adequate and sufficient.

Section 213 of the Code of Criminal Procedure provides:

"1. A preventive measure (including detention on remand) shall be immediately quashed or altered if the basis therefor has ceased to exist or new circumstances have arisen which justify quashing or replacing a given measure with a more or less severe one."

Section 225 of the Code of Criminal Procedure provides:

"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."

*The relevant provisions of the Code which provided for "mandatory detention" were repealed by virtue of a new Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes.

Within the above margin of discretion the Code of Criminal Procedure sets out a list of particular instances in which detention on remand may be imposed.

Section 217 of the Code of Criminal Procedure, insofar as relevant, provides:

"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 domicile [in Poland] or:

2. there is a reasonable risk that he will attempt to induce witnesses to give false testimony or to obstruct the due course of proceedings by any other unlawful means. ..."

2. Statutory time-limits for detention on remand.

From 4 August 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, Polish law sets out statutory time-limits concerning detention on remand.

Section 222 of the Code of Criminal Procedure in the version applicable after 4 August 1996, insofar as relevant, provides:

"3. The whole period of detention on remand until the date on which the court of first instance gives judgment may not exceed one year and six months in cases concerning offences. In cases concerning serious offences this period may not exceed two years.

4. In particularly justified cases the Supreme Court may, upon the request of the court competent to deal with the case, ... prolong detention on remand for a further fixed period exceeding the periods referred to in paras. 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 para. 3."

3. Domestic remedies relating to the lawfulness and length of detention on remand.

At the material time there were three different legal avenues whereby a detainee could challenge the lawfulness of his detention and thus possibly obtain release. Under Section 212 para. 2 of the Code of Criminal Procedure he could appeal to a court against a detention order made by a prosecutor. Under Section 222 paras. 2(1) and 3 he could appeal against a further decision by that court prolonging his detention on a prosecutor's request. Finally, Section 214 of the Code stated that an accused could at any time apply to the competent authority to have a preventive measure quashed or altered. Such an application had to be decided by the prosecutor or, after the bill of indictment had been lodged, by the court competent to deal with the case, within a period not exceeding three days.

COMPLAINTS

The applicant complains under Article 5 para. 3 of the Convention that the length of his detention on remand exceeded a "reasonable time".

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 30 April 1996 and registered on 18 November 1996.

On 2 July 1997 the Commission decided to communicate the applicant's complaint concerning the length of his detention on remand to the respondent Government and to declare the remainder of the application inadmissible.

The Government's written observations were submitted on 8 September and 3 November 1997. The applicant replied on 6 and 7 October and 8 December 1997.

On 9 December 1997 the Commission granted the applicant legal aid.

On 15 February 1998 the Government submitted a translation of their observations of 8 September 1997.

THE LAW

The applicant complains under Article 5 para. 3 of the Convention that the length of his detention on remand exceeded a "reasonable time".

Article 5 para. 3 of the Convention, insofar as relevant, provides:

"3. 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."

a) Under Article 26 of the Convention, "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law."

The Government submit that the applicant has not complied with the requirements of Article 26 of the Convention since he has not exhausted all the remedies available to him under Polish law. Firstly, the applicant failed to appeal against the detention order made by the Otwock District Prosecutor on 24 July 1995. Secondly, he did not appeal against four further decisions dismissing his requests for release given by the Warsaw Regional Court on 1 July, 5 August and 7 November 1996, and 9 January 1997 respectively. That being so, the applicant did not avail himself of remedies which were adequate and effective and which, in case of a favourable decision, would have resulted in his being released.

The applicant admits that he did not appeal against the detention order of 24 July 1995. He did, however, request the Otwock District Prosecutor to institute criminal proceedings against the policemen who had arrested him and maltreated him while he had been in police custody, thus raising an objection to the lawfulness of his detention. Subsequently, he filed numerous requests for release and complaints to various organs about his continued detention. Yet, since at the same time his detention pending investigation was repeatedly prolonged, any appeal by him would have offered poor prospects of success. The applicant therefore concludes that there is no failure on his part as regards the exhaustion of domestic remedies.

The Commission recalls that Article 26 must be applied with some degree of flexibility and without excessive formalism and that it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge decisions already given. It normally requires

also that the complaints intended to be made subsequently to the Convention organs should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see Eur. Court HR, Ahmet Sadik v. Greece judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V no. 20, p. 1654, para. 30 in fine).

The Commission further reiterates that under Article 26 of the Convention an applicant must make normal use of those domestic remedies which are likely to be effective and sufficient. When a remedy has been attempted, use of another remedy which has essentially the same objective is not required (No. 11471/85, Dec. 19.1.89, D.R. 59, p. 67).

In the present case the Commission, noting that the applicant filed several unsuccessful requests for release and that, at least on one occasion, i.e. on 24 October 1995, appealed against the decision prolonging his detention to the Warsaw Court of Appeal, finds that it cannot be said that he failed to put the substance of the present complaint before the domestic authorities.

It also finds that, under Polish law, such requests and appeals secure a judicial review of the lawfulness of detention on remand and that their purpose is to obtain release. They constitute, therefore, an adequate and effective remedy against the length of detention. Since the remedies relied on by the Government would have the same objective, the applicant should not, in the Commission's opinion, be required to avail himself of such other remedies.

It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies.

b) The Government further maintain that, in any event, the present complaint is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

They point out that there were valid reasons justifying the applicant's detention. First of all, there was a well-founded suspicion that he had committed a very serious and dangerous offence, i.e. murder, which meant that he could have been liable to a sentence ranging from eight years' imprisonment to the death penalty. In view of the likelihood of such a severe penalty and the fact that, before being detained, the applicant was searched for by a wanted notice in connection with other criminal proceedings against him and, moreover, had no permanent domicile in Poland, there was a reasonable risk that he might abscond or obstruct the due course of the proceedings against him. Also, there was a risk that he might induce other persons to give false testimony. Those risks persisted

both during the investigative stage and in the course of the proceedings before the court of first instance.

Moreover, the Government stress that the applicant's case was a very complex one. It concerned a very serious charge laid against two co-suspects. The nature of the offence made it essential to obtain expert evidence. For this reason the investigation lasted for more than ten months; however, during this time the authorities collected voluminous evidence, including several expert reports. The trial court proceeded with the applicant's case in an expeditious manner and no procedural inactivity can be found on its part.

The Government conclude that, having regard to the criteria of the reasonableness of the length of detention deriving from the Convention organs' case-law and, more particularly, to the fact that the applicant's detention was necessary to secure the proper course of the proceedings, the length of his detention did not exceed a "reasonable time" within the meaning of Article 5 para. 3 of the Convention.

The applicant generally contests the Government's submissions. He submits that his detention was entirely unjustified. First of all, he claims that there was (and still is) no evidence that he had committed the offence with which he had been charged. Moreover, the evidence obtained from both the biological expert and the fingerprint expert clearly confirmed that the charge laid against him was never justified. Also, evidence from witnesses heard by the court of first instance clearly showed that this charge had no basis. Nevertheless, he spent more than two years in detention.

The Commission considers, in the light of the parties' submissions, that this complaint raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of its merits. The Commission concludes, therefore, that this complaint is not manifestly ill-founded, within the meaning of Article 27 para. 2 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, the remainder of the application, without prejudging the merits.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

J.-C. GEUS
President
of the Second Chamber