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. 34964/03
by Paweł KOWALSKI
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 M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Ms L. MIJOVIĆ, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 13 October 2003,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together.

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Paweł Kowalski, is a Polish national, who was born in 1972 and lives in Częstochowa, Poland.

A. Circumstances of the case

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

A. The applicant's pre-trial detention

On 3 October 2001 the Katowice District Court (*Sąd Rejonowy*) ordered that the applicant be detained on remand until 10 December 2001 in view of the reasonable suspicion that he had committed a series of offences in an organised group. The court added that the measure was justified by the complexity of the case and the fact that the applicant had not confessed. It also considered that, given the applicant had not confessed and the risk that he might tamper with evidence, keeping him in detention was necessary to secure the proper conduct of the investigation.

The applicant's appeal against the detention order, likewise his further appeals against decisions prolonging his detention and applications for release were unsuccessful.

On 3 December 2001 the Katowice District Court, on an application from the Katowice Appeal Prosecutor (*Prokurator Apelacyjny*), prolonged the applicant's detention pending investigation until 2 January 2002. It reiterated the grounds previously given for his detention and added that the measure was also justified by the severity of the anticipated sentence.

On 13 December 2001 the Częstochowa Regional Court (*Sąd Okręgowy*) prolonged the applicant's detention until 2 April 2002, repeating the grounds that had been given in the previous decisions. It also stated that there was no risk that it would seriously jeopardise his life or health, or entail excessively harsh consequences for the applicant or his family.

Between 14 March and 4 December 2002 the courts prolonged the applicant's pre-trial detention on 5 occasions. The relevant decisions were given by the Częstochowa Regional Court on the following dates: on 14 March 2002 (extending his detention until 10 June 2002), on 23 May 2002 (prolonging his detention until 10 September 2002) and on 5 September 2002 (extending his detention until 2 October 2002). Subsequently, further decisions prolonging the applicant's detention were taken by the Katowice Court of Appeal (*Sąd Apelacyjny*) on the following dates: on 25 September 2002 (prolonging the applicant's detention until 10 December 2002) and on 4 December 2002 (extending his detention up to 24 April 2003).

In all those decisions the courts relied on a strong suspicion that the applicant had committed offences with which he had been charged. They considered that there was a risk that the applicant might go into hiding or tamper with evidence. The courts further stressed that the need to secure the proper conduct of the proceedings, especially the need to obtain extensive evidence, justified holding him in custody. They attached importance to the grave nature of the offences and the likelihood of a severe sentence of imprisonment.

On 24 February 2003 the investigation was terminated by the decision of the Katowice Regional Prosecutor (*Prokurator Okregowy*).

Later, on an unspecified date, the applicant was indicted before the Częstochowa Regional Court.

On 23 April 2003 the Częstochowa Regional Court ordered that the applicant be kept in custody until 2 October 2003. The court referred to a strong likelihood that he had committed the serious offences with which he had been charged and stressed that a heavy penalty might be imposed on him. The court also relied on the complex nature of the case and the fact that 75 witnesses were to be heard.

Subsequently, the Katowice Court of Appeal prolonged the applicant's detention pending trial on the following dates: on 17 September 2003 (extending his detention until 24 December 2003) and on 17 December 2003 (prolonging that term until 24 June 2004). The court reiterated the grounds originally given for the applicant's detention.

It appears that the applicant is still in detention pending trial.

B. The proceedings concerning a breach of the right to a trial within a reasonable time

On 2 May 2005 the applicant lodged with the Katowice Court of Appeal a complaint alleging that his right to have his case examined within the reasonable time had been violated. The proceedings are pending.

C. Monitoring of the applicant's correspondence

On 20 October 2003 the Court received the applicant's letter of 28 September 2003. The envelope bears the following stamps: "Częstochowa detention Centre received on 29.09.2003" (*Areszt Śledczy w Częstochowie wpłynęło dnia 29.09.2003)* and "Received for censorship without control on 1 October 2003" and an illegible signature and "Received for censorship without control on 8 October 2003" and an illegible signature.

B. Relevant domestic law and practice

1. 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:

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[1] This part of the statement of domestic law and practice is relevant only for cases nos. 7347/02 (*Kusyk v. Poland*), 22752/03 (*Midera v. Poland*) and 36576/03 (*Leszczak v. Poland*). 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

> "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.
>
> ..."

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.

2. Preventive measures, including detention on remand

A. The Code of Criminal Procedure 1969

The Code of Criminal Procedure 1969, which remained in force until 1 September 1998, listed as preventive measures, *inter alia,* detention on remand, bail and police supervision. Article 209 of the Code, which set out general grounds justifying the imposition of preventive measures, provided as follows:

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

Furthermore, the Code of Criminal Procedure allowed authorities a margin of discretion as to whether to continue the enforcement of preventive measures. Detention on remand was regarded as the most severe preventive measure. Article 213 of the Code provided as follows:

> "A preventive measure shall be immediately quashed or changed if the grounds therefore have ceased to exist or if new circumstances have arisen, which justify quashing a given measure or replacing it with one that is either more or less severe."

Article 225 of the Code provided:

> "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 217 § 1 of the Code, in the version after 1 January 1996, provided insofar as relevant:

> "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; or

Paragraph 2 of Article 217 then read:

> "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."

Article 218 provided:

> "If there are no special reasons to the contrary, detention on remand should be lifted, in particular, if:
>
> (1)º it may seriously jeopardise the life or health of the accused; or
>
> (2) ºit would entail excessively burdensome effects for the accused or his family."

Until 4 August 1996, when the Code of Criminal Procedure was amended, Polish law did not set out any statutory time-limits concerning detention on remand in court proceedings but only in respect of the investigative stage.

Article 222 of the Code of Criminal Procedure, as applicable after 4 August 1996, provided insofar 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 one year and six 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."

Subsequently, paragraph 4 was extended to include also "other significant circumstances, which could not be overcome by the organs conducting the proceedings".

B. The Code of Criminal Procedure 1997

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. In addition, new paragraph 5 was added. It provides:

" A decision of the Court of Appeal taken pursuant to paragraph 4 may be appealed against to the Court of Appeal sitting in a panel of three judges."

3. Sentences applicable in respect to offences of robbery, fraud and acting in an organised criminal group

Pursuant to Article 280 §§ 1 and 2 of the Criminal Code (*Kodeks Karny)*, a person convicted of robbery is liable to a sentence from 2 to 12 years' imprisonment; in case of armed robbery, the applicable sentence is from 3 to 15 years' imprisonment.

A person convicted of fraud is liable to a sentence of imprisonment ranging from 6 months to 8 years (Article 286).

Acting in an organised group set up in order to commit offences is an offence under Article 258 of the Criminal Code; the applicable sentence is from 1 month's to 3 years' imprisonment or, in case of acting in an armed organised group, from 3 months' to 5 years' imprisonment.

4. Censorship of correspondence

Rules relating to means of controlling correspondence of persons involved in criminal proceedings are set out in the Code of Execution of Criminal Sentences (*Kodeks karny wykonawczy*) of 1 September 1998.

Article 103 of that Code, which is contained in Chapter IV entitled "Rights and duties of convicted persons", provides as follows:

> "Convicted persons, their counsel, representatives and the relevant non-governmental organisations have a right to lodge complaints with institutions set up by international treaties ratified by the Republic of Poland concerning the protection of human rights. In those cases, correspondence of persons deprived of their liberty shall be sent to the addressee without delay and shall not be censored."

Provisions relating to the execution of detention on remand (Articles 207-223) are contained in Chapter XV entitled "Detention on remand".

Article 217 § 1 reads, in so far as relevant:

> "... a detainee's correspondence shall be censored by [the authority at whose disposal he remains], unless the authority decides otherwise."

Pursuant to Article 214 § 1,

> "Unless exceptions are provided for in the present Chapter, a detainee shall enjoy at least the same rights as are secured to a convicted person serving a sentence of imprisonment under the ordinary regime in a closed prison. No restrictions shall be applied to him except such as are necessary to secure the proper conduct of criminal proceedings, to maintain order and security in a remand centre and to prevent demoralisation of detainees."

Article 242 § 5, which is contained in Chapter XXI entitled "Definitions", provides:

> "The prohibition of censorship shall also mean the prohibition of acquainting oneself with the contents of a letter."

COMPLAINTS

1. The applicant complains under Article 5 § 3 of the Convention that his pre-trial detention is inordinately lengthy.

2. He also complains under Article 6 about the length of criminal proceedings.

3. In respect of the monitoring of the applicant's correspondence, the Court raises *ex officio* a complaint about a breach of Article 8 of the Convention.

THE LAW

1. The applicant complains under Article 5 § 3 of the Convention about the length of his pre-trial detention.

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. Under Article 6 the applicant submits that he did not have his case heard within a "reasonable time".

The Court finds that this complaint falls to be examined under Article 6 § 1 of the Convention which, in its relevant part, provides:

> "In the determination ... of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

However, pursuant to Article 35 § 1 of the Convention:

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

The Court observes that the present application was lodged with the Court when the relevant proceedings were pending before the domestic court.

It further observes that, pursuant to section 18 of the 2004 Act, it was open to persons such as the applicant in the present case whose case was pending before the Court to lodge, within six months from 17 September 2004, a complaint about the unreasonable length of the proceedings with the relevant domestic court, provided that their application to the Court had been lodged in the course of the impugned proceedings and that it had not yet been declared admissible.

The Court has already examined that remedy for the purposes of Article 35 § 1 of the Convention and found it effective in respect of complaints about the excessive length of judicial proceedings in Poland. In particular, it considered that it was capable both of preventing the alleged violation of the right to a hearing within a reasonable time or its continuation, and of providing adequate redress for any violation that has already occurred (see *Charzyński v. Poland* (dec.), no. 15212/03, §§ 36-42).

The Court notes that the applicant made use of new remedies for the excessive length of proceedings. He lodged a complaint about a breach of the right to a trial within a reasonable time under the 2004 Act with the relevant court. His case is pending. Accordingly, the complaint is premature

and must be rejected for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention.

3. In respect of the monitoring of the applicant's correspondence, the Court raises *ex officio* a complaint about a breach of Article 8 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 complaint under Article 5 § 3 concerning the length of his pre-trial detention and the complaint under Article 8 concerning a breach of the right to respect for his correspondence raised by the Court *ex officio*;

Declares the remainder of the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President