CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 51521/99
by Jerzy KUCHARSKI
against Poland

The European Court of Human Rights (First Section), sitting on 16 October 2003 as a Chamber composed of

Mr P. LORENZEN, *President*,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mr E. LEVITS,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mr L. GARLICKI, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having regard to the above application lodged on 15 April 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Jerzy Kucharski, is a Polish national, who was born in 1959 and lives in Drwalew, Poland.

A. The circumstances of the case

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

On 20 November 1996 the applicant was arrested on suspicion of having committed aggravated robbery and false imprisonment.

On 22 November 1996 he was brought before the Warsaw District Court (*Sąd Rejonowy*). The court ordered that he be remanded in custody until 20 February 1997.

The investigation, which was conducted by the Warsaw Regional Prosecutor (*Prokurator Wojewódzki*), lasted until the beginning of April 1998. Originally, the proceedings involved 12 suspects and 25 various charges against them. At the beginning of 1998 the charges against 6 persons, including the applicant, were severed from the case and the investigation against the remaining suspects was discontinued.

In the course of the investigation, the applicant's detention was several times prolonged by the Warsaw Regional Court (*Sąd Wojewódzki*) and the Warsaw Court of Appeal (*Sąd Apelacyjny*).

On 20 November 1997 the length of the applicant's detention reached 1 year, which at the material time was the maximum statutory time-limit for detention pending investigation. On that day the Supreme Court (*Sąd Najwyższy*), on an application made by the Prosecutor General (*Prokurator Generalny*) under Article 222 § 4 of the 1969 Code of Criminal Procedure ("the 1969 Code"), prolonged his detention beyond that statutory period and ordered that he be kept in custody until 20 February 1998 (see also "Relevant domestic law" below). The Supreme Court considered that the fact that a witness had partly changed his testimony and the need to confront a number of witnesses with each other constituted "exceptional circumstances" within the meaning of Article 222 § 4 of the 1969 Code and justified the prolongation of the applicant's detention.

On 15 April 1998 the applicant was indicted on charges of aggravated robbery and false imprisonment before the Warsaw Regional Court (*Sąd Okręgowy*). The bill of indictment comprised 25 various charges, including attempted homicide, brought against 6 defendants. The prosecution asked the court to hear evidence from more than 180 witnesses, including several anonymous witnesses, and to consider several expert reports.

On 26 October 1998 the Regional Court made an application under Article 263 § 4 22 § 4 of the so-called "New Code of Criminal Procedure" of 1997 ("the 1997 Code"), which entered into force on 1 September 1998,

and asked the Supreme Court to prolong the applicant's detention until 31 March 1999. The Regional Court stressed that in the light of evidence before it and, more particularly, testimonies of anonymous witnesses, there was a high probability that the applicant had committed the offences with which he had been charged. It further explained that it was impossible for it to complete the proceedings before the expiry of the two-year time-limit for pre-trial detention laid down in Article 263 § 3 of the 1997 Code since the trial had been postponed due to the fact that 3 of the applicant's co-defendants were involved in other criminal proceedings. The relevant cases were conducted simultaneously and heard from May to November 1998.

On 19 November 1998 the Supreme Court, after obtaining oral comments from the State Prosecutor (*Prokurator Krajowy*) granted the application. It shared the opinion of the Regional Court that the nature of the case and the fact that the applicant's co-defendants were involved in other criminal proceedings justified a further prolongation of the applicant's detention.

The trial began on 7 December 1998. Subsequent hearings were scheduled for 8 9, 15, 16, 17, 18 and 22 December 1998 and for 11, 12, 19, 20, and 27 January 1999; however, all hearings between 11 and 20 January 1999 were cancelled because one of the lay judges was ill. The next hearing, scheduled for 24 February 1999, was cancelled for an unspecified reason. Subsequent hearings were listed for 14 June, and 1 and 15 July 1999.

It appears that during the first-instance proceedings the Warsaw Regional Court listed 41 hearings, of which 16 were cancelled or adjourned.

The Regional Court several times asked the Supreme Court to prolong the applicant's detention. The applicant, for his part, made many unsuccessful applications for release from detention and appealed against refusals to lift that measure.

On 5 March 1999 the Warsaw Regional Court made an application to the Supreme Court under Article 263 § 4 of the 1997 Code. The applicant's defence counsel was informed of the date and hour of the court session and appeared before the court. He could not, however, put forward his arguments because the case was heard earlier than scheduled.

In its application, the Regional Court asked for the applicant's detention to be prolonged until 30 June 1999 as the trial could not be completed by 31 March 1999, the deadline previously fixed by the Supreme Court for keeping him in custody. The main reason was the fact that the Regional Court still needed to hear evidence from a significant number of witnesses, including 6 anonymous witnesses. In its opinion, there were also other grounds that justified the prolongation of his detention, such as a reasonable suspicion that he had committed the offences in question and severity of the anticipated sentence. In this connection, the court stressed that the offence of aggravated robbery, with which the applicant had been charged, carried a maximum punishment of 8 years' imprisonment.

On 15 March 1999 the applicant filed a pleading with the Supreme Court, asking for the application of 5 March 1999 to be rejected. He argued that keeping him in custody no longer served the interests of securing the proper conduct of the trial and that that purpose could be attained by other, less severe measures. In that regard, he stressed that he had already spent more than 2 years in detention pending trial. Furthermore, he expressed serious doubts as to whether it would be possible for the trial court to terminate the proceedings by 30 June 1999, given the fact it had needed the whole of the previous year to hear evidence from 40 witnesses and, at that time, it still had to hear 140 witnesses. The applicant further maintained that the procedure in which the Regional Court made the application was non-adversarial since the defendants had not been informed thereof. In consequence, he was unable to put forward any arguments or to respond to the prosecutor's submissions. Nor could he contest the trial court's findings in respect of the circumstances relevant for his detention. He also advanced arguments as to the general inadequacy of the procedure for the prolongation of detention beyond the statutory time-limit, stressing that it was inherently non-adversarial and provided for no appeal which, in consequence, left a detainee without any opportunity whatsoever to contest effectively grounds for keeping him in custody.

On 18 March 1999 the applicant made an application to the Warsaw Court of Appeal and asked for "the Warsaw Regional Court's decision of 5 March 1999 to be annulled". That application was deemed to be an appeal against the impugned decision and was referred to the Regional Court. On 6 April 1999 the Regional Court refused to proceed with the appeal, holding it was inadmissible in law as no appeal could be lodged against a decision whereby a trial court applied to the Supreme Court for a defendant's detention to be extended beyond the statutory time-limit.

On 24 March 1999 the Supreme Court held a session at which, after obtaining comments from the State Prosecutor, prolonged the applicant's detention until 30 June1999. It fully upheld the reasons given by the trial court for its application of 5 March 1999.

On 14 June 1999 the Warsaw Regional Court held a hearing and decided to apply again to the Supreme Court for the applicant's and 2 of his co-defendants' detention to be prolonged until 30 September 1999. It maintained that the trial could not be completed by 30 June 1999, the earlier deadline set, since many witnesses had not appeared before it and there had been general difficulties in ensuring their presence.

The Supreme Court granted the application on 29 June 1999. The State Prosecutor took part in the session and was invited to put forward his arguments. The Supreme Court considered that there were good grounds for keeping the applicant and his co-defendants, Z.R.R. and A.B., in detention. It noted that the role played by the applicant in the commission of the aggravated robbery with which he had been jointly charged with his co-

defendants had not been significant but, despite that fact, he was one of the accomplices. It shared the Regional Court's opinion that the applicant's detention was necessary in view of the existence of a reasonable suspicion that he had committed the offence in question. As regards the conduct of the trial, the Supreme Court observed that "it progressed quite efficiently" and that the fact that it was still not completed resulted from events which were beyond the trial court's control, such as the absence of witnesses. It also added that Z.R.R. had contributed to the length of the proceedings because, despite his original decision to remain silent throughout the trial, at their current stage he had chosen to give evidence before the court. Assessing all the relevant circumstances, the Supreme Court concluded that the time during which the applicant's detention was to be prolonged would suffice for the Regional Court to terminate the trial.

That, however, did not happen. On 30 August 1999, the Warsaw Regional Court again asked the Supreme Court to prolong the applicant's, Z.R.R.'s and A.B.'s detention until 30 November 1999 "because it would be impossible for the court to terminate the proceedings by 30 September 1999". That impossibility resulted from the fact that experts in psychiatry, who had in the meantime examined Z.R.R., had recommended that he be subjected to a psychiatric observation for 6 weeks.

In consequence, the court cancelled 6 of 10 hearings that it had scheduled between 7 September and 8 December 1999. It held hearings on 27 September, 22 October and 9 and 16 November 1999.

On 14 September 1999 the applicant filed a pleading, entitled "Defendant's comments on the Warsaw Regional Court's application for his detention to be prolonged - for the Supreme Court's session" with the Supreme Court. He maintained that the Regional Court had already heard all evidence that was relevant for the assessment of his criminal liability. He contested the legal classification of the offence with which he had been charged, testimonies given by some witnesses and argued that the charge against him did not have a reasonable basis. Furthermore, the applicant stressed that his detention – which would soon be 3 years – was already exceptionally long and was putting a severe strain on him and his family. That measure, he added, should not be imposed any longer but replaced by another, more lenient means of securing his presence before the court. In the applicant's view, it was not likely that the proceedings would be completed by 30 November 1999. In this connection, he submitted that the fact that Z.R.R. needed to undergo a psychiatric observation was not the only obstacle to the progress of the trial as most of the delays had been caused by the repeated absence of witnesses. In conclusion, he asked the Supreme Court to consider the case in the light of all available material and to reject the Regional Court's application.

The Supreme Court granted that application on 17 September 1999. It considered that, in view of the importance of the psychiatric observation of

Z.R.R. for the outcome of the case, a further prolongation of the trial and, in consequence, the applicant's detention were fully justified. It held that, from the point of view of "general and specific grounds for detention", there were valid reasons for keeping him and his co-defendants in custody. It was not explained which particular grounds listed in the relevant provisions applied in their case. Referring – briefly – to the applicant's pleading of 14 September 1999, the Supreme Court observed that his arguments essentially related to the assessment and credibility of evidence, the legal classification of the offence and the anticipated sentence, that is to say the circumstances which would be taken into account at the stage of conviction and sentencing.

At the hearing held on 22 October 1999 the Regional Court rejected the applicant's request for release. It held that in the light of evidence before it there was a high probability that he had committed the offences with which he had been charged. Furthermore, considering the severity of the anticipated penalty, his detention was justified under Article 258 § 2 of the 1997 Code. The Regional Court also found no special circumstances, as defined in Article 259 § 1 (2) of the 1997 Code, that would militate in favour of his release. In that context, the court nevertheless noted that the situation of the applicant's family, i.e. his partner and child, was difficult but not so severe as to entail very serious consequences for them.

On 2 November 1999 the applicant made another application for release, arguing that his detention had exceeded a reasonable time, was in breach of Article 5 § 3 of the Convention and, for all practical purposes, amounted to serving a sentence of imprisonment. He stressed that the trial court had already heard all evidence that was relevant for the assessment of the charges against him and that his continued detention was putting a severe strain on him and his family.

On 9 November 1999, Warsaw Regional Court made a subsequent application to the Supreme Court, asking for the applicant's, A.B.'s and Z.R.R.'s detention to be prolonged until 31 January 2000. The court considered that it was impossible for it to terminate the proceedings by 30 November 1999 because the experts recommended that Z.R.R.'s psychiatric observation be prolonged for a further 6 weeks. It stressed that hearings had already been listed for 14, 16 and 20 December 1999 and that the trial would continue in January 2000. However, given the volume of evidence and the fact that the judges sitting in the case had also to try other, earlier scheduled cases, the trial could not be accelerated by any means. Lastly, the court submitted that the grounds for the applicant's detention were defined in Article 249 § 1 of the 1997 Code and they still applied. In that connection, it referred to its applications of 26 October 1998, and of 5 March and 14 June 1999.

At the hearing held on 16 November 1999 the applicant asked for release. The Regional Court rejected that request. It considered that he

should be kept in custody in view of the existence of a reasonable suspicion that he had committed the offence with which he had been charged and the severity of the anticipated sentence. The court further held that there were no circumstances, as defined in Article 259 § 1 (1) and (2) of the 1997 Code, which would justify his release.

On 16 November 1999 the applicant filed a pleading with the Supreme Court and asked for that application to be dismissed. He submitted that his pre-trial detention had lasted 3 years and that he should be released in view of the difficult situation facing his family. His daughter suffered from staphylococcal infection. His partner's income was very low and, as most of it was spent on the costs of the child's treatment and rent, they lived in poverty. In that regard, the applicant referred to the Regional Court's decision of 22 October 1999, in which it had found that his family situation had indeed been difficult.

On 25 November 1999 the Warsaw Regional Court examined, and rejected, the applicant's application for release of 2 November 1999. It found that the applicant should still be held in custody on the grounds of a reasonable suspicion that he had committed the offences with which he had been charged, the serious nature of that offence and the need to secure the proper conduct of the trial. In the context of the applicant's family situation, the court observed that, while it was indeed "none too good", it was not exceptionally harsh, as defined in Article 259 of the 1997 Code.

On 30 November 1999 the Supreme Court, after hearing submissions of the State Prosecutor and defence counsels, prolonged the applicant's and his co-defendants' detention until 31 January 2000. It held that the grounds for keeping them in custody were still valid under Articles 249 § 1, 258 § 1 and 2 of the 1997 Code and that there were no special circumstances, as referred to in Article 259 § 1 of the 1997 Code, that would militate in favour of lifting detention. As to the applicant's family situation, the Supreme Court found that even though it was difficult, it still did not entail for his partner and daughter exceptionally harsh consequences within the meaning of Article 259 § 1 (2) of the 1997 Code. Lastly, it stressed that the termination of the proceedings within the previously allocated time-limit was not possible on account of obstacles which the trial court could not overcome.

On 2 and 5 December 1999 the applicant sent a number of pleadings to various judicial authorities, complaining that his basic constitutional and Convention rights, in particular his right to liberty and to trial within a reasonable time, had been violated. He also unsuccessfully challenged the impartiality of the judges dealing with his case. That challenge was dismissed on 9 December 1999.

On 13 December 1999 the applicant lodged a constitutional complaint (*skarga konstytucyjna*) with the Constitutional Court (*Trybunał Konstytucyjny*), maintaining that the rules governing detention on remand

were contrary to the principles of the presumption of innocence and judicial impartiality because they authorised detention if there was a degree of probability of guilt and likelihood of a severe sentence. It appears that his complaint was rejected on formal grounds, i.e. for his failure to have the complaint filed and signed by a lawyer.

Between 14 December 1999 and 31 January 2000 the Warsaw Regional Court scheduled 10 hearings for the following dates; 14, 16 and 20 December 1999 and 4, 10, 18, 25, 26 and 28 January 2000. It eventually heard the case only on 14 December 1999 and 10, 18, 25 and 26 January 2000, all remaining hearings having been cancelled.

At the hearing held on 14 December 1999 the applicant asked for release. The court rejected his application. It held that the reasons previously given for keeping him in custody were still valid and that it was justified under Article 258 § 2 of the 1997 Code and in view of the Supreme Court's recent decisions prolonging his detention. It also held that there were no special circumstances, as listed in Article 259 § 1 (1) and (2) of the 1997 Code, that would militate in favour of releasing him on account of his family situation.

On 10 January 2000 the Regional Court asked the Supreme Court to prolong the applicant's detention until 31 March 2000, submitting that the proceedings could not be terminated for a number of reasons. In that connection, it stressed that psychiatrists had submitted their report as late as 3 January 2000, a witness had been ill, Z.R.R. had challenged the impartiality of the judges dealing with the case and hearings set for 16 and 20 December 1999 had been cancelled.

The Supreme Court, after hearing the State Prosecutor's arguments, granted the application. It found that the reasons given by the Regional Court were convincing and, given that the trial had reached the final stage, there were grounds to believe that the judgment would be delivered by 31 March 2000.

At the hearing held on 26 January 2000 the applicant asked the court to release him. The application was dismissed since the court considered that all previous grounds given for keeping him in custody were still valid.

The next hearing was listed for 25 February 2000.

On 29 March 2000 the Regional Court gave judgment. It acquitted the applicant of aggravated robbery, convicted him of false imprisonment and sentenced him to 4 years' imprisonment. Since the applicant had already spent in detention 3 years, 4 months and 9 days – which meant that he had acquired the right to be released on probation – the court released him from detention.

The applicant appealed. On 22 February 2001 the Warsaw Court of Appeal heard his appeal and upheld the first-instance conviction and sentence.

The applicant did not lodge a cassation appeal.

On 22 October 2001 the Radom Regional Court, finding that the applicant had already served most of his sentence, gave an order putting him on probation for 2 years.

B. Relevant domestic law and practice

1. Amendments to criminal legislation

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

The applicant was detained on remand under the provisions of the 1969 Code. That 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" (*środki zapobiegawcze*). 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."

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. In the version applicable at the material time it provided, 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."

3. Cassation appeal

Under Article 519 of the 1997 Code, a party to criminal proceedings may lodge a cassation appeal with the Supreme Court against a final judgment of an appellate court which has terminated the criminal proceedings.

Article 523 of the 1997 Code provides, in so far as relevant:

"A cassation appeal may be lodged only on the grounds referred to in Article 439 [these include a number of procedural irregularities, such as, for instance, incorrect composition of the trial court; lack of legal assistance in cases where such assistance

> was compulsory; breach of rules governing jurisdiction in criminal matters; trying a person *in absentia* where his presence was obligatory etc.] or on the ground of another flagrant breach of law provided that the substance of the ruling in question was significantly affected as a result of such a breach. No cassation appeal may be directed against the severity of the penalty imposed."

As regards "another flagrant breach of law", an appellant can invoke any breach of substantive or procedural provisions of criminal law capable of affecting the substance of the contested judgment. This includes a breach of the principle of the presumption of innocence, which is laid down in Article 5 § 1 of the 1997 Code in the following way:

> "An accused shall be presumed innocent until his guilt has been proved and confirmed by a final judgment."

COMPLAINTS

1. The applicant complains under Article 5 § 1 of the Convention that the decisions prolonging his detention beyond the statutory time-limit were not given "in accordance with a procedure prescribed by law", as required under that provision.

2. Under Article 5 § 3 the applicant complains that his pre-trial detention exceeded a "reasonable time".

3. The applicant further invokes Article 5 § 4, submitting that the procedure for the prolongation of his detention beyond the statutory time-limit did not satisfy the requirements of this provision because he could not contest either the trial court's decision to ask for his detention to be prolonged or the resultant Supreme Court's decisions extending that measure.

In the context of the proceedings relating to the extension of his detention, the applicant also alleges a breach of Article 6 § 3 (c) in that neither he nor his lawyer could effectively participate in the court sessions relating to that matter.

4. Relying on Article 6 § 1 the applicant alleges that his trial was too lengthy and exceeded a "reasonable time" within the meaning of that provision.

5. Lastly, the applicant submits that the courts dealing with his case breached the principle of the presumption of innocence laid down in Article 6 § 2 of the Convention since, in their detention decisions, they held that his guilt was highly probable and they anticipated the severity of the sentence to which he was potentially liable.

THE LAW

1. The applicant complains under Article 5 § 1 of the Convention that the prolongation of his detention beyond the statutory time-limit was not ordered "in accordance with a procedure prescribed by law", as required under this provision.

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

> " 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 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 *Kaszczyniec v. Poland* (dec.), no. 59526/00, 1 April 2003).

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 alleges that the Polish courts, when prolonging his detention beyond the maximum time-limit set by law, did not follow the procedure prescribed by law.

However, the Court notes that the prolongation of the applicant's detention was based on Article 263 § 4 of the 1997 Code. Under that provision, the Supreme Court could extend – for a specific time and in the circumstances listed therein – detention that had reached the statutory term of 2 years laid down in paragraph 2 of that Article. Among such

circumstances were "significant obstacles that could not be overcome" and that, as in the applicant's case, prevented the trial court from giving judgment within the statutory term.

The Court accordingly finds that the decisions extending the applicant's detention had a legal basis and were issued by the appropriate judicial authority. It thus follows that the requirements of "fair and proper procedure" for the purposes of Article 5 § 1 were satisfied.

Furthermore, the Court does not see any element that would suggest that the legal basis for the applicant's detention was not clearly defined and, in consequence, lacked the necessary foreseeability required under the Convention. Nor can it be said that the authorities, when ordering that his detention be prolonged, acted in an arbitrary fashion.

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

2. Under Article 5 § 3 the applicant complains that his pre-trial detention exceeded a "reasonable time".

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. The applicant further invokes Articles 5 § 4, submitting that the procedure for the prolongation of his detention beyond the statutory time-limit did not satisfy the requirements of that provision.

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.

4. The applicant also complains that his trial exceeded a "reasonable time" within the meaning of Article 6 § 1 of the Convention.

That Article, in its relevant part, states:

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

The Court will assess the reasonableness of the length of the impugned proceedings in the light of the particular circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR-2000-X).

It observes at the outset that the period to be taken into consideration began on 20 November 1996, when the applicant was arrested on suspicion of having committed aggravated robbery and false imprisonment, and ended on 22 February 2001, when the Warsaw Court of Appeal gave the final judgment. It accordingly lasted 4 years, 3 months and 2 days.

The case was certainly a complex one. It involved numerous charges of serious offences and 6 defendants. Its complexity is also shown by the volume of evidence obtained and heard during the proceedings. Thus, the prosecution asked the court to hear evidence from some 180 witnesses and consider several expert reports. Also, during the trial, the Regional Court needed to put one of the applicant's co-defendants under psychiatric observation and to obtain supplementary reports from psychiatrists.

The Court would also note that, given the nature of the case and the number of persons involved, the conduct of the investigation and the organisation of the trial seem to have in themselves been difficult tasks. Yet, despite that fact, the authorities acted with all due diligence. The investigation was completed within about 1 and a half years which, having regard to the amount of material gathered during this time, was not a lengthy period.

The Regional Court needed some 8 further months to prepare the case for the main hearing, but once it made the schedule of the trial the proceedings progressed without substantial delays. It is true that the first-instance proceedings lasted nearly 4 years. Yet having regard to the fact that, in the light of the material available to the Court, during that time the Regional Court held 25 hearings, it cannot be said that they were not conducted with the requisite expedition.

The same holds true in respect of the appellate proceedings, which lasted some 11 months.

In the circumstances, the Court concludes that the proceedings complained of do not disclose an unreasonable delay within the meaning of Article 6 § 1.

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

5. Lastly, the applicant submits that the courts dealing with his case breached the principle of the presumption of innocence laid down in Article 6 § 2 of the Convention.

However, pursuant to Article 35 § 1:

> "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 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; and *Kwiek v. Poland* (dec.) no. 51895/99, 17 June 2003).

In the present case the Court finds that the applicant did not file a cassation appeal against the final judgment given in his case by the Warsaw Court of Appeal on 22 February 2001.

In that regard, it observes that under Polish law a cassation appeal can be brought by a party alleging a flagrant breach of any substantive or procedural provision of criminal law capable of affecting the substance of the judgment. That includes a breach of the presumption of innocence. The cassation appeal was therefore a remedy whereby the applicant could have effectively submitted the substance of the present complaint to the domestic authorities and sought relief.

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

Decides to adjourn the examination of the applicant's complaints concerning the length of his detention and the alleged inadequacy of the proceedings for the prolongation of his detention beyond the statutory time-limit;

Declares the remainder of the application inadmissible.

Søren NIELSEN
Deputy Registrar

Peer LORENZEN
President