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. 32056/96
by Mirosław KUJAWA
against Poland

The European Court of Human Rights (Fourth Section) sitting on 11 May 1999 as a Chamber composed of

Mr M. Pellonpää, *President*,
Mr G. Ress,
Mr L. Caflisch,
Mr J. Makarczyk,
Mr I. Cabral Barreto,
Mr V. Butkevych,
Mrs N. Vajić,
Mr J. Hedigan,
Mrs S. Botoucharova, *Judges*,

with Mr V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 21 February 1996 by Mirosław KUJAWA against Poland and registered on 27 June 1996 under file no. 32056/96;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Polish national, born in 1956 and living in Kudowa Zdrój.

He is represented before the Court by Mr Wojciech Koncewicz, a lawyer practising in Wałbrzych.

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

1. Particular circumstances of the case

a) Facts relating to the applicant's arrest

On 24 June 1995 the applicant was arrested by the police under a warrant of arrest issued by the Skierniewice District Prosecutor *(Prokurator Rejonowy)* on 23 June 1995, pursuant to Sections 206 and 208 of the Polish Code of Criminal Procedure.

The policeman, after arresting the applicant, filled in two documents: a so-called "record of arrest" *(protokół zatrzymania osoby)* and a so-called "arrest card" *(karta zatrzymania osoby)*. The record of arrest stated that the applicant had been arrested "on 24 June 1995 at 11.35 a.m.", whereas the arrest card stated that the applicant had been arrested "on 24 June 1995 at 2 p.m.".

On 26 June 1995 *B.W.*, a district prosecutor from the Skierniewice District Prosecutor Office, detained the applicant on remand until 25 September 1995 on suspicion that he had forged custom documents and had purchased stolen cars. This decision was served on the applicant on 26 June 1995 at 6 p.m. and stated that the applicant had been arrested on 24 June 1995 at 2 p.m.

In a letter of 5 July 1995 the applicant's defence counsel informed the Skierniewice Regional Prosecutor *(Prokurator Wojewódzki)* that *B.W.*, when detaining the applicant, had breached Section 207 of the Code of Criminal Procedure. Under this section, the applicant either should have been released upon the expiry of the period of 48 hours referred to in this provision, or, within this period, a detention order issued by a prosecutor should have been served on him. He also maintained that the prosecutor had deliberately confirmed an untrue time of the applicant's detention and requested that criminal and/or disciplinary proceedings be instituted against the prosecutor concerned.

In his further letter of 25 July 1995, the applicant's defence counsel requested the Skierniewice District Prosecutor to disqualify *B.W.,* who was conducting the investigation, from dealing with the applicant's case. He submitted that *B.W.* had committed an offence and should not deal with the case.

By letter of 28 July 1995 the District Prosecutor replied that there were no grounds justifying disqualification of *B.W.* from dealing with the applicant's case. However, upon the applicant's further complaints, disciplinary proceedings were eventually instituted against the prosecutor in question. By letter of 19 December 1995 the applicant was informed that a disciplinary penalty had been imposed on *B.W.*

On 27 December 1995 the Skierniewice District Prosecutor issued a decision whereby he "rectified an obvious clerical mistake" *("sprostował oczywistą omyłkę pisarską")* in the detention order of 26 June 1995, in particular, by stating that the applicant had been arrested on 24 June 1995 at 11.35 a.m. and not at 2 p.m.

The applicant and his lawyer appealed against this decision, arguing that the procedural formula in question had not been appropriate. In particular, they alleged that the exact time of the applicant's arrest had been altered intentionally, in order to conceal the fact that his arrest had exceeded the period of 48 hours, referred to in Section 207 of the Code of Criminal Procedure. The Skierniewice Regional Prosecutor dismissed the appeal on 15 January 1996.

On 6 March 1996 the applicant again requested the Skierniewice District Prosecutor to disqualify *B.W.* from dealing with his case.

On 14 March 1996 the Skierniewice District Prosecutor decided that the circumstances relied on by the applicant, in particular the fact that the disciplinary penalty had previously been imposed on *B.W.*, did not justify disqualification of the latter. Therefore, the request was dismissed.

b) Facts relating to the applicant's detention on remand and further criminal proceedings against him

After 26 June 1995 the Skierniewice District Prosecutor proceeded with the investigation.

On unspecified dates several other persons were charged and detained in connection with the same investigation.

On 20 September 1995 the Skierniewice Regional Court *(Sąd Wojewódzki)*, on the request of the Skierniewice District Prosecutor, prolonged the applicant's and his eight co-suspects' detention until 22 December 1995. The court found that the previous grounds for detaining the applicant still existed and that a further prolongation of his detention was justified by the fact that voluminous evidence had to be obtained in the course of the investigation (e.g. numerous expert reports were needed and evidence had to be obtained from abroad, through Interpol). The applicant and his defence counsel appealed against this decision, arguing that the court had failed to establish whether the evidence obtained in the course of investigation had sufficiently justified a "reasonable suspicion" that the applicant had committed offences with which he had been charged.

It appears that later, on 17 October and 1 December 1995, the Skierniewice District Prosecutor laid new charges against the applicant.

On 31 October 1995 the Łódź Court of Appeal *(Sąd Apelacyjny)* dismissed the applicant's appeal against the decision of 20 September 1995. The court found that the contested decision was correct on the merits; however, it also found that the grounds for this decision had been stated rather vaguely. Therefore, the appellate court supplemented those grounds, in particular, by specifying which elements of the evidence gathered during the investigation justified a "reasonable suspicion" that the applicant had committed the offences in question. In this respect the court referred to evidence given by two witnesses and certain forged documents which had been in the applicant's possession. The court also relied on the serious nature of the offences and the need to obtain expert evidence.

On 12 December 1995 the Skierniewice Regional Court, on the request of the Skierniewice District Prosecutor, prolonged the applicant's detention until 14 March 1996. The court again found that there was a "reasonable suspicion" that the applicant had committed the offences in question and stressed the fact that new charges had been laid against him.

On 12 March 1996 the Skierniewice Regional Court, on the request of the Skierniewice District Prosecutor, prolonged the applicant's detention until 14 June 1996. The court found that the investigation was progressing and fresh evidence had been obtained. It also found that the grave nature of the offences in question justified a further prolongation of the applicant's detention.

On 13 May 1996 the Skierniewice Regional Prosecutor lodged a bill of indictment with the Skierniewice Regional Court.

On 10 September 1996 the Łódz Court of Appeal ordered that the case be referred to the Wrocław Regional Court.

On an unspecified date the applicant requested the Wrocław Regional Court to release him, submitting that at the current stage of the proceedings there was no danger of his absconding or obstructing the proper course of the proceedings. His request was dismissed on 18 November 1996. On 13 December 1996, upon the applicant's appeal, the Wrocław Court of Appeal released him on bail.

In his letter of 9 September 1998 addressed to the Commission the applicant stated that the proceedings in his case were still pending before the court of first instance.

c) Facts relating to the applicant's contact with his defence counsel

It appears that the applicant's defence counsel was denied access to the applicant on 4 July 1995.

On 5 July 1995 the applicant's defence counsel filed a formal request with the Skierniewice District Prosecutor, asking for permission to see his client privately in prison.

On the same day the District Prosecutor issued an order *(zarządzenie)* permitting the lawyer to see the applicant on 13 July 1995 but in the presence of the prosecutor himself or a person designated by him. The prosecutor found that, in view of the applicant's attempts to obstruct the investigation, as well as the conduct of his lawyer, it was necessary to supervise meetings between the applicant and his counsel.

On 8 August 1995, upon the applicant's appeal, the Skierniewice Regional Court upheld the above-mentioned decision.

On 13 July 1995 the applicant had a meeting with his lawyer in the presence of the prosecutor.

On 28 July 1995 the applicant's defence counsel again requested the prosecutor for permission to see his client privately in prison.

On 1 August 1995 the Skierniewice District Prosecutor issued an order permitting the lawyer to see the applicant in the presence of the prosecutor himself or a person designated by him.

On 8 August 1995 the applicant filed an appeal with the Skierniewice Regional Court. He challenged the Skierniewice District Prosecutor's order of 1 August 1995. He also complained about interception of his correspondence with the lawyer.

On 28 August 1995, the Skierniewice Regional Court upheld the contested decision insofar as it related to the restrictions on the applicant's contact with his lawyer. The court found that it could not deal with the question of interception of the applicant's correspondence, as, under Polish law, at the investigative stage of the proceedings only a prosecutor was competent to make any decisions on monitoring the applicant's correspondence.

On an unspecified date the applicant's lawyer again requested the prosecutor for permission to see his client privately in prison.

On 8 September 1995 the Skierniewice District Prosecutor issued an order permitting the lawyer to see the applicant on 15 September 1995, in the presence of the prosecutor himself or a person designated by him, and under a further condition that the applicant would be brought to the prosecutor's office.

On an unspecified date the lawyer again requested the prosecutor for permission to see the applicant privately in prison.

On 17 November 1995 the Skierniewice District Prosecutor allowed the lawyer to see the applicant on 1 December 1995, in the presence of the prosecutor himself or a person designated by him and under a further condition that the applicant would be brought to the prosecutor's office.

It appears that at least until 5 December 1995 the applicant was unable to meet his lawyer privately.

2. Relevant domestic law

At the relevant material time rules governing imposition of arrest were contained in Section 206 *et seq.* of the Code of Criminal Procedure of 1969. Under Section 206 the police could arrest any person "if there existed a reasonable suspicion that he had committed an offence and if there was a danger of his absconding". Under Section 208 a prosecutor could issue a warrant of arrest, ordering that a person suspected of having committed an offence be arrested and brought before him.

Section 207 provided:

"An arrested person shall immediately be released if, within 48 hours following his arrest, no [prosecutor's] decision ordering his detention on remand has been served on him."

Section 207a provided:

"1. An arrested person may lodge an appeal with a district court against a warrant of arrest.

2. The court shall examine an appeal promptly. If the court finds that the arrest in question lacked grounds, it shall order that an arrested person be released immediately and shall inform about this fact a hierarchical superior of the person who issued a warrant of arrest."

In the light of the relevant case-law of the Supreme Court, a court dealing with an appeal against a warrant of arrest shall either uphold or quash the contested decision, regardless of whether the person concerned is still arrested or has been released. In the latter case, the court shall retrospectively rule on the question of whether a given arrest was lawful i.e. whether it had sufficient legal basis and, if it was not so, which statutory provisions were violated on account of the imposition of arrest (decision of the Supreme Court no. SN WZP 1/91, published in: OSN KW 992, poz. 10).

COMPLAINTS

1. The applicant complains under Article 5 § 1 (c) of the Convention that his arrest, which had exceeded the time-limit of 48 hours referred to in Section 207 of the Polish Code of Criminal Procedure, was unlawful.

2. The applicant further complains under Article 6 §§ 1 and 3 of the Convention that the criminal proceedings against him were unfair. In particular, he submits that the prosecutor conducting the investigation was biased and that she arbitrarily hindered him in maintaining contact with his defence counsel. Moreover, in the applicant's opinion, she deliberately stated the untrue hour of his arrest, and therefore, she should have been disqualified from dealing with his case.

3. The applicant also complains under Article 5 § 3 of the Convention about the length of his detention on remand.

4. Lastly, the applicant complains under Article 6 § 1 of the Convention that the length of the criminal proceedings against him exceeded a "reasonable time".

THE LAW

1. The applicant complains under Article 5 § 1 (c) of the Convention that his arrest, which had exceeded the time-limit of 48 hours referred to in Section 207 of the Polish Code of Criminal Procedure, was unlawful.

Article 5 § 1 (c) states, insofar as relevant:

"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 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 …"

Under 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, and within a period of six months from the date on which the final decision was taken".

In this respect the Court recalls that a "final decision" within the meaning of Article 35 § 1 refers solely to the final decision involved in the exhaustion of all domestic remedies according to the generally recognised rules of international law. In particular, only a remedy which is "effective and sufficient" can be considered for this purpose (Eur. Comm HR, No. 9136/80, 10.7.81, DR 26, p. 242).

The Court further recalls that the application of the rule of exhaustion of domestic remedies obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system (see Eur. Court HR, the *Selçuk and Asker v. Turkey* judgment of 24 April 1998, *Reports* 1998-II, p. 907, § 65).

The Court further notes that under Polish law applicable at the material time, a person arrested under Sections 206 and 208 of the Polish Code of Criminal Procedure could, pursuant to Section 207a, lodge an appeal against his arrest. Moreover, by lodging such an appeal the individual concerned could seek a ruling on the lawfulness of his arrest, regardless of whether he was still arrested or already released.

However, the Court observes that in the present case the applicant failed to lodge an appeal under Section 207a of the Code of Criminal Procedure. It is true that, at the further stage of the proceedings, he did, in his numerous letters to the Skierniewice District Prosecutor,

complain that his arrest had exceeded the statutory time-limit. These complaints resulted in the exact time of his arrest being eventually rectified.

It is also true that the applicant requested the competent authorities to institute disciplinary or criminal proceedings against the investigating prosecutor. Nevertheless, in the Court's view, the recourse to such remedies, which by their nature itself were not designed either to secure release from arrest, or to obtain a ruling on the lawfulness of arrest, cannot supersede the use of a normal appeal against arrest available under Polish law. Nor can it affect the date of the final decision for the purposes of Article 35 § 1 of the Convention, which, in the instant case, was given on 24 June 1994, i.e. more than six months before the date on which the applicant introduced his complaints.

It follows that this part of the application is inadmissible for non-compliance with the requirements of Article 35 § 1 of the Convention and that it must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant further complains under Article 6 §§ 1 and 3 of the Convention that the criminal proceedings against him were unfair. In particular, he submits that the prosecutor conducting the investigation was biased and that she arbitrarily hindered him in maintaining contact with his defence counsel. Moreover, in the applicant's opinion, she deliberately stated the untrue hour of his arrest, and therefore, she should have been disqualified from dealing with his case.

Article 6 §§ 1 and 3 (c) read, insofar as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair … hearing ... by [a] tribunal … .
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (c) to defend himself in person or through legal assistance of his own choosing…"

However, the Court notes that the criminal proceedings against the applicant are still pending. Thus, at the present stage of the case, the Court cannot speculate as to how the applicant's trial will continue, in particular whether, and if so to what extent, both the conduct of the investigating prosecutor and the restrictions on the applicant's contact with his defence counsel at the initial stage of the investigation might affect his right to defend himself and the fairness of the proceedings as a whole. Consequently, the Court considers that these complaints are premature.

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

3. The applicant also complains under Article 5 § 3 of the Convention about the length of his detention on remand. He further complains under Article 6 § 1 of the Convention about the length of the criminal proceedings against him.

The Court considers that it cannot, on the basis of the file, determine the admissibility of these complaints and that is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of these complaints to the respondent Government.

For these reasons, the Court, unanimously,

DECIDES TO ADJOURN the examination of the applicant's complaints concerning the length of his detention on remand and the length of the criminal proceedings against him;

DECLARES INADMISSIBLE the remainder of the application.

Vincent Berger
Registrar

Matti Pellonpää
President