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. 28481/03
by Patrycja ŁASZKIEWICZ
against Poland

The European Court of Human Rights (Fourth Section), sitting on 22 November 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 28 August 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Patrycja Łaszkiewicz, is a Polish national who was born in 1973 and lives in Będzin. She is represented before the Court by Ms E. Draga-Buchta, a lawyer practising in Katowice.

A. The circumstances of the case

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

1. The applicant's pre-trial detention

On 18 October 2002 the applicant was arrested on suspicion of supplying significant amounts of heroin to the market and acting in an organised criminal group. During her questioning by the prosecutor, she confessed that she had attempted to smuggle heroin to Sweden and responded extensively to all the questions put by the prosecutor.

On the same day the Katowice District Court remanded the applicant in detention for a period of three months in view of the reasonable suspicion that she had committed the offences referred to above. It appears that the court relied on the reasonable risk that the applicant might tamper with evidence. It also had regard to the severity of the anticipated penalty.

On 8 January 2003 the Katowice District Court prolonged the applicant's detention until 31 March 2003. It considered that there was a reasonable risk that the applicant might tamper with evidence, having regard to the number of suspects involved. It also relied on the severity of the anticipated penalty, given the organised character of the criminal activities, their scale and the amount of drugs involved. Lastly, it referred to the need to continue the process of taking evidence.

The applicant appealed. She submitted that her continued detention was not necessary to secure the proper conduct of the investigation. She argued that she had already given evidence and that she had had no contacts with the witnesses or other suspects, so the risk of tampering with evidence did not exist in her case. It appears that her appeal was dismissed on an unspecified date.

On 26 March 2003 the Katowice District Court extended the applicant's detention until 30 June 2003. It noted that that the applicant pleaded not guilty and denied that she had taken part in an organised criminal group trafficking in heroine. Having regard to the applicant's statements and the number of suspects involved, the court considered that there was a reasonable risk that the applicant might tamper with evidence. In this respect, it had regard to the fact that some of the suspects were still being searched for.

The applicant's lawyer appealed. She alleged, relying on Article 5 § 4 of the Convention, that the District Court had violated the principle of adversarial proceedings. In this respect, she submitted that the Regional Prosecutor's application for prolongation of detention had been received at the District Court on 19 March 2003. However, it was only in the afternoon of 25 March 2003 that the applicant's lawyer had been notified by telephone that the court's hearing would be held on 26 March 2003 at 8.40 a.m. She argued that in those circumstances she could not properly defend the interests of the applicant. She further submitted that the prosecutor had not read out the grounds of his application during the hearing.

On 14 May 2003 the Katowice Regional Court dismissed the applicant's appeal. It noted that the applicant had been charged with participation in an organised criminal group which operated in a number of European states. In this context, it considered that there was a real risk that the applicant might obstruct the proceedings if released. The Regional Court further relied on the severity of the anticipated penalty and emphasised the social danger posed by the drug trafficking. Furthermore, the Regional Court dismissed the applicant's allegations regarding access to the case-file and the late summoning to the hearing. It held, in so far as relevant:

> "The limitation on the lawyer's access to the investigation case-file results from the binding procedural rules.
>
> The court's hearing on the matter of detention is ancillary to the main proceedings and thus notification of this hearing can be effected shortly before the date for which it has been fixed. The lawyer was notified of the hearing at 1 p.m. on the day preceding the hearing. Thus, it cannot be said that the court was at fault in this respect."

On 24 June 2003 the applicant's lawyer requested the District Court to adjourn the hearing on the prolongation of detention, until she received a copy of the relevant prosecutor's application. That request was refused.

On 25 June 2003 the Katowice District Court ordered that the applicant be held in custody until 30 September 2003. It relied on the same grounds as in its earlier decisions.

The applicant's lawyer appealed. She argued that she had not been provided with a copy of the application for prolongation of the applicant's detention and that she had not been notified in good time of the hearing. She submitted that consequently she had been prevented from properly discharging her obligations as the applicant's lawyer.

On 9 July 2003 the Katowice Regional Court dismissed the appeal. It noted that on an unspecified earlier date the Appellate Prosecutor had prolonged the investigation until 31 October 2003 and had indicated what investigatory measures were to be taken. In those circumstances, the investigation could not have been terminated by 30 June 2003, given that some other evidence needed to be obtained. In respect of the refusal to provide the applicant with a copy of the prosecution's application for

prolongation of detention, the Regional Court found that the prosecutor was the only authority competent to decide on the issue of access to the file at the investigation stage and that any decision in this respect might be reviewed by the higher prosecutor. In respect of the notification of the hearing to the lawyer, the court found the applicant's complaints unfounded. It considered that in cases of detention, such notification could validly be made by the telephone.

On 23 September 2003 the Katowice District Court extended the applicant's detention until 16 October 2003. It had regard to the reasonable suspicion that the applicant had committed the offences with which she had been charged. It relied in this respect on the evidence collected so far in the investigation, including evidence given by the applicant and her co-suspect, and the documentary evidence obtained from abroad. It also considered that there was a reasonable risk that the applicant might tamper with evidence, given that some of the co-suspects still remained at large and that the case concerned an organised criminal group. It also had regard to the need to take further measures in the investigation as indicated in the prosecution's application for prolongation of detention.

In the meantime the statutory time-limit of one year for the applicant's detention pending the investigation expired. Consequently, any further prolongation of the applicant's detention was to be decided by the Court of Appeal. On 8 October 2003 the Katowice Court of Appeal extended the detention of the applicant and her co-suspect, J.B., until 31 January 2004. It considered that the investigation in the present case, which concerned trafficking in substantial amounts of drugs in a number of European countries, was very time-consuming. It was additionally complicated by the need to obtain evidence from abroad and to hold a confrontation between the suspects and a certain H.S. who had been transferred to Poland from Norway to serve his sentence on 29 September 2003. The court noted that another important suspect M.O., who had lived abroad, had been arrested on 24 September 2003. It thus considered that the investigation was conducted without undue delays, and that the extension of the detention pending the investigation beyond the statutory time-limit was due to the exceptional circumstances. The Court of Appeal also had regard to the scale of the suspects' criminal activities and the severity of the anticipated penalty. The applicant appealed against that decision.

On 5 November 2003 the Court of Appeal upheld the impugned decision. It referred, *inter alia*, to the presumption established by Article 258 § 2 of the CCP to the effect that the likelihood of a severe penalty being imposed on the applicant might induce her to obstruct the proceedings. In view of the

said presumption, the Court of Appeal underlined that it was not required to consider the imposition of other preventive measures[1].

On 27 January 2004 the Katowice Regional Prosecutor released the applicant, having obtained a bail deposit and an additional personal guarantee from a local councillor that the applicant would not obstruct the proceedings. The applicant's passport having been seized, she was also ordered not to leave the country. The prosecutor noted that despite the fact that more than 15 months had elapsed since the applicant's arrest, the investigation was not concluded. He observed that the prosecution sought to obtain evidence from abroad, however it could not be predicted when that evidence would be made available. The prosecutor considered that the applicant should not bear the negative consequences stemming from that fact and that other preventive measures would be sufficient to secure the proper conduct of the proceedings.

On 29 June 2004 the Regional Prosecutor terminated the investigation. On the same date he lodged a bill of indictment against the applicant with the Katowice District Court. The applicant was indicted on charges of supplying drugs on the market and acting in an organised criminal group.

It appears that the trial is pending before the District Court.

2. Access to the investigation file

On 16 May 2003 the Katowice Regional Prosecutor received the request of the applicant's lawyer for access to the investigation file. On 27 May 2003 the prosecutor refused that request, referring to the interests of the investigation. He considered that the investigation was at its early stage and still in progress. Furthermore, he found that for reasons which were not attributable to the prosecution a number of important witnesses had not yet been heard. The applicant appealed against that decision.

On 1 July 2003 the Katowice Appellate Prosecutor upheld the decision of 27 May 2003 to refuse access to the file. He observed that the restrictions on access to the file were temporary and justified by the interest of the investigation. In the latter respect, the Appellate Prosecutor referred to the organised character of the criminal activities at issue and the number of the suspects involved. He considered that in those circumstances, the interests of the investigation weighed against the applicant's right to be acquainted with all the evidence obtained in the case.

On 24 June 2003 the applicant's lawyer requested the Regional Prosecutor to provide her with a copy of his application for the prolongation of the applicant's detention with a view to preparing for the court's hearing. She also submitted that on 23 June 2003 the District Court refused to provide her with a copy of the prosecutor's application.

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1. The Court of Appeal relied on the decision of the Supreme Court of 19 November 1996, no. IV KZ 119/96, published in OSP 1997 no. 4, item 74.

On 26 June 2003 her request was refused, having regard to the interests of the investigation. The Regional Prosecutor considered that the lawyer's request was tantamount to a request for access to the entire content of the investigation's file. Consequently, it refused the request on the same grounds as previously. The applicant appealed. On 8 July 2003 the Appellate Prosecutor upheld the refusal on the same grounds as in his earlier decision.

On 19 September 2003 the Regional Prosecutor refused the applicant's request for a copy of the application for prolongation of her detention of 15 September 2003.

On 23 September 2003 the District Court granted the applicant's lawyer request for access to the court file, however with the exception of the prosecution's application for prolongation of the detention of 15 September 2003. It considered that the questions of access to the file of the investigation remained within the exclusive competence of the prosecutor.

On 19 May 2004 the applicant's lawyer was informed by the Police (Central Bureau of Investigation) that she could request access to the file of the investigation. She submitted a relevant request. On 31 May 2004 the applicant's lawyer was notified that on 7 June 2004 she would be given access to the file.

B. Relevant domestic law and practice

1. Access to the file

Access to the file in the course of investigation is governed by Article 156 § 5 of the Code of Criminal Procedure of 1997, which provides, in so far as relevant, that permission to have access to and make copies of the documents in the file is granted only with the consent of the authority conducting the investigation.

2. Preventive measures, including detention on remand

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 on leaving 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 in 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. Remedies against unreasonable length of the proceeding

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. The relevant provisions of the 2004 Act are set out in paragraphs 12-23 of the Court's decision of 1 March 2005 in the case of *Charzyński v. Poland*, (dec.) no. 15212/03, §§ 12-23, to be published in ECHR 2005-...[1]

COMPLAINTS

1. The applicant complains under Article 5 § 4 and of the Convention that the proceedings regarding prolongation of her pre-trial detention were not adversarial and that she could not effectively challenge the lawfulness of her continued detention. She refers in this respect to the refusal to grant her lawyer access to the investigation file and to provide her with copies of the prosecution's applications for prolongation of her detention. She also complains about the belated notification of her lawyer of the court's hearings regarding the prolongation of the pre-trial detention.

2. Referring to the same facts as above, the applicant complains under Article 6 § 1 read in conjunction with Article 6 § 3(b) of the Convention about the violation of the rights of the defence and of the right to a fair trial.

3. The applicant also complains under Article 5 § 1 of the Convention that she was unlawfully deprived of her liberty.

4. She further complains about the length of her pre-trial detention and the insufficient grounds for the continuation of that measure.

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1. This decision is also available on the Court's Internet site: www.echr.coe.int

5. The applicant further complains under Article 6 § 1 of the Convention about the unreasonable length of the criminal proceedings against her.

THE LAW

1. The applicant complains under Article 5 § 4 and of the Convention that the proceedings regarding prolongation of her pre-trial detention were not adversarial and that she could not effectively challenge the lawfulness of her continued detention. She refers in this respect to the refusal to grant her lawyer access to the investigation file and to provide her with copies of the prosecution's applications for prolongation of her detention. She also complains about the belated notification of her lawyer of the court's hearings regarding the prolongation of the 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. Referring to the same facts as above, the applicant complains under Article 6 § 1 read in conjunction with Article 6 § 3(b) of the Convention about the violation of the rights of the defence and of the right to a fair trial.

However, even assuming that this complaint raises an issue separate from that under Article 5 § 4 of the Convention, the Court notes that the criminal proceedings against the applicant are currently pending before the first-instance court.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

3. The applicant also complains under Article 5 § 1 of the Convention that she was unlawfully deprived of her liberty.

The Court considers that this complaint falls to be examined under Article 5 § 1 (c) of the Convention which reads:

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

The Court observes that in the present case the applicant was detained on the reasonable suspicion of supplying to the market significant amounts of heroin and acting in an organised criminal group. In the light of the material in its possession, the Court does not find any indication that the applicant's

detention was unlawful or ordered otherwise than "in accordance with a procedure prescribed by law", within the meaning of Article 5 § 1. It considers that it was ordered in accordance with domestic law and fell within the ambit of Article 5 § 1(c) of the Convention, as having been effected for the purpose of bringing her before the competent legal authority on suspicion of having committed an offence. The Court also observes that the lawfulness of her detention was examined und upheld on a number of occasions by the competent courts. Thus, the Court finds no indication that in the present case the applicant's detention was unlawful or effected in an arbitrary fashion.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

4. The applicant further complains about the length of her pre-trial detention and the insufficient grounds for the continuation of that measure.

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.

5. The applicant further complains under Article 6 § 1 of the Convention about the unreasonable length of the criminal proceedings against her.

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 proceedings complained of were pending before the domestic court and that they are still pending.

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. Moreover, given that the proceedings complained of are still pending, nothing prevents the applicant from lodging such a complaint even after the expiry of the time-limit set by the transitional rule, in accordance with the general provisions of the 2004 Act.

The Court has already examined those remedies for the purposes of Article 35 § 1 of the Convention and found them effective in respect of complaints about the excessive length of judicial proceedings in Poland. In particular, it considered that they were 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).

However, the applicant, despite having been informed by the Registrar of the possibility of lodging a complaint about the length of the proceedings under the 2004 Act, has chosen not to avail herself of this remedy.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning the excessive length of the applicant's detention and the lack of adversarial procedure in the proceedings regarding prolongation of her pre-trial detention;

Declares the remainder of the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President