CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 51792/99
by Jerzy TOKARCZYK
against Poland

The European Court of Human Rights (First Section), sitting on 31 January 2002 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. LORENZEN,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 22 April 1998 and registered on 13 October 1999,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having deliberated, decides as follows:

THE FACTS

The applicant, Jerzy Tokarczyk, is a Polish national, who was born in 1955 and lives in Lublin.

A. The circumstances of the case

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

In 1995 the Lublin District Prosecutor instituted investigations in respect of a person or persons unknown on suspicion of aiding and abetting abortion. On 11 April 1995 the District Prosecutor ordered the interception of the applicant's telephone calls as he suspected him of having committed a criminal offence of aiding and abetting abortion.

On 12 May 1995 the applicant was remanded in custody. He was released on an unspecified date after approximately four months of detention.

On an unspecified date the applicant appealed against the decision of 11 April 1995, submitting that the interception of his phone calls had exposed his family to harassment by the employees of the State telecommunications service. On 7 June 1995 the Lublin Regional Prosecutor upheld the contested decision, considering that it had been justified by the need to gather evidence in the proceedings. The recorded conversations had served as evidence, which enabled charges to be brought against the applicant. After the applicant was arrested, the interception of his phone calls was terminated on the same day.

By virtue of a judgment of the Lublin District Court of 27 October 1997 the applicant was found guilty on fourteen counts of aiding and abetting abortion in return for payment. He was also convicted of inciting one of the women who had had an abortion, M.Z., to give false evidence. The applicant was sentenced to one and a half years' imprisonment and a fine of 3,000 Polish zlotys (PLN) was imposed on him.

The court established that from March 1993 the applicant had been regularly placing advertisements in the local newspaper: "Gynaecologist - inducing periods; call after 6 p.m. ", and giving a phone number of a flat owned by him. Numerous women had telephoned him. He offered a service of taking them by his car to a hospital in Lviv in Ukraine, where abortion remained legal, for a fee of between PLN 700 and PLN 2,000. He had travelled to Lviv ten times, on various dates from 21 January 1995 until 27 April 1995, with fourteen women who had had abortions in the local hospital. The court relied on the testimony of thirty witnesses, including the fourteen women concerned, the staff of the newspaper in which the applicant had placed his advertisements, the persons living in his flat where

he had been taking the phone calls, and other persons living in the neighbourhood. The court also relied on numerous documents in the case-file. As regards the charge of inciting M.Z. to give false evidence, the court relied on the transcripts of the applicant's conversation with her, in which he had suggested that she tell the court that she travelled to Lviv to visit her family. The court further considered that the transcript of the two conversations was consistent with the evidence that this witness had given in the court.

The applicant appealed against that judgment. He submitted, *inter alia,* that the court had committed an error of fact in that it had failed to order expert medical opinions to establish whether the health of the women concerned had been such as to justify abortion under the law as it had stood at the material time. It was further argued that the court had failed to establish whether the women concerned were in a "difficult personal situation" within the meaning of the Family Planning, Protection of the Human Foetus, and Conditions Permitting Pregnancy Termination Act. The court had limited its considerations in this respect to the women's financial situation, entirely overlooking all other aspects of what could legitimately be understood as their "personal situation". The term "personal situation" should have been interpreted as referring to a woman's situation as a whole, including her subjective feelings. Regard should have been had to the particularly delicate situation of a woman in an unwanted pregnancy, often confronted with the hostility of her environment and having to cope with prejudices and negative opinions in respect of unmarried mothers. Only through a full assessment of all such circumstances could it be established whether the women in the instant case were in a difficult personal situation such as to render voluntary termination of pregnancy lawful under the provisions of the Act. Lastly, the applicant argued that the lower court did not have any credible evidence on which to convict him of inciting M.Z. to give false evidence.

On 10 March 1998 the Lublin Regional Court upheld the contested judgment. The court considered that there was in fact evidence concerning the charge of inciting M.Z. to give false testimony, namely the transcript of the telephone conversations between her and the applicant on 5 May 1995 and 9 May 1995, numbered 10 and 15. As to the health of the women who had had abortions, the court observed that there were no indications that the applicant had been interested in their health when he had offered his services. Therefore it could not be accepted that their health could have been such as to amount to a fact justifying the abortion within the meaning of the Act then in force, or that the applicant had himself had any regard to this factor. Insofar as the applicant argued that the lower court had failed to establish whether the women were in a "difficult personal situation", the court considered that the assessment made by the lower court was not arbitrary and that it was compatible with ordinary life experience.

The applicant lodged a cassation appeal with the Supreme Court. submitting complaints similar to those advanced in the appeal against the first-instance judgment. On 8 April 1999 the Supreme Court dismissed the cassation appeal as manifestly ill-founded.

Subsequently, the applicant applied to the Penitentiary Division of the Lublin District Court to grant him a stay of execution of the sentence as his health necessitated continuous medical care. On 31 August 1998 the court granted him a stay of execution. On an unspecified date the applicant applied again for a stay of execution of the sentence and on 29 June 1999 the Lublin District Court refused, holding that there were no indications that the serving of a prison sentence would entail any deterioration of his health. Subsequently, the applicant applied to the Supreme Court to reopen the criminal proceedings in his case, submitting that the Zamość District Prosecutor had, at his request, instituted criminal proceedings against witnesses who had testified in his case as their testimony had allegedly been false. Simultaneously, he applied for a stay of execution of the sentence.

On 5 August 1999 the Supreme Court refused to grant him a stay of execution.

On an unspecified later date the applicant appealed against the Lublin District Court decision of 29 June 1999 and on 16 August 1999 the Lublin Regional Court granted him a stay of execution of the sentence until 30 October 1999. Apparently, the applicant submitted further applications for a stay of execution and they all were refused.

On an unspecified date the applicant requested the Supreme Court to set a date for the in respect of his application to reopen the proceedings in his case. On 11 July 2000 he was informed in reply that the hearing could not be held until the final decision was given in the criminal proceedings against witnesses, as the decision was of significant importance for the decision on the reopening of the proceedings.

On an unspecified date the Zamość District Prosecutor discontinued the proceedings against the witnesses, finding that they had no case to answer. The applicant appealed against that decision and the Zamość District Prosecutor ordered his appeal to be considered by the Lublin District Court.

B. Relevant domestic law and practice

1. Intercepting of telephone communications in the context of criminal proceedings

Article 198 of the 1969 Code of Criminal Procedure, applicable at the material time, provided that the prosecutor or the court was empowered to order that telephone communications, which could be of potential relevance

to criminal investigations, be intercepted. The service of such a decision on the accused could be postponed for a specific period, considered necessary in the interest of the investigations.

Under the Minister of Justice's Order of 10 May 1983 on the interception of phone calls, recordings of telephone conversations were to be made on the basis of the prosecutor's or court's order, within the time-frame and scope specified in that order.

2. Termination of pregnancy

A woman's right to seek an abortion was introduced in Poland in 1956. From 1956 until 1993 voluntary termination of pregnancy on social grounds was in practice allowed.

The Family Planning, Protection of the Human Foetus, and Conditions Permitting Pregnancy Termination Act was subsequently adopted by Parliament on 7 January 1993. It seriously limited the grounds on which abortion could be sought. On 4 January 1997 an amended text of the Act entered into force. The law as amended provided that pregnancy could be terminated only in the following cases: where pregnancy endangered the mother's life or health; whre pre-natal tests or other medical findings indicated a high risk that the foetus could be severely and irreversibly damaged, or be suffering from an incurable life-threatening disease; where there were strong grounds for arguing that the pregnancy was a result of criminal activity (rape or incest); or where the mother was in a difficult personal situation.

On 27 May 1997 the Constitutional Court ruled that Article 1 § 2 of the Act, making human life in its pre-natal stage dependent on the decision of the legislative, did not comply with Article 1 of the 1952 Constitution. That provision stated that Poland was a democratic state ruled by law and implementing the principles of social justice. The Constitutional Court held that Article 2 of the Act was incompatible with Article 79 of the Constitution, which proclaimed the principle that marriage, motherhood and the family were to be placed under the protection and care of the Republic. The Court held that the provision in issue infringed the constitutional guarantees for the protection of human life at each stage of its development.

As a result, further amendments were made in December 1997 to the text of the Family Planning, Protection of the Human Foetus, and Conditions Permitting Pregnancy Termination Act of 1993. In particular, the right to terminate pregnancy where the pregnant woman was in a difficult was abolished. A pregnancy that risks a woman's life or health, or where the child suffers from a genetic malformation, may only be terminated by a physician in a public health-service institution. A physician other than the one who is to perform the operation must issue the certificate confirming the

risk to a woman's health. If the pregnancy resulted from criminal activity, it may only be terminated by the end of its twelfth week and the prosecutor is required to issue a certificate stating that it is probable that the pregnancy is the result of a crime.

Termination of pregnancy in situations other than those stipulated in the Family Planning, Protection of the Human Foetus, and Conditions Permitting Pregnancy Termination Act is now a criminal offence punishable by imprisonment for up to two years. The person performing the abortion is held criminally responsible, whereas the woman herself is not.

COMPLAINTS

1. The applicant complains under Article 8 of the Convention that the decision to intercept his phone calls was unlawful as it did not satisfy the conditions for ordering such interception as set forth in the laws governing criminal procedure and in the Minister of Justice's order on the interception of phone calls of 10 May 1983, which was applicable at the critical time.

2. The applicant complains under Article 5 of the Convention that his detention on remand was unlawful and unjustified.

3. He complains under Article 6 of the Convention that the decision to intercept his telephone conversations was not only unlawful, but also rendered unfair the subsequent criminal proceedings against him. The results of the monitoring of his telephone conversations were the only basis on which criminal charges were brought against him. The courts committed errors of fact and law in that they failed to establish fact which were relevant to the very existence of his criminal responsibility, such as the health of the women concerned. He also complains about the outcome of the proceedings and submits that he should not have been convicted.

4. The applicant complains that his conviction was politically motivated. The laws concerning abortion were changed in 1993. The conditions of abortion were so severely restrained that abortion became practically illegal. His activities harmed the well-entrenched financial interests of local gynaecologists practising clandestine abortion for high fees, and irritated the fanatical Catholic circles, which were on principle against abortion as a woman's personal choice. He maintains that he reiterated in the proceedings before the courts that his actions were motivated by a political choice that abortion should not be made unlawful. He invokes Article 10 of the Convention.

5. The applicant lastly complains under Article 5 about the decisions given in respect of the enforcement of the prison sentence, submitting that they were unlawful.

THE LAW

1. The applicant complains under Article 8 of the Convention that the decision to intercept his phone calls was unlawful as it did not satisfy the conditions set forth by law.

Under Article 35 § 1 of the Convention, the Court may only deal with the matter within a period of six months from the date on which the final decision was taken. Insofar as this complaint is to be understood as relating to the prosecutors' decisions concerning the intercepting of the applicant's telephone calls, the Court is not required to decide whether the relevant facts disclose any appearance of a violation of the Convention. The Court notes that the last decision by which the prosecutor dismissed the applicant's appeal against the decision ordering that his telephone calls be monitored was given on 7 June 1995 which is more than six months from the date on which the application was lodged with the Convention institutions.

It follows that this complaint is introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

2. The applicant complains under Article 6 of the Convention that the decision to intercept his telephone conversations was unlawful as it did not meet to the requirements that the law attached to such monitoring at the material time. He submits that it rendered unfair the subsequent criminal proceedings against him. He submits that the courts committed manifest errors of fact and law.

Article 6, insofar as relevant, reads:

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

Insofar as the applicant argues that the use of the allegedly unlawful transcripts of his telephone conversations rendered the proceedings unfair, the Court is not required to decide whether or not the relevant facts disclose any appearance of a violation of the Convention. Under Article 35 § 1 of the Convention, the Court may only deal with the matter after all domestic remedies have been exhausted.

The Court reiterates that the exhaustion rule under Article 35 § 1 of the Convention requires that the complaints intended to be made before the Court should have been made to the domestic courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law. Furthermore, any procedural means which might prevent a breach of the Convention should have been used (see the Cardot v. France judgment of 19 March 1991, Series A no. 200, p. 18, § 34).

The Court first acknowledges that the applicant objected to his telephone conversations being intercepted by lodging the appeal against the

prosecutor's of 11 April 1995. However, in his appeal he failed to raise the objection that the decision was unlawful in that it did not comply with the requirements set forth by the applicable provisions of criminal-procedure laws. Consequently, that aspect was not examined by the Regional Prosecutor, who upheld the contested decision on 7 June 1995.

Moreover, the applicant later lodged, first, an appeal against the first-instance judgment of the Lublin District Court of 27 October 1997. Subsequently, he also lodged a cassation appeal with the Supreme Court against the appellate court's judgment, given on 10 March 1998. The Court observes that neither of his pleadings in support of his successive appeals contains any reference to the alleged unlawfulness of the decision on the basis of which the prosecuting authorities had intercepted his telephone calls.

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

Insofar as the applicant complains about the alleged errors of fact and law committed by the courts which gave rulings in his case, the Court further reiterates that the admissibility of evidence, as well as the taking of evidence, are governed primarily by the rules of domestic law and that it is, in principle, for the national courts to assess the evidence before them (see the Sidiropoulos and Others v. Greece judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1617, § 45).

The Court observes that in the present case the courts took ample evidence: the first-instance court questioned thirty witnesses, including various persons who had information about the applicant's activities. Those questioned included not only the women who had abortions, but also the staff of the newspaper in which the applicant had placed his advertisements, the women's friends, the applicant's neighbours and the persons who had lived in his flat. There is nothing to show that the courts were arbitrary in their assessment of the evidence. The appellate court carefully examined the applicant's objections in respect of the first-instance judgment and found that no errors of law had been committed.

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

3. The applicant complains that his conviction was politically motivated. He argues that it amounted to a breach of Article 10 of the Convention, which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Court first notes the absence of any direct reference to Article 10 of the Convention in the remedies that the applicant lodged with the domestic authorities. However, the Court takes note of the applicant's submission that he insisted before the courts that he had offered assistance to the women who wished to have abortions because he considered the legal ban on abortion to be an unacceptable interference with their private lives and their legitimate freedom of choice.

The Court further observes that the applicant was convicted of aiding and abetting abortion. This offence was committed by offering to women who wished to have an abortion assistance in organising their travels from Lublin to Lviv in Ukraine, where they had abortion in a public hospital. He provided such assistance, for a fee, on ten occasions.

The Court notes the applicant's submissions to the appellate court that the first-instance court was negligent in that it failed to establish whether the women concerned were in a "difficult personal situation". The applicant argued that the term "personal situation" should be understood as referring to a woman's situation as a whole, including her subjective feelings. Regard should have been had to the particular situation of a woman in an unwanted pregnancy, often confronted with the hostility of her environment and having to cope with prejudices and negative opinions in respect of unmarried mothers. In the light of those arguments advanced by the applicant, it is legitimate, in the Court's view, to accept that his motives were not exclusively of a commercial character, but that he was also motivated by factors of a higher order, such as disagreement with the 1993 Act.

However, the Court observes that in the present case it was not the expression of views held by the applicant in respect of the legal status of abortion which was in issue in the criminal courts or which ultimately led to his conviction. The applicant was not engaged in any kind of public debate that could be understood as a simple expression of his opinions, and therefore protected by Article 10 of the Convention. The acts he was charged with and ultimately convicted of comprised practical steps he had taken in order to facilitate abortion, such as placing advertisements in newspapers, explaining the nature of his assistance to any women who were interested, negotiating the price of his services, driving them to Lviv,

waiting for them until the abortion was terminated and then driving them back to Lublin. Therefore the Court considers that the applicant was convicted of aiding and abetting abortion, which became a criminal offence under the provisions of the Family Planning, Protection of the Human Foetus, and Conditions Permitting Pregnancy Termination Act, and not because he expressed his views concerning the ethical and practical problems associated with reproductive rights, and the social and legal issues related to the availability of abortion. Consequently, the protection afforded by Article 10 of the Convention cannot be invoked in respect of the acts of which he was convicted.

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 complains that his detention on remand was unlawful and unjustified.

Under Article 35 § 1 of the Convention, the Court may only deal with the matter within a period of six months from the date on which the final decision was taken. The Court notes that the applicant was remanded in custody on 12 May 1995 and released on an unspecified date four months later, which was more than six months before the date on which he submitted his application. It follows that this complaint is introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

5. The applicant lastly complains under Article 5 about the decisions given in respect of the enforcement of the prison sentence, insofar as they ultimately led to his imprisonment, and submitting that they were unlawful.

The Court observes that the decisions complained of were all given in connection with the applicant's final conviction and the prison sentence which was imposed on him. They related mostly to the issue whether, regard being had to his health, the applicant could begin serving the sentence, imposed by the judgment of the Lublin District Court and later upheld by the Regional Court and the Supreme Court. Consequently, they were clearly given in order to ensure "the lawful detention of a person after conviction by a competent court" and as such were in compliance with the requirements of Article 5 of the Convention.

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President