CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 43748/98
by Rafał WIENSZTAL
against Poland

The European Court of Human Rights (Fourth Section), sitting on 7 February 2006 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 Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 30 July 1996,

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 regard to the partial decision of 11 December 2001,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the partial decision of 19 October 2004 declaring the applicant's complaints under Article 5 § 3 and 5 § 4 admissible;

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Rafał Wiensztal, is a Polish national, who was born in 1969 and lives in Radom, Poland. He was represented before the Court by

Mr P. Rybiński, a lawyer practising in Gdańsk. The respondent Government were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

A. The circumstances of the case

The applicant was arrested on 24 August 1994 on suspicion of extorting protection money from an escort agency. By a decision of 26 August 1994 given by the Gdańsk Regional Prosecutor the applicant and other suspects were detained on remand. On 2 September 1994 the applicant's lawyer appealed against the decision of 26 August 1994. His appeal was dismissed by a court on 8 September 1994.

On 24 October 1994 the Gdańsk Regional Prosecutor dismissed the applicant's lawyer's appeal of 19 October 1994 against the detention decision, considering that a number of witnesses had given evidence incriminating all the suspects. On 24 October 1994 the Gdańsk Regional Prosecutor ordered the applicant to undergo psychiatric observation.

On 10 November 1994 the Gdańsk Regional Court prolonged the applicant's detention on remand till 21 January 1995, considering that the charges against the applicant were of a serious nature and that they had been supported by the evidence gathered in the proceedings. The court pointed out that the investigation had not yet been completed and that the group the applicant belonged to had brought improper pressure upon the witnesses to change their testimony.

On 21 November 1994 an expert opinion on the state of the applicant's mental health was issued.

On 7 December 1994 the Gdańsk Court of Appeal dismissed the applicant's lawyer's appeal of 24 November 1994 against the decision of 10 November 1994 prolonging the applicant's detention on remand. The court emphasised that there was a strong likelihood that the applicant might obstruct the proper course of the proceedings by inciting the witnesses to give false testimony. The court also stated that the applicant's case did not disclose any of the grounds for release provided by Article 218 of the Code of Criminal Procedure.

On 17 January 1995 the Gdańsk Regional Court prolonged the applicant's detention on remand until 31 March 1995. It found that in view of the seriousness of the offence he was charged with, the strong probability of his guilt and the danger of him (or another member of the group) exerting additional pressure on the witnesses, the applicant's detention was warranted. The court also pointed to the necessity of taking further evidence.

On 10 February 1995 the Gdańsk Regional Prosecutor dismissed the applicant's lawyer's request that the preventive measure be replaced by a more lenient one, considering that the grounds on which the detention on remand had been ordered had not ceased to exist. On 9 March 1995 the

Gdańsk Appellate Prosecutor dismissed the lawyer's appeal against this decision, relying on the grounds previously invoked by the courts.

By a decision of 21 March 1995 the Gdańsk Regional Court prolonged the applicant's detention on remand until 30 June 1995. The court was of the opinion that the applicant's detention was justified by the strong probability of his guilt, the necessity to obtain further evidence and the risk of pressure being brought to bear on the witnesses. On 5 April 1995 the applicant's lawyer appealed against this decision. On 12 April 1995 the Gdańsk Court of Appeal upheld it, referring to the seriousness of the offence in question and the complexity of the case. The court remarked that the negative effect of the continuing detention upon his family situation was not such as to call for his release.

On 27 June 1995 the bill of indictment was lodged with the Gdańsk Regional Court against the applicant and eleven co-accused.

The court held hearings on 9, 16 and 23 November 1995. It heard the co-accused and several witnesses.

The hearing fixed for 11 January 1996 was adjourned due to the absence of the lawyer representing one of the co-accused. On 17 January 1996 another hearing was held. The court heard four witnesses.

At the hearing of 25 January 1996 the applicant lodged an application for release. The court refused, considering that his detention was justified by the existence of strong evidence of his guilt, the nature of the charges against him and a risk of interference with witnesses in order to influence their testimony. Moreover, conditions for release referred to in Article 218 of the Code of Criminal Procedure were not satisfied. The hearing was then adjourned in view of the absence of the applicant's lawyer.

On 5 March 1996 the applicant appointed a new lawyer to represent him.

On 6 March 1996 the court held a hearing and heard seven witnesses.

On 15 March 1996, in a separate set of criminal proceedings, the applicant was sentenced by the Elbląg Regional Court to two and a half years imprisonment and a fine. He served his sentence between 15 March 1996 and 11 September 1997.

The hearing scheduled for 20 March 1996 was adjourned following a request of one of the lawyers. On 22 May and on 3 June 1996 the court held hearings. At the hearing held on 18 June 1996 the court dismissed the applicant's request for release, referring to the gravity of the charges against him and considering that his case did not disclose any of the grounds for release provided by Article 218 of the Code of Criminal Procedure. The hearing was adjourned due to the absence of one of the co-accused.

Hearings fixed for 7 and 21 August and 11 and 18 October 1996 were cancelled for various reasons, mostly because of the absence of defence lawyers. On 15 November 1996 the court held a hearing and heard four witnesses. The hearing scheduled for 22 November 1996 was adjourned because of the illness of one of the lawyers. The court dismissed the applicant's request for release, considering that his continuing detention was necessary to ensure the proper conduct of the proceedings and that there

were no grounds for releasing the applicant under Article 218 of the Code of Criminal Procedure.

On 30 December 1996 the Gdańsk Regional Court requested the Supreme Court to prolong the applicant's detention until 30 June 1997, submitting that from 9 November 1995 until 22 November 1996 nineteen hearings had been fixed but only eight out of them had in fact been held. The adjournments had been ordered mainly due to the absence of defence counsel. The co-accused and 41 witnesses had been heard until then, nevertheless 65 witnesses remained to be examined. On 16 January 1997 the Supreme Court granted the Regional Court's request, pointing to the complexity of the case and concluding that the delay in the proceedings could not be attributed to the Regional Court.

On 5 February 1997 the court held a hearing and heard 8 witnesses.

The hearing scheduled for 5 March and 16 April 1997 were adjourned due to the absence of one of the co-accused and the illness of some lawyers. On 4 June 1997 the court held a hearing and heard seven witnesses. The court did not allow the applicant's request for release. The hearing scheduled for 11 June 1997 was adjourned due to the absence of some of the lawyers.

On 26 June 1997 the Gdańsk Regional Court lodged a request with the Supreme Court to prolong the applicant's detention until 31 December 1997. The court submitted that hearings had been held on 5 February 1997 and on 4 June 1997. The hearings scheduled on 19 February 1997, 5 March 1997, 16 April 1997 and 11 June 1997 had been adjourned or cancelled because of the illnesses of the accused and the defending counsel. The court had heard 15 witnesses, but 50 other witnesses were still to be examined and the continuing detention was necessary to ensure the proper conduct of the proceedings. On 13 August 1997 the Supreme Court, relying on the grounds given above, prolonged the applicant's detention. However, the limit of the duration of the detention was set to 1 December 1997 and not to 31 December 1997 as the Regional Court had requested.

The hearing held on 11 September 1997 was adjourned due to the absence of one of the co-accused.

On 16 September 1997 the Gdańsk Regional Court refused to release the applicant, observing that he had failed to indicate any new relevant circumstances in the case.

The hearing scheduled for 25 September 1997 was adjourned as one of the co-accused was ill.

The hearing scheduled for 1 October 1997 was adjourned because of the illness of the judge rapporteur.

The hearing held on 13 October 1997 was adjourned as two of the co-accused did not appear.

On 25 November 1997 the Gdańsk Regional Court again requested the Supreme Court to prolong the applicant's detention on remand. On 19 December 1997 the Supreme Court granted this request and prolonged the applicant's detention on remand until 30 April 1998. The Supreme Court observed that a number of hearings had not been held due to the

absence of either the co-accused or their defence counsel. Moreover, the composition of the court had to be changed owing to the illness of the presiding judge. The case was complex and multi-layered and the charges of a serious nature. In addition, some of the accused had contributed to the overall length of the proceedings by lodging motions with the court. In these circumstances, even though the proceedings in the case had been lengthy, the Regional Court could not be held responsible for this delay.

On 30 December 1997 the court decided to issue an arrest warrant in respect of the co-accused who had kept failing to attend hearings.

The hearings fixed for 7 January and 11 February 1998 were adjourned due to the absence of one of the co-accused.

On 25 February 1998, as a result of the change in its composition, the court recommenced the examination of the case. The co-accused had not agreed to continue the proceedings with new judges. The court decided to exclude two of the co-accused who would not appear at the hearings. The court adjourned the hearing due to the absence of some of the lawyers.

On 12 and 26 March the court held hearings. It heard the co-accused and 13 witnesses. On 8 April 1998 the court adjourned the hearing as the applicant's lawyer and other co-accused did not appear.

On 30 April 1998 the applicant was released under police supervision.

On 22 October 2002 the court gave a judgment by which the applicant was convicted as charged and sentenced to three years' imprisonment.

B. Relevant domestic law and practice

On 17 September 2004 the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (*Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki*) ("the 2004 Act") entered into force. It lays down various legal means designed to counteract and/or redress the undue length of judicial proceedings.

Article 2 of the 2004 Act reads, in so far as relevant:

> "1. Parties to proceedings may lodge a complaint that their right to a trial within a reasonable time has been breached [in the proceedings] if the proceedings in the case last longer than is necessary to examine the factual and legal circumstances of the case ... or longer than is necessary to conclude enforcement proceedings or other proceedings concerning the execution of a court decision (unreasonable length of proceedings)."

Article 5 reads, in so far as relevant:

> "1. A complaint about the unreasonable length of proceedings shall be lodged while the proceedings are pending. ..."

Article 12 provides for measures that may be applied by the court dealing with the complaint. It reads, in so far as relevant:

> "1. The court shall dismiss a complaint which is unjustified.

2. If the court considers that the complaint is justified, it shall find that there was an unreasonable delay in the impugned proceedings.

3. At the request of the complainant, the court may instruct the court examining the merits of the case to take certain measures within a fixed time-limit. Such instructions shall not concern the factual and legal assessment of the case.

4. If the complaint is justified the court may, at the request of the complainant, grant ... just satisfaction in an amount not exceeding PLN 10,000 to be paid by the State Treasury. If such just satisfaction is granted it shall be paid out of the budget of the court which conducted the delayed proceedings."

Article 18 lays down transitional rules in relation to the applications already pending before the Court. It reads, in so far as relevant:

"1. Within six months after the date of entry into force of this law persons who, before that date, had lodged a complaint with the European Court of Human Rights ... complaining of a breach of the right to a trial within a reasonable time guaranteed by Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ..., may lodge a complaint about the unreasonable length of the proceedings on the basis of the provisions of this law if their complaint to the Court had been lodged in the course of the impugned proceedings and if the Court has not adopted a decision concerning the admissibility of their case.

..."

On 18 January 2005 Supreme Court (*Sąd Najwyższy*) adopted a resolution (no. III SPP 113/04) in which it ruled that while the 2004 Act produced legal effects as from the date of its date of entry into force (17 September 2004), its provisions applied retroactively to all proceedings in which delays had occurred before that date and had not yet been remedied.

COMPLAINTS

In addition to the complaints under Article 5 § 3 and 5 § 4 which were declared inadmissible by the Court in a partial decision of 19 October 2004, the applicant complained under Article 6 § 1 about the length of the criminal proceedings against him.

THE LAW

The applicant complained under Article 6 § 1 (a) about the length of the criminal proceedings against him.

The Government considered that the complaint was manifestly ill-founded. They have not referred to the remedy introduced by the 2004 Act.

Pursuant to Article 35 § 1 of the Convention:

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

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

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

The Court has already examined that remedy for the purposes of Article 35 § 1 of the Convention and found it effective in respect of complaints about the excessive length of judicial proceedings in Poland. In particular, it considered that it was capable both of preventing the alleged violation of the right to a hearing within a reasonable time or its continuation, and of providing adequate redress for any violation that has already occurred (see *Michalak v. Poland* (dec.), no. 24549/03, §§ 37-43).

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, chose not to avail himself of this remedy.

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

For these reasons, the Court unanimously

Declares inadmissible the applicant's complaint about the length of criminal proceedings.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President