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. 27785/95
by Adam WŁOCH
against Poland

The European Court of Human Rights (Fourth Section), sitting on 30 March 2000 as a Chamber composed of

Mr M. Pellonpää, *President*,
Mr A. Pastor Ridruejo,
Mr L. Caflisch,
Mr J. Makarczyk,
Mr V. Butkevych,
Mr J. Hedigan,
Mrs S. Botoucharova, *judges*,
and Mr V. Berger, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 5 December 1994 and registered on 5 July 1995,

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 Commission's partial decision of 19 October 1998,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, a Polish citizen born in 1941, is a lawyer practising in Kraków.

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

A. The circumstances of the case

1. Criminal proceedings against the applicant

On 25 June 1990 the then Deputy Minister of Justice A.S. sent a letter to the Presidents of Regional Courts stating that in 1989 there was a rapid growth of cases in which courts ruled on adoptions of Polish children and the adoptive parents were foreigners. As a result, approximately one thousand children had left the country for good. This data should be considered as disquieting, the more so as mainly small children had been adopted. The public opinion was alarmed by the growing figures of foreign adoptions. It was true that Polish law laid down the same requirements for adoptions, regardless of the nationality of the future adoptive parents and that the children's welfare was a consideration of paramount importance for all adoption cases. However, the notion of welfare of a child should also include protection of national identity. Hence, foreign adoptions should be carried out only in exceptional cases and the courts should first examine whether the child could not find adoptive parents in Poland. The Presidents were invited to consider whether in cases in which the same persons were repeatedly acting as intermediaries in connection with the adoption proceedings, it was not advisable to inform the prosecution authorities accordingly. The Presidents were finally requested to supervise closely this category of cases and to undertake measures in order to eliminate the climate favourable for foreign adoptions.

The investigations concerning suspicions of illicit foreign adoptions with the applicant's involvement began on an unspecified date in 1993.

On 19 September 1994 the Kraków Regional Prosecutor charged the applicant with trading in children and incitement to giving false testimony. On 20 September 1994 the Kraków Regional Prosecutor remanded the applicant in custody.

On 29 September 1994 the applicant was served with written grounds of the decision of 19 September 1994. The Regional Prosecutor principally referred therein to numerous case-files of adoption proceedings in which the applicant had acted as a representative of foreigners who had sought adoption of children. The Prosecutor had also regard to testimony given by numerous witnesses. It was established that in many cases the prospective adoptive parents had given the applicant a power of attorney a long time before adoption proceedings had been instituted, or even before a child was born. Biological parents had had full parental rights and had given their consent to adoption exclusively by foreigners. The applicant, having known their, usually difficult, financial situation, had been inciting them to give their children for adoption in exchange for financial recompense. It had been either the applicant himself or other persons assisting him, who had later been taking newborn children from hospital and placed them with third parties. The biological parents had not had any further contacts with the children and had not participated in caring for them. However, they had remained in permanent contact with the applicant. Subsequently, at court hearings in the adoption proceedings, they

had been waiving their parental rights and had been giving their assent for adoption. The Prosecutor further considered that there was also a strong suspicion, supported by the evidence gathered in the investigations, that the applicant had been inciting the biological parents to give false evidence in the proceedings, in particular as regarded the circumstances in which they had met the adoptive parents. On most occasions they had testified that they had met the candidates for adoptive parents through common friends. Moreover, the applicant had exerted undue pressure on policemen taking certain measures in the proceedings against him. The Prosecutor further noted that the applicant had received remuneration for his services which in certain cases was inordinately high. The Prosecutor concluded that the circumstances of the case on the whole justified a suspicion that the applicant had been involved in a crime of trading in children within the meaning of Article IX of the Transitional Provisions of the Criminal Code and that he had committed an offence of incitement to giving false testimony.

The applicant lodged an appeal against this decision. He argued, *inter alia*, that the acts with the commission of which he had been charged could not possibly amount to a crime of trading in children. He further argued that in view of the fact that a significant number of witnesses had already been questioned by the prosecuting authorities, the likelihood that his remaining at liberty would in any manner jeopardise the progress in the proceedings was unfounded.

On 4 October 1994 the Kraków Regional Court dismissed the applicant's appeal against the decision to remand him in custody. The court first acknowledged that the case was without precedent and that it raised difficult questions of fact and law. The court stated that in the assessment of the decision under appeal, it had limited itself to its appreciation from the point of view of provisions governing imposition and maintenance of detention on remand, but had refrained from examining closely the substantive law issues. The court further categorically observed that the evidence gathered so far did not justify a suspicion that the applicant had tried to exert undue pressure on policemen involved in the proceedings. However, the evidence in the case-file supported a reasonable suspicion that he had committed an offence punishable under Article IX § 2 of the Transitory Provisions of the Criminal Code, which covered abduction and trading in children for any purpose and in any form, including, in the court's opinion, situations in which offenders were motivated solely by profit. The court further considered that this provision should be interpreted in the light of the United Nations Convention on Children's Rights, ratified by Poland in 1991. The court disagreed with the applicant's argument that he had exclusively been acting in his capacity as a lawyer, having regard to the fact that it transpired from the evidence that in his actions undertaken in connection with the adoption cases he had largely overstepped the limits of what would normally be expected from a lawyer in such cases. In particular, the applicant had been acting as a representative before the courts, but he had also been actively looking for children for adoption. He had also been taking *de facto* and legal measures in order to create artificially situations which would comply with the requirements of laws governing adoption. The court further agreed with the Prosecutor's conclusion that in many cases the applicant's remuneration was improperly high, which seemed to contravene Article 21 of the UN Convention on Children's Rights. This, in the court's view, indicated that the applicant had been motivated solely by profit.

The court further considered that, on the whole, the assessment of the evidence warranted a conclusion that legal requirements of detention on remand had been complied with. Firstly, the voluminous evidence showed that the suspicion against the applicant was well-founded. Secondly, the complexity of the case and the necessity of taking further

time-consuming measures, such as questioning further witnesses and examining numerous documents, argued in favour of the applicant's continued detention in order to safeguard the proper conduct of the proceedings. The court finally considered that there was a risk that the applicant's release would jeopardise the proceedings, having regard in particular to the nature of the charges against him which had included fabricating of false evidence for the purposes of adoption proceedings, in order to mislead the courts.

The Government contend that the applicant's lawyers participated in these proceedings. The applicant contests this.

On 28 October 1994 the Regional Prosecutor examined the applicant's request for release submitted to the Minister of Justice on 22 September 1994 and refused to allow the applicant's request.

On 2 November 1994 the applicant requested to be released, or to have his detention replaced by a more lenient preventive measure.

On 14 November 1994 the Kraków Regional Prosecutor declined to entertain the applicant's request for release. The Prosecutor considered that in the light of the applicant's medical records and those of his wife, there were no sufficient grounds to accept his argument that he should be released as there were no indications that his continued detention entailed any danger to life or limb, or any particular hardship for him or for his family.

On 23 November 1994 the Kraków Regional Prosecutor ordered that a medical expert opinion be prepared by two psychiatrists and one psychologist in order to establish whether the applicant's health was compatible with his detention and whether he could be held criminally responsible.

On 2 December 1994 the Kraków Appellate Prosecutor dismissed the applicant's appeal against the decision of the Regional Prosecutor of 14 November 1994. The Prosecutor considered that the assessment of the applicant's and his wife's medical records by the lower prosecutor had been correct. He further emphasised that the question whether the facts invoked by the prosecuting authorities to justify the applicant's detention could be considered as falling under Article IX of the Transitory Provisions of the Criminal Code, had already been examined by the Regional Prosecutor in his decision of 29 September 1994 and by the Regional Court in its decision of 4 October 1994. Whereas it was true that the court had regarded this legal qualification as "controversial" ("*kontrowersyjna*"), it had accepted the prosecutor's arguments that the applicant's detention was justified.

On 5 December 194 the Kraków Regional Prosecutor assigned a further expert, a neuropsychology specialist, to examine the applicant in order to complete the medical data gathered in preparation of the expert report provided for by the decision of 23 November 1994.

On 5 December 1994 the applicant requested to be interrogated by the Regional Prosecutor.

On 12 December 1994 the Kraków Regional Prosecutor requested the Kraków Regional Court to prolong the applicant's detention until 28 February 1995.

In reply to the applicant's letter of 5 December 1994, the Regional Prosecutor informed him on 16 December 1994 that, in view of the fact that the expert report had to be prepared, he could not have been interrogated before the submission of the Prosecutor's request of 12 December 1994 for the prolongation of the detention to the court. It was further stated that the relevant legal provisions did not provide for a prosecutor's request for prolongation of detention on remand to be served on an accused. The applicant was also informed that in view of the fact that the evidence gathered in the investigations justified a conclusion that new developments were to be expected as regards further persons who would ultimately be charged in the case, the applicant's lawyer had been refused access to the case-file in order to safeguard the proper conduct of the proceedings.

In a letter of 16 December 1994 the applicant complained again that he had not been questioned in the investigations since the day of his arrest.

On 19 December 1994 the Kraków Regional Court, on the request of the Kraków Regional Prosecutor, prolonged the applicant's detention for three months.

In a letter of 21 December 1994 to the Regional Prosecutor the applicant complained that the proceedings concerning the extension of his pre-trial detention were not adversarial, contrary to the requirements of Article 5 of the European Convention for the Protection of Human Rights, as neither he nor his lawyer had been allowed access to the case-file. He also complained that he was not allowed to participate in religious services in prison and requested permission to obtain new books and newspapers from his family.

In a reply of 10 January 1995 the Regional Prosecutor stated that the applicant had not been questioned because further evidence had to be gathered in order to ensure that his questioning be effective.

On 11 January 1995 the Kraków Court of Appeal examined the applicant's appeal against the decision of 19 December 1994. The court stated that the acts with which the applicant had been charged could not reasonably be qualified as trading in children within the meaning of Article IX of the Transitional Provisions of the Criminal Code. This was so because, in the assessment of what could constitute an offence of "trading in children", regard had necessarily be had to the fact that adoption was in a child's best interest, whereas the notion of trading in human beings inherently involved acts to the detriment of its victims. Whereas it was true, the court continued, that adoption did, to a certain extent, limit the liberty of the person to be adopted, its purpose was to improve the child's conditions of life and to enhance its prospects of well-being. Therefore, the adoption in itself had to be perceived as beneficial for the child. In the case under examination, it had not been established by the investigating authorities that the acts with which the applicant had been charged had caused any harm to any children or to other persons. The court attached particular importance to the fact that Section IX of the Transitional Provisions of the Criminal Code which penalised trading in human beings was to be replaced, following a proposal of a Committee charged with drafting a new Code, by a separate offence of organising adoptions for commercial purposes. This indicated, the court emphasised, that it was impossible to charge the applicant with the offence provided by Section IX of the Transitional Provisions, as the offence of trading in human beings was considered by a unanimous opinion of eminent legal scholars, members of the drafting Committee, to constitute an offence separate from that of organising adoptions for commercial purposes. The court concluded that the very fact that the applicant had acted as a lawyer in many adoption proceedings, and had received fees for it, was not sufficient for a reasonable suspicion that an

offence punishable under Section IX had been committed. The applicant was released on the same day.

On 26 April 1995 A.S., who had meanwhile been nominated the First President of the Supreme Court, informed the press that he had taken an unpaid leave from his function in order to participate as a candidate in the election campaign for the office of President of Poland.

On 8 May 1995 the United States District Court for the Western District of Pennsylvania, upon letters rogatory of the Kraków Regional Prosecutor, ordered that certain witnesses be questioned in connection with the proceedings against the applicant. The court had regard to the information submitted by the Prosecutor that the Polish Criminal Code forbade Polish citizens to intervene in adoption proceedings for commercial motives and gaining profits. The testimony of the witnesses would be sought in order to obtain information concerning the process by which the adoptive parents had obtained knowledge of the possibility to adopt Polish children, on how they had proceeded to obtain the final judicial decisions on the adoption of these children, and on what had been the applicant's role.

On 17 June 1995 the applicant complained to the Minister of Justice about the manner in which the proceedings were conducted. He complained in particular that, despite the considerations contained in the Court of Appeal's decision of 11 January 1995 to release him, the criminal proceedings were still being pursued. He further submitted that his private telephone was tapped. He complained about the press campaign against him which, in his view, was inspired by Mr A.S., the President of the Supreme Court and at the same time a candidate in the national presidential election. He finally complained about the letters rogatory submitted to the American authorities.

In reply, in a letter of 4 July 1995, the Kraków Appellate Prosecutor informed the applicant that an examination of the case-files, which numbered 46 volumes, had shown that his complaints were ill-founded. The fact that the Court of Appeal had ruled that his detention should not be continued had no bearing on the issue of the applicant's criminal responsibility. As regards the complaint that his phone was tapped, it was stated that the prosecutor's office had not issued any authorisation for the applicant's phone being tapped. If the applicant had any information indicating that his phone was tapped illegally, it was open to him to request that criminal investigations in this respect be instituted. Insofar as the applicant complained that the criminal proceedings against him had been instituted for political motives, this complaint did not call for any comment, in particular in the light of the evidence gathered in the investigations and in view of A.S.' public statements. As regards the letters rogatory, their legal basis was to be found in Chapter XII of the Code of Criminal Procedure. The complaint that in the applicant's case they amounted to an "abuse of law" were unfounded.

In a letter to the Minister of Justice of 12 August 1995 the applicant complained that the reply of 4 July 1995 had failed to address his complaints adequately. He emphasised that in the light of the Kraków Court of Appeal's decision of 11 January 1995 the legal qualification of the charges against him was untenable. He further insisted that his allegations concerning phone tapping were well-founded, and that the Prosecutor was well aware thereof. He further stressed that he had in fact requested that an analysis be made, in the light of the material gathered by the police which had used informal methods of gathering the evidence, of a genuine influence which A.S., the President of the Supreme Court, who had made "protection of the Polish family" one of the crucial slogans of his presidential campaign, had exerted on the manner in

which his case had been conducted. He finally stated that in the letters rogatory the Polish authorities had misled the American court as to the legal qualification of the charges against him.

In 1995 the prosecuting authorities obtained evidence taken upon letters rogatory to the French and Italian judicial authorities and also from the authorities of Connecticut, Michigan, Maryland, Virginia and Illinois.

In a letter of 9 April 1996 the applicant requested the Minister of Justice to supervise the conduct of the case. He complained that his passport had been invalidated and that the relevant proceedings were pending before the Supreme Administrative Court. He further submitted that he had not had any access to the files of the investigations. He complained that the case had been pending at least from the beginning of 1993 without any decision on the merits having been rendered, and that, as a result, his reputation had suffered.

In 1996 the prosecuting authorities obtained evidence taken following letters rogatory from the judicial authorities of New Jersey and New York.

On 27 May 1997 the Kraków Regional Prosecutor requested the New York courts to take further evidence from three witnesses.

On 16 December 1998 the Regional Prosecutor requested the Minister of Justice - Prosecutor General to give permission for a prolongation of the investigations. On 30 December 1998 the Minister prolonged the investigations until 30 June 1999.

On 4 February 1999 the Regional Prosecutor refused access to the case-file to the applicant, considering that this would jeopardise the proper course of proceedings in which the evidence was still being gathered.

The proceedings are still pending.

2. Press publications concerning the applicant's case

In the initial stage of the proceedings, after the applicant's arrest in particular, numerous articles were published in the national and local press, informing the public about the applicant's arrest and about the charges proffered against him.

On 22 September 1994 a national daily *Rzeczpospolita* published a note entitled "Advocates and trading in children" in which it was stated that, according to information given by Ms M. W.-Ś, a spokeswoman for the Kraków Regional Prosecutor, two lawyers from Kraków had been charged with ten counts of trading in children under Article IX of the Transitional Provisions of the Criminal Code. It was further stated that the investigation had been instituted a year before and that the supposed price for a child had been from 200,000 old Polish zlotys to 3000 new zlotys.

On 23 September 1994 *Dziennik Polski*, a local newspaper of Kraków, published an article entitled "Better late than never." The author of the article said, *inter alia*, that lawyer Adam W. had been placing advertisements in foreign press for his services as a lawyer in adoption proceedings. He had received fees for his representing foreign clients in such

proceedings. The lawyers charged in this case regarded children as merchandise. They had been purchasing children from their mothers and had been selling them afterwards, with a considerable profit, abroad. The article further relied on an interview with Mrs M. W.-Ś., the spokeswoman of the Kraków Regional Prosecutor's Office who had stated that for the time being only the tip of the iceberg had come to light. The prosecuting authorities had at their disposal voluminous case-files, but, as the proceedings were pending, no further details should be revealed.

On the same day *Czas Krakowski*, a Kraków daily, published an article entitled "Salesmen in gowns. A child for dollars".

On 30 September 1994, *Rzeczpospolita* published an article written by professor L.G., who later became the First President of the Supreme Court, entitled "Is it really trading with children?". The author expressed strong doubts as to whether the offence punishable by Article IX of the Transitional Provisions of the 1969 Criminal Code could be applied in context other than trading in human beings for the purposes of prostitution. It was emphasised that in view of the historical background of this provision, dating back to international treaties of 1910 concluded for the purposes of combating international networks deriving profits from prostitution, it could not be applied to situations concerning adoptions of children in which no allegations were made of there being any links or intentions related to organising prostitution.

On 6 October 1994, weekly magazine *Nie* published a copy of a notice available in the Consulate of the United States in Kraków according to which the applicant had been handling adoption cases before the Kraków courts, and made it known that the applicant had been arrested.

On an unspecified date after 11 January 1995, in a letter to *Czas Krakowski* the Spokesman of the Kraków Court of Appeal stated that it was regrettable that the press publications had not correctly reflected either the facts of the case, nor the reasoning of the Court of Appeal in its decision of 11 January 1995 by virtue of which the applicant had been released. It was further stated that the following considerations should be taken into account as regards this case: firstly, that there was no legal basis under Polish law penalising acting as intermediary for the purposes of adoption against a fee. Secondly, in the applicant's case the Court of Appeal had not found that the applicant's continued detention would satisfy applicable provisions of the Code of Criminal Procedure. Thirdly, the fact that detention on remand had been lifted did not have any bearing on the further course of the criminal proceedings and, in particular, on the criminal liability of the accused person. It was finally stressed that the courts were independent and that the Court of Appeal had given its decision having scrupulously examined all relevant elements of the case.

B. Relevant domestic law and practice

a) Evolution of Polish criminal legislation during the relevant period

Polish criminal legislation was amended several times during the relevant period. The Code of Criminal Procedure enacted in 1973 ("old" Code) was replaced by a new Code of Criminal Procedure, adopted by Parliament (*Sejm*) on 6 June 1997, which entered into force on 1 September 1998.

The “old” Code was significantly amended by the Law of 29 June 1995 on Amendments to the Code of Criminal Procedure and Other Criminal Statutes. This Law entered into force on 1 January 1996. However, the entry into force of the provisions concerning imposition of detention on remand was postponed until 4 August 1996. In pursuance with these provisions, detention on remand was imposed by a judge (whereas before it was imposed by a prosecutor - see section (b) below).

The second amendment, effected by the Law of 1 December 1995 on Amendments to the Law of 29 June 1995 (commonly referred to as “the Interim Law of 1 December 1995”) entered into force on 1 January 1996.

b) Preventive measures

The Polish Code of Criminal Procedure of 1969 (“old”), applicable at the relevant time, listed as "preventive measures", inter alia, detention on remand, bail and police supervision.

Articles 210 and 212 of the “old” Code of Criminal Procedure provided that before the bill of indictment was transmitted to the court, detention on remand was imposed by the prosecutor. The decision to impose detention on remand could be appealed against, within a seven-day time-limit, to the court competent to deal with the merits of the case. In pursuance of Article 222 of the Code, the prosecutor could order detention on remand for a period not exceeding three months. When, in view of the particular circumstances of the case, the investigations could not be terminated within this period, detention on remand could, if necessary, be prolonged by the court competent to deal with the merits of the case, upon the prosecutor's request, for a period not exceeding one year. This decision could be appealed against to a higher court.

c) Grounds for detention on remand

Article 217 subparas. 1 (2) and (4) of the Code of Criminal Procedure, as applicable at the material time, provided that detention on remand could be imposed if, inter alia, there was a reasonable risk that an accused will attempt to abscond or to induce witnesses to give false testimony or to obstruct the due course of proceedings by any other unlawful means, or an accused has been charged with an offence which creates a serious danger to society.

The notion of “danger to society” as set out in the Criminal Code related to the assessment of the seriousness of criminal offences and, if the "danger to society" represented by a given offence was serious, this was also an aggravating circumstance which the court had to take into consideration when determining a sentence.

d) Proceedings to examine the lawfulness of detention on remand

At the material time there were three types of proceedings enabling a detainee to challenge the lawfulness of his or her detention and thus possibly obtain release. Under Article 221 § 2 of the “old” Code of Criminal Procedure he could appeal to a court against a detention order made by a prosecutor. Under Article 222 §§ 2(1) and 3 he could appeal against a further decision by that court prolonging his detention at a prosecutor's request. Finally, under

Article 214 an accused could at any time request the competent authority to quash or alter the preventive measure applied in his case. Such an application had to be decided by the prosecutor or, after the bill of indictment had been lodged with the court competent to deal with the case, by that court, within three days.

Under all the relevant provisions of the Code of Criminal Procedure of 1969 read together, a detainee was entitled to appeal against any decision prolonging his or her detention on remand, regardless of whether it had been made at the investigative or judicial stage of proceedings.

e) Provisions governing criminal responsibility for the offence of trading in children

Article IX of the Transitory Provisions of the Criminal Code of 1969 provided that a person who delivered, enticed or abducted other persons for prostitution purposes, even with this person's consent, committed an offence punishable by a prison sentence of not less than three years. Under § 2 of this provision the same sentence could be imposed on a person who practised trading in women or children.

Under Article 2 of the Transitory Provisions of the new Code, which entered into force on 1 September 1998, the Transitory Provisions to the 1969 Code were repealed.

Under Article 253 § 1 of the new Code, a person who trades in human beings, even with their consent, commits an offence punishable by prison sentence of no less than three years. Pursuant to § 2 of the same Article, a person who, with a view of obtaining profit, organises adoptions of children in a manner contrary to the law, commits an offence punishable by prison sentence from three months to five years.

f) Case-law of the Polish courts in cases in which charges of trading in children were brought against the accused

On 29 November 1995 the Supreme Court, in reply to a legal question put to it by the Warsaw Court of Appeal, in the context of criminal proceedings concerning charges made under Article IX of the Transitory Provisions of the Criminal Code of 1969, as to whether the intent of coercing a victim of the offence of trading with children into practising prostitution was a constituent element of this offence, replied in the negative.

On 3 November 1999 the Warsaw Regional Court, in the same criminal proceedings in which five accused had been charged with an offence punishable under Article IX of the Transitory Provisions of the Criminal Code of 1969, discontinued the proceedings against them. The court recalled that in view of the fact that this Article had ceased to be in force, the prosecuting authorities had amended the charges by qualifying the acts with the commission of which the applicants had been charged as offence punishable under Article 253 § 2 of the new Code. The court considered that this qualification could not be upheld. There were no grounds on which to accept that the notion of "trading in children" included also the acts, which could be only regarded as organising illicit adoptions. It was only under the new Criminal Code, in force since 1 September 1998, that organising illicit adoptions had become a criminal offence. Consequently, the court had to discontinue the proceedings pursuant to Article 17 § 1 item 1 of

the new Code, which provided that the criminal proceedings had to be discontinued if the charges against the accused had not been made out.

On 4 February 2000 the Warsaw Court of Appeal, following the prosecutor's appeal against this decision, amended it in part, considering that the proceedings in their part concerning the charges of trading in children should have been discontinued on the ground that the acts, with which the accused had been charged, had not amounted to a criminal offence punishable at the time of their commission. The court recalled that the accused had been indicted with trading in children on the basis that they had, in order to gain profit, visited hospitals, orphanages and hostels for single mothers, trying to persuade biological parents to place their children for adoption, in certain cases against money. Their actions had further been described as taking children away from biological parents and taking further care of them, followed by undertaking measures to institute adoption proceedings. The accused had allegedly also arranged transfers of children to foreign citizens and made payments to the biological parents. The court considered that these acts could neither be qualified as trading in children within the meaning of the repealed Article IX of the Transitory Provisions of the old Code, nor as trading in human beings within the meaning of § 2 of Article 253 of the new Criminal Code. Such acts could only be construed, regard having been to their nature, as organising foreign adoptions, in certain cases for commercial motives. As a result, these acts at the time of their commission, i.e. from 1990 to 1993, had not constituted criminal offences, given that it was only under the 1997 Criminal Code, which had entered into force on 1 September 1998, that they could have been qualified as falling within the ambit of Article 253 § 2 of that Code, penalising organisation of adoptions for commercial motives. Consequently, the proceedings should have been discontinued on the ground that the acts concerned had not coincided with the constituent elements of the offence of trading in children as defined by the Polish law at the material time, but not the ground that the charges against the accused had not been made out.

g) Proceedings for compensation for unjustified detention

Chapter 50 of the Code of Criminal Procedure of 1969, as applicable at the material time**,** provided for compensation regarding damages arising out of imprisonment resulting from conviction which has subsequently been quashed and the convicted person was acquitted, for obviously unjustified detention on remand and for arrest and detention up to 48 hours. The Regional Court in whose region the detained person had been released was competent to examine whether the conditions for awarding compensation were met. The decision of the Regional Court could be appealed to the Court of Appeal.

According to Article 489 of the Code, a request for compensation for manifestly unjustified detention on remand had to be lodged within one year from the date on which the final decision terminating the criminal proceedings in question had become final. Therefore, in practice, a request for compensation for unjustified detention Article 487 of the Code of Criminal Procedure could not be lodged until the criminal proceedings against the person concerned were terminated (see also the decision of the Supreme Court no. WRN 106/96, 9.1.96, published in Prok. i Pr. 1996/6/13). The court competent to deal with such a request was obliged to establish whether the detention was justified in the light of all the circumstances of the case, in particular whether the authorities considered all the factors militating in favour of or against the detention (see, inter alia, the decision of the Supreme Court no. II KRN 124/95, 13.10.95, published in OSNKW 1996/1-2/7).

The proceedings relating to a request under Article 487 of the Code of Criminal Procedure were to be regarded as independent of original criminal proceedings in which the detention was imposed. They were not designed to secure release from detention but financial reparation for damage arising from unjustified detention on remand. The person concerned, by instituting such proceedings, could retrospectively seek a ruling as to whether his or her detention was justified. He or she could, however, put to test the lawfulness of continuing detention on remand and obtain his or her release.

COMPLAINTS

The applicant complains under Article 2 of the Convention that the authorities, by ordering his detention on remand, tried to take his life.

The applicant further complains under Article 3 of the Convention that his detention amounted to a degrading treatment, that he was lowered in the eyes of public opinion by the charges brought against him, that the conditions of his detention, in particular the fact that he was detained in the former cells of persons sentenced to capital punishment, were degrading, and that while detained he could not participate in religious services in prison.

The applicant further complains under Article 5 § 1 of the Convention that his detention on remand was unlawful as there could not have been a reasonable suspicion of his having committed a crime within the meaning of Article 5 § 1 (c) of the Convention. He was at that time carrying out his normal professional obligations as an advocate, representing parties to various adoption proceedings. Therefore, regard being had to the nature of his profession, it could not have been reasonably inferred that his involvement in these duties could be qualified as an offence of trading in children. He submits that his detention lacked any reasonable legal basis under Polish law. He relies in particular on the decision of the Kraków Court of Appeal of 11 January 1995 which, in his submission, clearly indicates that the suspicion against him could not have been regarded as lawful.

The applicant complains under Article 5 § 4 of the Convention that the proceedings before the Kraków Regional Court in December 1994 and, upon appeal, before the Kraków Court of Appeal, concerning the prosecutor's request for extension of his detention, were not adversarial as neither he nor his lawyer were allowed access to the case-file, to the evidence gathered in the investigations and to the prosecutor's request for extension of detention.

The applicant complains under Article 6 § 1 of the Convention that the criminal proceedings in his case are not being conducted within a reasonable time.

The applicant complains under Article 6 § 2 of the Convention that his right to be presumed innocent until a final judgment of a competent court was breached by a hostile press campaign inspired by the authorities, in which he was identified as a person running an illicit network of adoptions and in fact selling Polish children abroad, motivated solely by commercial purposes.

The applicant complains under Article 8 of the Convention that his private telephone communications are being intercepted by the prosecuting authorities.

THE LAW

1. The applicant complains under Article 2 of the Convention that the authorities, by ordering his detention on remand, tried to take his life.

He further complains under Article 3 of the Convention that his detention amounted to a degrading treatment and that he was lowered in the eyes of public opinion by the charges brought against him.

Article 2 of the Convention, insofar as relevant, reads:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally …"

Article 3 of the Convention provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court observes that the applicant was detained on remand from 20 September 1994 to 11 January 1995, i.e. for a period of three months and twenty-one days. There is no indication that the conditions of his detention were different than those normally to be found in Polish detention centres or that any danger to the applicant's life and limb arose during his detention. The Court further notes that the applicant does not allege that he was treated in a manner which would be in any way different from that applicable in respect of other detained persons. The Court does not find it established that the treatment of the applicant was contrary to the prohibition of degrading or inhuman treatment stipulated in Article 3 of the Convention, or that any issue arises in this respect under Article 2 of the Convention.

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

2. The applicant further complains under Article 5 § 1 of the Convention that his detention on remand was unlawful as there could not have been a reasonable suspicion of his having committed a crime within the meaning of Article 5 § 1 (c) of the Convention. He was at that time carrying out his normal professional obligations as an advocate, representing parties to various adoption proceedings.

Article 5 § 1 of the Convention, insofar as relevant, reads as follows:

> "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…"

a) As regards the exhaustion of domestic remedies, the Government first argue that the applicant failed to exhaust the remedies available to him under Polish law. He should have instituted compensation proceedings claiming damages arising out of manifestly unjustified detention, provided for by Chapter 50 of the Code of Criminal Procedure as it stood at the material time. They emphasise that these provisions served as a legal basis for claiming compensation for manifestly unjustified detention on remand. Under the relevant case-law of the Polish courts, these proceedings were considered as an effective remedy for the purpose of reviewing the lawfulness of detention and granting compensation once detention was found unjustified. This was confirmed, *inter alia*, by a ruling of the Supreme Court of 6 February 1981 in which that Court stated that compensation could be awarded only in cases in which charges lacked any reasonable factual basis or where the detention lacked legal basis. Considering that in the present case the applicant complains that his right to liberty and security of a person was breached on the ground that his detention lacked any legal basis, he should have first tried available domestic remedy for protection of this right.

The Court recalls that, under the Convention organs' case-law, where lawfulness of detention is concerned, an action for damages against the State is not a remedy which has to be exhausted because the right to obtain release from detention and the right to obtain compensation for any deprivation of liberty incompatible with Article 5 are two separate rights (see Eur. Comm. HR, no. 12747/87, Dec. 12.12.1989, D.R. 64, pp. 97, 124).

The Court further recalls that, according to Polish law and practice, a request for compensation for manifestly unjustified detention on remand under Article 487 of the Code of Criminal Procedure of 1969 enabled a detainee to seek, retrospectively, a ruling as to whether his detention in already-terminated criminal proceedings was justified, and to obtain compensation when it was not. The proceedings relating to such a request were designed to secure financial reparation for damage arising from the execution of unjustified detention on remand. As a consequence, this was not a remedy by which a detainee could challenge the lawfulness of his continuing detention on remand and obtain a release (see Eur.Comm. HR, no. 28358/95, Dec. 8.12.1997, unpublished).

As regards the domestic remedy referred to by the Government, the applicant submits that in his case these proceedings cannot be deemed to constitute an effective remedy as regards the complaint about the lack of legal basis of his detention. In the practice of the Polish courts, detention on remand can be found unjustified and compensation is granted only in cases of a manifest error in the decision on detention, for example as to the identity of the detained person. The applicant further argues that the Government's argument as to the alleged non-exhaustion of domestic remedies is contradictory. On the one hand, they argue that his detention on remand was lawful. On the other hand, they seem to consider that he should exhaust domestic remedies based on an argument that his detention was unlawful and manifestly unjustified.

The Court observes that the applicant had at his disposal a specific judicial remedy to complain about the alleged unlawfulness of his arrest, i.e. a complaint to the court under Chapter 23 of the Code of Criminal Procedure against the detention order. The purpose of this remedy was to secure a judicial review as to whether the detention order was lawful and justified. The applicant did avail himself of this remedy by lodging an appeal against the

detention order of 19 September 1994. The applicant further lodged an appeal with the Kraków Court of Appeal against the first-instance decision of 19 December 1994, prolonging the applicant's detention for further three months. The Court observes that the applicant does not complain that he has not obtained compensation for his detention in contravention of Article 5 § 5 of the Convention. As it is exclusively the lawfulness of his detention on remand which under examination in the present case, the Court considers that the remedy referred to by the Government, i.e. the compensation proceedings under Chapter 50 of the old Criminal Code, is not a relevant one in this context.

The Court therefore concludes that this part of the application cannot be rejected for non-exhaustion of domestic remedies.

b) As to the substance of the complaint, the Government argue that the applicant's detention on remand was based on a firm suspicion that from May 1989 until December 1993 he had committed an offence of trading in children in ten cases, which constituted a serious offence penalised under Article IX of the Transitional Provisions of the Criminal Code of 1969. There was also a firm suspicion that the applicant had been inciting the biological parents to give false testimony in the adoption proceedings. The suspicion against the applicant was based on testimony of witnesses, who had *inter alia* confirmed the commercial character of the applicant's activity. Mr and Mrs J. had stated that the applicant had gained a financial profit of not less than 14,000 US dollars. The prosecuting authorities also relied on ten case-files of adoption proceedings in which the applicant had acted as a lawyer.

The Government submit that the decision to remand the applicant in custody was taken in accordance with the provisions of Article 217 §§ 2, 3 and 4 of the Code of Criminal Procedure as applicable at the material time. It was stated in this decision that the applicant's detention on remand was necessary due to the fact that he was charged with a dangerous offence and that there was a risk of collusion on his part, given that prior to this decision being taken the applicant, during the investigations, had tried to exercise pressure on certain officers of the police. This pointed to a risk that the applicant, if at liberty, could jeopardise criminal proceedings.

The Government further stress that the interpretation of Article IX of the Transitional Provisions of the Criminal Code given in the decision of the Kraków Court of Appeal of 11 January 1995 neither was binding upon other organs conducting criminal proceedings against the applicant, nor was it a well established interpretation of this provision, accepted in the case-law of the Polish Courts of Appeal and of the Supreme Court.

The Government refer in this respect to the contents of this provision which stated that a person who delivered, enticed or abducted other person for prostitution purposes, even with his or her consent, committed an offence punishable by a sentence of deprivation of liberty of not less than three years. Paragraph 2 of this Article provided that the same sentence should be imposed on persons who traded in women or in children. The Government contend that a textual interpretation of this provision must lead to the conclusion that the offence of trading in children did not presuppose that it be committed to the detriment of the victims of such trade. Such intention on the part of a perpetrator was expressly provided for only in paragraph 1 of Article IX.

They emphasise that the Supreme Court interpreted Article IX in a manner consistent with their reasoning in its resolution of 29 November 1995 (I KZP 33/95), given in a very similar case. The Polish Supreme Court ruled therein that Article IX § 2 penalised trading in children regardless of the intention of the perpetrator, including whether the perpetrator had an intent to induce children to practise prostitution or not. Thus, the requirement of acting to the detriment of a victim of such trade did not constitute a constitutive element of an offence under this provision. Consequently, the only constitutive element of an offence punishable by this provision was the fact that the perpetrator traded in children, i.e. he or she was acting with commercial motives.

As regards the applicant's case, the Government are of the opinion that the legal qualification of the acts committed by him as constituting an offence of trading in children was justified under this provision. They stress that the applicant obviously did not limit his activity to what was normally regarded as legal assistance in adoption proceedings and, also, that he acted for profit.

In conclusion, the Government submit that the applicant's deprivation of liberty amounted to lawful detention ordered for the purpose of bringing him before the competent legal authority on a reasonable suspicion of having committed an offence, as required under Article 5 § 1 (c) of the Convention.

The applicant first submits that on 1 September 1998 the new Criminal Code and the transitory provisions thereof entered into force. Under the new legislation Article IX of the Transitory Provisions of the 1969 Criminal Code, the offence with which he had been charged, were repealed. Despite this fact, the criminal proceedings against the applicant are still conducted which in itself amounts to a breach of the principle *nullum crimen sine lege*.

The applicant emphasises that in his case neither legal nor factual grounds for charging him with trading in children ever existed. Therefore, his detention on remand was also in breach of this fundamental principle of criminal law.

The applicant further refers to the case-law of the Supreme Court, referred to by the Government, and states that the ruling on the constitutive elements of the offence under Article IX was given in 1995, after his release from detention on 11 January 1995. It cannot, therefore, have any bearing on the assessment of his detention. He further argues that the Supreme Court's case-law would only apply to situations in which the existence of trading with children was proven by evidence, which was not the case in the criminal proceedings against him.

In the light of the parties' submissions, the Court finds that this part of the application raises complex questions of fact and law, the determination of which should depend on an examination of the merits. Therefore, this complaint cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant complains under Article 5 § 4 of the Convention that the proceedings before the Kraków Regional Court in December 1994 and, upon appeal, before the Kraków Court of Appeal, concerning the Public Prosecutor's request for extension of his detention, were not fully adversarial as neither he nor his lawyer were allowed access to the case-file.

Article 5 § 4 of the Convention reads:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government acknowledge that the provisions of the Polish Code of Criminal Procedure as applicable at the material time did not provide for the participation of either the applicant or of his defence counsel at the session of the Kraków Regional Court on 19 December 1994, during which the request for prolongation of the applicant's detention was examined. Under Article 88 of the then applicable Code, the prosecutor could participate in such session or file a motion in writing. Other parties to the proceedings could attend courts sessions only if law expressly provided for it. However, the provisions of the Code did not provide for such participation regarding the proceedings in which the imposition or lifting of detention on remand was examined.

The Government further argue that, as regards access to the case-file for the applicant and his lawyers, it is obvious, regard being had to the very nature of investigation proceedings in criminal cases, that the person charged with an offence and his or her counsels can have access to the case-file as determined by a decision of a prosecutor. Under Article 143 of the Code of Criminal Procedure as applicable at the material time, access to the case-file and making copies of documents contained therein required a permission of authority conducting these proceedings. However, the Government emphasise that the applicant and his lawyers were fully aware of the charges brought against, given that these charges had been made out in detail in the written reasons of the detention order of 19 September 1994 which had been served on them.

The Government further address the applicant's argument that neither the applicant nor his lawyers were served with the request of the Regional Prosecutor of 12 December 1994 for extension of his detention on remand. The Government stress that the applicant cannot reasonably claim that this deprived him of a possibility to prepare his defence in the ensuing detention proceedings. The Government emphasise that the applicant and his defence counsel as practising lawyer were fully aware that on 20 December 1994 at the latest the Regional Court had to give a decision as to the extension of detention on remand.

The Government further acknowledge that the examination of the prosecutor's request for extension of the applicant's detention on remand was not conducted in a fully adversarial manner. However, they are of the opinion that the applicant's rights guaranteed under Article 5 § 4 of the Convention were not breached. First of all, they stressed that the essential aim of this provision was to provide a person deprived of liberty with the right to take proceedings by which the lawfulness of his or her detention was to be decided speedily by a court and release ordered if the detention is not lawful. The applicant did avail himself of the right to have such proceedings instituted when lodging his appeal against the detention order of 19 September 1994. It must further be emphasised that this appeal was examined at the session of the Kraków Regional Court of 4 October 1994 in the presence of the applicant's defence lawyers Mr M.G. and Mr W.P., thus in a fully adversarial manner.

The Government conclude that the applicant fully exercised his right to take judicial proceedings by which the lawfulness of his detention was decided speedily by a court.

The applicant submits that he has never been allowed access to the case-file, including during the proceedings held in December 1994 before the Kraków Regional Court, in which the prolongation of his detention on remand was considered. The applicant offers in evidence a letter of the Krakow Regional Prosecutor of 4 February 1999 by which access to the case-file was refused him and his defence counsel.

The applicant refutes the Government's statement that his lawyers participated in the court session on 4 October 1994 in which his appeal against the detention order was examined. He also argues that at this session the court did not put any questions to the applicant.

The applicant further submits that the request made by the prosecutor on 12 December 1994 to have the applicant's detention prolonged until 28 February 1995 was not served either on the applicant or on his lawyers. He argues that he has thereby been deprived of a right to have his case decided in adversarial proceedings.

In the light of the parties' submissions, the Court finds that this part of the application raises complex questions of fact and law, including the question of applicability of Article 5 § 4 of the Convention to the proceedings complained of, the determination of which should depend on an examination of the merits. Therefore, this complaint cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

4. The applicant complains under Article 6 § 1 of the Convention that the criminal proceedings in his case are not conducted within a reasonable time.

Article 6 § 1 of the Convention in its relevant part provides:

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

The Government reject the allegation.

The Court observes that the proceedings were instituted on an unspecified date in 1993 and that they are still pending.

The Court considers, in the light of the criteria established in its case-law on the question of "reasonable time" (the complexity of the case, the applicant's conduct and that of the competent authorities), and having regard to all the information in its possession, that an examination of the merits of this complaint is required.

5. The applicant complains under Article 6 § 2 of the Convention that his right to be presumed innocent until a final judgment of a competent court was breached by a press campaign inspired by the authorities.

Article 6 § 2 of the Convention reads:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Government submit that the proceedings against the applicant are still in the investigative stage. Therefore it cannot be reasonably argued that numerous press articles concerning the criminal proceedings against the applicant could in the future influence the court which will examine the applicant's case.

They further argue that, in any event, the press campaign against the applicant cannot be attributable to any actions on the part of the public authorities. They stress that the series of press articles on the applicant's case was commenced by an article published by the daily "Rzeczpospolita" on 30 September 1994 by professor L.G., who expressed doubts on whether the acts with which the applicant had been charged could be qualified as trading in children within the meaning of Article IX of the Transitional Provisions of the Criminal Code. On 15 November 1994, in response to this article, the Kraków Regional Public Prosecutor published in the same daily his opinion as to the legal qualification of the offence concerned. However, the Government stress that the latter article did not contain any statements which could amount to an official declaration that the applicant was guilty of any criminal offence.

The applicant submits that the criminal proceedings against him were instituted as a part of a politically motivated campaign of those political circles which adamantly opposed foreign adoptions. He refers in particular to the fact that the spokespersons of the prosecuting authorities repeatedly informed the press that the applicant was guilty of trading in children, that he had been buying and selling children, and the alleged prices had been quoted. Information about him were given in a manner which clearly allowed for establishing the applicant's identity. The facts of the case were presented by the press in an obviously biased manner.

The applicant further states that the aim of the campaign against him was to ban foreign adoptions by branding persons involved in such adoptions as acting out of base motives. This campaign was led in particular by A.S., who at the beginning of the 1990s was the Deputy Minister of Justice and later became the First President of the Supreme Court. The applicant refers in particular to the letter addressed in 1990 by A.S. to the Presidents of Regional Courts in which it was suggested that foreign adoptions be discouraged. The applicant further submits that in 1995 A.S. was a candidate in the elections for the President of Poland. He argues that his campaign against foreign adoptions was politically motivated.

The applicant finally refers in support of his arguments to numerous press articles concerning his case.

The Court recalls that a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion, and, consequently, jurors called upon to decide the guilt of an accused (see, *inter alia*, Eur. Comm. HR, no. 10486/83, Hauschildt v. Denmark, Dec. 9.10.1986, D.R. 49, pp. 86, 101). At the same time, the Court notes that the press coverage of current events is an exercise of freedom of expression guaranteed by Article 10 of the Convention. If there is a virulent press campaign surrounding the trial, what is decisive is not the subjective apprehensions of the suspect concerning the absence of prejudice

required of the trial courts, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified (see, *mutatis mutandis*, the Castillo Algar v. Spain judgment of 28 October 1998, *Reports* 1998-VIII, p. 3116, § 45).

The Court reiterates that the presumption of innocence is binding not only upon a judge or court but also upon other public authorities (see, the Allenet de Ribemont v. France judgment of 10 February 1995, Series A no. 308, p. 17, §§ 38 and 41). Given the right to receive and impart information under Article 10 of the Convention, Article 6 § 2 cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (*loc. cit.*, § 38). This being so, a distinction should be made between statements which reflect the opinion that the person concerned is guilty and statements which merely describe "a state of suspicion". The former infringe the presumption of innocence, whereas the latter have been regarded as unobjectionable in various situations examined by the Court (see, *inter alia*, the Lutz v. Germany judgment of 25 August 1987, Series A no. 123, p. 25, § 62; the Englert v. Germany judgment of 25 August 1987, Series A no. 123, p. 55, § 39; the Nölkenbockhoff v. Germany judgment of 25 August 1987, Series A no. 123, p. 80, § 39; and the Leutscher v. the Netherlands judgment of 26 March 1996, *Reports* 1996-II, p. 436, § 31).

Turning to the circumstances of the present case, the Court first acknowledges that the applicant's case was indeed commented upon extensively, both in the local press in Kraków and in the nation-wide newspapers. However, the Court observes that the articles referred to by the applicant were published principally at the time of his arrest in September 1994 and during his detention. The applicant was released on 11 January 1995. Therefore a considerable period of time has already elapsed since events referred to by the applicant in support of his complaint under Article 6 § 2 of the Convention. The Court further notes that the proceedings are still in the investigative stage and that apparently evidence is still being gathered. The prosecuting authorities have not yet lodged the bill of indictment with the court. Consequently, the composition of the panel of judges who will examine the merits of the applicant's case has not been determined.

In these circumstances, and leaving open the question whether the press coverage of the applicant's case was in any way inspired by the authorities, the Court considers that there are no grounds on which to find that the impartiality of the court competent to deal with the applicant's case was adversely affected by the press campaign to a degree amounting to a breach of the presumption of innocence guaranteed by Article 6 § 2 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 34 § 4 and must be rejected under Article 35 § 4 of the Convention.

6. The applicant complains under Article 8 of the Convention that his private telephone communications are intercepted by the prosecuting authorities.

The Court observes that the applicant has failed to substantiate this complaint. It follows that this part of the application is manifestly ill-founded within the meaning of Article 34 § 4 and must be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints that his detention on remand lacked legal basis under Polish law as it stood at the material time; that the proceedings before the Kraków Regional Court and Kraków Court of Appeal held in December 1994 concerning his detention on remand were not truly adversarial and that the criminal proceedings against him are not conducted within a reasonable time;

DECLARES INADMISSIBLE the remainder of the application.

Vincent Berger
Registrar

Matti Pellonpää
President

Commented [Note1]: Summarise the complaints without necessarily citing the invoked Convention Articles.