AS TO THE ADMISSIBILITY OF

Application No. 26757/95
by Robert WÓJCIK
against Poland

The European Commission of Human Rights sitting in private on 7 July 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 28 November 1994 by Robert WÓJCIK against Poland and registered on 20 March 1995 under file No. 26757/95;

Having regard to the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to:

- the observations submitted by the respondent Government on 26 February 1996 and the observations in reply submitted by the applicant on 10 April 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Polish citizen, was born in 1968. He is

currently serving a prison sentence in Zabrze prison.

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

On 4 February 1993 the applicant was arrested and on 5 February 1993 the Kraków District Prosecutor remanded him in custody for three months on suspicion of assault, gang rape and aggravated theft.

On 16 April 1993 the Public Prosecutor further charged the applicant with uttering threats.

On 23 April 1993 and 6 July 1993 the Kraków Regional Court (S*d Wojewódzki) prolonged the applicant's detention for three months, considering that there was sufficient evidence on the case-file to support the charges against him and that further evidence should be taken, including a forensic expert opinion from a police laboratory, that reports of an expert psychologist and psychiatrist should be prepared and that certain witnesses should also be questioned.

On 12 August 1993 the applicant had access to the case-file. He requested that further witnesses be heard.

On 25 August 1993 the Kraków Regional Court prolonged the applicant's detention until 20 September 1993 in order that the evidence requested by the applicant be taken.

On 8 September 1993 the accused had access to the case-file.

On 29 September 1993 the Kraków District Public Prosecutor transmitted the bill of indictment against the applicant and two other accused to the Kraków Regional Court. The applicant was charged with assault, rape, aggravated theft and uttering threats. The date of the first hearing in the case was set for 25 May 1994 and later adjourned to 30 June 1994 due to the judge's illness. The judge rapporteur later left the judicial service and the case was reassigned to another judge.

On 14 March 1994 the applicant requested to be released. He submitted that the detention had lasted fourteen months and that he wished to have his case decided and to obtain an acquittal as soon as possible. He complained of the assessment of evidence by the Public Prosecutor. On 16 March 1994 the Kraków Regional Court dismissed this request, considering that the seriousness of the offence and particular brutality with which the offence had been committed indicated that the applicant should remain in detention. The applicant's argument as to the assessment of evidence made during the investigations was premature as it was for the Court deciding the case to assess the evidence. However, the evidence taken so far, including the testimony of one of the co-accused, made it possible to establish a strong suspicion against the applicant.

The hearing set for 30 June 1994 was adjourned as one of the accused requested to have further access to the case-file.

At the next hearing on 29 August 1994 the accused were heard. The next hearing was fixed for 29 September 1994. That hearing was adjourned at the request of one of the accused.

At the hearing on 19 October 1994 witnesses were heard. The applicant requested that a forensic expert opinion be prepared. This opinion was submitted to the Court on 28 November 1994.

On 29 November 1994 the applicant requested to be released. On 1 December 1994 the Kraków Regional Court dismissed the applicant's application for release. The ground for the decision was the seriousness of the offences and the manner in which they had been

committed. Moreover, the applicant had a long criminal record. There was sufficient evidence in the case-file to support the allegation that the applicant had committed the offences in question. The proceedings were well advanced and their length to date could not in itself justify the applicant's release.

On 20 December 1994 the Kraków Court of Appeal (S*d Apelacyjny) dismissed the applicant's appeal against this decision. The Court considered that the grounds for further detention relied on by the Court in its decision of 16 March 1994 were still relevant. The length of detention, invoked by the applicant, did not suffice to justify his release. The proceedings were well advanced, and the length of the proceedings, although considerable, could not be attributed to the Court.

The next hearing on 27 December 1994 was adjourned as one of the accused had failed to comply with the summons.

On 2 January 1995 the applicant complained to the President of the Court of Appeal about the length of the proceedings. He submitted that ten months had elapsed between the date on which the indictment had been transmitted to the Kraków Regional Court and the date of the first hearing, which was in breach of Article 6 para. 1 of the Convention. He further submitted that there were long intervals between the hearings.

In a letter of 25 January 1995 the President of the Court of Appeal informed the applicant that the regrettable length of the proceedings was due to the difficulties experienced by the Court on account of staff shortages and a heavy case-load ("spowodowana zostala etatowymi i organizacyjnymi trudnosciami S*du, w sytuacji przeci*zenia ilosci* spraw do zalatwienia"). The judgment at first instance would probably be pronounced at a hearing scheduled for 7 February 1995.

On 8 March 1995 the Kraków Regional Court dismissed the applicant's application for release. The Court considered that the circumstances in which the detention pending trial was upheld on 1 December 1994 remained unchanged. In particular, the seriousness of the applicant's offences had to be taken into account, as well as the fact that the applicant had a long criminal record. The delay in the proceedings, which were in their final stage, could not be attributed to the Court. The applicant appealed against the decision.

On 16 March 1995 the applicant complained to the President of the Kraków Court of Appeal about the delay in the proceedings. In a letter of 23 March 1995 the President stated that the hearing of 7 February 1995 had been adjourned as one of the lay judges had fallen ill and had been taken away by an ambulance. The hearings would be resumed in the first fortnight of April.

On 23 March 1995 the Kraków Court of Appeal dismissed the applicant's appeal against the decision of 8 March 1995. The Court considered that whereas it was true that the applicant had been detained for a long time, there were no new circumstances which would justify his release. The lay judge who had fallen ill in February 1995 would be able to participate in hearings in early April and then the hearings would be resumed.

On 28 April 1995 the Kraków Regional Court convicted the applicant of assault, rape, aggravated theft and uttering threats and sentenced him to five years and six months' imprisonment. The applicant's request for release was refused.

On 29 November 1995 the Kraków Court of Appeal upheld the judgment of the lower court.

COMPLAINTS

The applicant complains under Article 5 para. 3 of the Convention that the decision concerning his detention was taken by a Public Prosecutor. He was never brought before a court for review of the lawfulness of his arrest. The courts, when dealing with his applications for release, had at their disposal only the case-file and the submissions of the Public Prosecutor.

The applicant complains under Article 5 para. 3 of the Convention of the length of his detention.

He further complains under Article 6 para. 1 of the length of the criminal proceedings against him. He complains in particular that ten months elapsed between the date on which the indictment was transferred to the Kraków Regional Court and the date on which the first hearing was held.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 28 November 1994 and registered on 20 March 1995.

On 29 November 1995 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 26 February 1996. The applicant replied on 10 April 1996.

THE LAW

1. Insofar as the applicant's complaints relate to the decisions taken before 1 May 1993, the Commission recalls that Poland has recognised the competence of the Commission to receive individual applications "from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation of the rights recognised in the Convention through any act, decision or event occurring after 30 April 1993". The applicant was arrested on 4 February 1993 and the Kraków District Prosecutor remanded him in custody on 5 February 1993. It follows that the applicant's complaint concerning these measures is outside the competence ratione temporis of the Commission and therefore incompatible with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

2. The applicant further complains that he was never brought before a judge competent to review the lawfulness of his detention. When dealing with his applications for release, the courts had at their disposal only the case-file and the submissions of the Public Prosecutor.

The Commission has examined this complaint under Article 5 para. 4 (Art. 5-4) of the Convention, which states:

> "4. 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 submit that under Polish law the decisions on detention on remand and on its extension can be appealed against to a court. These appeals are examined at court sessions in camera. It is true that not all the guarantees of fair hearing are applicable in taking these decisions. However, the courts have an opportunity to examine whether the decisions concerned are lawful and justified.

The Government further submit that the law does not provide for a mandatory presence of the accused or his lawyer before the court when

it is taking decisions on extension of the detention on remand. However, this does not necessarily entail a breach of the principle of equality of arms in such proceedings as the participation of the Prosecutor is optional and not obligatory. Further, the court examines the written appeal of the detained person and thus has detailed knowledge of his arguments. Moreover, the Public Prosecutor in such proceedings represents the public interest.

As regards the present case the Government submit in particular that at the hearings before the Kraków Regional Court on 1 December 1994 and 8 March 1995, at which the Court examined the applicant's requests for release, the representative of the Kraków District Prosecutor was not present. It is true that at the hearings before the Court of Appeal the Public Prosecutor was present. However, as the indictment had already been submitted to the court, the Public Prosecutor did not represent the prosecution, but acted as a representative of the public interest.

The applicant does not address this argument.

The Commission considers that the applicant's above complaint raises serious issues of fact and law under the Convention the determination of which should depend on an examination of the merits. It follows that this part of the application cannot be dismissed as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant complains under Article 5 para. 3 (Art. 5-3) of the Convention of the length of his detention.

Article 5 para. 3 (Art. 5-3) of the Convention provides:

> "3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial."

a) The Government first state that the applicant has not exhausted all domestic remedies available under Polish law with regard to length of detention. He did not appeal against the decision of 5 February 1993 to remand him in custody. Nor did he file an appeal with the Court of Appeal against the decisions to prolong his detention on remand of 23 April, 6 July and 25 August 1993.

The applicant submits that he is not a lawyer and was not sufficiently aware of the relevant domestic remedies.

The Commission recalls that the applicant must make normal use of those domestic remedies which are likely to be effective and sufficient. When a remedy has been attempted, use of another remedy which has essentially the same objective is not required (No. 11471/85, Dec. 19.1.89, D.R. 59, p. 67).

The Commission observes that the applicant did not appeal against the decision to remand him in custody and did not lodge an appeal against three decisions prolonging his detention. It should nevertheless be noted that he lodged three requests to be released. The Kraków Regional Court dismissed the first request on 16 March 1994 and the applicant did not appeal. However, he later lodged appeals against the refusals of release pronounced by that Court on 1 December 1994 and 8 March 1995 with the Kraków Court of Appeal and these appeals were in turn dismissed by that Court. The Commission considers that such requests, whose purpose it is to obtain a judicial

review of the lawfulness of continued detention and to obtain release of a person detained on remand, constitute an adequate and effective remedy within the meaning of Article 26 (Art. 26) of the Convention with regard to the applicant's complaint about the length of his detention. They have the same purpose as the remedies relied on by the Government, in particular the appeal against the decision to prolong the detention. Thus, the applicant should not be required to avail himself of both those remedies.

It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies.

b) As regards the substance of the complaint, the Government submit that the Kraków Regional Court, when deciding on prolongation of the applicant's detention, regularly examined in detail whether the continued detention was justified under the criteria provided for in domestic law, such as serious charges against the applicant and the danger that his release would jeopardise the proceedings. The Court was, beyond any doubt, diligent in its considerations. The applicant contributed to the length of detention as on 12 August 1993 he requested that further evidence be taken. The Government conclude that the overall period of detention, which lasted two years and nine months was reasonable, and there were no serious deficiencies in the proceedings.

The applicant submits that his detention was too long, even when the period of his detention before 1 May 1993 is not taken into consideration.

The Commission recalls that the period to be considered begins only on 1 May 1993, when Poland's recognition of the right of individual petition took effect (cf. Eur. Court HR, Foti and others v. Italy judgment of 10 December 1982, Series A no. 56, p. 18, para. 53). Likewise, in examining the length of detention undergone subsequent to the date of the recognition of the right of individual petition, the Commission takes account of the stage which the proceedings had reached. To that extent, therefore, it has regard to the previous detention (see No. 7438/76, Dec.9.3.79, D.R. 12 p. 38).

The Commission considers that the applicant's above complaint raises serious issues of fact and law under the Convention the determination of which should depend on an examination of the merits. It follows that this part of the application cannot be dismissed as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

4. The applicant further complains under Article 6 para. 1 (Art. 6-1) of the length of the criminal proceedings against him.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time ..."

a) Under Article 26 (Art. 26) of the Convention, the Commission may only deal with a matter after all domestic remedies have been exhausted.

The Government first submit that there is no specific remedy under Polish law to complain about the length of proceedings. However, they submit that the judicial remedies, i.e. appeals against the procedural decisions, could be employed in this respect. In particular, the complaint about the allegedly excessive length of the proceedings can be raised in any requests for release from detention on remand. These remedies should be regarded as effective.

The applicant submits that he did all he could as regards exhaustion of the relevant remedies. He complained to the Regional Court and to the Court of Appeal about the length of the proceedings, but to no avail. He was informed that the length of the proceedings was caused by the significant number of the cases before the court and by the staff shortage.

The Commission recalls the Convention organs' case-law, according to which the decisive question in assessing the effectiveness of a remedy concerning a complaint about the length of proceedings is whether the applicant can raise this complaint before domestic courts by claiming specific redress; in other words, whether a remedy exists that could answer his complaints by providing a direct and speedy, and not merely indirect, protection of the rights guaranteed in Article 6 (Art. 6) of the Convention (Eur. Court HR, Deweer judgment of 27 February 1980, Series A no. 35, p. 16, para. 29; No. 8890/80, Dec. 6.7.92, D.R. 29, p. 129). When the complaint concerns the length of criminal proceedings an application by the accused to accelerate the proceedings cannot be regarded as an effective remedy. Such an application would not have afforded redress for the violation complained of which concerned the allegedly excessive length of the proceedings (No. 8435/78, Dec. 6.3.82, D.R. 26, p. 18).

The Commission considers that the judicial remedy referred to by the Government, i.e. an appeal against procedural decisions pronounced in the proceedings, cannot be regarded as being effective. The applicant seeks a finding that there was a violation of his right under Article 6 para. 1 (Art. 6-1) of the Convention to a hearing within a reasonable time. The judicial remedy referred to by the Government does not constitute a remedy for the breach complained of as its purpose is to have decisions taken in the course of the proceedings set aside or amended. As regards the complaint about allegedly excessive length of the proceedings raised in the requests for release from the detention on remand, its purpose is to obtain release of the accused, not to accelerate the criminal proceedings.

The Commission finds that it has not been established that the applicant had any effective remedy at his disposal which would have enabled him to submit his complaints under Article 6 para. 1 (Art. 6-1) of the Convention to the domestic authorities and would have contributed to a significant reduction of the length of the criminal proceedings.

Accordingly, this complaint cannot be declared inadmissible for non-exhaustion of domestic remedies.

b) As to the substance of the length complaint, the Commission observes that the proceedings commenced on 4 February 1993 and ended with the judgment of the Krakow Court of Appeal on 29 November 1995. Accordingly, they lasted for two years, ten months and twenty-five days.

The applicant considers that the length of the proceedings exceeds the reasonable time set out in Article 6 para. 1 (Art. 6-1) of the Convention. The Government contest this.

The Commission recalls that the period to be considered begins only on 1 May 1993, when Poland's recognition of the right of individual petition took effect (cf. Eur. Court HR, Foti and others v. Italy judgment of 10 December 1982, Series A no. 56, p. 18, para. 53). In assessing the reasonableness of the time that elapsed after this date, account must be taken of the then state of proceedings. Accordingly, the period to be considered is two years, six months and twenty-nine days.

The Commission considers, in the light of the criteria

established by the case-law of the Convention organs on the question of "reasonable time", and having regard to all the information in its possession, that an examination of the merits of the complaint is required.

For these reasons, the Commission, unanimously,

DECLARES INADMISSIBLE the application insofar as it concerns events preceding 1 May 1993, the date on which the Commission's competence to examine individual applications against Poland took effect;

DECLARES ADMISSIBLE, without prejudging the merits, the remainder of the application.

H.C. KRÜGER Secretary to the Commission	S. TRECHSEL President of the Commission