CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF GARYCKI v. POLAND

(Application no. 14348/02)

JUDGMENT

STRASBOURG

6 February 2007

FINAL

06/05/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Garycki v. Poland,

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

Sir Nicolas BRATZA, *President,*
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ, *judges,*
and Mr T.L. EARLY, *Section Registrar,*

Having deliberated in private on 16 January 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 14348/02) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Grzegorz Garycki ("the applicant"), on 10 October 2001.

2. The applicant, who had been granted legal aid, was represented by Ms B. Słupska-Uczkiewicz, a lawyer practising in Wrocław. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. On 19 May 2005 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the length of the applicant's pre-trial detention, the alleged breach of the presumption of innocence and the alleged violation of the right to respect for correspondence to the Government. Under the provisions of Article 29 § 3 of the Convention, the Court decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1976 and lives in Sosnowiec.

1. The applicant's pre-trial detention

5. The applicant was arrested by the police on 17 January 2000. On the same day the Katowice Regional Prosecutor charged him with 23 offences (mostly burglaries). On 18 January 2000 the Katowice District Court (Sąd Rejonowy) ordered that the applicant be detained on remand in view of the reasonable suspicion that he had committed a number of burglaries. The court found that there was a reasonable risk that the applicant would obstruct the proper conduct of the proceedings, having regard to the severity of the anticipated penalty. The detention order was subsequently extended by the Katowice Regional Court (Sąd Okręgowy) on 10 April and 5 July 2000.

6. On 15 September 2000 the prosecution filed a bill of indictment with the Katowice Regional Court. The applicant was charged with armed robbery, robbery and burglary (21 counts). There were 11 defendants in the case, including the applicant. Five of them were remanded in custody. The prosecution asked the court to hear evidence from 34 witnesses. The case file comprised at that time some 32 volumes. The prosecution obtained voluminous evidence, including various expert reports.

7. On 25 September 2000 the Regional Court ordered the applicant's continued detention until 17 January 2001. It observed, *inter alia*, that there existed a risk of collusion and that the nature of the offences with which the applicant had been charged justified the continuation of his detention.

8. On 13 November 2000 the Regional Court ordered that the case be joined to that of a certain M.K.

9. On 15 January 2001 the Katowice Regional Court prolonged the applicant's detention until 15 May 2001. It found that the nature of the offences with which the applicant had been charged, the defendants' modus operandi and the severity of the likely penalty justified the prolongation of the detention. It further held that there was a risk that the applicant would obstruct the proceedings, given that he had not confessed. The Regional Court found that prolongation of the applicant's detention was necessary in order to secure the proper conduct of the proceedings for the time needed for the examination of the case. It held that no other measures could prevent the applicant from attempting to interfere with the proceedings or even from going into hiding.

10. The Regional Court listed a hearing for 22 March 2001. However, it had to be cancelled since the applicant and one of the co-defendants had been disorderly and were removed from the courtroom. In addition, one other co-defendant and his counsel failed to appear.

11. On 14 May 2001 the Regional Court ordered that the applicant be held in custody until 15 October 2001, relying on the same grounds as previously. In addition, it observed that the trial court had not yet commenced an examination of the merits due to reasons that were beyond the court's control, such as the failure of some of the co-accused or their

lawyers to appear before the court or the police's failure to bring the detained co-defendants for trial. The Regional Court noted that the continued detention of the applicant and some of his co-defendants was necessary in order to secure the proper conduct of the proceedings in the case. That decision was upheld on appeal on 13 June 2001.

12. On 8 October 2001 the Regional Court prolonged the applicant's detention until 17 January 2002. It reiterated the grounds given in its previous decisions. It also noted that all of the 8 hearings scheduled to date had had to be cancelled for various reasons such as: the illness of the trial judge or one of the co-defendants, the unwarranted absence of some of the co-defendants, the absence of the legal-aid lawyer of one of the co-defendants, the fact that one of the lawyers had left the courtroom when the bill of indictment was being read out and the failure of the police to bring the detained co-defendants from prison for trial. The applicant and two other co-defendants appealed against that decision.

13. On 30 October 2001 the Court of Appeal (*Sąd Apelacyjny*) upheld the decision. The Court of Appeal stated in the relevant part of the reasons for its decision that:

> "The appeal is not well-founded. Firstly, it should be stated that, contrary to the defendant's claims, they committed the offences with which they are charged (*Na wstępie stwierdzić należy, wbrew zarzutom oskarżonych, że popełnili oni zarzucane im przestępstwa.*)".
>
> The evidence proving this consists not only of the allegations made by P.S., but also by R.S. who in the official record of the hearing of 16 December 1999 (...) described the persons with whom he had committed burglaries of warehouses in Olkusz and Lubliniec, but later, on 26 February 2000, stated that what he had said was not true; the [trial] court will assess which of these accounts is credible".

The Court of Appeal further found that there was a real risk that the defendants would obstruct the proceedings by exerting pressure on P.S. (a co-defendant who had incriminated them), given the fact that they had resorted to very aggressive language in their correspondence when referring to P.S. Further, there was a risk of their going into hiding.

14. Two hearings had to be cancelled due to the police's failure to bring the detained co-defendants from prison (18 October and 8 November 2001).

15. On 22 November 2001 the trial began. However, the Regional Court was only able to hear two defendants. Two subsequent hearings had to be cancelled due to the absence of one of the defence counsel (29 November 2001) and the illness of one of the defence counsel (20 December 2001).

16. On 28 December 2001 the Regional Court made an application under Article 263 § 4 of the Code of Criminal Procedure to the Katowice Court of Appeal for prolongation of the applicant's detention until 15 June 2002, since the statutory 2-year time-limit of detention pending trial was soon to be exceeded (Article 263 § 3 of the CCP). It emphasised that the grounds originally given for his detention were still valid and that the court

was not able to proceed with the hearing of evidence due to reasons that could not be attributed to the court. It noted that out of 13 hearings scheduled to date 12 had had to be cancelled. In addition to the reasons specified in the decision of 8 October 2001, the Regional Court also mentioned the illness of one of the defence counsel and the police's failure to bring the detained co-defendants from prison (on two occasions). It also observed that the continued detention of the applicant was necessary in order to secure the proper conduct of the trial and that no other measures would prevent the applicant and his co-accused from obstructing the proceedings or going into hiding.

17. On 9 January 2002 the Court of Appeal granted the Regional Court's application. In addition to the reasons previously given, it held that the case was particularly complex. It also emphasised that the trial court should take all necessary measures to organise the proceedings in a diligent manner so as to hold hearings at reasonable intervals and terminate the trial by 15 June 2002. The applicant appealed against that decision, but to no avail.

18. On 24 January 2002 the applicant requested the trial court to lift his detention on the ground that it entailed a difficult financial situation for his wife and child. On 11 March 2002 the Regional Court refused that request, having regard, *inter alia*, to the report prepared by a court officer. The applicant's repeated request to that effect was refused on 10 June 2002.

19. On 20 May 2002 the Regional Court made another application to the Katowice Court of Appeal, requesting an extension of the applicant's detention until 1 October 2002. It stressed that, despite some progress in the trial (all the co-defendants and 23 out of 34 witnesses called by the prosecution had been heard), there were still prosecution witnesses (11) and witnesses called by the co-accused (20) to be heard. On 29 May 2002 the Court of Appeal granted that application.

20. The trial court held hearings on the following dates: 31 January, 15 and 21 March, 11 and 25 April, 16 May 2002, 3 and 27 June, 31 July, 29 August and 12 September 2002. Four hearings were cancelled for the following reasons: the absence of some of the co-defendants and defence counsel (24 January 2002); the trial judge's illness (22 February 2002); the failure of one of the co-defendants to appear (26 September 2002) and the failure of one of the defence counsel to appear (17 October 2002).

21. On 16 September 2002 the trial court made yet another application to the Court of Appeal for an extension of the applicant's detention until 4 November 2002. It referred to the necessity to hear witnesses called by the co-defendants and to obtain an expert report as to the mental health of one of the co-defendants. On 25 September 2002 the Court of Appeal granted that application. Another similar application of the trial court of 18 October 2002 was granted by the Court of Appeal on 30 October 2002. The latter court considered that the proceedings had not been terminated due to

reasons beyond the trial court's control. The applicant's detention was prolonged until 20 December 2002.

22. In the course of the proceedings the applicant appealed unsuccessfully against several decisions extending his detention.

23. On 3 December 2002 the Regional Court held the last hearing and closed the trial. On 10 December 2002 it gave judgment. The applicant was convicted of 2 counts of robbery and 14 counts of burglary and sentenced to 9 years' imprisonment. He was acquitted of 7 counts of burglary.

24. The applicant appealed against the first-instance judgment. On 23 October 2003 the Katowice Court of Appeal upheld the judgment of the Regional Court in respect of the applicant. Throughout the proceedings before the trial court and the Court of Appeal the applicant was represented by a legal-aid counsel.

25. On 16 January 2004, relying on Article 78 of the CCP, the applicant requested the Court of Appeal to appoint a legal-aid counsel for him with a view to lodging a cassation appeal. On 29 March 2004 the court granted that request and appointed the same counsel who had represented the applicant at the earlier stages of the proceedings to prepare a cassation appeal. By a letter dated 14 April 2004 the counsel informed the Court of Appeal that, having analysed the case file, he had not found any grounds on which a cassation appeal could be based.

26. On 21 April 2004 the Court of Appeal informed the applicant about the legal-aid counsel's refusal and that no other legal-aid counsel would be appointed for him. Furthermore, it informed the applicant that he had 30 days from the day following the receipt of that letter to lodge a cassation appeal by a counsel of his own choosing. It appears that the applicant did not lodge a cassation appeal with the Supreme Court (Sąd Najwyższy).

2. Censorship of correspondence

27. On 21 October 2002 the Court's Registry sent a letter to the applicant acknowledging the receipt of his letter of 15 September 2002.

It appears that that letter was delivered to the applicant after having been controlled by the authorities. The Court's envelope bears two stamps that read "Katowice Detention Centre. Received 25 October 2002" and "Katowice Detention Centre. Received 4 November 2002" (*Areszt Śledczy w Katowicach. wpł. 25 PAŹ 2002 and wpł. 4 LIS. 2002*). There were also two hand-written notes "R[egional] C[ourt] K[atowi]ce XVI K" (SO K-ce) and "return after censorship" (*zwrot po cenzurze*).

II. RELEVANT DOMESTIC LAW

1. Detention on remand

28. The relevant domestic law and practice concerning the imposition of detention on remand (*tymczasowe aresztowanie*), the grounds for its prolongation, release from detention and rules governing other, so-called "preventive measures" (*środki zapobiegawcze*) are stated in the Court's judgments in the cases of *Gołek v. Poland*, no. 31330/02, §§ 27-33, 25 April 2006 and *Celejewski v. Poland*, no. 17584/04, §§ 22-23, 4 August 2006.

2. Presumption of innocence

29. Article 42 § 3 of the Constitution provides:

> "Everyone shall be presumed innocent until proved guilty in a final decision of a court of law."

A similar principle is laid down in Article 5 § 1 of the Code of Criminal Procedure.

3. Legal assistance

30. Pursuant to Article 78 of the Code of Criminal Procedure a defendant who does not have a defence counsel of his own choosing may request the trial court to appoint him a legal aid counsel if he had duly proved that he could not afford legal assistance (i.e. that the costs of such assistance "would entail a substantial reduction in his and his family's standard of living").

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

31. The applicant complained that the length of his detention on remand had been excessive. He relied on Article 5 § 3 of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

32. The Government contested that argument.

A. Admissibility

33. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Period to be taken into consideration

34. The Court observes that the applicant was arrested on 17 January 2000 and remanded in custody on 18 January 2000. On 10 December 2002 the Katowice Regional Court convicted the applicant and sentenced him to 9 years' imprisonment. As from that date he was detained "after conviction by a competent court", within the meaning of Article 5 § 1 (a) and therefore that period of his detention falls outside the scope of Article 5 § 3 (cf. *Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI). Consequently, the period to be taken into consideration under Article 5 § 3 lasted 2 years and nearly 11 months.

2. The reasonableness of the length of detention

(a) The parties' arguments

35. The Government argued that there had been valid reasons for holding the applicant in detention for the entire period in question. They stressed that the applicant's detention had been justified by the persistence of a reasonable suspicion that he had committed the numerous offences at issue and by the gravity of the charges against him, which attracted a heavy sentence. They also referred to the fact that the offences with which the applicant had been charged concerned activities of a group of persons in a significant area of the country. The Government further argued that there had been a risk that the applicant, if released, might obstruct the proceedings or go into hiding. The continued detention of the applicant was aimed at preventing the possibility of collusion and of exerting pressure on P.S., a co-defendant who had incriminated other defendants.

36. The Government also relied on the fact that the applicant had been subject to the rules on recidivism as in 1995 he had been convicted of similar offences and sentenced to a term of imprisonment. They further submitted that on 8 April 1999 the applicant had been arrested and questioned by the police in connection with a burglary committed in Mysłowice. On 9 April 1999 the prosecutor had charged the applicant with that burglary and placed him under police supervision. On 31 August 1999

the investigation had been discontinued. In this respect, the Government argued that the police supervision had not prevented the applicant from committing 9 burglaries in the relevant period, as had been established in the Regional Court's judgment of 10 December 2002. The Government thus underlined that the applicant's detention had been necessary to prevent him from committing further offences. Lastly, they maintained that the authorities displayed adequate diligence in dealing with the applicant's case, having regard to its complexity and the need to obtain voluminous evidence.

37. The applicant argued that the length of his detention on remand (35 months) had exceeded a "reasonable time". Throughout the whole relevant period the authorities relied on the severity of the likely sentence and the risk that the applicant would go into hiding and/or obstruct the proceedings. However, he submitted that the courts had not provided any arguments in support of their findings concerning the risk of his going into hiding or otherwise evading justice and that his continued detention had served the aim of securing his presence at the trial.

38. The applicant emphasised that the courts had not given relevant and sufficient reasons for his continued detention. He argued that the likelihood of heavy sentence being imposed on him could not suffice to justify the whole period of his detention. As regards the risk of exerting pressure on P.S. (co-defendant), the applicant maintained that with the progress of the trial any such risk had gradually lost its relevance. Furthermore, the authorities should have considered other guarantees to ensure that he would appear for trial, for instance bail or police supervision. Lastly, the authorities had not displayed special diligence in the proceedings.

(b) The Court's assessment

(i) Principles established under the Court's case-law

39. The presumption is in favour of release. As established in *Neumeister v. Austria* (judgment of 27 June 1968, Series A no. 8, p.37, § 4), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable (see *McKay v. the United Kingdom* [GC], no. 543/03 , § 41, ECHR 2006-...).

40. Continued detention therefore can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, §§ 110-111 with further references, ECHR 2000-XI).

41. It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned requirement of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see, for example, *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV, and *Kudła*, cited above, § 110).

42. The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered in this respect (see, for example, *Scott v. Spain*, judgment of 18 December 1996, *Reports* 1996-VI, pp. 2399-2400, § 74, and *I.A. v. France*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2978, § 102).

43. In sum, domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty. For at least an initial period, the existence of reasonable suspicion may justify detention but there comes a moment when this is no longer enough. As the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features, there is no fixed time-frame applicable to each case (see *McKay*, cited above, § 45).

(ii) Application of the principles to the circumstances of the present case

44. The Court observes that the judicial authorities, in addition to the reasonable suspicion against the applicant, relied principally on two grounds, namely (1) the severity of penalty to which he was liable given the serious nature of the charges against him and (2) the risk of obstruction of the proceedings. In respect of the latter, they referred to the fact that the applicant had not confessed. The domestic courts further considered that there had been a risk that the applicant, if released, might exert pressure on P.S., a co-defendant who had incriminated him (see paragraph 13 above). They also invoked the risk of the applicant going into hiding, without

however specifying the grounds for such suspicion. Lastly, the judicial authorities referred to the complexity of the case and the significant volume of evidence to be examined at the trial.

45. Furthermore, the Government submitted that the applicant had been a recidivist offender and that police supervision imposed on him between 9 April and 31 August 1999 had not prevented him from having committing further offences in that period.

46. The Court accepts that the reasonable suspicion that the applicant had committed the offences with which he had been charged may have warranted his detention in the early stage of the proceedings. However, with the passage of time that ground inevitably became less relevant. In particular, the Court considers that that ground cannot suffice to justify the entire period in issue. It must then establish whether the other grounds advanced by the judicial authorities were "relevant" and "sufficient" to continue to justify the deprivation of the applicant's liberty.

47. The Court notes that the judicial authorities continuously relied on the likelihood that a heavy sentence might be imposed on the applicant, given the serious nature of the offences with which he had been charged. In this respect, the Court recalls that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending. It acknowledges that in view of the seriousness of the charges against the applicant the authorities could justifiably consider that such a risk existed. However, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand (see *Ilijkov v. Bulgaria*, no. 33977/96, §§ 80-81, 26 July 2001).

48. As regards the risk of obstruction of the proceedings, the Court notes that in its decision of 15 January 2001 the Katowice Regional Court held that such risk was justified by the fact that the applicant had not confessed. In so far as the domestic courts appear to have drawn adverse inferences from the fact that the applicant had not confessed, the Court considers that their reasoning showed a manifest disregard for the principle of the presumption of innocence and cannot, in any circumstances, be relied on as a legitimate ground for deprivation of the applicant's liberty (see *Górski v. Poland*, no. 28904/02, § 58, 4 October 2005; *Leszczak v. Poland*, no. 36576/03, § 48, 7 March 2006). Secondly, the judicial authorities considered that there had been a risk that the applicant might interfere with the course of the proceedings by exerting pressure on P.S., a co-defendant who had testified against them. The Court observes that it was legitimate for the authorities to consider that factor as capable of justifying the applicant's detention at the initial stages of the proceedings. However, the Court considers that that ground gradually lost its force and relevance as the proceedings progressed and it cannot accept it as a justification for holding the applicant in custody for the entire period.

49. In the circumstances of the present case, the Court finds that the severity of the likely sentence and the risk of interfering with the proceedings alone, or in conjunction with the other grounds relied on by the authorities, cannot constitute a "relevant and sufficient ground" for holding the applicant in detention for a period of 2 years and nearly 11 months.

50. The Court further observes that the applicant was detained on multiple charges of robbery and burglary committed together with a number of accomplices. The defendants had not been formally charged with acting in an organised criminal group. In these circumstances, the Court is not persuaded that the instant case presented particular difficulties for the investigation authorities and for the courts to determine the facts and mount a case against the perpetrators as would undoubtedly have been the case had the proceedings concerned organised crime (see *Celejewski v Poland*, no. 17584/04, § 37, 4 May 2006).

51. As regards the grounds invoked by the Government in their observations, the Court notes that, although they seem relevant, the judicial authorities had not relied on them in their decisions regarding the applicant's detention.

52. The Court would also emphasise that under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his appearance at trial. Indeed, that provision proclaims not only the right to "trial within a reasonable time or to release pending trial" but also lays down that "release may be conditioned by guarantees to appear for trial" (see *Neumeister*, cited above, p. 36, § 3; and *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000).

53. In the present case the Court notes that there is no specific indication that during the entire period in question the authorities gave consideration to the possibility of ensuring the applicant's presence at trial by imposing on him other "preventive measures" expressly foreseen by Polish law to secure the proper conduct of the criminal proceedings.

54. What is more, it is not apparent from the relevant decisions why the judicial authorities considered that those other measures would not have ensured the applicant's appearance before the court or in what way the applicant, had he been released, would have obstructed the course of the trial. Nor did they mention any factor indicating that there was a real risk of his absconding or obstructing the proceedings. In that regard the Court would also point out that, although such a potential danger may exist where an accused is charged with a serious offence and where the sentence faced is one of long term of imprisonment, the degree of that risk cannot be gauged solely on the basis of the severity of the offence and the anticipated sentence (see *Muller v. France*, judgment of 17 March 1997, *Reports* 1997-II, p. 388, § 43).

55. The Court accordingly concludes that the reasons relied on by the courts in their decisions were not sufficient to justify the applicant's being held in custody for 2 years and nearly 11 months. In these circumstances it is not necessary to examine whether the proceedings were conducted with special diligence.

56. There has accordingly been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

57. The applicant, relying on Articles 6 § 1 and 6 § 2 of the Convention, complained about a breach of his right to be presumed innocent until proved guilty in respect of the grounds for the Court of Appeal's decision of 30 October 2001.

The Court finds that this complaint falls to be examined under Article 6 § 2 of the Convention, which reads as follows:

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

58. The Government contested that argument.

A. Admissibility (exhaustion of domestic remedies)

59. The Government submitted that the applicant had not exhausted all available domestic remedies. He had failed to lodge a cassation appeal with the Supreme Court, despite the fact that he had been duly instructed about the appeal procedure. The Government argued that after the legal-aid counsel's refusal to lodge a cassation appeal, the applicant could have requested the court to appoint another legal-aid counsel for him. They submitted that such a possibility existed under Polish law subject to certain conditions,. They relied in this connection on two decisions of the Supreme Court (of 1 December 1999, no. III KKZ 139/99 and of 3 February 2004, no. V KZ 3/04). Furthermore, the applicant had had a possibility of having his cassation appeal lodged by a counsel of his own choosing.

The Government maintained that a cassation appeal may be lodged by a party alleging a flagrant breach of any substantive or procedural provision of criminal law capable of affecting the substance of the judgment (cf. *Kucharski v. Poland* (dec.), no. 51521/99, 16 October 2003 and *Michta v. Poland* (dec.), no. 13425/02, 23 March 2004). The cassation appeal was therefore a remedy whereby the applicant could have effectively submitted the substance of the present complaint to the domestic authorities and sought relief.

60. The applicant disagreed with the Government's arguments and submitted that he had done all that could be expected of him in order to lodge a cassation appeal.

61. The Court notes that on 29 March 2004 the Katowice Court of Appeal appointed a legal-aid counsel for the applicant with a view to his lodging a cassation appeal. That decision implied that the Court of Appeal found that the applicant had proved that he could not afford legal assistance of his own choosing (cf. Article 78 of the CCP). The Court further notes that following the legal-aid counsel's refusal to lodge the cassation appeal for lack of adequate grounds, the Court of Appeal informed the applicant that no other legal-aid counsel could be appointed for him.

It is clear from the above that, contrary to the Government's assertion, the applicant could not be expected to request the court to appoint another legal aid counsel for him. Likewise, as regards the possibility of having his cassation appeal lodged by a counsel of his own choosing, the Court observes that that was only a theoretical option which would contradict the Court of Appeal's finding in its decision of 29 March 2004 that the applicant was not able to meet the expense of legal assistance. In those circumstances, the Court considers that the applicant exhausted all available and effective domestic remedies. For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

62. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

63. The Government argued that the impugned Court of Appeal's decision of 30 October 2001 should be read as a whole. Although some of the terms employed in that decision seemed to suggest that the applicant had committed the offences with which he had been charged, the conclusion of this part of the decision indicated that the credibility of all evidence would be assessed by the trial court. It was obvious from the context that the Court of Appeal had referred to the existence of evidence pointing to a strong likelihood that the applicant had committed the offences in issue, and not to the question of his guilt or innocence.

64. The Government emphasised that similar language had not been used in any other court decision regarding the applicant's pre-trial detention. Furthermore, they found no indication that the impugned terms had adversely affected the court judgments regarding the applicant's criminal

responsibility. It did not transpire from the case file that the judges had proceeded from the assumption that the applicant had been guilty or that they had been in any way biased as a result of the impugned statements. In their view, the wording used in the Court of Appeal's decision was unfortunate, but could not be interpreted as a statement indicating the applicant's guilt.

65. The applicant argued that his right to be presumed innocent had been breached on account of the terms employed in the grounds of the Court of Appeal's decision. Those terms implied that already in October 2001 the Court of Appeal had been convinced of the applicant's guilt. Thus, the Court of Appeal had violated one of the fundamental principles of the criminal procedure laid down in Article 5 of the Code of Criminal Procedure. The applicant further maintained that the Regional Court's judgment of 10 December 2002 by which the applicant had been convicted exclusively on the basis of evidence given by one of the co-defendants (P.S.) also amounted to a breach of Article 6 § 2.

2. Relevant principles

66. The Court reiterates that the presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of a fair trial that is required by paragraph 1. The presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. A premature expression of such an opinion by the tribunal itself will inevitably run foul of the said presumption (see, among other authorities, *Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, p. 30, § 56; *Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62, §§ 27, 30 and 37; *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36; *Daktaras v. Lithuania*, no. 42095/98, §§ 41-44, ECHR 2000-X and *Matijašević v. Serbia*, no. 23037/04, § 45, ECHR 2006-...).

67. Furthermore, 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*, *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, p. 25, § 62 and *Leutscher v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 436, § 31).

68. Article 6 § 2 governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution" (see *Minelli*, cited above, § 30). However, once an accused has been found guilty, in principle, it

ceases to apply in respect of any allegations made during the subsequent sentencing procedure (see *Phillips v. the United Kingdom*, no. 41087/98, § 35, ECHR 2001-VII).

69. The freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6 § 2 cannot therefore 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 (see *Allenet de Ribemont*, cited above, § 38).

70. The Court has considered that in a democratic society it is inevitable that information is imparted when a serious charge of misconduct in office is brought (see *Arrigo and Vella v. Malta* (dec.), no. 6569/04, 10 May 2005). It has acknowledged that in cases where an applicant was an important political figure at the time of the alleged offence the highest State officials, including the Prosecutor General, were required to keep the public informed of the alleged offence and the ensuing criminal proceedings. However, this circumstance could not justify any use of words chosen by the officials in their interviews with the press (see *Butkevičius v. Lithuania*, no. 48297/99, § 50, ECHR 2002-II (extracts)). The Court has emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence. Nevertheless, whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see, *inter alia*, *Adolf v. Austria*, judgment of 26 March 1982, Series A no. 49, pp. 17-19, §§ 36-41 and *Daktaras*, cited above, § 41). In any event, the opinions expressed cannot amount to declarations by a public official of the applicant's guilt which would encourage the public to believe him or her guilty and prejudge the assessment of the facts by the competent judicial authority (see *Butkevičius*, cited above, § 53)

3. Application of the above principles

71. The Court notes that in the grounds for its decision of 30 October 2001 on the prolongation of the applicant's detention, the Court of Appeal stated that the defendants, including the applicant, had committed the offences with which they had been charged. The Government argued that, having regard to the overall context of that decision, the Court of Appeal had referred to the existence of evidence pointing to a likelihood that the applicant had committed the offences in issue, and not to the question of his guilt or innocence. However, the Court emphasises that there is a fundamental distinction to be made between a statement that someone is merely *suspected* of having committed a crime and a clear judicial declaration, in the absence of a final conviction, that the individual *has committed* the crime in question (*Matijašević*, cited above, § 48). Having

regard to the explicit and unqualified character of the impugned statement, the Court finds that it amounted to a pronouncement of the applicant's guilt before he was proved guilty according to law. The Court underlines that there could be no justification for a court of law to make a premature expression of this kind.

72. The fact that the applicant was ultimately found guilty and sentenced to nine years' imprisonment cannot vacate his initial right to be presumed innocent until proved guilty according to law. As noted repeatedly in this Court's case-law, Article 6 § 2 governs criminal proceedings in their entirety "irrespective of the outcome of the prosecution" (see paragraph 68 above).

73. There has accordingly been a violation of Article 6 § 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

74. In his letter of 22 March 2004 the applicant further complained that the letter dated 21 October 2002 addressed to him by the Court had been censored by the authorities in breach of Article 8 of the Convention.

75. The Government argued that that complaint had been introduced outside the six-month time-limit set down by Article 35 § 1 of the Convention.

76. The Court notes that the alleged censorship of the applicant's correspondence took place between 25 October and 4 November 2002. However, the applicant complained about that fact only in his letter of 22 March 2004. It follows that this complaint has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

78. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage related to the breaches of Articles 5 § 3 and 6 § 2.

79. The Government argued that the applicant's claims were exorbitant and as such should be rejected. They asked the Court to rule that a finding

of a violation constituted in itself sufficient just satisfaction. In the alternative, they invited the Court to assess the amount of just satisfaction on the basis of its case-law in similar cases and having regard to national economic circumstances.

80. The Court considers that in the circumstances of the case, the above finding of violations constitutes in itself sufficient just satisfaction for any moral damage suffered by the applicant.

B. Costs and expenses

81. The applicant claimed EUR 3,000 for legal costs and expenses before the Court. The applicant's lawyer submitted her claim in a separate document and stated that she had spent 30 hours of work on the case at a rate of 100 euros per hour.

82. The Government argued that any award under this head should be limited to those costs and expenses that had been actually and necessarily incurred and were reasonable as to quantum. They noted that the applicant's lawyer did not produce any invoice confirming the expenses incurred. Additionally, they maintained that the sum claimed was higher than usually awarded in similar cases.

83. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. The Court notes the applicant was paid EUR 850 in legal aid by the Council of Europe. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,500 for the proceedings before it, less the amount received by way of legal aid from the Council of Europe. The Court thus awards EUR 1,650 for costs and expenses.

C. Default interest

84. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the excessive length of the applicant's pre-trial detention and the breach of the presumption of innocence admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds* that there has been a violation of Article 6 § 2 of the Convention;

4. *Holds* that the finding of violations constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,650 (one thousand six hundred and fifty euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President