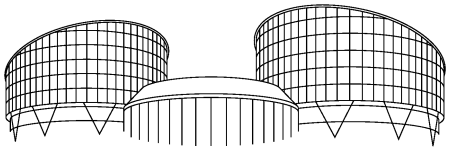

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF POROWSKI v. POLAND

*(Application no. 34458/03)*

JUDGMENT

STRASBOURG

21 March 2017

*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 Porowski v. Poland,**

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

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
András Sajó,
Nona Tsotsoria,
Krzysztof Wojtyczek,
Egidijus Kūris,
Gabriele Kucsko-Stadlmayer, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 28 February 2017,

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

## PROCEDURE

1. The case originated in an application (no. 34458/03) 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 Dariusz Porowski ("the applicant"), on 26 November 2001.

2. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, who was succeeded by Ms J. Chrzanowska of the Ministry of Foreign Affairs.

3. The applicant alleged that his detention on remand had been unlawful and had exceeded a "reasonable time". He also complained of the censorship of his correspondence with his lawyer and of the alleged unfairness and unreasonable length of three sets of criminal proceedings against him and against third persons.

4. On 14 September 2006 the Court decided to give notice of the application to the Government. On 17 February 2009 the case was communicated to the Government for supplementary observations on an additional complaint which was introduced by the applicant on 20 January 2003.

## THE FACTS

5. The applicant was born in 1964 and lives in Otwock.

# I. THE CIRCUMSTANCES OF THE CASE

## A. First set of criminal proceedings against the applicant and his detention on remand (no. II K 414/02)

6. The applicant was arrested on 11 July 2000.

7. On 12 July 2000 the Jarosław District Court (*Sąd Rejonowy*) remanded him in custody on suspicion that, together with two accomplices, he had attempted to extort money from J.G. and M.G. by depriving the alleged victims of their liberty and threatening to kill them.

8. Subsequently, the applicant's detention on remand was extended by the Jarosław District Court on 9 October and 29 December 2000 and 3 April, 25 June, 18 September and 29 October 2001. Interlocutory appeals brought by the applicant against those decisions were rejected.

The Jarosław District Court justified its decisions to impose and, later, to extend the preventive measure with reference to the strong evidence against the applicant, the severe punishment which was likely to be imposed if he was convicted and the risk that he would abscond or go into hiding if released. In the domestic court's opinion, the latter risk was real in the light of the fact that in the past, the applicant had rarely lived at his permanent address.

9. On 13 December 2001 the Jarosław District Court convicted the applicant as charged and sentenced him to five years' imprisonment. The period which he had already spent in detention, namely one year, five months and three days (from 11 July 2000 until 13 December 2001), was deducted from his sentence.

10. On 23 April 2002 the Krosno Regional Court (*Sąd Okręgowy*) quashed that judgment and remitted the case to the first-instance court.

11. The applicant's detention was continued by the Krosno Regional Court on 22 March 2002 and the Jarosław District Court on 4 June and 8 October 2002 and 9 January, 3 April, 7 July and 9 October 2003.

At this stage of the proceedings the domestic courts referred to the original grounds for the applicant's detention. They also noted that the trial was pending and that delays had occurred for reasons not attributable to the court.

Interlocutory appeals against those decisions were rejected, as were requests for release lodged by the applicant and his lawyer.

12. On 7 November 2003 the Jarosław District Court convicted the applicant as charged and sentenced him to five years' imprisonment. The time which he had already spent in detention, namely three years, three months and twenty seven days (from 11 July 2000 to 7 November 2003), was deducted from his sentence.

13. On 23 March 2004 the Krosno Regional Court upheld the first-instance judgment in respect of the applicant.

14. On 9 December 2004 the Supreme Court dismissed the applicant's cassation appeal.

15. Throughout the entire proceedings the applicant was represented by two lawyers of his choice.

16. The applicant did not lodge any complaint about the length of these proceedings under the Law of 17 June 2004 on complaints of a breach of the right to a trial within a reasonable time *(Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki* – "the 2004 Act")

## B. Second set of criminal proceedings against the applicant and his detention on remand (no. II K 46/06)

17. On 10 November 2000 the Mińsk Mazowiecki District Court remanded the applicant in custody on the grounds that there was a reasonable suspicion that he had committed armed robbery and deprived the victims of their liberty. The court also considered that the measure was justified by the severity of the punishment which was likely to be imposed if he was convicted and the need to ensure the proper conduct of the proceedings. The applicant lodged an interlocutory appeal. On 29 November 2000 the Siedlce Regional Court upheld the detention order.

18. The applicant lodged several applications for release. He claimed that his mother suffered from a "back illness" and required his personal care. All those applications were dismissed, both at first instance and on appeal.

19. On 29 January 2001 the Siedlce Regional Prosecutor *(Prokurator Rejonowy)* lodged an indictment against the applicant and two co-accused, charging them with armed robbery and false imprisonment. At that stage the prosecutor ordered that nine witnesses be heard.

20. Subsequently, the applicant's detention on remand was extended by the Mińsk Mazowiecki District Court on 6 February, 11 April, 12 July and 15 October 2001, and on 10 January 2002. Three of these decisions were upheld by the Siedlce Regional Court on 1 March, 29 August and 7 November 2001 respectively.

The domestic courts referred to the same grounds as previously, noting that prior to his arrest the applicant had not lived at his permanent address and that his whereabouts were unknown. It was also observed that the trial had still not begun because the applicant had challenged the judges who would be hearing his case.

21. On 14 June 2002 the Mińsk Mazowiecki District Court dismissed a request by the applicant for release.

22. Meanwhile, on 2 April 2002 the applicant's case was severed from that of his co-accused, to be dealt with in a different trial.

The first hearing was scheduled for 18 June 2002 but was ultimately adjourned. The subsequent hearing was likewise adjourned.

23. Subsequently, the Mińsk Mazowiecki District Court further extended the applicant's detention on 9 April and 12 July 2002. The earlier decision was upheld by the Siedlce Regional Court on 8 May 2002.

The courts reiterated the grounds previously given for the applicant's continued detention, also noting that there was a real risk that he would obstruct the proceedings if released in the light of the fact that many of his alleged accomplices were still at large.

24. On 30 July and 29 August 2002 the trial court held the first two hearings in the case and on 27 August 2002 it ordered that the applicant undergo psychiatric observation.

25. On 6 September 2002 the Mińsk Mazowiecki District Court extended the applicant's detention on remand. This decision was upheld by the Siedlce Regional Court on 2 October 2002. Both courts referred to the original grounds, also noting that the applicant's case had not yet reached the trial stage since proceedings against him before a different criminal court were pending at the time and there was a need to obtain an expert report which, in turn, required him to undergo psychiatric observation in a specialist institution.

26. On 22 October 2002 the Siedlce Regional Court rejected an application by the applicant to have his detention on remand replaced with a different preventive measure.

27. On the same date, as the period of the applicant's detention on remand was approaching two years, the trial court lodged an application with an appellate court under Article 263 § 4 of the Code of Criminal Procedure (*Kodeks postępowania karnego* – hereinafter, "the Code"), seeking to extend the preventive measure for another five months.

28. On 30 October 2002 the Lublin Court of Appeal (*Sąd Apelacyjny*) declared that it lacked jurisdiction and transferred the applicant's remand file to the Mińsk Mazowiecki District Court.

The appellate court referred to the uniform and well-established line of interpretation given to Article 263 of the Code by the Supreme Court. It reiterated that the statutory time-limit of two years for detention on remand was considered to run only in so far as a person had been effectively deprived of his or her liberty in the particular case in the framework of which the preventive measure had been applied (see paragraphs 73 and 74 below).

The appellate court concluded that since the applicant had been deprived of his liberty, either on remand or after conviction, from 12 July 2000 onwards in the first criminal case, the term of his "effective detention on remand" in the second criminal case had not yet begun.

29. On 5 November 2002 the Mińsk Mazowiecki District Court once more extended the applicant's detention. On 4 December 2002 the Siedlce

Regional Court upheld that decision. Both courts held that the three original grounds for the applicant's detention and the need for him to undergo psychiatric observation were sufficient to extend the preventive measure in question even though the proceedings had not yet reached the trial stage. In addition, the second-instance court addressed the arguments which had been raised in an interlocutory appeal brought by the applicant against the District Court's decision. To that effect, the Regional Court reiterated the view of the Lublin Court of Appeal that the applicant's detention on remand was not effective because he had been first deprived of his liberty within the framework of the first criminal case. It also considered that only the most severe preventive measure and not bail, as the applicant had suggested, could ensure the proper conduct of the proceedings.

30. On 17 December 2002 the Mińsk Mazowiecki District Court stayed the proceedings pending the enforcement of the court's decision of 27 August 2002 ordering the applicant to undergo psychiatric observation (see paragraph 24 above). On 5 February 2003 the Siedlce Regional Court dismissed an interlocutory appeal brought by him against this decision. It was observed that he could not at that stage be placed under psychiatric observation because his presence was necessary in the court before which his other criminal case was pending and because that court had not authorised the measure.

31. In the meantime, on 28 January 2003 the Mińsk Mazowiecki District Court once again extended the applicant's detention on remand, referring to the risk that he might attempt to obstruct the proceedings if released.

32. On 27 February 2003 the Siedlce Regional Court quashed that decision and ordered the applicant's release from custody. The court found that the grounds for his detention were no longer valid in the light of the fact that the proceedings had been stayed.

33. The Government submitted that on 3 March 2003 the applicant had actually been released to his home. He on the other hand maintained that he had remained in custody as he had concurrently been in detention on remand in connection with his first criminal trial, pending at the time before the Jarosław District Court (see paragraphs 6-13 above).

34. On 12 November 2003 the Mińsk Mazowiecki District Court barred the applicant from leaving the territory of Poland.

35. On 11 December 2003 the Jarosław District Court ordered that the applicant undergo psychiatric observation in the psychiatric wing of the Warszawa-Mokotów Remand Centre.

36. On 30 December 2003 the Mińsk Mazowiecki District Court resumed the proceedings in the applicant's case in view of that decision and the fact that the psychiatric observation could be scheduled to start in March 2004. On the same date the court again remanded him in custody on the grounds that the evidence showed a significant probability that he had committed armed robbery. It also had regard to the severity of the

punishment that could be expected and the need to ensure the proper conduct of the proceedings.

37. On 28 January 2004 the Siedlce Regional Court dismissed an interlocutory appeal brought by the applicant against this decision. The appellate court acknowledged that the applicant had not to date attempted to obstruct the proper course of the proceedings. Nevertheless, the likelihood that a severe punishment would be imposed if he were convicted was considered to be sufficient reason for his continued detention.

38. On 6 February 2004 the applicant applied to the Mińsk Mazowiecki District Court for the preventive measure to be changed. On 24 February 2004 the court dismissed his request.

39. On 23 March 2004 the Mińsk Mazowiecki District Court further extended the applicant's detention on remand. The court gave the argument that strong evidence had been obtained against him, that it was likely that a severe sentence would be imposed in the case, and that, if released, he would attempt to persuade witnesses to give false evidence or would, by other unlawful means, try to obstruct the proceedings, especially in the light of the fact that the psychiatric observation was underway.

40. Appealing against the latter decision, the applicant's lawyer argued that his client had already been detained for almost four years and that the District Court did not have jurisdiction to decide on the preventive measure. Moreover, it was argued that since the applicant had never attempted to obstruct the proceedings, there was no risk that he would try to do so in the current stage of the case.

41. On 28 April 2004 the Siedlce Regional Court dismissed that appeal. It was observed that the actual period of the applicant's detention on remand in the case in question had not reached two years because he had been concurrently deprived of his liberty in the framework of the first set of criminal proceedings. As to the grounds for extending his detention on remand, the appellate court held that, even though he had not attempted to obstruct the proper course of the proceedings, the likelihood that a severe punishment would be imposed if he were to be convicted was sufficient reason to uphold the preventive measure in question.

42. On 24 June 2004 the Mińsk Mazowiecki District Court again decided to extend the applicant's detention on remand in view of the reasonable suspicion that he had committed armed robbery and the severity of the punishment that could be expected. This decision was upheld on 15 July 2004 by the Siedlce Regional Court.

43. On 23 August 2004 the Mińsk Mazowiecki District Court rejected a request by the applicant for release, relying on the same grounds as in the decision described above.

44. Subsequently, the applicant's detention on remand was extended by the Mińsk Mazowiecki District Court on 9 September and 22 December 2004 and 24 March and 23 June 2005. The decisions were

upheld by the Siedlce Regional Court on 29 September 2004, on an unspecified date and on 13 April and 28 July 2005 respectively.

All the decisions in question were based on the grounds that there was strong evidence against the applicant, that a severe punishment would be imposed if he were convicted and, since the court proceedings were only at the initial stage, that if released, he would attempt to persuade witnesses to give false evidence or, by other unlawful means, obstruct the proper course of the proceedings. It was also stressed in the earlier decisions that the trial court had not yet started its examination of the applicant's case on the merits.

45. On 1 September 2005 the Mińsk Mazowiecki District Court convicted the applicant as charged and sentenced him to six years' imprisonment. The period he had already spent in detention on remand, namely one month and twenty-one days (from 11 July until 1 September 2005), was deducted from his sentence. The remainder of his incarceration was considered to have comprised the prison sentence which had been imposed by the Jarosław District Court in the separate criminal case (see paragraph 12 above).

It appears that the first-instance court held fourteen and adjourned five hearings. It decided applications by the applicant challenging the judges, opposing the psychiatric observation and requesting a fresh examination of the case.

46. On 10 February 2006 the Siedlce Regional Court quashed the judgment of 1 September 2005 (see paragraph 45 above) and remitted the case to the first-instance court, ordering it to gather additional evidence.

47. On 7 March 2006 the Mińsk Mazowiecki District Court extended the applicant's detention. That decision was upheld on 29 March 2006. The domestic courts considered that the actual period of detention on remand in the framework of the second case had only started running on 11 July 2005, when he was no longer deprived of his liberty in connection with the first criminal case. The courts also referred to the two original grounds for the applicant's continued detention, namely a reasonable suspicion that he had committed armed robbery and the severity of the punishment that could be expected. In the courts' view, the latter element in turn created a presumption that the applicant would attempt to obstruct the proper conduct of the proceedings if released.

48. On 29 March 2006 the Siedlce Regional Court fully adhered to the reasoning of the first-instance court and upheld the above-mentioned decision.

49. On 11 April 2006 the case was transferred to the Siedlce Regional Court as the competent court because, in the meantime, the charges against the applicant had been modified.

50. Pending trial the applicant's detention was extended by the Siedlce Regional Court on 31 May and 21 June 2006, on an unspecified date and on

13 November 2006 and 19 January 2007. The decisions were upheld by the Lublin Court of Appeal.

The domestic courts reiterated the original grounds for the applicant's detention on remand and stressed that the preventive measure in question had not lasted more than two years, regard being had to the fact that from 7 November 2003 to 11 July 2005 he had been serving a prison sentence imposed in the first set of criminal proceedings.

51. The first hearing took place on 29 June 2006.

52. On 6 July 2007 the Siedlce Regional Court convicted the applicant as charged and sentenced him to six years' imprisonment. It appears that the court held seven hearings in the case. The period the applicant had already spent in detention on remand, namely one year, eleven months and twenty five days (from 11 July 2005 until 6 July 2007) was deducted from his sentence.

53. On 9 April 2008 the Lublin Court of Appeal quashed that judgment, lifted the preventive measure and remitted the case to the lower courts. The following day the applicant was released from the remand centre. He has remained at liberty ever since.

54. On 23 October 2009 the Siedlce Regional Court convicted the applicant on a number of charges and sentenced him to six years' imprisonment. It held fourteen hearings in the case. Two years and nine months of the applicant's detention on remand (from 11 July 2005 to 10 April 2008) were deducted from his sentence. It appears that he was not ordered to serve the remainder of his sentence.

55. On 12 February 2010 the applicant appealed.

56. On an unspecified date before March 2011 the Lublin Court of Appeal upheld the first-instance judgment.

57. The applicant did not wish to take his case to the Supreme Court, believing that a cassation appeal would not have any prospects of success.

58. He did not lodge a complaint about the length of the second set of criminal proceedings under the 2004 Act.

### C. The applicant's constitutional complaint

59. On 29 November 2006 the applicant made a constitutional complaint (*skarga konstytucyjna*) under Article 191, read in conjunction with Article 79 of the Constitution (see paragraph 86 below), asking for Article 263 §§ 3 and 4 of the Code (see paragraph 73 below) to be declared unconstitutional (SK 39/07). He alleged that the provision infringed, *inter alia*, the right to personal inviolability and security under Article 41 § 1 of the Constitution (see paragraph 71 below). On 30 January 2007 the applicant finalised his complaint.

The applicant challenged two aspects of Article 263 of the Code of Criminal Procedure.

60. Firstly, he alleged that Article 263 §§ 3 and 4 were unconstitutional in so far as, under the legal principle (*zasada prawna*) of the Supreme Court (see paragraph 74 below), they concerned only effective detention on remand, that is to say only the actual period of deprivation of liberty on the basis of a detention decision issued in a particular case because they denied a detainee sufficient protection of his liberty if he had earlier been convicted or otherwise deprived of his liberty on the basis of decisions issued in another set of proceedings.

61. Secondly, the applicant challenged Article 263 § 3 in so far as it defined a maximum statutory period for the length of detention on remand only until the delivery of a first judgment by the trial court. Consequently, people such as him who remained in detention while their criminal proceedings were pending *de novo* after the quashing of the first judgment of the first-instance trial court, were not protected against unreasonably lengthy detention on remand. Article 263 § 3 of the Code was silent in that respect and because of that, the authorities could extend the preventive measure for an indefinite period following the quashing of the first judgment of a trial court.

62. On 15 January 2008 the Ombudsman joined the proceedings, asking that Article 263 § 3 of the Code be declared unconstitutional in so far as it left a legal loophole which was filled in by an erroneously developed well-established court practice not to include in the calculation of the statutory two-year period of detention on remand (prior to the first judgment of the first-instance court) periods of the detainee's concurrent deprivation of liberty on the basis of a criminal sentence.

63. On 10 March 2009 the Constitutional Court discontinued the application under section 39 of the Constitutional Court Act of 1 August 1997, which provided for such a possibility in the event a ruling was considered to be redundant (*zbędne*).

64. It was observed that, despite the obvious differences in scope, the essence of the first part of the applicant's complaint, concerning Article 263 §§ 3 and 4 of the Code (see paragraph 60 above), had already been examined on the merits by the Constitutional Court in case no. SK 17/07. The provision had been declared unconstitutional in so far as it was interpreted to the effect that the statutory maximum period of two years allowed for a person's detention on remand prior to the first judgment of the first-instance court had not comprised the term of the prison sentence the detainee was serving in another case, concurrently to his detention on remand, thus allowing for an extension of the preventive measure beyond two years by a first-instance court on general grounds (see paragraphs 77-81 below).

65. In connection with the second part of the complaint (see paragraph 61 above), the Constitutional Court held that the applicant did not have the standing to challenge Article 263 § 3 of the Code because this

provision had not been applicable to his detention in the relevant period. The preventive measure in question had been extended during the proceedings which had been pending before the first-instance court *de novo*, after the original judgment had been quashed by the appellate court. In these circumstances, the legal basis for extending the applicant's detention was Article 263 § 7 of the Code (see paragraph 74 below).

### D. Criminal proceedings against prison staff

66. On 8 June 2001 the applicant informed the Przemyśl prosecutor's office about an offence allegedly committed by staff of Przemyśl Prison. He claimed that they had been selling alcohol, cigarettes and drugs to prisoners. On 29 November 2002 the Przemyśl prosecutor's office discontinued the criminal investigation against the alleged culprits. This decision was upheld by the Przemyśl District Court on 27 February 2003.

### E. Monitoring of the applicant's correspondence

#### *1. Correspondence with the lawyer*

67. When, on 26 November 2001, the applicant lodged his application with the Court he had been detained on remand in relation to the first and second sets of criminal proceedings against him. On 31 July and 30 November 2001 and on 10 and 14 March 2003 he sent letters to his defence lawyer, W.J. The envelopes bear the stamp "Jarosław District Court" and a handwritten note stating "censored on..." (*ocenzurowano dn.*).

68. On 18 July 2003 the Lubaczów District Prosecutor discontinued criminal proceedings against several judges of the Jarosław District Court who, in the applicant's view, had monitored his correspondence with his lawyer. The court held that none of the individuals concerned had opened and read the applicant's correspondence. This decision was upheld by the Lubaczów District Court on 25 November 2003. The court found that the applicant's correspondence had not been read and the words "censored" had been automatically stamped on the applicant's letters.

#### *2. Correspondence with the Court*

69. On 4 December 2001, the Registry of the Court received its first letter from the applicant, dated 26 November 2001. The envelope bears the stamp "Jarosław District Court" and a handwritten note stating "Censored on 30 November 2001" (*Cenzurowano dn. 30 XI 2000*).

70. On 8 August 2002 the Registry of the Court received another letter from the applicant, dated 22 July 2002. It was delivered in an envelope bearing the stamp "Jarosław District Court" and a handwritten note stating "Censored on 26 July 2002" (*Cenzurowano dn. 26 VII 2002*).

# II. RELEVANT DOMESTIC LAW AND PRACTICE

## A. Preventive measures, including detention on remand

### *1. General provisions*

71. Article 2 of the Constitution reads as follows:

> "The Republic of Poland shall be a democratic State ruled by law and implementing the principles of social justice."

Article 41 of the Constitution, in its relevant part, provides:

> "1. Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty shall be imposed only in accordance with principles and under procedures specified by statute...."

72. The Code defines detention on remand as one of the "preventive measures" (*środki zapobiegawcze*). The others are bail (*poręczenie majątkowe*), police supervision (*dozór policji*), a guarantee by a responsible person (*poręczenie osoby godnej zaufania*), a guarantee by a social entity (*poręczenie społeczne*), a temporary ban on engaging in a given activity (*zawieszenie oskarżonego w określonej działalności*) and a ban on leaving the country (*zakaz opuszczania kraju*).

Article 249, as applicable at the relevant time, set out the grounds for imposing preventive measures:

> "1. Preventive measures may be imposed in order to ensure the proper conduct of proceedings and, exceptionally, to prevent an accused committing another serious offence; they may be imposed only if the evidence shows a significant probability that the accused has committed an offence."
>
> ...
>
> 3. Before preventive measures are applied, the court or the prosecutor shall hear the accused, unless it is impossible due to [him or her] being in hiding or abroad..."

Article 258 lists the grounds for detention on remand. It provided at the material time, in so far as relevant:

> "1. Detention on remand may be imposed if:
>
> (1) there is a reasonable risk that an accused will abscond or go into hiding, in particular where his identity cannot be established or where he has no permanent residence [in Poland];
>
> (2) there is a reasonable risk that an accused will attempt to persuade [witnesses or co-defendants] to give false evidence or obstruct the proper course of proceedings by any other unlawful means;
>
> 2. If an accused has been charged with a serious offence or an offence for the commission of which he may be liable to a statutory maximum sentence of at least [eight] years' imprisonment, or if a court of first instance has sentenced him to at least [three] years' imprisonment, the need to continue detention to ensure the proper

conduct of proceedings may be established by the likelihood that a severe punishment will be imposed.

..."

The Code sets out the extent of the courts' discretion to continue a specific preventive measure. Article 257 § 1 reads:

"1. Detention on remand shall not be imposed if another preventive measure is sufficient."

Article 259 § 1 reads:

"1. If there are no special reasons to the contrary, detention on remand shall be lifted, in particular, if depriving an accused of his liberty would:

(1) seriously jeopardise his life or health; or

(2) entail excessively harsh consequences for the accused or his family."

Article 259 § 3 provides:

"3. Detention on remand shall not be imposed if an offence attracts a sentence of imprisonment not exceeding one year."

Article 259 § 4 specified at the relevant time that Article 259 § 3 is not applicable where the accused attempts to evade justice or persistently fails to comply with a summons or where his identity cannot be established.

*2. Statutory time-limits for detention on remand*

**(a) Article 263**

73. Article 263 §§ 3 and 4 of the Code provided at the material time:

"3. The cumulative length of detention on remand until the first judgment issued by the trial court shall not exceed two years.

4. Detention on remand may be extended for a fixed period exceeding the periods provided for in paragraphs 2 and 3 by an appellate court ... at the request of the court dealing with a case ... if ...: the criminal proceedings have been adjourned, the accused is under prolonged psychiatric observation, preparation of the expert's opinion is protracted, evidence has to be obtained in a particularly complicated case or from abroad, the accused has caused a delay in the proceedings, or there are other important obstacles which cannot be overcome."

74. As derived from the practice of the Polish courts and legal writing, Article 263 §§ 3 and 4 of the Code ceases to apply once the first-instance court has ruled on the merits of the criminal case in which detention on remand has been ordered. In the event that the first-instance judgment is quashed on appeal and the detention is again pending trial before the first-instance court, the preventive measure is to be extended even if it takes it beyond the total time of two years by the trial court under the general conditions (see the Warsaw Court of Appeal's decision of 4 February 2003 no. II AKz 61/03 and the Constitutional Court's decision of 10 March 2009

(SK 39/07) as described in paragraph 65 above and the Commentary to the Code by P. Hofmański, C.H. Beck).

Polish law does not therefore set out a maximum time-limit in the event it is necessary to continue detention on remand after the delivery of the first judgment by the first-instance court. Article 263 § 7 only regulates the maximum frequency with which such a measure can be extended. Until the amendment which took effect on 1 July 2003, each extension of detention on remand in such circumstances had to be ordered for no longer than three months. That period was thereafter increased to six months.

**(b) Detention on remand running concurrently with another measure of detention of remand**

75. At the material time and still today, in the light of a uniform practice of the domestic courts and legal writing, the period of detention on remand within the meaning of Article 263 § 3 is considered to comprise only "effective detention", that is to say the time of the actual deprivation of liberty imposed on the sole basis of a detention decision given in the course of that particular set of proceedings. This approach was confirmed and further defined in the Supreme Court's (*Sąd Najwyższy*) resolution of 29 January 1998 (no. I KZP 29/97), given by a bench of seven judges.

> "... In the event that decisions to impose detention on remand [on] a particular person have been given in two or more sets of proceedings, the [calculation of the] duration of this measure ... shall not include the term of the person's deprivation of liberty under the decision on detention on remand [which had been] given in the other set of proceedings ... "

**(c) Detention on remand running concurrently with a prison sentence**

76. A similar line of reasoning was applied, at the relevant time, to situations in which a measure of detention on remand ran concurrently with a measure of deprivation of liberty after conviction. This approach was confirmed in the Supreme Court's decision of 28 January 1997 (IV KO 35/96) and in the Supreme Court's resolution given by seven judges on 30 October 1997 (no. I KZP 17/97). This interpretation was changed following a judgment issued by the Constitutional Court in 2008 (see paragraphs 77-80 below) and the related legislative amendment in 2009 (see paragraph 81 below).

77. On 10 June 2008 the Constitutional Court ruled in a case resulting from a constitutional complaint lodged by a former detainee on 20 July 2007 challenging the constitutionality of Article 263 § 3 of the Code (SK 17/07).

78. The following preliminary remark was made in the judgment:

> "... [the Constitutional Court] does not examine the correctness of the interpretation of law provisions made by the courts .... However, because the actual content of many legal provisions [becomes] formulated only in the process of their implementation, the [Constitutional] Court, when [assessing their] constitutionality, takes as a point of

> departure, such understanding [of these legal provisions] as functions commonly in the jurisprudence".

Article 263 § 3 of the Code was therefore examined in its "uniform and authoritative" meaning which was given by the Supreme Court (see paragraph 76 above).

79. The provision was declared, *inter alia*, in breach of the principle that any deprivation or restriction of liberty could only arise from an act of law (*zasada wyłączności ustawy*) and had to be in accordance with clearly formulated and coherent legal provisions (*zasada poprawnej legislacji*) (Article 41 of the Constitution, cited in paragraph 71 above). The Constitutional Court held:

> "The legislative flaw of Article 263 § 3 of the Code ... is its ambiguity which made it necessary to formulate through case-law ... a rule of law resolving [the issue] of calculating the period of detention on remand if it [runs concurrently with] a sentence of imprisonment [which had been] imposed in another case, in such a way that the statutory maximum length of detention on remand, prior to the judgment of the first-instance court, does not include the periods during which a detainee is concurrently serving a prison sentence imposed in another case, allowing the first-instance court to extend the detention on remand on general grounds beyond two years."

80. The Constitutional Court observed that a direct consequence of its ruling was the derogation of the unconstitutional rule of law by virtue of the judgment itself and at the date of its publication. It was further stated that the judgment in question allowed the domestic courts to start interpreting and implementing the impugned provision of the Code in compliance with the Constitution as indicated by the Constitutional Court. The last paragraph of the judgment contained a general clause, reiterating that under Article 190 of the Constitution and other provisions as applicable (see paragraph 86 below) a judgment of the Constitutional Court declaring unconstitutionality of a particular rule of law, served as a basis for the reopening of proceedings in cases in which a final and enforceable judicial decision, a final administrative or other decision had been issued on the basis of the normative act declared unconstitutional.

81. As a result, on 12 February 2009 the following amendment was introduced to Article 263 of the Code. It entered into force on 19 February 2009.

> "3 (a) Where ... detention on remand is concurrent with the execution of a sentence of imprisonment imposed in another case, the relevant period[s] under paragraph ... 3, shall include the period a detainee has served of [his] sentence of imprisonment".

82. On 24 July 2006 the Constitutional Court, in a case in which it examined jointly two constitutional complaints lodged by former detainees in 2003 and 2004, declared Article 263 § 4 of the Code unconstitutional in so far as it related to the investigation stage of criminal proceedings (no. SK 58/03). The provision in question provided that the detention measure could be extended beyond two years if the pre-trial proceedings

could not be completed because of "important obstacles" which could not be overcome (see paragraph 73 above). It did not set any statutory time-limit for extending the detention measure. The Constitutional Court considered that the provision, by its imprecise and broad wording, could lead to arbitrary decisions by the courts on detention on remand and thus infringe the very essence of constitutional rights and freedoms. Referring to other grounds for extraordinary extensions of detention on remand under Article 263 § 4, namely where the criminal proceedings have been suspended, the accused is under prolonged psychiatric observation, preparation of an expert opinion in protracted, evidence has to be collected in a particularly complex case or in a foreign country, or the accused has intentionally caused a delay in the proceedings, the Constitutional Court stated that although those criteria were to some extent also vague, their constitutionality could be ensured through their precise definition formulated through practice and by reference, *inter alia*, to the settled case-law of the European Court of Human Rights as regards violations of Article 5 § 3 of the Convention. The Constitutional Court ruled that the provision in the part which had been declared unconstitutional was to be repealed within six months of the date of the publication of the judgment in the Journal of Laws (*Dziennik Ustaw*).

On 16 February 2007 the "important obstacles" clause was reformulated in a new Article 263 § 4(a) of the Code.

### B. Compensation for unlawful detention on remand

83. Chapter 58 of the Code, entitled "Compensation for wrongful conviction, detention on remand or arrest", stipulates that the State is liable for wrongful convictions or for unjustifiably depriving an individual of his liberty in the course of criminal proceedings against him.

Article 552 provides, in so far as relevant:

> "1. An accused who, as a result of the reopening of the criminal proceedings against him or of a cassation appeal, has been acquitted or resentenced under a more lenient substantive provision, shall be entitled to compensation from the State Treasury for the pecuniary and non-pecuniary damage he has suffered in consequence of having served all or part of the sentence initially imposed on him.
>
> ...
>
> 4. Entitlement to compensation for pecuniary and non-pecuniary damage shall also arise in the event of manifestly wrongful arrest or detention on remand."

In the light of well-established domestic practice, the requirements for compensation for manifestly unlawful detention on remand under Article 552 § 4 shall comply cumulatively with the requirements stemming from paragraph 1 of that provision (see, in particular, Supreme Court's

resolution no. IKZP 27/99 of 15 September 1999 and the Supreme Court's decision no. WZ 26/01 of 28 June 2001).

Pursuant to Article 555, an application for compensation for manifestly wrongful detention on remand has to be lodged within one year of the date on which the decision terminating the criminal proceedings in question became final.

It follows that proceedings related to an application under Article 552 § 4 are subsequent to and dependent on the outcome of the original criminal proceedings in which the detention was ordered. The claimant may only retrospectively seek a ruling as to whether his detention was in compliance with the applicable procedure or justified. He cannot, however, test the lawfulness of his continued detention on remand and obtain release. Moreover, if compensation is sought for manifestly wrongful detention on remand, this remedy is only available if the claimant has been acquitted or the relevant criminal investigation against him or his criminal court proceedings have been discontinued.

84. Admittedly, allegations that detention on remand is manifestly wrongful because of procedural breaches in imposing the measure are examined not in the light of the ultimate outcome of the claimant's criminal case, but in view of the circumstances existing at the time when the measure was imposed, that is to say when the decision was issued in breach of procedure. On the other hand, the State will not be held liable for manifestly wrongful detention if the pecuniary or non-pecuniary damage suffered by the claimant had been completely redressed, for example, by means of deducting the length of the claimant's detention on remand from the sentence imposed by the court in the related or other criminal trial (see the Supreme Court's resolution no. IKZP 27/99, cited above; the Supreme Court's decision of 20 September 2007 given by seven judges (IKZP28/7, OSNKW 2007/10/07); the Supreme Court's decision of 15 November 2007 (IV KK 82/07, OSNwSK 2007/1/2610), and the Supreme Court's judgment of 2 April 2001 (V KKN 481/99, OSNKW 2001, nr 7-8, poz. 66).

85. The above *lex specialis* remedy excludes the applicability of the provisions of civil law and general principles of the State's liability in tort as regulated in Article 417 et seq. of the Civil Code unless it is for the purpose of seeking redress for further damage which occurred as an indirect result of the wrongful detention on remand (see the Supreme Court's decision of 7 February 2007 (V KK 61/06, OSNKW 207, Nr 3, poz. 28) and the Rzeszów Court of Appeal's judgment of 13 March 2014 (II AKa 16/14); compare with the Wrocław Regional Court's judgment of 23 April 2013 (I C 40/12)).

## C. Constitutional complaint and its consequences

86. Article 79 § 1 of the Constitution provides as follows:

> "In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or other normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution."

Article 190 of the Constitution, in so far as relevant, provides as follows:

> "1. Judgments of the Constitutional Court shall be universally binding and final.
>
> 2. Judgments of the Constitutional Court ... shall be published without delay.
>
> 3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date for the end of the binding force of a normative act. This time-limit may not exceed [eighteen] months in relation to a statute or [twelve] months in relation to any other normative act ...
>
> 4. A judgment of the Constitutional Court on non-conformity with the Constitution, an international agreement or statute, of a normative act on the basis of which a final and enforceable judicial decision or a final administrative decision ... was given, shall be a basis for reopening of the proceedings, or for quashing the decision ... in a manner and on principles specified in provisions applicable to the given proceedings."

Article 540 of the Code provides that court proceedings which have been terminated with a binding decision may be reopened following a judgment of the Constitutional Court.

At the material time paragraph 2 of this provision read as follows:

> "The proceedings shall be reopened for the benefit of the accused if the provision of law which served as the basis for the conviction or conditional discontinuation has lost its binding force or has been amended as a result of a judgment of the Constitutional Court."

After an amendment, which entered into force on 19 September 2009, paragraph 2 was re-formulated as follows:

> "The proceedings shall be reopened for the benefit of the party if the Constitutional Court has ruled on non-compliance with the Constitution ... of a provision of law which served as the basis for a decision (*orzeczenie*); the reopening shall not be to the detriment of the accused."

87. On 22 July 2009 the Lublin Court of Appeal ruled in a case brought by a person seeking to reopen his criminal trial on the grounds that his detention prior to his conviction was unlawful in view of a 2008 Constitutional Court judgment (II AKo 116/09). The action failed because it was held that the law, which was later declared unconstitutional, was the basis only for the decisions on detention and not the judgments by virtue of which the claimant had been criminally convicted and sentenced.

88. On 5 October 2009 the Lublin Court of Appeal ruled in a case of a former detainee who sought compensation on the grounds that his detention on remand which had ceased in 2004 and 2006 respectively was unlawful in view of a 2008 Constitutional Court judgment (II Aka 165/09). The claimant's action failed. Firstly, it was held that the detention order was not unlawful because of the Constitutional Court's judgment because it had been made in compliance with the applicable law as interpreted at the relevant time. Secondly, it was considered that the action was, in any event, statute-barred because the time-limit of one year was not to be counted from the date of the Constitutional Court's judgment but from the end date of the claimant's detention on remand.

### D. Monitoring of detainees' correspondence

89. The legal provisions concerning the monitoring of detainees' correspondence applicable at the material time are set out in the cases of *Matwiejczuk v. Poland* (no. 37641/97, §§ 65 and 66, 2 December 2003) and *Drozdowski v. Poland* (no. 20841/02, §§ 9-15, 6 December 2005).

### E. Remedies for unreasonable length of proceedings

90. The relevant domestic law and practice concerning remedies for excessive length of judicial proceedings, in particular the applicable provisions of the 2004 Act, are described in the cases of *Charzyński v. Poland* (no. 15212/03 (dec.), §§ 12-23, ECHR 2005-V), *Ratajczyk v. Poland* (no. 11215/02 (dec.), ECHR 2005-VIII), and *Krasuski v. Poland* (no. 61444/00, §§ 43-46, ECHR 2005-V).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

91. On 20 January 2003 the applicant complained that his detention on remand imposed in connection with the second criminal case had been unlawful and not in accordance with a procedure prescribed by law within the meaning of Article 5 § 1 of the Convention. He maintained in this connection that his detention had been extended beyond 10 November 2002, that is, beyond the expiry of the statutory time-limit of two years for detention on remand, on the basis of decisions of the Regional Court based on general grounds. The applicant argued that the statutory period of two years under Article 263 § 3 of the Code should have been calculated irrespective of his concurrent detention in the first criminal case and,

consequently, Article 263 § 4 should have been applied to the effect that decisions concerning the preventive measure in question should have been taken by an appellate court and only on the basis of the exceptional grounds enumerated in that provision (see paragraph 73 above). He also argued that the law as applicable at the relevant time had been imprecise and unforeseeable.

Article 5 § 1 of the Convention, in its relevant part, 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. Admissibility

### *1. The parties' submissions*

92. The Government submitted that the applicant had not exhausted the domestic remedies available under Polish law. In particular, he had failed to lodge, before introducing his application with the Court, a complaint under Article 79 § 1 of the Polish Constitution (see paragraph 86 above) contesting the constitutionality of the provisions of the Code that had served as a basis for extending his detention on remand. The availability of such a remedy had been confirmed by two judgments of the Constitutional Court issued on 24 July 2006 (SK 58/03) (see paragraph 82 above) and 10 June 2008 (SK 17/07) (see paragraphs 77-80 above) in which it upheld the objections raised by the complainants and by the applicant's own constitutional complaint, which was lodged after the date of the introduction of the present application and discontinued on 10 March 2009 (see paragraphs 59-65 above).

The Government stressed that the applicant should have had recourse to the Constitutional Court as soon as his detention on remand had reached two years or, alternatively, on a later date prior to lodging his application with the Court. If his constitutional complaint had proved to be successful and Article 263 §§ 3 and 4 of the Code had been declared unconstitutional, he could have subsequently made a request to have the proceedings concerning the extension of his detention reopened or the relevant decision quashed, as provided by the applicable provisions of the Constitution read together with the Code.

93. The applicant submitted that before lodging his application with the Court, he had raised the issue of unconstitutionality of the relevant provisions by means of numerous interlocutory appeals against the detention decisions and his unsuccessful applications for release.

*2. The Court's assessment*

94. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to first use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65 and 66, *Reports of Judgments and Decisions* 1996-IV, and *Włoch v. Poland*, no. 27785/95, § 89, ECHR 2000-XI).

95. Moreover, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the material time, that is to say it was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Kennedy v. the United Kingdom*, no. 26839/05, § 109, 18 May 2010).

In the absence of a specifically introduced remedy, the development and availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by domestic case-law (see, *mutatis mutandis* and with reference to remedies for delay, *McFarlane v. Ireland* [GC], no. 31333/06, § 120, 10 September 2010 and *Vlad and Others v. Romania*, nos. 40756/06, 41508/07 and 50806/07, § 112, 26 November 2013). It is for the Government to submit any pertinent examples of domestic case-law to the Court with a view to demonstrating the scope of a newly established remedy and its application in practice (see *Melnītis v. Latvia*, no. 30779/05, § 50, 28 February 2012).

Once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case (see *Betteridge v. the United Kingdom*, no 1497/10, § 48, 29 January 2013).

96. The Court observes that from the moment his detention on remand reached two years (10 November 2002) until the date of the first judgment (1 September 2005) the applicant lodged nine appeals against the decisions ordering the extension of his detention on remand (see paragraphs 29, 32, 37, 40, 42 and 44 above). He also unsuccessfully requested that the detention measure applied in respect of him be lifted or changed (see paragraphs 38 and 43 above).

97. The Court has already found that those remedies, namely an appeal against a detention order or a request for release, whether submitted to the prosecutor or to the court, depending on the stage of the proceedings, and an appeal against a decision to extend detention, serve the same purpose under Polish law. Their objective is to secure the review of the lawfulness of detention at any given time in the proceedings, both in their pre-trial and trial stage, and to obtain release if the circumstances of the case no longer justify continued detention (see *Kacprzyk v. Poland*, 50020/06, § 29, 21 July 2009; *Iwańczuk v. Poland* (dec.), no. 25196/94, 9 November 2000; and *Wolf v. Poland*, nos. 15667/03 and 2929/04, § 78, 16 January 2007).

98. It has also been held that 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 have the lawfulness of detention examined by a court and the right to obtain compensation for any deprivation of liberty incompatible with Article 5 are two separate rights (see *Zdebski, Zdebska and Zdebska v. Poland* (dec.), no. 27748/95, 6 April 2000).

A domestic court invited to rule on an action for damages caused by unlawful detention examines the matter after the events and therefore does not have jurisdiction to order release if the detention is unlawful, as Article 5 § 4 requires it should (see *Weeks v. the United Kingdom*, 2 February 1987, § 61, Series A no. 114). A civil action for damages would have no bearing on the question of exhaustion of domestic remedies in respect of the applicant's complaint under Article 5 § 1 (see *Belchev v. Bulgaria* (dec.), no. 39270/98, 6 February 2003, and *Nakhmanovich v. Russia* (dec.), no. 55669/00, 28 October 2004).

99. The Court accepts that the general and intended consequence of the Constitutional Court's judgments in Poland is that they result in the reopening of cases which had been decided on the basis of an unconstitutional provision or rule of law (see paragraph 80 above). However, the Government did not provide persuasive explanations that a constitutional complaint can lead to the release of the person remanded in custody if the legal basis of the detention measure is declared contrary to the Constitution by the Constitutional Court. Accordingly, in the instant case the Government, upon whom the burden of proof lies, have not satisfied the Court that a constitutional complaint constituted a remedy which was practical and effective for the applicant to challenge the lawfulness of his detention in the sense of offering him timely and reasonable prospects of correcting the alleged constitutional shortcomings of his detention while it was ongoing (see, *mutatis mutandis*, *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 40-44, ECHR 2008-III; *Šoć v. Croatia*, no. 47863/99, §§ 93-94, 9 May 2003; *Apostol v. Georgia*, no. 40765/02, §§ 38 and 46, ECHR 2006-XIV; and *Vodeničarov v. Slovakia*, no. 24530/94, §§ 38-44, 21 December 2000).

100. In view of the above considerations, the Court concludes that for the purposes of Article 35 § 1 of the Convention, the applicant has exhausted domestic remedies and that the Government's plea of inadmissibility on the grounds of non-exhaustion of domestic remedies must be dismissed.

101. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. The parties' arguments*

#### (a) The applicant

102. The applicant complained that his detention on remand in connection with the second criminal case had been unlawful within the meaning of Article 5 § 1 of the Convention, in so far as it had been extended beyond 10 November 2002, the expiry of the statutory time-limit for detention on remand, by decisions of the lower courts based on general grounds. The applicant argued that by doing so, the domestic courts had not acted in accordance with a procedure prescribed by law and, alternatively, that the procedure itself had not been sufficiently precise and foreseeable.

The applicant argued that the statutory two-year period under Article 263 § 3 of the Code should have been calculated irrespective of his concurrent detention in the first criminal case and that, consequently, Article 263 § 4 should have been applied to the effect that decisions concerning the preventive measure in question should have been taken by an appellate court and only on the particular grounds enumerated in that provision.

#### (b) The Government

103. The Government submitted that the extension of the applicant's detention on remand after 10 November 2002 was not contrary to Article 5 § 1 of the Convention. They further argued that the Court ought to give due consideration to the fact that for part of the time he had been remanded in custody in connection with the second criminal case, the applicant had also been deprived of his liberty in the framework of the first set of criminal proceedings against him. The Government relied on the principle set out in the case of *Kudła v. Poland* that "in view of the essential link between Article 5 § 3 of the Convention and Article 5 § 1 (c), a person convicted at first instance cannot be regarded as being detained "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence", as specified in the latter

provision, but is in the position provided for by Article 5 § 1 (a), which authorises deprivation of liberty "after conviction by a competent court" (see *Kudła v. Poland* [GC], no. 30210/96, § 104, ECHR 2000-XI, and *B. v. Austria*, 28 March 1990, § 36-39, Series A no. 175).

*2. The Court's assessment*

**(a) Period to be taken into consideration**

104. The Court is in no doubt, and it was common ground between the parties, that the applicant was remanded in custody on 10 November 2000 in accordance with a procedure prescribed by law by a competent court within the meaning of Article 5 § 1 (c) of the Convention (see paragraph 17 above). Furthermore, the applicant does not contest the lawfulness of his detention on remand up until 10 November 2002.

105. In consequence, the issue of the lawfulness of the applicant's detention under Article 5 § 1 (c) of the Convention for the purpose of bringing him before the competent legal authority in the framework of the second criminal case prior to the delivery of a first judgment by the trial court (see paragraph 74 above), arises in so far as the measure was in place from: (i) 10 November 2002 to 27 February 2003 (when the Siedlce Regional Court ordered the applicant's release) and (ii) 30 December 2003 (when the Mińsk Mazowiecki District Court again remanded the applicant in custody) to 1 September 2005 (when the applicant was convicted) (see paragraphs 32, 36 and 45 above).

106. It must be noted, however, that during the entire first period as mentioned above, the applicant was concurrently detained within the meaning of Article 5 § 1 (c) of the Convention in connection with the first criminal case (see paragraphs 10 and 11 above). The lawfulness of his detention pending the first set of criminal proceedings was not challenged by the applicant either before the Court or any domestic court. Consequently, irrespective of whether or not the second preventive measure was at that time in accordance with the law, the applicant was in any event lawfully deprived of his liberty, with his rights being restricted under the ordinary conditions of the regime applicable to those on remand. In addition, during part of the second of the above-mentioned periods, the applicant was concurrently deprived of his liberty, having been convicted by a competent court and serving a prison sentence from 7 November 2003 until 11 July 2005 (see paragraphs 12 and 47 above). As a result, his rights in this period were no longer protected by Article 5 § 1 (c) but by Article 5 § 1 (a) of the Convention.

107. It follows that the Court will examine the lawfulness of the applicant's detention under Article 5 § 1 (c) in the framework of the second criminal case in the period from 11 July to 1 September 2005, that is to say from the date he finished serving his first criminal sentence (see

paragraph 12 above) until the date he was convicted by the first-instance court in the second case (see paragraph 45 above).

**(b) Lawful detention in compliance with a procedure prescribed by law**

108. The issue to be determined is whether the applicant's detention in connection with the second criminal case beyond 10 November 2002, and more precisely, from 11 July to 1 September 2005, was "unlawful", because, as was alleged, it had not complied with "a procedure prescribed by law" and, alternatively, because the procedure itself had not been sufficiently precise and foreseeable.

*(i) General principles*

109. It is well established in the Court's case-law under Article 5 § 1 of the Convention that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be "lawful" (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008-I, and *M. v. Germany*, no. 19359/04, § 90, ECHR 2009-VI).

Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports* 1998-VI; *Saadi*, cited above, § 67; *Kafkaris v. Cyprus* [GC], no. 21906/04, § 116, ECHR 2008-I; *Ladent v. Poland*, no. 11036/03, § 47, 18 March 2008; and *Schönbrod v. Germany*, no. 48038/06, § 81, 24 November 2011). There thus exists a certain overlap between this term and the general requirement stated at the beginning of Article 5 § 1, namely the observance of "a procedure prescribed by law" (see *Bordovskiy v. Russia*, no. 49491/99, § 41, 8 February 2005, and *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33).

110. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see *Bordovskiy*, cited above, § 42, and *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 1996-III).

111. A period of detention is, in principle, "lawful" if it is based on a court order. A subsequent finding of a superior domestic court that a lower court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention (see *Mooren v. Germany* [GC], no. 11364/03, § 74, 9 July 2009; *Benham*, cited above, § 42; *Douiyeb v. the Netherlands* [GC], no. 31464/96, § 45, 4 August 1999; *Minjat v. Switzerland*, no. 38223/97, § 41, 28 October 2003; and *Khudoyorov v. Russia*, no. 6847/02, § 128, ECHR 2005-X (extracts)).

For the assessment of compliance with Article 5 § 1 of the Convention a basic distinction has to be made between *ex facie* invalid detention orders – for example, given by a court acting in excess of jurisdiction (see *Marturana v. Italy*, no. 63154/00, § 78, 4 March 2008) or where the interested party did not have proper notice of the hearing (see *Khudoyorov*, cited above, § 129, and *Liu v. Russia*, no. 42086/05, § 79, 6 December 2007) – and detention orders which are *prima facie* valid and effective unless and until they have been overturned by a higher court (ibid.). A detention order must be considered as *ex facie* invalid if the flaw in the order amounted to a "gross and obvious irregularity" in the exceptional sense indicated by the Court's case-law (compare *Liu*, cited above, § 81; *Garabayev v. Russia*, no. 38411/02, § 89, 7 June 2007; and *Marturana*, cited above, § 79). Accordingly, unless they constitute a gross and obvious irregularity, defects in a detention order may be remedied by the domestic appellate courts in the course of judicial review proceedings (see *Mooren*, cited above, § 75).

112. When speaking of "law" the Convention alludes to the concept which comprises statute as well as case-law. In this connection, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one. It has thus included both enactments of lower rank than statutes and unwritten law. In sum, the "law" is the provision in force as the competent courts have interpreted it (see in particular, in the context of Article 7, *Kafkaris*, cited above, § 139; in the context of Article 8, *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A and *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 93, Series A no. 12; in the context of Article 9, *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 88, ECHR 2005-XI; in the context of Article 10, *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 83, 14 September 2010; *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 47, Series A no. 30 and *Casado Coca v. Spain*, 24 February 1994, § 43, Series A no. 285 A; and in the context of Article 11, *Vyerentsov v. Ukraine*, no. 20372/11, § 63, 11 April 2013).

113. Moreover, as the Court has held in the context of Article 7 of the Convention, it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which to a greater or lesser extent are vague, and whose interpretation and application are questions of practice. However clearly drafted a legal provision may be, in any system of law, including criminal, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace

with changing circumstances. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain. The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States (see *Del Rio Prada v. Spain* [GC], no. 42750/09, §§ 92 and 93, ECHR 2013-VI with further references).

114. To assess whether the applicant's detention was in conformity with the requirements of Article 5 § 1 (c) of the Convention as regards its lawfulness, the Court must have regard to the legal situation as in force at the material time (see *Włoch*, cited above, § 114).

115. The "lawfulness" of detention under domestic law is the primary but not always a decisive element. The Court must, in addition, be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1, which is to prevent people from being deprived of their liberty arbitrarily. To this end, the Court must also ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see, among many other authorities, *Baranowski v. Poland*, no. 28358/95, § 51, ECHR 2000-III; *Winterwerp*, cited above, § 45; and *Erkalo*, cited above, § 52).

116. Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Del Rio Prada*, cited above, § 125; *Baranowski*, cited above, § 52; and *M. v. Germany*, cited above, § 90).

*(ii) Application of these principles to the present case*

117. The Court notes that under Article 263 § 3 of the Code, as applicable at the relevant time (see paragraph 73 above), the length of detention on remand until the delivery of a first judgment by the trial court was in principle not to exceed two years. Under Article 263 § 4 of the Code (see paragraph 82 *in fine* above) detention on remand pending trial could be extended for a fixed period exceeding two years only by an appellate court if at least one of the following conditions was met: (i) the criminal proceedings were adjourned; (ii) the identity of the accused had to be established or confirmed; (iii) the accused was under prolonged psychiatric observation; (iv) preparation of the expert's opinion was protracted; (v) evidence had to be obtained either in a particularly complicated case or from abroad; (vi) if the accused caused a delay in the proceedings; or

(vii) there were other important obstacles which could not be overcome (see paragraph 73 above).

118. In the light of the uniform practice of the domestic courts, including the Supreme Court, the statutory two-year-period of detention on remand within the meaning of the above-mentioned provisions, was, at the relevant time, considered to comprise only the actual period of the person's deprivation of liberty imposed on the basis of a detention decision given in the course of that particular set of proceedings. Consequently, so long as the detainee had been concurrently remanded in custody or was serving a prison sentence in the framework of another, earlier criminal case, it was considered that the statutory period of detention in the later case was not running (see paragraphs 75 and 76 above). This, in turn, meant that the preventive measure in question could be extended by a court of lower instance and on general grounds even after the period of two years had elapsed in the later criminal proceedings.

119. On 10 June 2008 the Constitutional Court declared Article 263 § 3 of the Code unconstitutional because, *inter alia*, its imprecise wording required a rule of law to be formulated in case-law, hence outside an act of law, on the manner of calculating the length of detention on remand running concurrently with a sentence of deprivation of liberty (see paragraphs 77-80 above). As a result of this ruling, on 12 February 2009 the provision was amended, with the amendment becoming effective on 19 February 2009 (see paragraph 81 above). From that time onwards, in situations where detention on remand ran concurrently with a prison sentence imposed in another case, the relevant period was to include the term of the prison sentence the detainee was serving. The domestic approach to situations in which detention on remand runs concurrently with a measure of detention on remand imposed in another case has remained unchanged (see paragraph 75 above).

120. The Court observes at the outset that in some earlier cases it has had due regard to rulings of the Constitutional Court declaring domestic legislation unconstitutional and/or incompatible with the Convention (see, *inter alia*, in respect of: the Bug river claims, *Broniowski v. Poland* [GC], no. 31443/96, § 131, ECHR 2004-V; rent-control legislation and Article 1 of Protocol No. 1, *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 208, ECHR 2006-VIII; overcrowding of detention facilities and Article 3 of the Convention, *Orchowski v. Poland*, no. 17885/04, § 123, 22 October 2009; regulation of prisoners' visiting rights and Article 8 of the Convention, *Wegera v. Poland*, no. 141/07, §§ 73-74, 19 January 2010; the status of assessors and the standard of "independent tribunal" under Article 6 of the Convention, *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, §§ 52 and 53, 30 November 2010; and "judge or other officer authorised by law to exercise judicial power" under Article 5 § 3 of the Convention, *Mirosław Garlicki v. Poland*, no. 36921/07, § 112, 14 June 2011).

Article 41 of the Polish Constitution (see paragraph 71 above) is formulated essentially in the same manner as Article 5 § 1 of the Convention. In view of the principle of subsidiarity, the Constitutional Court's ruling of 10 June 2008 (see paragraph 120 above) could constitute a basic criterion in the Court's own assessment of whether the law regulating the extension of detention on remand beyond two years was, at the relevant time, of the quality meeting the standard set out in Article 5 § 1 of the Convention.

The Court notes in this context that the constitutional standard of clarity and precision of criminal legislation as applied by the Polish Constitutional Court requires that the text of a statute enacted by parliament be sufficient to make it foreseeable how the provisions will be applied.

121. Turning to the circumstances of this case, it is clear to the Court that, as the law stood at the time the applicant was detained within the meaning of Article 5 § 1 (c) in the framework of the second criminal case, the preventive measure in question was extended beyond 10 November 2002 in conformity with the applicable law as it was uniformly interpreted by the domestic courts (compare with *Del Rio Prada*, cited above, § 103). It must be noted that in its decision of 30 October 2002 the Lublin Court of Appeal fully adhered to the practice described above, expressly declaring that it lacked jurisdiction to decide on the applicant's detention on remand and holding that in the applicant's situation, the term of his effective detention on remand had not yet begun to run in the framework of the second criminal case (see paragraph 28 above).

122. In this context, the Court reiterates its case-law according to which the principle of legal certainty, which is necessarily inherent in the law of the Convention, may dispense States from reopening or questioning legal acts or situations that antedate judgments of the Court declaring domestic legislation incompatible with the Convention. The same considerations apply where a Constitutional Court repeals domestic legislation as being unconstitutional (see, *Henryk Urban*, cited above, § 65 – in the context of the Court's ruling under Article 41 in a case concerning a law on the status of assessors and the notion of an "independent tribunal" under Article 6; *P.B. and J.S. v. Austria*, no. 18984/02, § 49, 22 July 2010 – in the context of a law excluding a person in a homosexual relationship from insurance cover as a dependant of a civil servant and Article 14, read in conjunction with Article 8; and *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31 – in the context of a law regulating the maternal affiliation of a child born out of wedlock and Article 8).

In the instant case, the subsequent shift in the understanding of Article 263 § 3 of the Code, resulting from the relevant Constitutional Court judgment and the corresponding textual amendment, occurred only after the applicant's detention had come to an end and, in any event, concerned only situations where preventive detention ran concurrently with detention after

conviction. It did not therefore render the procedure in the applicant's case and the measure in question retroactively void. In the Court's view, the change in domestic law does not warrant the conclusion that the measure had previously been non-compliant with the Convention.

123. In fact, the earlier domestic practice of viewing a measure of detention on remand as not effectively running as long as it was concurrent with a measure of deprivation of liberty after conviction is compatible with the Court's own case-law (see *Borisenko v. Ukraine*, no. 25725/02, § 44, 12 January 2012, and *X. v. Federal Republic of Germany* (dec.), no. 8626/79, 12 March 1981). Consequently, the shift which occurred in Poland was not aimed at limiting human rights or even aligning the meaning of the national notion of "detention" to that under Article 5 § 1 (c) of the Convention, since the previously binding rule of law conformed to Convention standards. The amendment further strengthened the rights of individuals concerned, but had no impact on the applicant.

124. In view of the above considerations, the Court finds that the applicant's detention on remand, in so far as it was extended beyond 10 November 2002 in the framework of the second criminal case prior to the delivery of the first judgment by the trial court and in so far as it fell under Article 5 § 1 (c) of the Convention (see paragraph 107 above), cannot be viewed as "unlawful" on the grounds that, as alleged by the applicant, there was a breach of the domestic procedure as it was interpreted and applied at the material time.

125. Moreover, it is the Court's understanding of the Constitutional Court's 2008 judgment that the breach of constitutional principles resulted from the fact that Article 263 § 3 of the Code, owing to its ambiguity, was completed by a rule from case-law and not statute. It must be observed that when speaking of "law", the Convention alludes to a concept which comprises statute as well as case-law and that the requirements of Article 5 § 1 are satisfied if the domestic courts sufficiently dissipate any doubts in interpreting the relevant legal provisions (see paragraphs 112 and 113 above). In other words, Article 5 § 1 requires precision and foreseeability of an applicable provision not necessarily on its own but as the competent courts have interpreted it. The judgment referred to above itself acknowledged that Article 263 § 3 of the Code had acquired a "uniform and authoritative" meaning through the practice of the Supreme Court (see paragraph 78 above and *a contrario*, *Šebalj v. Croatia*, no. 4429/09, §§ 192-95, 28 June 2011).

It follows that the relevant Polish criminal legislation, by reason of being defined through the courts' long-standing and uniform practice, satisfied the test of "foreseeability" of a "law" for the purposes of Article 5 § 1 of the Convention.

126. There has, accordingly, been no breach of that provision.

## II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

127. The applicant complained that the domestic courts had not given relevant and sufficient reasons for his continued detention pending the first and the second trials. He relied on Article 5 § 3 of the Convention, which, in so far as relevant, 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."

### A. Admissibility

128. The Government submitted that the Constitutional Court's judgment of 10 June 2008 which declared Article 263 of the Code unconstitutional (see paragraphs 77-80 above) and its decision given in the applicant's own case on 10 March 2009 (see paragraph 63 above), rendered the applicant's detention on remand between October 2002 and 1 September 2005 manifestly unjustified. In consequence, it was open to the applicant to make a request for compensation for manifestly unjustified detention on remand in accordance with Article 552 § 4 of the Code (see paragraph 83 above). In view of the foregoing, the Government invited the Court to reject the application for non-exhaustion of domestic remedies, pursuant to Article 35 § 1 of the Convention.

129. The Court reiterates that under the Convention case-law, where the 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 have the lawfulness of detention examined by a court and the right to obtain compensation for any deprivation of liberty incompatible with Article 5 are two separate rights (see *Zdebski and Zdebska*, decision cited above). The Court further reiterates that a request for compensation for manifestly unjustified detention on remand under Article 552 of the Code enables 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 are essentially designed to secure financial reparation for damage arising from the execution of unjustified detention on remand (see *Włoch*, cited above, §§ 90 and 91).

130. The Court observes that the applicant lodged appeals against nearly all the decisions by which the Jarosław District Court had extended his detention on remand in the framework of the first criminal case and applied on a number of occasions for release (see paragraph 8 and 11 above). He also appealed against the decision to arrest him in connection with the second criminal case (see paragraph 17 above) and brought at least fifteen interlocutory appeals against the subsequent detention decisions (see

paragraphs 20, 23, 25, 29, 32, 37, 40, 42, 44, 47 and 50 above). He also unsuccessfully sought to have the detention measure applied in respect of him lifted or changed (see paragraphs 18, 21, 26, 38 and 43 above).

131. Accordingly, the Court concludes that, for the purposes of Article 35 § 1 of the Convention, the applicant has made use of the domestic remedies available to him and the Government's plea of inadmissibility on the grounds of non-exhaustion must be dismissed.

132. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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*

133. Where an accused person is detained on remand for two or more separate periods on different sets of charges, the reasonable time guarantee of Article 5 § 3 requires a global assessment of the cumulative period (see *Piechowicz v. Poland*, no. 20071/07, § 188, 17 April 2012, and *Mitev v. Bulgaria*, no. 40063/98, § 102, 22 December 2004).

134. The cumulative period which the applicant spent in detention on remand within the meaning of Article 5 § 3 of the Convention amounted to a little over four years and six months.

The Court took into consideration, for the purposes of this calculation, the following periods of the applicant's detention on remand within the meaning of Article 5 § 1 (c) of the Convention: (i) from 11 July 2000, when the applicant was arrested, until 13 December 2001 (see paragraphs 6 and 9 above), which amounted to one year, five months and three days; (ii) from 23 April 2002 until 7 November 2003 (see paragraphs 10 and 12 above), which amounted to one year, six months and fifteen days; (iii) from 11 July 2005 (see paragraph 47 above) until 1 September 2005 (see paragraph 45 above), which amounted to one month and twenty-one days; and (iv) from 10 February 2006 until 6 July 2007 (see paragraphs 46 and 52 above), which amounted to one year, four months and twenty-four days.

The Court also took note of the fact that from 13 December 2001 until 23 April 2002, from 7 November 2003 until 11 July 2005, from 1 September 2005 until 10 February 2006 and from 6 July 2007 until his release on 10 April 2008, the applicant was detained "after conviction by a competent court", within the meaning of Article 5 § 1 (a) (see paragraphs 9, 10, 12, 45, 46, 52 and 53 above). Consequently, these periods of his detention fall outside the scope of Article 5 § 3 (see *Kudła*, cited above,

§ 104, and *Ślusarczyk v. Poland*, no. 23463/04, §§ 146 and 147, 28 October 2014).

*2. The parties' submissions*

**(a) The applicant**

135. The applicant submitted that the length of his detention on remand had been excessive and that the authorities had not provided sufficient justification for imposing the measure. In particular, he claimed that there had been no real risk of him absconding. In that connection, he submitted that he had fully cooperated with the authorities in the framework of the first criminal case. Lastly, he denied that he had used his rights as a defendant "in an excessive manner", causing unnecessary delays.

**(b) The Government**

136. The Government considered that the applicant's detention on remand satisfied the requirements of Article 5 § 3. It was justified by "relevant" and "sufficient" grounds, in particular the existence of a reasonable suspicion throughout the entire period of his detention that he had committed the offences with which he had been charged. Moreover, the Government considered that the applicant's protracted detention pending the second set of proceedings had been justified by a genuine public interest requirement, namely the fact that he had been charged with a serious offence and had been facing a lengthy prison sentence. The Government also noted that the applicant's detention on remand had been justified by the risk that he would obstruct the proceedings.

*3. The Court's assessment*

**(a) General principles**

137. The Court reiterates that under the second limb of Article 5 § 3, a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify his continued detention. Moreover, the domestic courts "must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release". Article 5 § 3 of the Convention cannot be seen as authorising pre-trial detention unconditionally, provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Sarban v. Moldova*, no. 3456/05, §§ 95-97, 4 October 2005, with further references).

138. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the detention to be lawful under Article 5 § 1 (c) of the Convention. However, after a certain lapse of time, it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty (see, among many authorities, *W. v. Switzerland*, 26 January 1993, § 30, Series A no. 254 A).

139. The Convention case-law has developed four basic acceptable reasons for refusing bail: the risk that the accused will fail to appear for trial (see *Stögmüller v. Austria*, 10 November 1969, § 15, Series A no. 9); the risk that the accused, if released, would take action to prejudice the administration of justice (see *Wemhoff v. Germany*, 27 June 1968, § 14, Series A no. 7) or commit further offences (see *Matznetter v. Austria*, 10 November 1969, § 9, Series A no. 10) or cause public disorder (see *Letellier v. France*, 26 June 1991, § 51, Series A no. 207).

140. Furthermore, the Court has reiterated that shifting the burden of proof to the detainee person in matters of detention is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases (see *Rokhlina v. Russia*, no. 54071/00, § 67, 7 April 2005, and *Ilijkov v. Bulgaria*, no. 33977/96, § 85, 26 July 2001). Arguments for and against release must not be "general and abstract" (see *Clooth v. Belgium*, 12 December 1991, § 44, Series A no. 225), but must contain references to the specific facts and the applicant's personal circumstances justifying his detention (see *Panchenko v. Russia*, no. 45100/98, § 107, 8 February 2005).

141. Lastly, the Court emphasises that when deciding whether a person should be released or detained, the authorities have an obligation under Article 5 § 3 to consider alternative measures to ensure his or her appearance at trial (see *Sulaoja v. Estonia*, no. 55939/00, § 64, 15 February 2005, and *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000).

**(b) Application of the above principles in the present case**

142. The applicant was remanded in custody on charges of extortion, deprivation of liberty, making death threats and armed robbery.

143. In their detention decisions given in both sets of proceedings, the authorities referred to three grounds, namely (i) the reasonable suspicion against the applicant, (ii) the severity of the punishment to which he was liable and (iii) the risk that he would go into hiding if released. As regards the latter, they noted that in the past the applicant had rarely lived at his permanent address (see paragraphs 8 and 20 above).

144. At the later stage, the domestic courts extended the preventive measures, referring to the original grounds and giving the argument that delays had occurred in both trials for reasons which could not be attributed

to the courts (see paragraph 11 above). More particularly, the delay in the opening of the second trial had been because the applicant had challenged the judges (see paragraph 20 above) and, at the later stage, because there was a need for him to undergo psychiatric observation (see paragraphs 24, 25 and 29 above). It was also stressed that the risk that the applicant would obstruct the proper course of the proceedings if released was real, since many of his alleged accomplices were still in the community (see paragraphs 23 and 31 above).

145. On 27 February 2003 the detention measure in the second case was lifted as the domestic court considered that the grounds for his detention were no longer valid since his trial had been stayed (see paragraph 32 above). In fact, he remained in custody until 7 November 2003 under the detention order issued in the framework of the first criminal case (see paragraphs 11 and 33 above).

146. After the applicant finished serving his prison sentence imposed in the first case and before he was convicted for the first time in the second case, that is to say between 11 July and 1 September 2005, his detention on remand pending the second trial was extended by the Mińsk Mazowiecki Court on 23 June 2005 (upheld on appeal by Siedlce Regional Court on 28 July 2005). The court referred to all the same grounds as previously (see paragraph 44 above).

147. On 30 December 2003 the second criminal trial was resumed and the applicant was remanded in custody on the three original grounds and, additionally, in view of the possibility that the psychiatric observation could be scheduled for March 2004 (see paragraph 36 above). In their subsequent decisions to extend the applicant's detention on remand, the domestic courts emphasised that the likelihood that a severe punishment would be imposed on him was, under domestic law, in itself sufficient reason to justify the detention measure. In addition, the domestic courts continued to refer to the other original grounds, namely reasonable suspicion and the risk that the applicant would obstruct the proceedings if released. The latter reason was continuously referred to in spite of the fact that the domestic courts acknowledged that the applicant had not to date attempted to interfere with the proceedings (see paragraphs 37, 39, 41, 42 and 44 above). It was also noted that his effective detention on remand in that case had up to that point lasted less than two years, in view of the fact that he had concurrently been serving the prison sentence imposed in the other case (see paragraph 41 above).

148. Lastly, towards the end of this set of the criminal proceedings, the applicant's detention on remand was extended in the period between 7 March 2006 and 6 July 2007, on the basis of the reasonable suspicion against him and the severity of the punishment which could be expected. It was also expressly noted that the latter element had created a presumption

that he would attempt to obstruct the proper conduct of the proceedings if released (see paragraphs 47, 48 and 50 above).

149. The Court accepts that the reasonable suspicion against the applicant of having committed a serious offence could initially warrant his detention. However, with the passage of time, that ground became less and less relevant. The Court must then establish whether the other grounds adduced by the domestic courts – the severity of the anticipated sentence, the risk of him absconding or, otherwise, obstructing the course of the proceedings – were "relevant" and "sufficient" (see *Kudła*, cited above, § 111).

150. The Court agrees that the risk that the applicant would obstruct the proceedings by attempting to persuade witnesses to give false evidence could be a valid reason to extend his detention but only at the earlier stage of the proceedings, in 2002, when his alleged accomplices had not been apprehended by the authorities (see paragraph 23 above).

151. According to the authorities, in both criminal trials, the likelihood of a severe sentence being imposed on the applicant created a presumption that he would obstruct the proceedings. However, the Court would reiterate that, while the severity of the sentence faced is a relevant element in the assessment of the risk of somebody absconding or re-offending, the seriousness of the charges cannot in itself justify long periods of detention on remand (see *Michta v. Poland*, no. 13425/02, §§ 49, 4 May 2006).

152. With this is mind, the Court is of the view that the seriousness of the charges cannot in itself justify the fact that the applicant was held in detention for more than four and a half years (see *Michta*, cited above, §§ 42 and 49, for detention lasting two years and eleven months, and *Goral v. Poland*, no. 38654/97, § 68, 30 October 2003, for detention lasting eighteen months).

153. As regards the argument that he was likely to abscond because before his arrest he had rarely lived at his permanent address, the Court notes that it was not alluded that he had actually gone into hiding, moved abroad or that his whereabouts had been otherwise unknown. To that effect, it does not appear that the authorities had any trouble finding and arresting him in July 2000.

154. 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 (see the case-law cited in paragraph 141 above). 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 *G.K. v. Poland*, no. 38816/97, § 85, 20 January 2004). A range of other, less stringent preventive measures could have been alternatively considered and imposed on the applicant to ensure his presence and participation in the proceedings.

155. Lastly, it is noted that the offences with which the applicant had been charged, even though they carried a severe punishment, did not belong to the category of organised crime (compare *Bąk v. Poland*, no. 7870/04, § 56, 16 January 2007). It does not appear that the applicant's cases presented particular difficulties for the investigative authorities or for the courts to determine the facts and mount a case against him, as would undoubtedly have happened if the proceedings had concerned organised crime (see *Celejewski v. Poland*, no. 17584/04, § 37, 4 May 2006, and *Malik v. Poland*, no. 57477/00, § 49, 4 April 2006).

156. Having regard to the foregoing, the Court concludes that the grounds given by the domestic authorities could not justify the overall period of the applicant's detention. In these circumstances it is not necessary to examine whether the proceedings were conducted with special diligence.

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

## III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

158. The applicant complained that his correspondence with his lawyer during his detention pending trial had been monitored. In addition, the material in the case file pointed to the suggestion that his communication with the Court had also been monitored.

He invoked Article 8 of the Convention, which in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for ... his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

### A. Admissibility

#### *1. The Government's objection of non-exhaustion of domestic remedies*

159. The Government submitted that the applicant had not exhausted the available domestic remedies. He had failed to bring an action under Article 24 § 2 read in conjunction with Article 448 of the Civil Code. These provisions would have allowed him to assert that by censoring his correspondence, the authorities had breached his personal rights protected by the Civil Code and, on that account, to claim compensation for non-pecuniary damage.

In this connection the Government relied on a Warsaw Regional Court judgment given on 27 November 2006 in which a prisoner was awarded 5,000 Polish zlotys (PLN) in damages from the State Treasury for a breach of the secrecy of his correspondence with the Central Board of the Prisons Service and the Central Electoral Office. The court held that the secrecy of an individual's correspondence was one of the personal rights protected under Article 23 of the Civil Code, and that in the event of a breach a claimant could be awarded compensation for non-pecuniary damage.

160. The applicant submitted that his letters to his lawyer had been opened and censored in breach of domestic law and Article 8 of the Convention. He did not comment on the Government's objection.

*2. The Court's assessment*

161. The applicant complained under Article 8 that four of his letters to his lawyer had been censored. In addition, the Court raised of its own motion the suggestion that the applicant's correspondence with the Court had been opened and read. Each of the alleged interferences with the applicant's correspondence had occurred at the time of his detention pending trial.

162. As regards the censorship of the applicant's letters to his lawyer, the Court notes that the alleged interference occurred in 2001 and 2003 (see paragraph 67 above), whereas the Government relied on the Warsaw Regional Court's judgment of 27 November 2006 in support of their non-exhaustion plea (see paragraph 159 above). Any relevance that the latter judgment might possibly have to the present case is therefore reduced by the fact that it was given long after the interference in question and the lodging of the application with the Court (see, for example, *Lewak v. Poland*, no. 21890/03, §§ 25-27, 6 September 2007; and, in contrast, *Bišta v. Poland*, no. 22807/07, §§ 47-50, 12 January 2010). Furthermore, the Court observes that the judgment relied on by the Government was delivered by a first-instance court.

163. As regards the applicant's letters to the Court (see paragraphs 69 and 70 above), the applicant could not have been aware that they had been censored by the authorities. The applicant cannot therefore be required to bring any domestic proceedings to obtain redress for the alleged breach of his right to respect for his correspondence.

164. For these reasons, the Government's plea of inadmissibility on the grounds of non-exhaustion of domestic remedies must be dismissed.

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

## B. Merits

### *1. Existence of interference*

166. The Court notes that four envelopes sent by the applicant to his lawyer bear stamps marked "Jarosław District Court" and a handwritten note stating "censored on..." (*ocenzurowano dn.*). In addition, two envelopes sent by the applicant to the Court bear stamps marked "Jarosław District Court" and a handwritten note stating "Censored on 30 November 2001" and "Censored on 26 July 2002" respectively (see paragraphs 67, 69 and 70 above).

167. The Court has held on many occasions that as long as the Polish authorities continue the practice of marking detainees' letters with the "censored" stamp, it has no alternative but to presume that those letters have been opened and their contents read (see *Matwiejczuk*, cited above, § 99; *Pisk-Piskowski v. Poland*, no. 92/03, § 26, 14 June 2005; *Michta*, cited above, § 58; and *Lewak*, cited above, § 29). Accordingly, the Court considers that, despite no separate stamp being visible on the letter, it can be presumed that the envelope was opened and its content read. The Court notes that the Government have not provided any explanation to rebut this presumption in the instant case. In this context, the statement of the domestic court in its ruling of 25 November 2003 – that the applicant's correspondence with his lawyer had not been read and the words "censored" had been automatically stamped on his letters (see paragraph 68 above) – do not alter the Court's finding.

168. It follows that in respect of the applicant's letters sent to his lawyer and to the Court, there was an "interference" with his right to respect for his correspondence guaranteed by Article 8 of the Convention.

### *2. Whether the interference was "in accordance with the law"*

169. The Court notes that the interference occurred while the applicant was in detention on remand and that the Government have failed to show that it had any legal basis in domestic law.

170. The Court observes that under Article 214 of the Code of Execution of Criminal Sentences, detainees enjoy the same rights as those convicted by a final judgment. Accordingly, the prohibition on censorship of correspondence with a detainee's counsel contained in Article 8 § 3 of the same Code, which expressly relates to convicted people, is also applicable to prisoners on remand (see *Michta*, cited above, § 61, and *Kwiek v. Poland*, no. 51895/99, § 44, 30 May 2006). Moreover, the prohibition on censorship of convicted people's correspondence with the Court, which is set forth in Article 103 of the Code of Execution of Criminal Sentences, is likewise applicable to those remanded in custody (for domestic provisions

concerning monitoring of detainees' correspondence, (see paragraph 89 above).

171. The censorship of the applicant's letters to his lawyer and to the Court was therefore contrary to domestic law. It follows that the interference in the present case was not "in accordance with the law".

172. Having regard to this finding, the Court does not consider it necessary to ascertain whether the other requirements of Article 8 § 2 of the Convention were complied with.

Consequently, the Court finds that there has been a violation of Article 8.

## IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

### A. Alleged violation of Article 6 § 1 of the Convention on account of the unfairness of the two sets of criminal proceedings against the applicant and criminal proceedings against third parties

173. The applicant further complained that the two sets of criminal proceedings instituted against him and the criminal proceedings against the prison staff (see paragraph 66 above) had been unfair. In particular, he complained that the prosecution authorities had entirely disregarded evidence which would have exonerated him, that he had not had a face-to-face confrontation with certain witnesses, that he had not been given access to the case file, that the witness statements had been taken "in a biased manner", and that the prosecution and the courts had wrongly assessed the evidence and had made erroneous findings. The applicant relied on Article 6 § 1 of the Convention which, in its relevant part, provides:

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

174. In so far as the applicant's complaint concerns the first set of criminal proceedings against him, the Court observes that, in accordance with Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references, and *Antonicelli v. Poland*, no. 2815/05, § 48, 19 May 2009).

175. In the present case, the Court notes that the applicant's complaint is essentially challenging the outcome of the proceedings. Assessing the

circumstances of the case as a whole, there is no indication that the proceedings were conducted unfairly.

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

176. As to the complaint concerning the second set of proceedings, the Court notes that the applicant failed to lodge a cassation appeal with the Supreme Court against the judgment of the Lublin Court of Appeal delivered on an unspecified date prior to March 2011 (see paragraphs 56 and 57 above). A cassation appeal is a remedy which would have enabled the applicant to submit the substance of his complaint to the domestic authorities and seek relief.

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

177. Lastly, in so far as the applicant complained that the criminal proceedings he had instituted against the prison staff had been unfair, the Court observes that he was not a defendant in those proceedings and that he had not joined the proceedings as a civil party. Furthermore, Article 6 does not guarantee a right to have third parties prosecuted or sentenced for a criminal offence (see, *mutatis mutandis*, *Perez v. France* [GC], no. 47287/99, §§ 57-72, ECHR 2004-I).

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

### B. Alleged violations of Article 6 § 1 of the Convention on account of the unreasonable length of two sets of criminal proceedings against the applicant and criminal proceedings against third parties

178. The applicant also complained that the length of the two sets of criminal proceedings against him and the criminal proceedings against the prison staff had been incompatible with the "reasonable time" requirement provided in Article 6 § 1 of the Convention.

179. However, in so far as the complaint concerns the two sets of criminal proceedings against the applicant, the Court finds that he has not exhausted domestic remedies as required by Article 35 § 1 of the Convention.

In this connection, the Court observes that it was open to the applicant to lodge, within six months of 17 September 2004 in relation to the first criminal case and much longer into the future in relation to the second case, his complaints about the length of the proceedings under the 2004 Act.

The Court has already examined that remedy for the purposes of Article 35 § 1 of the Convention and found it effective in respect of

complaints about the length of judicial proceedings in Poland. In particular, the Court considered that the remedy was capable both of preventing the alleged violation of the right to a hearing within a reasonable time or its continuation, and of providing adequate redress for any violation that has already occurred (see *Charzyński v. Poland* (dec.), no. 15212/03, §§ 36-42, ECHR 2005-V).

The applicant did not lodge, either in connection with the first or second criminal case against him, a complaint under the 2004 Act. He thus failed to avail himself of the available domestic remedy.

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

181. Moreover, in so far as the applicant complained about the criminal proceedings against the prison staff, this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) (see paragraph 177 above) and must be rejected in accordance with Article 35 § 4.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

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

182. The applicant claimed PLN 16,180 in respect of pecuniary damage. He submitted various bills and receipts proving his expenditure on food during his detention. He also made a claim for non-pecuniary damage for the suffering caused by his detention, but did not indicate an amount.

183. Referring to the claim for pecuniary damage, the Government submitted that there was no causal link between the alleged violation of Article 5 § 3 of the Convention and the loss alleged by the applicant. As regards the claim for non-pecuniary damage, they invited the Court to reject it as it was imprecise.

184. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, the Court accepts that the applicant suffered non-material damage, such as stress and frustration, in particular but not only, because of his futile efforts to be released from detention on remand. Making its assessment on an equitable basis, the Court awards the applicant 6,500 euros (EUR) under this head.

### B. Costs and expenses

185. The applicant also claimed PLN 36,053 (approximately EUR 8,800) for costs and expenses incurred before the Court and approximately EUR 12,000 for costs and expenses incurred before the domestic courts (lawyers' fees for the two sets of criminal proceedings). The applicant submitted various postage, translation and photocopying receipts amounting to approximately EUR 400. He also presented a number of invoices from his lawyers, amounting to approximately EUR 2,000.

186. The Government considered these sums excessive. They asked the Court to make an award, if any, only in so far as the costs and expenses concerned had been actually and necessarily incurred and were reasonable as to quantum.

187. Regard being had to the information in its possession and its established criteria, the Court considers it reasonable to award the applicant, who was not represented before this Court, the sum of EUR 400 for the Convention proceedings.

### C. Default interest

188. 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 under Article 5 §§ 1 and 3 concerning the lawfulness and length of the applicant's detention on remand and under Article 8 concerning censorship of the applicant's correspondence admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 5 § 1 of the Convention;

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

4. *Holds* that there has been a violation of Article 8 of the Convention;

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 6,500 (six thousand five hundred euros) in respect of non-pecuniary damage and EUR 400 (four hundred

euros) for costs and expenses, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 21 March 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Ganna Yudkivska
President