Cezary Kulesza*

Effective Defence in The Pre-trial Detention Proceedings

(Remarks in The Light of The Judgment of The Strasburg Tribunal of January 15, 2008, Łaszkiewicz v. Poland)[1]

ABSTRACT *- The article analyzes fundamental problems of the effective participation of the defence counsel in the pre-trial detention sessions in the Polish criminal procedure. One of the last judgments of the Strasburg Tribunal (Łaszkiewicz v. Poland case of January 15, 2008, ECHR nr 28481/03) constitutes the background for the deliberation. Violation of article 5 § 4 was announced because the procedure of the judicial application of the detention in preparatory proceedings in the Polish 1997 Code of Criminal Procedure does not fulfil the requirements of the adversarial procedure based on the principle of equal weapons. According to the Polish procedural regulations, the court grants the defence access to the files of not only preparatory proceedings but also or even most of all, to the detention motion, upon the approval of the prosecutor. Those regulations constituted basis for the recognition of the complaint by the Strasburg Tribunal. Based on the statistical data, author analyzes the reasons of weakness of the judicial control over the detention in the provisions of the 1997 Code of Criminal Procedure and reaches to the procedural practice based on the provisions of the previous Code of 1969. He indicates the "mudded" responsibility between the organs deciding upon the detention: applying*

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1 ECHR no. 28481/03

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prosecutor and deciding court. The article also deals with the problem of favor procuratori that is the need of some cooperation between the advocate and prosecutor necessary for the effective defence in the preparatory proceedings. Author emphasizes dangers arising from an increasing significance of the operational and identification actions in the Polish criminal procedure. He calls for the amendment of the provisions of the 1997 Coder of Criminal Procedure challenged by the ECHR.

The article analyzes fundamental problems of the effective participation of the defence counsel in the pre-trial detention sessions in the Polish criminal procedure. One of the last judgments of the Strasburg Tribunal (*Łaszkiewicz v. Poland* case of January 15, 2008, ECHR nr 28481/03) constitutes the background for the deliberation.

The facts related in the analyzed judgment were as follows:

On 16 October 2002 the applicant, Ms. Łaszkiewicz, was arrested in Katowice. The applicant was charged by the Katowice Regional Prosecutor with supplying significant amounts of heroin to the market between February 2000 and October 2000 in Poland and several European countries. She was also charged with acting in an organised criminal group of drug traffickers. During her questioning by the prosecutor, she confessed that she had attempted to smuggle heroin to Sweden and responded to all questions put by the prosecutor.

On 18 October 2002 the Katowice District Court remanded the applicant in custody until 16 January 2003 on reasonable suspicion that she had committed the offences referred to above. It held that there was a risk that the applicant would obstruct the proceedings by influencing witnesses since she had not confessed. The court also took into account that the applicant had been charged with acting in an organised criminal gang and had regard to the severity of the anticipated penalty.

The Katowice District Court, acting on the Katowice Regional Prosecutor's motions, subsequently prolonged the applicant's pre-trial detention on four occasions up until 16 October 2003 (see paragraphs 10, 18, 25 and 31 of the ECHR judgment).

During that period neither the applicant nor his defence counsel was served copies of the prosecutions' motions before the court decisions were taken.

In that connection, it must be noted that the Polish Code of Criminal Procedure of 1997 (CCP- as amended) does not impose an obligation on the prosecutor to com-

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municate his motion for imposition or prolongation of pre-trial detention to the defence (see i.a. article 250 § 3 of the Code).

Furthermore, in respect of two hearings on the applicant's detention before the Katowice District Court (26 March 2003 and 25 June 2003) the Regional Prosecutor made only summary oral submissions justifying his motion for prolongation of detention (see paragraphs 17 and 25 of the ECHR judgement). In the course of the whole proceedings counsel for the applicant repeatedly drew the Katowice District Court's attention to the limitations on the defence resulting from the refusal of access to the prosecutor's motions (see paragraphs 19 and 27).

The applicant's pre-trial detention was subsequently prolonged on one occasion by the Katowice Court of Appeal. It must be underline that in respect of those proceedings the Katowice Appellate Prosecutor provided counsel with a copy of his motion for prolongation of the applicant's detention.

In their detention decisions, the courts, in addition to the reasonable suspicion against the applicant, relied principally on three grounds, namely (1) the risk that the applicant might tamper with evidence since a number of suspects had remained at large, (2) the fact that the investigation concerned a criminal gang involved in drug-trafficking on a significant scale and (3) the severity of the penalty to which she was liable. The domestic courts also referred to the complexity of the investigation and the danger to society posed by drug-trafficking.

On 21 January 2004 the applicant's counsel requested the Regional Prosecutor to release the applicant subject to certain guarantees. On 27 January 2004 the Katowice Regional Prosecutor ordered the applicant's release, having obtained a bail deposit and an additional personal guarantee from a local councillor that the applicant would not obstruct the proceedings. The applicant's passport was seized and she was ordered not to leave the country. The prosecutor noted that despite the fact that more than 15 months had elapsed since the applicant's arrest, the investigation had not been concluded. He observed that the prosecution was endeavouring to obtain evidence from abroad, however it could not be predicted when that evidence would be made available. The prosecutor considered that the applicant should not be prejudiced by those delays and that other preventive measures would be sufficient to secure the proper conduct of the proceedings.

On 19 May 2004 the applicant's lawyer was informed by the Katowice Police that she could apply for access to the investigation file pursuant to Article 321 of the

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CCP as the investigation was coming to an end, and on 7 June 2004 the applicant's counsel was allowed to consult the file.

On 29 June 2004 the prosecution filed a bill of indictment with the Katowice District Court. The applicant was charged with drug-trafficking and acting in an organised criminal group. After receiving the bill of indictment the applicant made a plea and requested the trial court (pursuant to Article 387 of the CCP) to sentence her to 18 months' imprisonment and a fine. The prosecution did not object. On 27 June 2005 the Katowice District Court convicted the applicant as charged and sentenced her to 18 months' imprisonment and a fine.

The applicant appealed. She argued that the trial court had not taken into account her conviction in Sweden. The Katowice Regional Court dismissed her appeal on 1 March 2006.

The two main arguments brought against the Polish Government by Ms. Łaszkiewicz before ECHR were: violation of the Article 5 § 3 and of the Article 5 § 4 of the Convention.

I. As to alleged violation of Art.5 § 3 of the Convention:

Before the ECHR the applicant complained that the length of her detention on remand had been excessive. She relied on Article 5 § 3 of the Convention, which reads, in so far as relevant:

"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."

The applicant argued that an excessive period of detention, such as the period in the present case, was in itself incompatible with Article 5 § 3 of the Convention, given the principle of the presumption of innocence. She emphasized that the courts had not given sufficient and relevant reasons for her continued detention and repeatedly invoked the severity of the anticipated penalty and the serious nature of the charges. As regards the risk of obstructing the proceedings, the applicant argued that it had not been based on any reliable facts and that, with the passage of time, it had become irrelevant from the point of view of the proper conduct of the proceedings. Furthermore, the authorities had not taken into account any other guarantees that she would appear for trial.

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The ECHR recalled that the general principles regarding the right "to trial within a reasonable time or to release pending trial, as guaranteed by Article 5 § 3 of the Convention were stated in a number of its previous judgements (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 110 *et seq*, ECHR 2000-XI; and *McKay v. the United Kingdom* [GC], no. 543/03, §§ 41-44, ECHR 2006-..., with further references)(§ 54)

The Court empasized that the applicant was charged with drug-trafficking and acting in an organised armed criminal gang (see paragraph 39). When assessing compliance with Article 5 § 3 of the Convention, the Court took into account the fact that the present case concerned a member of a criminal gang (*Bąk v. Poland*, no. 7870/04, § 57, 16 January 2007).

The Court accepted that the reasonable suspicion against the applicant of having committed the serious offences may initially have warranted her detention:" However, with the passage of time that ground inevitably became less and less relevant. It must then establish whether the other grounds advanced by the judicial authorities were "relevant" and "sufficient" to continue to justify the deprivation of liberty" (§ 57).

In Court's opinion, the Polish judicial authorities relied on the fact that the applicant had been charged with being a member of an organised criminal gang. In this regard, the Court reiterated "that the existence of a general risk flowing from the organised nature of the alleged criminal activities of the applicant may be accepted as the basis for his detention at the initial stages of the proceedings (see, *Górski v. Poland*, no. 28904/02, § 58, 4 October 2005) and in some circumstances also for subsequent prolongations of the detention" (see, *Celejewski v. Poland,* no.17584/04, 4 August 2006 § 37)(§ 59).

The Court also accepted that in such cases, involving numerous accused, the process of gathering and hearing evidence is often a difficult task. In these circumstances, the Court considered that "the need to obtain voluminous evidence from many sources, including from abroad, and to determine the facts and degree of alleged responsibility of each of the co-suspects, constituted relevant and sufficient grounds for the applicant's detention during the period necessary to terminate the investigation"(§ 59). Furthermore, the Court underlined that in cases concerning organised criminal gangs, the risk that a detainee, if released, might bring pressure to bear on witnesses or other co-suspects, or otherwise obstruct the proceedings, is by the nature of things often particularly high.

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The foregoing considerations were sufficient for the Court to conclude that "the grounds given for the applicant's pre-trial detention were "relevant" and "sufficient" to justify holding her in custody for the entire relevant period, that is 1 year, 3 months and 12 days." (§ 60) and the Court found that "there has been no violation of Article 5 § 3 of the Convention" (§ 62).

II. As to alleged violation of Art. 5 § 4 of the Convention

Ms. Łaszkiewicz complained that the proceedings regarding prolongation of her pre-trial detention had not been adversarial and that the defence could not effectively challenge the lawfulness of her continued detention. She referred in this respect to the refusal to provide her counsel with copies of the prosecution's applications for prolongation of her detention and to grant her access to the investigation file. She also complained about the belated notification of her counsel of the court's hearings regarding the prolongation of the pre-trial detention. She relied on Article 5 § 4 of the Convention.

The ECHR stated in regards to that arguments that court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. The Court emhasised that equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention:" In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among other authorities, *Lamy v. Belgium*, judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29; *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II; *Lietzow v. Germany*, no. 24479/94, § 44, ECHR 2001-I)"(§ 77).

In Court's opinion these requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the Court's case-law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of "criminal charge" – that this provision has some application to pre-trial proceedings (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 36)[2].

2 See in this respect to the Court's case - law in: C. Kulesza, Efektywność udziału obrońcy w procesie karnym w perspektywie prawnoporównawczej, Zakamycze 2005, pp. 204–217 with further references.

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In Court's opinion, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. The Court empasized, that : " While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon (see, *Lietzow* cited above, *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001, *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I and *Migoń v. Poland*, no. 24244/94, § 79, 25 June 2002)" (§ 78).

The ECHR agreed that the Katowice District Court's detention orders gave some details about the facts grounding the suspicion against the applicant. However, the Court has established in its case-law (*Lietzow*, § 46; *Schöps,* § 50 and *Garcia Alva*, § 41, all cited above) that the information provided in this way was only an account of the facts as construed by the court on the basis of all the information made available to it by the prosecutor. Thus, in Court's opinion, in such circumstances it was hardly possible for an accused to challenge properly the reliability of such an account without being made aware of the evidence on which it is based. The Court considered that it is even less realistic for an accused, such as the applicant in the present case, to contest the lawfulness of her detention on remand without having been served in advance with copies of the prosecution's motions. The Court stated, that in Łaszkiewicz case the applicant had no opportunity to mount an adequate challenge to the lawfulness of her detention on remand for a period of one year. The Court found that even if the applicant was represented at the hearings concerning her detention, this possibility was not sufficient to afford her a proper opportunity to comment on the prosecution's motions (see, *Osváth v. Hungary*, no. 20723/02, § 18, 5 July 2005).

The Government admitted that the applicant's counsel had no access to the investigation file between 27 May 2003 and 8 October 2003.

In my opinion, as defence lawyer, it is possible that the applicant's counsel made in this case one, or two mistakes. She made her first explicit request for access to the file during the detention hearing held on 26 March 2003. We don't know, when the defence attorney entered to the proceedings and if her request was late. Anyway, her first attempt to approach the files was wrong addressed. Pursuant to Art. 156 § 5 CCP for access to the files must agree Prosecutor, as *dominus litis* of preparatory proceedings. In the present case the defence counsel was informed by

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the Katowice District Court that her request would be transmitted without undue delay to the Regional Prosecutor for examination (see paragraph 16). However, the request was not followed by an immediate action on the part of the authorities as it was only received at the Regional Prosecutor's Office on 16 May 2003 and examined on 27 May 2003.

The ECHR noted that counsel's request for a copy of the prosecution's motion made on 24 June 2003 was considered by the Katowice Regional Prosecutor to be equivalent to a request for access to the whole file and was subsequently refused. In the Court's view that can be seen as an over-formalistic and disproportionate response on the part of the prosecution authorities which implied that it would not be possible under Article 156 § 5 of the Code of Criminal Procedure to grant access to certain documents from the file or a part of the file. The Court stated in that connection that it was for the authorities to organise their procedure in such a way as to meet the procedural requirements laid down in Article 5 § 4, since the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (*Schöps,* cited above, § 47).

Concerning the Government's argument that the effectiveness of the fight against organised crime should be taken into account when assessing compliance with Article 5 § 4, the Court acknowledged the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, in Court's opinion, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence: "Therefore, information which is essential for the assessment of the lawfulness of a detention, such as reasons which, in the prosecution's view, justify continued deprivation of liberty, should be made available in an appropriate manner to the suspect's lawyer (*Garcia Alva*, cited above, § 42 and *Migoń*, cited above, § 80)"(§ 84).

In conclusion, the ECHR considered that the procedure before the Katowice District Court which reviewed the lawfulness of the applicant's detention on remand failed to ensure equality of arms and was not truly adversarial since the applicant could not adequately challenge the Regional Prosecutor's motions for prolongation of her detention. In Court's opinion there has therefore been a violation of Article 5 § 4 of the Convention. The Court found that there was no need to examine the applicant's complaint concerning the belated notification to her counsel of the court's hearings regarding the prolongation of the pre-trial detention.

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It is worthy to mention, regards to admissibility of the complaint, that in the *Łaszkiewicz* case the ECHR recalled that it has already dealt with the question of the effectiveness of the constitutional complaint in Poland (see, *Szott- Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003, and subsequently *Pachla v. Poland* (dec.), no. 8812/02, 8 November 2005, *Wiącek v. Poland* (dec.), no. 19795/02, 17 January 2006 and *Tereba v. Poland* (dec.), no. 30263/04, 21 November 2006). Especially in the *Szott-Medyńska* decision the Court considered in particular two important limitations of the Polish model of constitutional complaint, namely its scope and the form of redress it provides. Having analysed the above-mentioned limitations of the Polish procedure of constitutional complaint, the Court observed that the constitutional complaint could be recognised as an effective remedy, within the meaning of the Convention, only where: 1) the individual decision, which allegedly violated the Convention, had been adopted in direct application of an unconstitutional provision of national legislation; and 2) procedural regulations applicable to the revision of such type of individual decisions provided for the reopening of the case or the quashing of the final decision in consequence of the judgment of the Constitutional Court in which unconstitutionality had been found. (§ 68).

The Court remarked, that the case-law of the Constitutional Court on the availability of a constitutional complaint in respect of decisions taken in ancillary proceedings was evolving over time. It paid attention, referred to detention on remand question, i.a. to two judgments. In the judgment of 17 February 2004 the Constitutional Court held that a constitutional complaint was allowed in the case of a prosecutor's order regarding supervision of the contacts between a suspect and his lawyer (see, the judgment of 17 February 2004, case no. SK 39/02). Later, in the judgment of 24 July 2006 the Constitutional Court (case no. SK 58/03) ruled that a constitutional complaint could be lodged in the case of exceptional prolongation of detention on remand beyond the statutory 2-year time-limit. However, the ECHR observed that the facts giving rise to the alleged violation of Article 5 § 4 in the present case concern the period from 16 October 2002 to 27 January 2004, when the applicant was released. It further notes that at the relevant time the practice of the Constitutional Court in respect of the admissibility of a constitutional complaint against an ancillary decision adopted in the context of criminal proceedings was not clearly established (§ 69). Thus, the Court concluded that in the *Łaszkiewicz* case the constitutional remedy lacked the requisite effectiveness. Furthermore, the Court noted "that it is open to doubt whether a constitutional complaint in the present case could satisfy the second part of the test established in the *Szott-Medyńska* decision" (§ 70).

In the *Łaszkiewicz v. Poland* judgment, a typical incidental court proceedings concerning the pre-trial detention in a serious organized-crime case was introduced.

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It allows noting a number of occurrences characteristic for the Polish procedural practice after a wide amendment of the 1997 Code of Criminal Procedure was implemented based on the law of January 10, 2003 (Dz.U. no. 17 poz. 155), especially the conditions of the defence effectiveness of the persons under pre-trial detention. Action in the interest of the accused should constitute the consequence of the defence counsel's activity, however it becomes objective as it is not the accused but the defence counsel acting also in a public interest who decides what is advantageous and what is not for the client (with respect to the accused person's will). Such effectiveness of the defence councel's actions is an *ex post* effectiveness because it should be evaluated after they are done. At the same time, an objective improvement of the accused person's procedural situation is not the only consequence (effect) of the defence counsel's actions. Other may include unmeasured benefits such as increase of the confidence in counsel, decrease of the psychological stress related to the participation in the proceedings, knowledge and information concerning the procedural rules or increase of the sense of security. It is the achievement of those unmeasured benefits which constitutes the essence of the effective participation of the defence counsel in the procedure.

Above all it should be pointed that early engagement of the defence counsels in the cases of the persons under pre-trial detention brings positive results both for the defence and the entire system, as can be viewed in the German or Austrian experience[3].

Another issue should be related to this institution and those are short terms given by the legislator to the courts to hear the cases concerning the appeal against the decision on the imposition or prolongation of the detention (compare art. 5 p. 4 of the Convention).

Even though nowadays this hardest preventive measure is applied by the courts, it should be noted that a high percentage of the prosecutor's motions in the matter is accepted while the number of the motions decreases. The national Polish data shows that along with the decreasing number of the applied detentions, the number of heard appeals is also lower, the number of reversed detentions increases and the number of accepted appeals decreases in relation to the heard ones. Between 2003 and 2007 the courts accepted only 12-15% of the appeals against decision concerning the appli-

3 D. Burhoff, Verteidigungsmöglichkeiten im Rahmen der besonderen Haftprüfung durch das OLG — oder: Vermeidung von weiteren Untersuchungshaft durch Verteidigermitwirkung (in:) Sicherheit durch Strafe? Öffentlicher Strafanspruch zwischen Legalitätsprinzip und Opferinteresse. 26. Strafverteidigertag Mainz, 8.–10. März 2002, Berlin 2002, p. 131–156; U. Busse, S. Hohman, Verkürzung und Vermeidung von Untersuchungshaft durch frühzeitige Strafverteidigung (in:) Sicherheit durch Strafe?, *op. cit.*, p. 157–176; R. Soyer, Vermeidung von Untersuchungshaft durch frühzeitige Verteidigermitwirkung in Österreich (in:) Sicherheit durch Strafe?, *op. cit.*, p. 177–194.

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cation of the detention, and almost 85-88% of all the reversed detentions were done *ex officio* by the prosecutor (article 253 § 1 of the Code of Criminal Procedure) or based on the motion of the defence (art. 254 of the Code of Criminal Procedure).[4]

Similar results were found in the study conducted by J. Izydorczyk in the Łódź District Court. They show that district courts accepted over 90% of the prosecutor's detention motions and in the same proportions the court of second instance sustained the detention decisions overruling the defence's appeals in the matter. This study indicates that the prosecutors *ex officio* or on the defence's motion revoked between 20–60% of the total number of detentions applied by the courts.[5]

Based on the study a controversial conclusion may be drawn, that despite the change brought by the amendment of the 1969 Code of Criminal Procedure (which transferred the decision upon the detention to the court competences) and introduction of an analogous solution to the Code of 1997, the prosecution still maintains an enormous influence on the application of this hardest preventive measure.

Similar results were obtained in the studies carried out at the end of 70ties and the beginning of 80ties of the twentieth century, when the prosecutor was the organ applying pre-trial detention in the course of preparatory proceedings. The arrested rarely submitted complaints against the detention (12-13%) and the submitted ones were in over 90% of cases overruled by the courts. Such situation was caused mainly by the surprisingly short, 7-day deadline to submit the complaint against the detention[6]. In addition, if the defence counsel wanted to effectively appeal against the

4 The statistical information of the Ministry of Justice for the first half years of 2003-2007 shows that around 90% of those motions were accepted reaching respectively: 93,4% in 2003, 89,4% in 2004, 89,1% in 2005 90,1% in 2006 and 87,8 % in 2007. The analysis of the 5-year statistics indicates that the decreasing tendency of the number of prosecutor's detention motions ended in the first half year of 2006. In the first half year of 2007 the number of motions was again a little higher than previously (by 364 – 1,9%) and higher than in 2003 (by 1159 – 6,4%). The numbers of pre-trial detentions applied by the courts increased between first half hear of 2003 to first half year of 2005, then it began to decrease when compare to the first half year of 2005: by 1 597 (8,6 %) in first half year of 2006 and by 1724 (9,2 %) in first half year of 2007. In first half year of 2007 the percentage of the applied detentions reached 87,8% and was lower than in the entire studied period. Once again, the number of accused under pre-trial detention in the finished preparatory proceedings, handed over to the court, reached 9 844 where it was 9799 in first half year of 2006 and 10 440 in first half year of 2007. Source: Statistical information on the activity of the common organizational prosecution units in the first half year of 2007, Ministry of Justice, Department of Organization, ms.gov, p. 6-7

Number of reversed pre-trial detentions reached in the first half years of 2005-2007 respectively: 4 183 in 2005; 4 238 in 2006 and 4216 in 2007 including:

1. by the prosecutor: art. 253 § 1 of the Code: in 2005 - 3 251; in 2006 - 3.393; in 2007 -3.275,

art. 254 of the Code: 352 323 311

2. by the court: as a result of the consideration of appeal based on art. 252 § 1 of the Code: in 2005 – 580, in 2006 – 520, in 2007 – 630, when the number of appeals submitted by the arrested (or their defence counsels): in 2005 - 4 733, in 2006 -4 413, in 2007 – 4.047. Source: Statistical information…, *op. cit.*, table II, p. 18

5 J. Izydorczyk, Stosowanie tymczasowego aresztowania w polskim postępowaniu karnym, Zakamycze 2002, p. 329-338 and 361-365.

6 See: A. Kaftal, Kontrola sądowa postępowania przygotowawczego, Warszawa 1974, p. 95

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decision, he should have known not only the content of the document but also the content of at least parts of the preparatory proceedings material which required the prosecutor's approval to examine the case files.[7]

The refusal to access the case files by the defence results in particularly severe consequences for the suspect under pre-trial detention and is a threat to the proper result of the trial. In such case, the prosecutor or other organ carrying out the preparatory proceedings usually justifies the refusal with a risk of the obstruction of the proceedings. A conclusion may be drawn from the statements of reasons for the refusal decisions that, taking into consideration that the accused is in temporary custody, it is the defence counsel *de facto* accused by the prosecutor of the intention to commit the offence from art. 239 of the Criminal Code .

It should be added, that the judicature of the Supreme Court does not treat the lack of proper access of the defence to the preparatory proceedings material as a flagrant procedural omission and indicates the necessity for the defence to bring up such complaint in the early stages of the proceedings.[8]

Judgment of the European Court of Justice *Wedler v. Poland* of May 27th, 2003 (ETPC 44115/98, LEX nr 78529) should be mentioned here as it includes the following statements:

„The necessity to keep some of the information gathered in the course of investigation confidential, to prevent the influence of the suspect on the evidence and obstruction of the investigation, results from the need to guarantee the conduction of effective investigation. However, this otherwise justified goal can not be reached by significant limitations of the right to defence. Therefore, information important to evaluate the legitimacy of the detention of a particular person should be made properly accessible for the defence counsel of the suspect."As it is stated in the Polish specialist literature[9], in all of the cases, when the suspect is under pre-trial detention during the investigation or inquiry and at the same time, access to the case files is rejected denied throughout preparatory proceedings (including access to the part of the evidentiary material constituting the factual base for the prolongation of the preventive measure and which is non-specifically used by the courts in their decisions), it is highly possible to declare the violation of the fair trial standards required in accordance with art. 5 § 4 of the ECHR.

7 See: C. Kulesza, Sędzia śledczy w modelu postępowania przygotowawczego na tle prawnoporównawczym, Białystok 1991, p. 195with further refercnes and study results.

8 Compare judgment of the Supreme Court of March 11, 2005 (V KK 355/04 LEX nr 148196)

9 M. Wąsek–Wiaderek, Dostęp do akt sprawy oskarżonego tymczasowo aresztowanego i jego obrońcy w postępowaniu przygotowawczym - standard europejski a prawo polskie, Palestra 2003, b. 3–4, p. 55.

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In the light of the Polish legislature and judicature it may be undoubtedly stated that when the court decides upon the pre-trial detention during the preparatory proceedings, it is the prosecutor, not the court who approves access to the case files for the defence, including the motion on the application of this preventive measure. As the judicature indicates, prosecutor's rejection (even if it is just the motion) can, if need be, considered as a temporary limitation of the right to defence. [10] Judicature of the appellate courts also indicates a leading role of the prosecutors in deciding on the detention as the prosecutors (not the court) are burden with *onus probandi* when its legitimacy is being proved[11]. In addition it should be noted that there are rulings indicating that belated notification of the defence about the court session dealing with detention or even lack of such notification constitutes only a procedural negligence and it is the task of the defence to prove that it had influenced the content of the court's decision.[12]

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10 As the Appellate Court in Wrocław stated in the decision of August 23, 2007 (II AKz 412/07- LEX nr 301497) "When controlling the decision on the pre-trial detention the court can not be excused from judgment if the rejection to access to investigatory files does not violate fundamental right of the person under pre-trial detention to actual possibility to control the legitimacy of the depravation of liberty." The Appellate Court in Katowice on the other hand, in decision of April 25, 2007 (II Akz 255/07 - Prok.i Pr. 2007/11/29) emphasized that the specifics of this phase of the criminal procedure called preparatory proceedings is characterized by particular dynamics, searching for evidence, verification of particular versions of events – based on provisions of law – art. art. 156 § 5 of the Code of Criminal Procedure, it justifies the competence of the prosecutor to limit the access of the parties to the material included in the case files. „This competence also regards the moment of the procedure when the case suspended in the court recognizing the prosecutor's motion on the prolongation of the pre-trial detention based on art. 263 § 4 of the Code. The motion includes not only arguments on the actions already performed and significant in the context of the premises to apply preventive measures, but also introduces those necessary activities which the prosecutor plans to undertake in the nearest future. The objection of the prosecutor based on the content of art. 156 § 5 of the Code should not be interpreted as a violation of the right to defence – even though At the same time this fact should oblige the person leading the preparatory proceedings to perform all the activities particularly carefully and effectively, especially if the suspect is under pre-trial detention".

The same court in decision of November 8, 2006 (II AKz 628/06 - KZS 2007/1/85) acknowledged that „vagueness of the arguments included in the justification of the appealed decision is a result of the fact that at the moment the case is in the stage of preparatory proceedings and prosecutor using the rights given by art. 156 § 5 explained that he does not agree to disclose the files and motion on the pre-trial prolongation to the parties. Such explanation is binding for the court and in addition indirectly influences the statement of reasons for the given judgments in which the court refers to arguments not fully known or clear to parties. It is undoubtedly a limitation of the right to defence in a substantive meaning, nevertheless it is only of a temporary nature and the right to Access the evidentiary material is not an absolute right".

11 As the Appellate Court in Wrocław stated in the decision of May 23, 2007 (II AKz 239/07 - LEX nr 271951): "Substantive burden to prove the thesis on the absolute necessity to apply pre-trial detention formulated in the motion lies on the prosecutor introducing the motion to the court; it can not be shifted to the court and failure to prove the thesis in court leads to loosing the case (including the trial concerning the application of the pre-trial detention)".

12 As the Appellate Court in Katowice brought in decision of January 16, 2007 (II AKz 879/05 -KZS 2007/5/83): "Late notification on the date of court session, undoubtedly limits the right of defence to participate in the session dealing with the prolongation of pre-trial detention mentioned in art. 249 § 5 of the Code of Criminal Procedure. This right can not be treated as an obligatory participation of the defence counsel in the session and therefore an absolute premise for appeal from 439 § 1 p. 10 of the Code does not occur. On the other hand, the Appellate Court in Białystok in the statement of reasons for the decision of April 27, 2006 (II AKz 93/06 - OSAB 2006/1/43) recognized that lack of notification of the defence about the time of the court session dealing with prolongation of the pre-trial detention despite the guarantee provided in art. 249 § 5 of the Code and failure to act in accordance with art. 117 § 2 – actions are not performed (...) – "is a gross violation of the suspect's right to defence", but eventually it overruled the defence's appeal stating that the counsel did not demonstrate "that his absence in the court session had influenced the state of the case to the extend allowing for disqualification of the appealed decision".

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Based on the comparison of the above mentioned studies carried out under the rule of the 1969 and 1997 Codes of Criminal Procedures, another controversial thesis may be formulated, that according to the current law the responsibility for the detention is "mudded" between the prosecutor and courts. When the prosecutor applied pre-trial detention, he undoubtedly was aware of the justification and consequences of such decision. Court recognizing the appeal, often acting based on the superficial knowledge of the files and scarce orientation in the specificity of the preparatory proceedings, when sustaining the prosecutor's decision, did not want, as a rule, to hinder the conduction of an efficient procedure.

Under current law, prosecutor filing the motion to apply detention to the court, to some extend reveals himself from the responsibility of the final decision in the matter and the courts, due to the reasons described above, as it were *ex ante*, affirm legitimacy of such motion. It should be noted, that in appellate courts deciding on the appeals against detention is given a short session time and they accept the actual findings of the investigatory organs without their own evidentiary procedure (despite the possibility provided in art. 97 of the Code of Criminal Procedure).

To limit excessive application of the pre-trial detention, it is not enough for the court to be independent. The judge must know the practice of the preparatory proceedings and be very well familiar with the procedure's files.[13]

As stated in the judicature, the judge deciding about the detention should be guided by precise actual evidentiary or legal considerations and is obliged to accurately clarify why a different preventive measure was not found sufficient (see: Supreme Court's decision of 17.04.2007, WZ 12/07, Prok. i Pr. 2007/9/10 and decisions of the appellate court in Krakow of 29.06.2007, II Akz 270/07, KZS 2007/6/47 and of 14.06.2007, II AKz 246/07, KZS 2007/6/46). In addition, in case of precise basis, the judicature of the Supreme Court states for example that „ The condition, that the need to apply pre-trial detention to secure the proper course of the procedure can be justified with „severe penalty threatening the accused" (art. 258 § 2), is fulfilled if not only the charge of the commitment of the crime or offence threatened with imprisonment penalty (with upper level reaching at least 8 years) was accurate, but also if the circumstances of the case indicate that the severe imprisonment penalty may actually be inflicted (decisions of the Supreme Court of 03.04.2007, WZ 11/07, Biul. SN 2007/6/24 and of 20.03.2007, WZ 8/07, Prok. i Pr. 2007/7-8/18).

13 More on the subject see: C. Kulesza, Dylematy stosowania przez sądy aresztu tymczasowego (uwagi na tle doświadczeń francuskich) (article for the WSPOL conference in Szczytno, November 8-9, 2007 – in print), p. 1-7 with further references.

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It is therefore worth to emphasize that in Łaszkiewicz case, the criminal court sentenced the accused in the course of procedural agreement to 18 months' imprisonment. According to art. 413 § 2 p. 2 of the Code of Criminal Procedure, the court undoubtedly counted the time of pre-trial detention toward the imprisonment penalty. In this context, voices of the doctrine should be heard, that the procedural practice of the 80ties demonstrated particular tendency to adjudicate unconditional imprisonment penalties for perpetrators under pre-trial detention while choosing penalties with conditional suspension of execution for the perpetrators released pending trial.

Studies of J. Izydorczyk moreover indicated rare participation and faint activeness of the defence counsels in the detention sessions. It is not possible however to agree with the author that one of the reasons of this rare participation of the advocates in detention session is their fear that the accused will plea guilty in their presence, which will make further defence more difficult.[14] The main reason of such situation is most often inability to access the preparatory proceedings files, which as a rule brings their participation in the session to passive presence.

Summing up the above deliberations it should be *de lege lata* indicated that the defence counsel who wants to revoke the detention of his client should convince the prosecutor as a *dominus litis* in the preliminary stage of the trial, not the court that the measure is unjustified. It is also important to note that in case when the district court refuses to consider the detention motion, the prosecutor may effectively appeal against such decision in the appellate court, and if the prosecutor himself revokes this preventive measure (as it was in the *Łaszkiewicz v. Poland* case), obviously he will not appeal against his own decision favourable for the suspect.

Such reflection may awake understandable objections with regards to the structure and functions of the prosecution, especially in the light of last amendments implemented by the law on the change of the law on prosecution and other laws of March 29, 2007 (Dz.U. nr 64 poz.432) effective July 12, 2007 which bring threats to the prosecution's independence.

The procedural functions of the prosecution, defence and independent court are specifically divided so it is necessary for the defence to somehow cooperate with the procedural organs[15]. In German literature one of the conditions of individual effec-

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14 J. Izydorczyk, Stosowanie tymczasowego aresztowania w polskim postępowaniu karnym, Zakamycze 2002, p. 357-359.

15 ,,The public defender and the prosecutor are trying cases against each other every day. They begin to look at their work like two wrestlers who wrestle with each other in a different city every night and in time to get to be good friends. The biggest concern of the wrestlers is to be sure they don't hurt each other too much. Apply that to the public defender and prosecutor situation, and it is not a good thing in a system of justice that based on the

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tiveness of the defence in the preparatory proceedings is indicated in the form of so called *favor procuratori* when the advocate's actions serve to establish and maintain good relations with the prosecution to gain its favour.

As it is however pointed by H. Dahs, the term "*favor procuratori*" is very dangerous. If it is not properly interpreted it may lead to the threat of the internal independence and freedom of the defence counsel.[16] It is the essence of the defence's activity to object procedural decisions and procedural organ's behaviours unfavourable to the accused, especially when they are bias. It requires the defence counsel to be firm and take tough positions both during the adversarial trial and inquisitional preparatory proceedings. Otherwise, he may neglect his duties of energetic defence of the accused. Therefore, the concern over *„favor procuratori"* does not always go along with requirements of effective defence.[17]

In case of prosecutor's refusal of access to files, which can be appealed against only in the course of prosecutor's supervision (art. 156 § 5 and 159 of the Code of Criminal Procedure)[18], the defence counsel may verify his client's statement only by gathering other, in a way substitute, evidentiary information. Such supplementing information may be obtained on the motion of the defence or *ex officio* by compilation of the statements of reasons for the decisions (or orders) concerning presentation of charges (art. 313 § 3 of the Code of Criminal Procedure), changes or supplements (art. 314 of the Code of Criminal Procedure) or concerning the preventive measure.

Statement of P. Wiliński: "According to art. 313 of the Code of Criminal Procedure, inspection of the investigatory material must happen with relation to the issuance of the order with presentation of charges, similarly in case of the change or extension of the charges (art. 314 of the Code of Criminal Procedure)." seems to be a misunderstanding (or *de lege ferenda* demand) and does not have any support in the current version of the Code of Criminal Procedure. [19]

adversary system." R. Alschuler, The Defence Attorney's Role in Plea Bargaining, The Yale Law Journal 1975, vol. 84, p. 1210.

16 H. Dahs, Handbuch des Strafverteidigers, wyd. 6, Köln 1999, p. 108

17 More on the significance of favor procuratori for the effective defence in the Polish criminal procedure compare. C.Kulesza, Efektywna obrona w postępowaniu przygotowawczym a favor procuratori, Prok. i Pr. 2007, nr 4, p. 5 – 33.

18 It is worth to indicate that in the above mentioned amendment (of March 29, 2007) of the Code of Criminal Procedure also changed the provision of art. 159 so that the complaint against the prosecutor's order on the rejection to access the case files is not recognized by the superior prosecutor but by the directly supervising prosecutor. As the rejection decision is quite often consulted (especially by the young prosecutors and assistant prosecutors) with the directly supervising prosecutor, the new regulation justifies thesis that the complaint in the prosecuting sector has become legal fiction.

19 P. Wiliński: Zasada prawa do obrony w polskim procesie karnym, Zakamycze 2006, p. 375.

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In the Polish specialist literature it is indicated that due to significant limitations of the possibility to inspect the preparatory proceedings files, the defence counsel should convince the suspect to submit motions to compile the order with presentation of charges. Such statement of reasons is to guarantee not only the execution of the right to defence but also allows for controlling the legitimacy of the presented charges. The doctrine assigns to it a big cognitive significance, even though it does not include evidentiary sources, which if given, as P. Girdwoyń states, would constitute a mistake of the prosecuting organs. According to this author, information coming from such statements of reasons along with the suspect's statements allow for reconstruction of the hypothetical evidentiary sources and even to reach them by own detection. [20]

As a rule, however, the statements of reasons are laconic, vague or even misleading with regards to the evidentiary basis. Other information may be provided by the participation of the defence counsel in the acts of procedure (especially in the ones which will not be repeated – art. 317 of the Code of Criminal Procedure), performed based on the defence's motion (art. 315 of the Code of Criminal Procedure) or by the acquaintance with the legal experts' opinions (art. 318 of the Code of Criminal Procedure). A view provided by the Polish literature should be shared here that the defence can not be denied access to records of the unrepeated acts and acts performed on its motion as art. 157 § 3 constitutes *lex specialis* to art. 156 § 5 of the Code of Criminal Procedure. The party should receive records of the acts in which it participated or had the right to participate in (based on the law or on the procedural organ's decision), whether it was used or not. [21]

In the context of the possibility to acquaint with the case files during the detention proceedings, it should be added that the advocate and his client can not acquaint with the results of the operational and identification actions, especially those carried out in the frame of operational control. According to article 19, p. 16 of the law on Police, those materials are not made available to the person involved in them, and even though they could provide evidence for the prosecutor to begin the criminal procedure (art. 19, p. 15 of the law on Police) they are not disclosed before the suspect finally acquaints with the preparatory proceedings material in the course of art. 321 of the Code of Criminal Procedure. Materials remain then at the prosecutor's disposal. It should be added that for example in Germany; documentation concerning the first actions of the Police is disclosed regardless of the form and significance of the prosecutor actions' results to the defence. The judicature of the German courts also recognized that operational files (so called *Spurenakten*, although the term does

20 P. Girdwoyń, Zarys kryminalistycznej taktyki obrony, Zakamycze 2004, p.101.
21 T. Grzegorczyk, Kodeks postępowania karnego. Komentarz, Zakamycze 2001, p. 389.

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not fully coincide with the Polish one) constitute part of the files and are available. They must however be prepared in the *in rem* phase and their content should be significant to declare the commitment of the offence and its legal consequences. Concise files of the prosecutor are excluded from the access. In this view, P. Girdwoyń states that the Polish art. 19 p. 16 of the act on Police grants the prosecuting organs extensive competences, incomparable to the ones provided in German (§ 100a and following ones of StPO) or Austrian law. [22] This limitation of the right to defence is especially important when considering the tendency to exceed the influence of the operational and identification actions on the results of the main trial[23] and ineffective judicial control of their application in the Polish criminal procedure[24].

Summing up the above deliberations and indicating the judicature of the Polish Constitutional Tribunal analyzed by the European Court of Human Rights, a question should be asked about the accordance of at least two provisions of the 1997 Code of Criminal Procedure with the Constitution. Above all, in the context of the constitutional right to defence and access to justice article 250 § 3 of the Code should be examined as it *expressis verbis* requires the prosecutor in the course of preparatory proceedings to send the motion on the application of pre-trial detention only to the court and not to the defence. Appreciating the importance of confidentiality of the preparatory proceedings, criteria determining rejection to access the case files in the preparatory proceedings should be specified because article 156 § 5 of the Code of Criminal Procedure does not provide any limitations for the prosecutor in this matter. Moreover, the reality of the control over the rejection would require its exclusion from the prosecuting sector (compare art. 159 of the Code of Criminal Procedure) and its replacement, even following the German pattern, by the judicial control[25] performed for example by a specialized organ of the investigating judge. [26]

The plausibility of the above mentioned postulates is confirmed not only by the judgment of the ECHR of January 18, 2008 in *Łaszkiewicz v. Poland* case but also even indirectly by one of the last decisions of the Polish Constitutional Tribunal (decision of February 5, 2008 – K 34/06) where the Tribunal stated that art. 247 § 1 of

22 P. Girdwoyń, Zarys..., *op. cit.*, p. 98–99 with further references.

23 It is worth to mention that the parliamentary draft of the law on operational and identification actions, which was submitted to the Seym on January 26, 2007 clearly provides (art. 2 p. 2) "disclosure and security of the offence evidence" as one of their goals (Druk nr 1570, p.1).

24 Compare: C. Kulesza, Czynności operacyjno-rozpoznawcze w świetle orzecznictwa Trybynału w Strasburgu i sądów polskich, Przegląd Policyjny 2008, nr 2 (in print) with further references.

25 In German procedure defence counsel is granted a wider access to files because of the judicial actions being undertaken during the preparatory proceedings. It is a consequence of a rule that the defence should poses the same evidentiary material as the court taking one time decisions in the preparatory proceedings, just as the sentencing court to which the files are revealed (§ 147 p. 1 StPO). According to doctrine, it is considered the basic requirement of the effective defence. H. Laufhütte, w: Karlsruher Kommentar zur Strafprozessordnung und zum GVG mit Einführungsgesetz, (wyd. 5), G. Pfeifer (ed.), München 2003, p. 851.

26 Compare: C. Kulesza, Dylematy stosowania przez sądy aresztu tymczasowego, *op. cit.* with further references.

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the Code of Criminal Procedure dealing with the compulsory appearance is in contrary to the article 41 p. 1 in relation to art. 31 p. 3 of the Constitution. As stated by the Tribunal "the questioned provision does not meet the constitutional requirement - addressed to the legislator – to provide rules concerning limitation or depravation of liberty. It does not fully regulate significant elements of the limitation of personal liberty, leaving unlimited freedom to decide on the final shape of such limitation in the hands of the organ ordering the arrest. As a consequence this provision does not protect the individual from the arbitrary authority as the reasons for the depravation (limitation) of the liberty are not clearly stated in the law". [27] It makes the judicial control over the legitimacy of arrest and compulsory appearance impossible.

In addition, the revoked provision (within 12 months since the publication of the judicial decision in the Official Journal) is in contrary to the principle of proportionality, as "application of the most far reaching compulsory measure (short term depravation of personal liberty of the person exercising the presumption of innocence) does not in any way depend on the documentation of the ineffectiveness of other measures or on the making their potential ineffectiveness believable." [28]

De lege lata one should note some court practices favourable for the accused (access of the defence to prosecutor's detention motions before sessions in preparatory proceedings) and procedurally objective attitude of a few prosecutors who make such motions available to the defence (on the defence's motion or even *ex officio*). Existing legal limitations of the effective defence does not excuse the defence counsels from the duty to submit motions on the access to case files at the entrance to the procedure, notification about the actions of investigation or inquiry and participation in those, especially when it comes to the final inspection of the case files (art. 321 of the Code of Criminal Procedure)[29]

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27 Press release after the session dealing with compulsory appearance, www.trybunal.gov.pl

28 Ibidem

29 During the author's proof of this article occurred the decision of the Polish Constitutional Tribunal (decision of June 3, 2008- K 42/07 (OTK-A 2008/5/77) where the Tribunal stated that art.156 par. 5 of the Code of Criminal Proceedings dealing with arbitrary refusal to grant defense access to the investigation files which constitute basis for the prosecution's detention motion is in contrary to the article 2 and 42 p. 2 in relation to art 31 p. 3 of the Constitution.

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