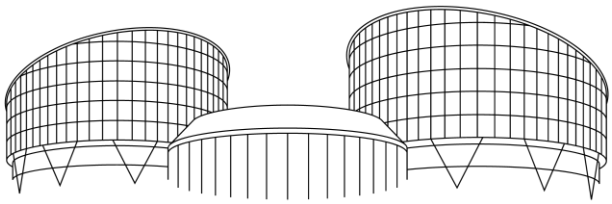

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF FRASIK v. POLAND

(Application no. 22933/02)

JUDGMENT

STRASBOURG

5 January 2010

FINAL

05/04/2010

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 Frasik v. Poland,

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

Nicolas Bratza, *President*,
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 1 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 22933/02) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Rafał Frasik ("the applicant"), on 10 September 2001.

2. The applicant was represented by Mr Z. Cichoń, a lawyer practising in Kraków. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, a breach of Article 12 of the Convention on account of the court's refusal to grant him leave to marry in prison and a breach of Article 13 in that he had had no domestic remedy to challenge that refusal. He also complained that one of his appeals against a decision extending his pre-trial detention was not examined "speedily", as required by Article 5 § 4.

4. On 23 January 2007 the Chamber to which the case had been allocated decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility.

5. Having consulted the parties, the President of the Chamber decided that in the interests of the proper administration of justice, the proceedings in the present case should be conducted simultaneously with those in the case of *Jaremowicz v. Poland* (application no. 24023/03) (Rule 42 § 2 of the Rules of Court).

6. The applicant and the Government each filed written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties

replied in writing to each other's observations. In addition, third-party comments were received from the Helsinki Foundation for Human Rights, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties have not replied to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1975 and lives in Kraków.

A. Criminal proceedings against the applicant and his detention on remand

1. Investigation

8. On 5 September 2000 the applicant was arrested by the police on suspicion of having committed rape and uttered threats against a certain I.K. On 7 September 2000 he was brought before the Kraków-Śródmieście District Court (*Sąd Rejonowy*) and, upon the application of the Kraków-Śródmieście District Prosecutor (*Prokurator Rejonowy*), detained on remand for 3 months starting from the date of his arrest, that is, until 5 December 2000.

9. The court held that the evidence against the applicant, in particular his partial confession, justified a reasonable suspicion that he had committed the offences with which he had been charged. It also considered that there was a considerable risk that the applicant, if released, would obstruct the proceedings against him or induce witnesses to give false testimony. Moreover, one of the offences in question (rape) carried a maximum sentence of 10 years' imprisonment, which made it likely that a severe penalty would be imposed on him. In sum, in the court's opinion, keeping the applicant in custody was necessary to secure the proper conduct of the proceedings.

Earlier, the applicant and I.K. had been in a relationship that had lasted some 4 years, but they had terminated it several months before the above events.

10. As regards the circumstances surrounding I.K.'s decision to ask the prosecution to institute criminal proceedings against the applicant, the Government submitted that, when testifying during the initial stage of the proceedings, she had stated that she had been afraid to terminate their

relationship because she had been threatened by the applicant, and that on several occasions he had beaten her. On 21 December 2000, when the District Prosecutor again heard evidence from her, she confirmed her decision.

11. In the meantime, on 27 November 2000, the Kraków-Śródmieście District Court had extended the applicant's detention until 5 January 2001, holding that the grounds stated in the initial decision remained valid. It added that his detention was necessary to secure the process of obtaining evidence from experts in sexology, forensic psychiatry and psychology.

12. The applicant appealed on 1 December 2000. He contested the factual basis for the rape charge, arguing that it was doubtful whether his acts could be qualified as rape, in particular as they had been directed against his co-habitee, I.K., whom he had beaten during intercourse because she had told him that she had had a relationship with another man. He had already confessed to battery. Moreover, since in his view it was the victim's evidence, not his, that was the most relevant for the outcome of the proceedings, there was no risk of his exerting pressure on her. He also relied on Article 5 § 3 of the Convention, maintaining that, in these particular circumstances, his detention amounted to serving a prison sentence.

13. The appeal was examined and rejected by the Kraków Regional Court (*Sąd Okręgowy*) on 16 January 2001. The court held that the charges against the applicant were supported by the existing evidence and that keeping him in detention was justified by a serious risk of collusion and of his interfering with the collection of evidence. These conclusions were based on the fact that the applicant had threatened the victim and used physical violence against her, and that one of the offences carried a severe penalty.

14. Meanwhile, on 3 January 2001, the Kraków-Śródmieście District Court had prolonged the applicant's pre-trial detention until 5 February 2001, relying on the grounds given in the previous decisions. The applicant appealed on 15 January 2001, again contesting the basis for the rape charge and submitting that there were serious doubts as to whether he had committed the offence since I.K. wished to marry him.

15. Earlier, on 11 December 2000, the applicant had asked the Kraków-Śródmieście District Prosecutor to release him under police supervision, stating that on 30 November 2000 he had received a visit from I.K. He had apologised to her and she had forgiven him for everything he had done. They wanted to get married and live a normal family life together. In consequence, she wished to withdraw all her accusations. As Christmas was approaching, he wanted to spend it with I.K. and her daughter to strengthen their relationship and make amends for all the harm he had done to her. He feared that his continued detention would be detrimental to their relationship and to I.K.'s young daughter, who treated him as her father and whom he treated as his own daughter.

The District Prosecutor rejected the application on 15 December 2000.

16. On 2 January 2001 I.K. asked the District Prosecutor to release the applicant, unconditionally or under police supervision. She said that he had apologised and she had forgiven him. She thought he should be released because the time he had already spent in detention had changed him for the better and made him realise that what he had done was wrong. She believed that he would mend his ways as he was aware that if he did not he would be severely punished. She admitted that she had made her accusations against the applicant under the influence of the anger and pain he had caused her, adding that, for those reasons, she would like to be absolved from testifying against him.

17. On 3 January 2001 the applicant asked the District Prosecutor to release him under police supervision. He stated that he loved I.K. and had apologised to her and been forgiven. What had happened would never happen again. They wanted to get married and live together. They could move into a flat that he had meanwhile inherited from his grandfather. I.K. needed his financial support and help taking care of her daughter, whom he used regularly to fetch from school. He added that, having been in detention since 5 September 2000, he had understood that what he had done had been wrong. He knew that he would never do it again. He wanted very much to be with I.K. and make amends to her for what he had done.

The application was rejected on 8 January 2001.

18. On 15 January 2001 the applicant also filed a complaint that his appeal of 1 December 2000 had been examined as late as 16 January 2001, that is to say six weeks later. This was incompatible with Article 5 § 4 of the Convention, which required the court to examine the lawfulness of his detention "speedily".

2. Trial

19. On 24 January 2001 the applicant was indicted before the Kraków-Śródmieście District Court on charges of rape and uttering threats.

20. On 7 February 2001 the Kraków Regional Court heard the applicant's appeal of 15 January 2001 against the decision extending his detention until 5 February 2001. It dismissed the appeal, finding that the decision had been fully justified by the need to secure the proper conduct of the proceedings. In particular, the court stressed the risk of the applicant's exerting pressure on I.K., especially in view of the fact that she had stated during the investigation that even when in detention he had sent her a letter hinting that after his release he might seek revenge on her. Moreover, the offence of rape carried a maximum sentence of 10 years which, together with the serious circumstances of the incident as related by I.K., gave sufficient grounds to believe that the applicant, given the severity of the penalty, might be prompted to bring pressure to bear on her in order to make her refuse to testify, or change her testimony.

21. The trial started on 1 March 2001. I.K. stated before the court that she "was a family with the applicant" and wished to exercise her right not to testify.

22. On 26 March 2001 the District Court ordered that the applicant be held in detention pending trial until 5 June 2001. In particular, it relied on the risk of his bringing pressure to bear on I.K. It further reiterated all the previous grounds for his continued detention.

23. The applicant appealed and again contested the factual basis for the rape charge and stressed that his detention had exceeded a "reasonable time" within the meaning of Article 5 § 3 of the Convention.

24. In the meantime, presumably on 2 April 2001, I.K. had made a written declaration to the court, submitting that she wished to exercise her right not to testify because she was, as defined in Article 185 of the Code of Criminal Procedure (*Kodeks postępowania karnego*), "in a particularly close personal relationship" (*w szczególnie bliskim stosunku osobistym*) with the applicant. She also asked the court to release the applicant and stated that she wished to marry him.

25. On 23 April 2001 I.K. repeated that statement at a hearing and asked the court to absolve her from her duty to testify. However, the court rejected her request. It held, first, that her refusal was dictated by her fear of the applicant rather than by her affection for him and, secondly, that their relationship – both past and present – lacked the necessary psychological, physical and financial bonds to be regarded as a *de facto* marriage and, consequently, a "particularly close personal relationship" within the meaning of the Code of Criminal Procedure that would override her duty to testify against the applicant at the trial. Since I.K. persisted in refusing to testify, the presiding judge imposed a fine on her for obstructing the trial.

On 30 April 2001 I.K. unsuccessfully appealed against the court's decision to fine her for refusing to testify. She again stated that she did not want to testify against the applicant.

26. On 24 April 2001 the Regional Court dismissed the applicant's appeal against the decision of 26 March 2001, holding that the District Court had correctly assessed the evidence before it and had rightly concluded that it fully indicated the probability that the applicant had committed the offences with which he had been charged. It also analysed the circumstances surrounding I.K.'s refusal to testify, explaining that, even though she had again informed the trial court that she would like to exercise her right not to testify because she regarded herself as a "person in a particularly close relationship" with the applicant, that question had to be decided finally by the trial court. In the Regional Court's opinion, regardless of how the trial court eventually qualified their relationship there was still the risk that the applicant would attempt to influence the witness, especially in view of his previous aggressive behaviour towards her. Lastly, referring to the complaint of a breach of Article 5 § 3, the court rejected the

applicant's arguments as to the allegedly excessive length of his detention. It observed that the District Court had proceeded swiftly with the trial. Since 24 January 2001, the date on which the bill of indictment had been lodged, it had already held 2 hearings and, as it had heard most of the evidence, the first-instance proceedings were soon to be concluded.

27. During the proceedings the applicant sent numerous letters to I.K. In May 2001 their number reached 140.

28. Subsequently, the District Court gave two further decisions prolonging the applicant's detention. On 21 June 2001 it extended his detention until 5 October 2001 and on 3 October 2001 until 5 December 2001. The court relied on the grounds given in the previous decisions, attaching special importance to the risk of the applicant's tampering with the witness I.K. At that time the witness still maintained her decision to marry the applicant and her refusal to testify.

29. The applicant unsuccessfully appealed against those decisions, submitting that the trial court, by holding him in custody, repeatedly imposing fines on I.K. and refusing to grant them leave to marry in prison, had not only penalised him without him having been convicted but also showed no respect for their private life. In his view, this amounted to a "misunderstanding" and unjustified interference with their right to private life. He also relied on the fact that I.K. had stated before the court that she "no longer felt that she had been raped", maintaining that the change of both parties' attitude to each other and to the applicant's deed was an important circumstance militating in favour of his release. In his appeals, he invoked Article 5 § 3 and Article 12 of the Convention.

30. Before the end of the trial I.K. eventually testified, stating, among other things, that she no longer considered that the applicant had raped her and that she had forgiven him.

31. On 19 November 2001 the Kraków-Śródmieście District Court convicted the applicant as charged and sentenced him to 5 years' imprisonment. It ordered that the applicant be held in custody pending the outcome of his appeal.

32. On 7 May 2002 the Kraków Regional Court heard the applicant's appeal. It upheld the conviction but reduced the sentence to 3 years' imprisonment, finding that the complete change of the victim's attitude to the applicant over the course of the proceedings fully justified the reduction. It also observed that that change could not have been dictated simply by her fear of the applicant because, had it been so, she would have preferred to have him locked up for the longest period possible.

33. The applicant filed a cassation appeal (*kasacja*) with the Supreme Court (*Sąd Najwyższy*). The Supreme Court heard and dismissed the appeal on 27 May 2003.

B. The applicant's requests for leave to marry in prison

34. On 24 April 2001 the applicant asked the trial court to grant him leave to marry I.K. in the Kraków Remand Centre. He maintained, among other things, that they both wished to solemnise their relationship and that they had already planned to get married in the past. In April 1999 their plans were delayed because I.K., who had been pregnant with their child, had had a miscarriage. The next date was to be fixed for December 2000 but that fell through because he was arrested and detained on remand in September 2000.

35. On 15 May 2001 I.K. requested the Kraków-Śródmieście District Court to grant them leave to marry in prison. She stated that they had been together for 4 years and remained in a close relationship for 3 years. She also referred to their past decisions to get married – which had not been realised because of her miscarriage in 1999 and, as regards the plans to fix a marriage date in December 2000, because the applicant had been arrested. Furthermore, she submitted that their marriage would also be important for her daughter, who had developed a close emotional bond with the applicant, treated him as her father and missed him badly. Finally, she said that she loved the applicant very much and asked for her request to be granted.

36. At the hearing held on 21 May 2001 the applicant again asked the court to grant him leave to marry I.K. in prison. He said that he loved her very much and would like to marry her as soon as possible.

I.K., summoned by the presiding judge to the hearing room, confirmed that she had already applied to the court for leave to marry the applicant in the Kraków Remand Centre. She asked the court to enable her to contact him in order to discuss arrangements for the marriage. She continued to refuse to testify against him, saying that she loved him very much and deeply regretted what she had said at the police interview. She asked the court to regard her as his common-law wife.

37. On 2 July 2001 the applicant again asked the District Court for leave to marry in the Kraków Remand Centre, maintaining that the judge had informed him at the hearing of 21 May 2001 that leave had been granted and that he would receive it in writing. He further asked the court to grant him permission to have photographs taken of the ceremony and to serve light refreshments, such permission being required by the Governor of the Kraków Remand Centre in order to organise the event.

38. By a letter of 11 July 2001 the presiding judge informed the applicant, his lawyer and I.K. that their requests for leave to marry in the remand centre had been refused. The letter read, in so far as relevant, as follows:

"The Kraków-Śródmieście District Court Second Criminal Division hereby informs you that the application for leave to contract a marriage in prison made by the accused Rafał Frasik and the injured party (*pokrzywdzona*) [I.K.] has not been granted in view of the interests of the proceedings.

A prison or remand centre is no place to hold ... ceremonies so important in a person's life as a wedding.

In this court's opinion no circumstances justify contracting a marriage in the remand centre. If indeed – which in the court's view is doubtful – the accused and the injured party are sure of their decision that is so important for them and for their families and want to hold a ceremony, they may plan it for another time and in another place than a remand centre.

It should be noted that marriage is always connected with a ceremony and the participation of other persons whose presence is obligatory; certainly, the conditions in a remand centre or prison are not suitable for it.

If the accused and the injured party have known each other for 4 years and they have not yet managed to officialise their life, in the circumstances of the present case their sudden decision to enter into a marital union sheds doubt on their intentions, to say the least.

The accused and [I.K.]'s decision to marry has emerged at a particular moment in the course of the proceedings, namely when the court refused to consider [I.K.] as a 'close person' (*osoba najbliższa*) – [a status] which would have given her the right to refuse to testify – and when it imposed a fine on her for unjustified refusal to testify.

Thus, the court cannot but find that a request for leave to contract a marriage [made] at this particular time is a further attempt to persuade the court that the relations between the accused and the injured party are of a close nature – which, in reality, in the court's opinion, is not the case and was invented only for the sake of the proceedings."

39. The applicant's lawyer replied to the letter on 6 August 2001. He stated that the court's arguments could not erase the applicant's and I.K.'s right to marry guaranteed by Article 12 of the Convention. He added that the mere fact that he was in detention did not deprive him of that right.

40. It appears that later the applicant and I.K. made further requests for leave to contract their marriage in the remand centre, but to no avail.

C. The Supreme Court's findings in respect of Article 12

41. In his cassation appeal against the Regional Court's judgment of 7 May 2002 the applicant invoked Article 12 of the Convention as one of the legal grounds for the appeal. The Supreme Court, in its above-mentioned judgment of 27 May 2003 (see paragraph 33 above), held that the refusal to grant the applicant leave to contract a marriage in prison constituted a violation of Article 12 of the Convention. Nevertheless, in the Supreme Court's view, this kind of – admittedly serious – breach of the law

on the part of the trial court did not have any real bearing on the applicant's conviction and could not result in it being quashed.

42. The relevant part of the reasoning of the Supreme Court's judgment reads as follows:

> "However, one must agree with the appellant that there has been a violation of Article 12 of [the Convention] in the present case. This provision concerns the right to marry and in this context the European Court of Human Right's case-law states that a detainee cannot be prohibited from marrying, except in order to prevent fictitious unions .... However, in the court's decision refusing the request made by the injured party and the accused for leave to marry, it was observed that if they had known each other for 4 years and had not managed to officialise their life "their sudden decision to enter into a marital union shed doubt on their intentions", especially as the request "emerged at a particular moment ... when the court refused to consider [I.K.] as a 'close person'"; this, in the [court]'s view, was accordingly merely "a further attempt to persuade the court that the relations between the accused and the injured party [were] of a close nature, which, in reality ... [was] not the case".
>
> These arguments are not convincing. It is in a way natural that the request for leave to contract a marriage emerged after the court's refusal to recognise the injured party's status at the trial because the injured party and the accused had previously regarded themselves as close persons. It is also evident that if the accused had not been kept in detention but had been released, there would have been no obstacles to his contracting a marriage. Only his incarceration made it impossible for him and the injured party to decide autonomously to get married. A prospective nuptial couple (*nupturienci*) do not have to prove and demonstrate to the relevant authority the depth of their feelings justifying their marriage. The court's decision, especially in view of the reasons given for it, was consequently wrong and amounted to a flagrant breach [of the law] since it infringed the standards laid down in the European Convention on Human Rights, which is binding on Poland."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

1. Detention on remand

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

44. As regards the general situation of a detainee, during criminal proceedings against him he is considered to be "at the disposal" (*w dyspozycji*) of the authority – be it a prosecutor or a court – currently dealing with the case. One of the consequences of this is that a detainee

wishing to have visits from relatives in prison, or a visit from any third person or, as in the present case, to contract a marriage during his detention, must first obtain leave from the relevant authority. While the number and nature of visits in prison are regulated by the provisions of the Code of Execution of Criminal Sentences (*Kodeks karny wykonawczy*) and the Rules for Execution of Detention on Remand (*Regulamin wykonywania tymczasowego aresztowania*), such matters as leave to contract a marriage in prison are entirely at the competent authority's discretion.

2. Testimonial privilege

45. The Code of Criminal Procedure grants an unqualified right not to testify only to the accused's closest relatives and an accomplice witness who has been charged with the same offence in another case (Article 182). Except for national security, in all other situations, even such as client-lawyer privilege, doctor-patient privilege and journalist privilege, the prosecutor or the court can either absolve witnesses from their duty not to disclose confidential information or order them to testify (Article 180).

46. According to Article 185, a similar rule applies to persons who are in a "particularly close personal relationship" with the accused. This provision reads as follows:

> "A person who remains in a particularly close personal relationship with the accused may, if he or she has so requested, be absolved from testifying or from replying to a question."

47. In the light of the Supreme Court's case-law and legal writing, a "particularly close personal relationship" is generally defined as a strong and long-lasting emotional bond between the accused and the witness, resulting, for instance, from friendship, colleagueship, engagement, cohabitation or tutorship such that the act of testifying causes the witness internal conflict.

B. The Family and Custody Code

48. Under the provisions of the Family and Custody Code (*Kodeks Rodzinny i Opiekuńczy*) the registrar of the relevant Registry Office (*Kierownik Urzędu Stanu Cywilnego*) may refuse to solemnise a marriage only if there exists a statutory obstacle rendering the marriage null and void, such as age, legal incapacity, mental disorder, bigamy, close affinity of the parties or adoptive relationship (Articles 5, 10 11, 12, 13, 14 and 15). In case of doubt, the registrar must ask the competent court to rule on whether the marriage can be contracted (Article 5).

Pursuant to Article 4, a marriage before the registrar may not be concluded until 1 month after the persons concerned have made a written declaration that they have no knowledge of any statutory obstacle to the

solemnisation of their marriage. At their request and for important reasons, the registrar may solemnise the marriage before the expiry of that term.

49. Article 6 of the Family and Custody Code lays down the rules for a proxy marriage. Contracting a marriage through a representative is subject to leave that can be granted by a family court in a non-contentious procedure. It depends on two principal conditions. First, the court must be satisfied that there exist "important reasons" justifying the departure from the normal procedure. Secondly, the applicant's signature on a proxy must, on pain of being null and void, be made in the presence of a notary, who confirms its authenticity by a special declaration.

The Supreme Court's case-law and the practice of the domestic courts in respect of proxy marriage is very scant. A few existing rulings of the Supreme Court relate to applications by foreigners for leave to contract proxy marriages with Polish women and date back to the 1970s.

III. EUROPEAN PRISON RULES

50. The Recommendation of the Committee of Ministers to member states on the European Prison Rules (Rec(2006)2) ("the European Prison Rules"), adopted on 11 January 2006, sets out the following standards in respect of the enforcement of custodial sentences and detention on remand that may be relevant to the present case.

Rule 3 reads:

> "Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed."

Rule 70 reads, in so far as relevant:

> "1. Prisoners, individually or as a group, shall have ample opportunity to make requests or complaints to the director of the prison or any other competent authority.
>
> ...
>
> 3. If the request is denied or a complaint rejected, reasons shall be provided to the prisoner and the prisoner shall have the right to appeal to an independent authority."

THE LAW

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

51. The applicant complained under Article 5 § 3 of the Convention that his pre-trial detention had exceeded a "reasonable time" within the meaning of that provision. Article 5 § 3 reads, in so far as relevant, 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."

52. The Court recalls 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, are stated in a number of its previous judgments (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 110, ECHR 2000-XI; and *Mc Kay v. the United Kingdom* [GC], no. 543/03, §§ 41-44, ECHR 2006-..., with further references).

53. In the present case the period of the applicant's detention to be considered under Article 5 § 3 started on 5 September 2000, when he was arrested by the police on suspicion of rape and uttering threats, and ended on 19 November 2001, the date of his first-instance conviction (see paragraphs 8 and 31 above). Accordingly, it lasted 1 year, 2 months and 14 days.

54. In their detention decisions the authorities, in addition to the reasonable suspicion against the applicant, repeatedly relied on the need to secure the proper conduct of the proceedings. This was justified by the possibility of collusion and the risk that the applicant, if released, might bring pressure to bear on the victim and other witnesses and thus obstruct the process of obtaining evidence. They also invoked other grounds, such as the serious nature of the offences with which he had been charged and, in consequence, the likelihood of a severe penalty being imposed on him (see paragraphs 9, 11, 13, 14, 20, 22, 26 and 28 above).

55. Assessing the facts of the case as a whole and having regard to the length of the period under consideration, the Court finds those grounds sufficiently persuasive. Evidence against the applicant was strong; it was even supported by his own partial confession (see paragraphs 9, 10 and 12 above). In the circumstances of the case and given the nature of the charges against the applicant, it was not unreasonable on the part of the authorities to keep him in custody for the time necessary to secure the unhindered process of taking evidence from witnesses. It is true that with the passage of time the victim's – and the main witness's – attitude towards the applicant changed considerably. She decided to marry him and asked the authorities to release him. Also, the applicant on many occasions expressed

his regret for what he had done to her (see paragraphs 15-17 above). These were certainly important factors to be taken into account in assessing the degree of his culpability. They could, and did, have mitigating effects on the sentence imposed on the applicant (see paragraph 32 above). So they certainly required due consideration in the examination of the parties' requests for leave to marry in the Kraków Remand Centre (see paragraphs 34-41). However, it cannot be said that they alone justified the applicant's immediate release, especially in view of the domestic courts' continuing, and reasoned, concerns.

In view of the foregoing and given that the authorities displayed due diligence in handling the case – the investigation was terminated after some four-and–a-half months and the first instance proceedings lasted merely 10 months (see paragraphs 8, 19, 26 and 31 above) – it cannot be said that the length of the applicant's detention was excessive.

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

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

56. The applicant further complained that his appeal against the decision given by the Kraków District Court on 27 November 2001 prolonging his detention had not been examined "speedily", as required by this provision. Article 5 § 4 reads as follows:

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

57. The Government contested that argument.

A. Admissibility

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

B. Merits

1. Period to be taken into consideration

59. The applicant lodged the appeal in question on 1 December 2000. The Kraków Regional Court examined it on 16 January 2001, that is to say after 46 days (see paragraphs 12-13 above).

2. The parties' submissions

60. The applicant maintained that the requirement of "speediness" laid down in Article 5 § 4 was not satisfied. No complex issues were involved in his case and no evidence needed to be taken in the course of the proceedings. Yet it took the appellate court almost 2 months to rule on his appeal.

Referring to the Government's argument that the lawfulness of his detention had been reviewed in parallel proceedings relating to his requests for release and that his detention had meanwhile been extended on the basis of a subsequent decision, the applicant argued that this did not mean that the court handling his appeal did not have to act in compliance with Article 5 § 4.

61. The Government acknowledged that there had been a certain delay in examining the applicant' appeal. It was true that under Article 5 § 4 acceptable periods should be counted in days or weeks rather than months. However, during the period in question the lawfulness of the applicant's detention had been under constant supervision. It had twice been reviewed by the District Prosecutor, who had dealt with the applicant's requests for release and had rejected them on 15 December 2000 and 8 January 2001 respectively. Moreover, the matter had also been examined by the District Court, which, on 3 January 2001, had prolonged his detention until 5 February 2001. In their view, the fact that the authorities had had to give other decisions related to the applicant's detention explained the delay in the examination of his appeal.

3. The Court's assessment

(a) The principles deriving from the Court's case-law

62. The Court recalls that Article 5 § 4, in guaranteeing to persons arrested or detained the right to have the lawfulness of their detention reviewed, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of the detention and to an order terminating it if proved unlawful (see, among many other authorities, *Baranowski v. Poland* no. 28358/95, § 68, ECHR 2000-III).

63. The finding whether or not the relevant decision was taken "speedily" within the meaning of that provision depends on the particular features of the case. In certain instances the complexity of medical or other issues involved in determining whether a person should be detained or released is be a factor which may be taken into account when assessing compliance with Article 5 § 4. That does not mean, however, that the complexity of a given dossier – even exceptional – absolves the national authorities from their essential obligation under this provision (see,

Baranowski v. Poland, cited above, and *Iłowiecki v. Poland*, no. 27504/95, §§ 74-76, 4 October 2001). In particular, there is a special need for a swift decision determining the lawfulness of detention in cases where a trial is pending, because the defendant should benefit fully from the principle of the presumption of innocence (see, for instance, *Jabłoński v. Poland*, no. 33492/96, § 93, 21 December 2000).

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

64. It is common ground that the proceedings in issue did not involve the need to supplement evidence or the determination of any complex issues of a medical or other nature. It has also been acknowledged by the Government that a certain delay occurred in the course of the examination of the applicant's appeal. However, they suggested that the length of the proceedings complained of should be assessed having regard to the fact that at about the same time other proceedings relating to the applicant's detention were pending (see paragraph 61 above).

In the Court's view, this by no means absolved the Regional Court from handling the applicant's appeal in a manner compatible with Article 5 § 4. Even if a detainee has made several applications for release, that provision does not give the authorities either a "margin of discretion" or a choice as to which of them should be handled more expeditiously and which at a slower pace. All such proceedings are to run "speedily" (see *Iłowiecki v. Poland*, cited above).

65. In this context it is also to be noted that the procedure for release before the prosecutor relied on by the Government could not make up for the review required under Article 5 § 4, since this provision clearly speaks of "the lawfulness of ... detention ... decided speedily by a court."

Furthermore, the Kraków District Court's detention decision of 3 January 2001 was taken before the applicant had had any reasonable chance to contest the previous order prolonging his detention until 5 January 2001 and have his appeal challenging that order heard. As stated above, the appeal was examined on 16 January 2001, that is to say 11 days after the contested decision had already expired and its examination had become obviously purposeless (see paragraphs 13 and 14 above).

66. It is true that the period of forty-six days may appear *prima facie* not to be excessively long. Yet that delay resulted in the applicant's appeal being of no legal or practical effect and cannot, therefore, be considered compatible with the requirement of "speediness" laid down in Article 5 § 4 (see *Baranowski*, cited above, §§ 74-76, and *Jabłoński*, cited above, § 94).

The Court consequently holds that there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

67. The applicant further complained that the Kraków-Śródmieście District Court's refusal to grant him leave to marry in prison was arbitrary and unjustified. He alleged a breach of Article 12 of the Convention, which reads:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

A. Admissibility

68. The Government raised two preliminary objections. They maintained that this part of the application was incompatible *ratione personae* with the provisions of the Convention or, in any event, that it should be rejected for non-exhaustion of domestic remedies.

1. The Government's objection on compatibility ratione personae

(a) The Government

69. The Government submitted that the applicant had lost his victim status for the purposes of Article 34 of the Convention since the Supreme Court, when dealing with his cassation appeal, had acknowledged that there had been a violation of his right to marry within the meaning of Article 12. In its judgment of 27 May 2003 the Supreme Court expressly stated that the Kraków District Court's refusal to grant the applicant leave to marry in the remand centre had amounted to a flagrant breach of the Convention. In the Government's view, such an assessment made by the highest domestic judicial authority should be considered an acknowledgement of the Convention violation and a form of moral redress for the applicant.

(b) The applicant

70. The applicant disagreed. The above-mentioned ruling of the Supreme Court had not changed his situation or eliminated the prejudice suffered. It had not repealed the District Court's refusal or constituted leave to marry in prison. Nor had the court awarded him any just satisfaction for the breach of the Convention. He asked the Court to reject the Government's objection.

(c) The Court's assessment

71. It is the settled case-law of the Court that the word "victim" in the context of Article 34 of the Convention denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice; prejudice

is relevant only in the context of Article 41. Consequently, a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among many other authorities, *Brumârescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII).

72. In the present case it is evident that the Supreme Court's finding of a breach of the applicant's right to marry had no further legal or other consequences for his exercise of this right. This was not even a "decision favourable to [the] applicant" but merely a belated post-factum declaration, made more than 2 years after the applicant's repeated but futile attempts to obtain leave to marry. It did not, and could not, constitute any form of redress for the alleged violation of Article 12 required by the Convention.

It follows that the Government's objection *ratione personae* must be rejected.

2. The Government's objection on exhaustion of domestic remedies

(a) The Government

73. The Government further argued that the applicant had not exhausted domestic remedies, as required by Article 35 § 1 of the Convention. In their opinion, the applicant could have contracted his marriage outside the remand centre – without leaving it. In particular, he could have asked a civil court to grant him leave to contract a proxy marriage with I.K., relying on Article 6 of the Family and Custody Code, which gave such a possibility to a party who, for important reasons, could not be personally present at the registry office.

(b) The applicant

74. The applicant replied that, in the circumstances of his case, this was not a remedy that could be considered adequate and effective for the purposes of Article 35 § 1.

(c) The Court's assessment

75. The rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 65).

The aim of the rule is to afford Contracting States an opportunity to put matters right through their own legal system before having to answer before an international body for their acts. However, although Article 35 § 1 requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, it does not require that recourse should be had to remedies that are inadequate or ineffective (see *Egmez v. Turkey* no. 30873/96, ECHR 2000-XII, §§ 65 et seq.). Nor can it be said that in cases where the national law provides for several parallel remedies in the spheres of civil, criminal or even administrative law, the person concerned, after a sustained but eventually unsuccessful attempt to obtain redress through one such remedy, must necessarily try all other means (see *H.D. v. Poland* (dec.), no. 33310/96, 7 June 2001).

76. The Government relied on a remedy which, under Polish family law, is designed to address exceptional circumstances, such as important obstacles to appearing in person before the authorities in order to contract a marriage. According to Article 6 of the Family and Custody Code, the person concerned may obtain leave to contract a proxy marriage if the court is satisfied that there are important reasons for the departure from the ordinary procedure and subject to the condition that he or she supplies a proxy signed in the presence of a notary, with the authenticity of the signature being officially confirmed (see paragraph 49 above).

77. The Court is not persuaded that this procedure, although available to the applicant in theory, would have given him reasonable prospects of success in practice.

In order to initiate the proceedings before the family court, the applicant would have had to obtain prior leave from the Kraków District Court to receive a visit from a notary in the remand centre (see paragraph 43 above), so as to draw up a duly signed proxy before him. The applicant already repeatedly applied to that court for leave to marry, but in vain (see paragraphs 34-37 above). Having regard to the presiding judge's unambiguously outright refusal to grant him such leave and the reasons given for this decision – most notably, her personal conviction that the applicant's marriage to I.K. would serve solely to allow the latter to take advantage of the corresponding testimonial privilege (see paragraphs 25 and 38 above) – there is little likelihood that he would have succeeded in getting approval for completing formalities enabling him to contract a proxy marriage during the trial. In any event, the Government have not supplied any example from domestic practice demonstrating that the proxy-marriage procedure can effectively be used by persons in detention.

Accordingly, the Government's objection on non-exhaustion of domestic remedies must be rejected.

B. Merits

1. The parties' submissions

(a) The applicant

78. The applicant maintained that the refusal to grant him leave to marry I.K. in detention was clearly in breach of Article 12 of the Convention. The circumstances of the case did not justify such a serious interference with his and I. K.'s decision to solemnise their relationship. In contrast to what the Government stated, the nature of the offence with which he had been charged – rape – obliged the District Court to give serious consideration to the victim's change of attitude towards him and to respect her decision to marry him regardless of past events and the fact that he had been placed in detention.

(b) The Government

79. The Government stated that they preferred to refrain from expressing their opinion on the alleged violation of Article 12. Nevertheless, they wished to draw the Court's attention to certain circumstances of the case.

They stressed at the outset that there was no established case-law of the Court concerning the exercise of the right to marry by a person in detention. In the case of *Hamer v. the United Kingdom* (no. 7114/75, decision of 13 October 1977, D.R. 10 p. 174) the former European Commission of Human Rights found admissible a complaint under Article 12 about a refusal to grant leave to marry to a prisoner sentenced to a specific term of imprisonment, who could not marry his partner until he had been released from prison. In the present case the circumstances were different. The applicant was refused such leave while being held in pre-trial detention. Detention on remand, by its very nature, is not a measure imposed for a specific period but it can be lifted at any time. Thus, the applicant could have married I.K once he had been released.

80. Article 12, they added, did not guarantee an unlimited right to marry since this right was regulated by "the national laws" governing its exercise. Consequently, as the Court had held in the case of *B. and L. v. the United* Kingdom (no. 36536/02, judgment of 13 September 2005), this right was subject to limitations, although they could not restrict or reduce the right to such an extent that its very essence was impaired.

81. The Government agreed that the reasons for the refusal given by the presiding judge had not been appropriate. However, this decision should be seen in the light of all the circumstances of the case. It could not be contested that the applicant had raped I.K. – he had been convicted of and sentenced for that offence. It was obvious that he had earlier threatened the victim, as confirmed by her at the initial stage of the investigation.

Apparently, I.K had changed her attitude towards the applicant after one visit to the remand centre in October 2000. Yet it emerged from the materials contained in the case-file that the applicant's request for leave to marry her had been connected with the prospect that she would take advantage of testimonial privilege, relying on their marital relationship. Witnesses had confirmed during the trial that the applicant had uttered threats against I.K., so the District Court had had good reason to question his stated intentions when he asked it for leave to marry her.

82. The applicant could have married I.K. after his release but he had not done so. The District Court had refused him leave on 11 July 2001. After serving part of his sentence, he had been released on probation on 2 December 2002. Accordingly, 1 year and 5 months after the refusal he could have married I.K. What is more, the Government argued, after his conviction had been upheld on appeal by the Kraków Regional Court on 7 May 2002, the applicant had not made any further request for leave to marry in prison.

2. The third party's comments

83. The Helsinki Foundation for Human Rights stressed the importance of the fundamental human right to marry, which had been acknowledged by the Court on many occasions, one example being the case of *Christine Goodwin v. the United Kingdom* (no. 28957/95, judgment of 11 July 2002).

It drew the Court's attention to the fact that the case-law of the Convention institutions relating to prisoners' right to marry had gradually developed from non-recognition to explicit protection.

In the case of *X. v. the Federal Republic of Germany* (no. 892/60, Yearbook IV 1961, p. 240 (256), the Commission, relying on the domestic court's finding that it had been expected that the applicant would be detained for a long time and he would not therefore be able to cohabit with his prospective wife for a long time to come, and that marriages of prisoners inevitably tended to affect the maintenance of order in prison, had rejected the complaint under Article 12 as manifestly ill-founded. However, subsequently, in the case of *Hamer v. the United Kingdom*, (no. 7114/75, Commission's report of 13 December 1979), where the Article 12 complaint was based on similar facts, the Commission had altered its previous position and expressed the opinion that there had been a breach of this provision, holding that "[t]he essence of the right to marry ... is the formation of a legally binding association between a man and a woman. It is for them to decide whether or not they wish to enter such an association in circumstances where they cannot cohabit".

84. It was natural that, as the Court had held in many cases concerning the rights of prisoners, any measure depriving a person of liberty inevitably entailed limitations on the exercise of Convention rights, including a measure of control on prisoners' contacts with the outside world. In the

context of the right to marry this might mean that the authorities, in exercising their power in this area, could monitor the wedding ceremony and limit, for instance, the number of participants. However, they should maintain a fair balance between the demands of security in prison and the prisoner's right to marry. Their discretion should be limited to, and their decisions based on, concrete facts, not on prejudice. A refusal should be restricted to situations where the marriage ceremony would jeopardise prison security – and not just be difficult to organise. Moreover, rules regulating the authorities' discretion should be laid down in the national law. In particular, the law ought to list specific circumstances in which the authorities should not give leave to marry – for example, if it would affect the process of rehabilitation. In this context, it must be stressed that the issues involved were of a sensitive nature; thus, unjustified refusal of leave to marry could be regarded as additional or disciplinary punishment.

85. According to the third-party intervener, the authorities often based their refusals on the argument that there was a risk that the detained applicant intended to contract a fictitious marriage in order to achieve some other purpose or advantage. Polish law did not require the registry authorities to check, prior to its solemnisation, whether an intended marriage was fictitious or "genuine". Since there was no difference in legal status between unmarried persons who were free and those in prison, imposing such a requirement on prisoners was tantamount to discrimination.

86. It was difficult to gauge the scale of the problem in Poland since the authorities did not conduct any statistical surveys regarding the number of marriages in prison. Furthermore, Polish legislation gave the authorities unlimited discretion to decide whether to grant prisoners leave to marry. In this context the third–party intervener referred to the related case of *Jaremowicz v. Poland* (no. 24023/03; see also paragraph 5 above) and the refusal to grant that applicant leave to marry in prison justified by the fact, *inter alia*, that "[n]o provision oblige[d] a governor of a penitentiary establishment to grant a detained person leave to contract a marriage in the establishment run by him" (see *Jaremowicz v. Poland*, no. 24023/03, judgment of 5 January 2009, § 17).

It was true that Polish law did not lay down any procedure for contracting marriage in prison. Marriages of persons at liberty could not be forbidden if the requisite conditions, such as for example, marriageable age, were met. In contrast, a request for the solemnisation of a marriage in prison could, as shown by the facts of the present case, be rejected for reasons that were not listed in the legal provisions governing marriage.

87. The Helsinki Foundation for Human Rights concluded that the effective protection of the right to marry in prison required additional procedural guarantees, such as the possibility of challenging the prison authority's decision before a court, the stipulation of a time-limit for handling a leave request, to ensure that the procedure was terminated within

a reasonably short time, and the publication of a list of grounds for possible refusal, which should be limited to genuine, neutral and legitimate interests.

3. The Court's assessment

(a) Principles deriving from the Court's case-law

88. Article 12 secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. As to both procedure and substance it is subject to the national laws of the Contracting States, but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see *F. v. Switzerland*, 18 December 1987, Series A no. 128, § 32, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 29, ECHR 2002-VI).

In consequence, the matter of conditions for marriage in the national laws is not left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far (see *R. and F. v. the United Kingdom* (dec.), no. 35748/05, 28 November 2006).

89. The Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage. However, the relevant laws – which must also meet the standards of accessibility and clarity required by the Convention – may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice (see *Hamer v. the United Kingdom*, no. 7114/75, Comm. Rep. 13 December 1979, D.R. 24, pp. 12 et seq., §§ 55 et seq.; *Draper v. the United Kingdom*, no. 8186/78, Comm. Rep., 10 July 1980, D.R. 24, § 49; *Sanders v. France*, no. 31401/96, Com. Dec., 16 October 1996, D.R. no. 160, p. 163; *F. v. Switzerland*, cited above; and *B. and L. v. the United Kingdom*, no. 36536/02, 13 September 2005, §§ 36 et seq.).

90. This conclusion is reinforced by the wording of Article 12. In contrast to Article 8 of the Convention, which sets forth the right to respect for private and family life, and with which the right "to marry and to found a family" has a close affinity, Article 12 does not include any permissible grounds for an interference by the State that can be imposed

under paragraph 2 of Article 8 "in accordance with the law" and as being "necessary in a democratic society", for such purposes as, for instance, "the protection of health or morals" or "the protection of the rights and freedoms of others". Accordingly, in examining a case under Article 12 the Court would not apply the tests of "necessity" or "pressing social need" which are used in the context of Article 8 but would have to determine whether, regard being had to the State's margin of appreciation, the impugned interference was arbitrary or disproportionate (see paragraph 88 above, with references to the Court's case-law).

91. Personal liberty is not a necessary pre-condition for the exercise of the right to marry.

Imprisonment deprives a person of his liberty and also – unavoidably or by implication – of some civil rights and privileges. This does not, however, mean that persons in detention cannot, or can only very exceptionally, exercise their right to marry. As the Court has repeatedly held, a prisoner continues to enjoy fundamental human rights and freedoms that are not contrary to the sense of deprivation of liberty, and every additional limitation should be justified by the authorities (see *Hirst (no. 2) v. the United Kingdom*, [GC], no 74025/01, § 69, ECHR 2005- IX, with further references).

92. In the above-mentioned case of *Hirst (no.2)*, the Grand Chamber of the Court referred to a non-exhaustive list of rights that a detained person may exercise. For example, prisoners may not be ill-treated, or subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention. They continue to enjoy the right to respect for private and family life, the right to freedom of expression, the right to practice their religion, the right of effective access to a lawyer or to a court for the purposes of Article 6 and the right to respect for their correspondence (ibid.). In the same way, as emphasised by the European Commission of Human Rights in the case of *Hamer v. the United Kingdom* (cited above, § 89), they enjoy the right to marry.

The principle that any restrictions on those other rights must be justified in each individual case is also explicitly stated in the European Prison Rules which, in Rule 3, stipulate that "[r]estrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed" (see paragraph 27 above).

93. While such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment, there is no question that detained persons forfeit their right guaranteed by Article 12 merely because of their status. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for any automatic interference with prisoners' rights, including their right to establish a marital relationship with the person of

their choice, based purely on such arguments as what – in the authorities' view – might be acceptable to or what might offend public opinion (see, *mutatis mutandis*, *Hirst (no. 2)*, cited above, § 70; *Dickson v. the United Kingdom*, [GC], no. 44362/04, §§ 67-68, ECHR 2007-...; *Hamer v. the United Kingdom*, cited above, § 67; *Draper v. the United Kingdom*, cited above, § 54; and *F. v. Switzerland*, cited above, §§ 43 et seq.).

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

94. The Court observes at the outset that the applicant's complaint is not directed against the laws governing marriage in Poland, their quality or their application in his particular case. The object of the applicant's grievance is the Kraków District Court's refusal to grant him leave to marry in the Kraków Remand Centre, which, in his submission, constituted an arbitrary and unjustified interference with his right to marry guaranteed by Article 12 (see paragraphs 67 and 78 above). The Government agreed that the grounds relied on by the court had not been appropriate but refrained from taking a position on the merits of the complaint (see paragraphs 79 and 81 above).

One of the presiding judge's principal reasons for the refusal was to prevent I.K. – the victim – from marrying the applicant so that she could exercise her right not to testify against him. The judge also considered that the remand centre was not an appropriate place for holding a marriage ceremony and that the sincerity of the couple's intentions was open to doubt given that they had not "officialised their life" previously (see paragraph 38 above).

Indeed, already at the opening of the trial I.K. relied on testimonial privilege, arguing that she was in a "particularly close relationship" with the applicant and requesting the court to absolve her from testifying against him (see paragraphs 21, 24, 45 and 46 above).

95. It is beyond question that it was for the trial court, in the exercise of its independent judicial decision-making power, to determine whether, for the purposes of Article 185 of the Code of the Criminal Procedure, I.K. satisfied the requirements entitling her to testimonial privilege, and to draw such consequences as it saw fit from her change of attitude towards the applicant when assessing evidence before it or deciding on his continued detention. However, the Court sees no reason why the trial court should have assessed – as it did – whether the quality of the parties' relationship was of such a nature as to justify their decision to get married, or to analyse and decide which time and venue were or were not suitable for their marriage ceremony (see paragraph 38 above).

The choice of a partner and the decision to marry him or her, whether at liberty or in detention, is a strictly private and personal matter and there is no universal or commonly accepted pattern for such a choice or decision. Under Article 12 the authorities' role is to ensure that the right to marry is exercised "in accordance with the national laws", which must themselves

be compatible with the Convention, as stated above; but they are not allowed to interfere with a detainee's decision to establish a marital relationship with a person of his choice, especially on the grounds that the relationship is not acceptable to them or may offend public opinion (see paragraphs 88, 89 and 93 above).

It goes without saying that detention facilities are neither designed, nor freely and normally chosen for that purpose. What needs to be solved in a situation where a detained person wishes to get married is not whether or not it is reasonable for him to marry in prison but the practical aspects of timing and making the necessary arrangements, which – as the third party rightly pointed out (see paragraph 84 above) – might, and usually will, be subject to certain conditions set by the authorities. Otherwise, they may not restrict the right to marry unless there are important considerations flowing from such circumstances as danger to prison security or prevention of crime and disorder (see paragraph 93 above).

96. In the present case there is no indication that such circumstances existed. Nor was the parties' eligibility or compliance with the conditions for marriage laid down in Polish law put in question at any stage in the proceedings. The main reason why the applicant was denied leave to marry in prison was the trial court's conviction that the marriage would have adverse consequences for the taking of evidence against him. This, the court considered, was an obstacle justifying the imposition of a ban on his right to marry during the trial, a ban which in reality had no legal basis since under Polish law the relation "accused-victim" in criminal proceedings is not a legal or factual impediment to contracting a marriage (see paragraph 48 above).

If the applicant had not been in detention, there would have been no means to prevent him and I.K. from marrying in the registry office at any chosen time during the trial. Nor would the genuineness of his feelings – which, in order to justify his requests, he was compelled to express and show before the court – have been debated by the registry authorities before the solemnisation of the relationship. As pointed out by the Supreme Court, only the fact that the applicant was in detention made it impossible for him and I.K. to decide autonomously to get married, and, had he been a free man, he would not have had to prove and demonstrate before any authorities the depth and quality of his feelings (see paragraph 42 above). In consequence, the Court cannot but fully endorse the Supreme Court's assessment that the interference with the applicant's right to marry was disproportionate and arbitrary.

97. The Government did not contest the Supreme Court's conclusion in respect of a breach of Article 12 (see paragraphs 69 and 81 above). They nevertheless argued that the applicant could have married I.K. after his release, that is to say some 1 year and 5 months after he was denied leave to marry in the remand centre. They also referred to the fact that he had

apparently not made any attempts to obtain such leave after his conviction became final, about one year after the refusal. They maintained that these considerations should be taken into account in the assessment of the breach of Article 12 alleged by the applicant (see paragraph 82 above).

The Court does not accept this argument. The Government seem to be suggesting that the fact that the applicant had the possibility of marrying I.K. in the future, which in his case meant a period of more than one year, could alleviate the consequences of the District Court's refusal. However, a delay imposed, before getting married, on persons of full age and otherwise fulfilling the conditions for marriage under national law, be it as a civil sanction or the practical consequence of such a refusal as in the instant case, cannot be considered justified under Article 12 of the Convention (see *F. v. Switzerland*, cited above, §§ 33-37).

98. The third party drew the Court's attention to another, general aspect of the case, namely the lack of any procedure for contracting marriage in prison under Polish law. It submitted that, as shown by the facts supplied by the applicant, the authorities' discretion in granting or refusing a detained person the right to marry is unlimited. There are no rules stating in which circumstances a request for leave to marry in a detention facility can be refused and no time-limits are set for handling such requests (see paragraphs 86 and 87 above).

99. It is true that Polish law leaves the relevant authorities complete discretion in deciding on a detainee's request for leave to marry in prison (see paragraph 44 above). It is also true that no specific provision of national law deals with marriage in detention. In the Court's view, however, Article 12 does not require the State to introduce separate laws or specific rules on marriage for prisoners; thus, as stated above, detention is not a legal obstacle to marriage (see paragraphs 91-93 above). Nor can it be said that there is any difference in legal status, as regards the right to marry, between unmarried persons who are in detention and those who are not.

100. What lies at the heart of the violation of Article 12 of the Convention alleged in the present case is not the scope of discretion afforded to the Polish authorities but the arbitrary fashion in which the Kraków District Court used its decision-making power. The discretion available in theory may be very wide, but the decisive element is how it is applied by the authorities in practice. In the applicant's case the Convention breach was caused by the lack of restraint displayed by the national judge in exercising her discretion and by her failure to strike a fair balance of proportionality between the various public and individual interests at stake in a manner compatible with the Convention, rather than by the absence of detailed rules on marriage in detention. Even if the trial court acted with a view to ensuring the orderly conduct of the trial – which was the legitimate interest – it lost sight of the need to weigh in the balance

respect for the applicant's fundamental Convention right. As a result, the measure applied impaired the very essence of the applicant's right to marry.

Accordingly, the Court concludes that there has been a violation of Article 12 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

101. Lastly, the applicant complained that the lack of any remedy enabling him to contest the refusal to allow him to marry in prison had amounted to a violation of Article 13 of the Convention. This provision reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

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

B. Merits

103. The Government acknowledged that no appeal lay in law against a judge's refusal to grant a detainee leave to marry. They pointed out, however, that such a decision could be changed at any time at the applicant's subsequent request. In any event, as they had already explained, the person concerned could obtain leave to contract a proxy marriage (see paragraph 73 above).

104. The Court, having found above that there has been a violation of Article 12 of the Convention, concludes that the applicant's complaint is without doubt arguable for the purposes of Article 13 of the Convention. This required the State to provide him with a domestic remedy to deal with the substance of his complaint (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI; *Christine Goodwin v. the United Kingdom*, cited above, §§ 112-113). In view of the Government's admission of the absence of any procedure whereby the applicant could have appealed against or otherwise challenged the decision denying him his right to marry in detention, the Court finds that there has been a breach of Article 13 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. 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

106. The applicant claimed non-pecuniary damage of 20,000 euros (EUR) in respect of distress, anxiety and grief caused by the fact that on account of the court's arbitrary refusal to grant him leave to marry, he had irrevocably lost the possibility of marrying a beloved person.

107. The Government considered that the sum was exorbitant. If the Court were to find a violation of any of the Convention provisions invoked by the applicant, that finding would provide sufficient and just satisfaction. Alternatively, they asked to Court to assess the applicant's claim on the basis of its case-law in similar cases and in the light of the particular circumstances of this case.

108. The Court considers that the applicant certainly suffered non-pecuniary damage – such as feelings of frustration and not inconsiderable distress – which is not sufficiently compensated by the finding of violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 under this head.

B. Costs and expenses

109. The applicant claimed EUR 2,500 for costs and expenses incurred in the proceedings before the Court.

110. The Government asked the Court to grant the reimbursement, if any, of this sum, only in so far as the costs and expenses claimed had actually and necessarily been incurred and were reasonable as to quantum.

111. The Court considers it reasonable to award the sum of EUR 1,500.

C. Default interest

112. 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 Articles 5 § 4, 12 and 13 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

3. *Holds* that there has been a violation of Article 12 of the Convention;

4. *Holds* that there has been a violation of Article 13 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, the following amounts, to be converted into Polish zlotys at the rate applicable at the date of settlement:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non pecuniary damage;
      (ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (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 5 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Nicolas Bratza
Deputy Registrar	President