TO THE EUROPEAN COURT OF HUMAN RIGHTS
(Application No. 36921/07)

MIROSŁAW GARLICKI V. POLAND

WRITTEN COMMENTS

BY

THE HELSVINKI FOUNDATION FOR HUMAN RIGHTS

29 FEBRUARY 2008
I. INTRODUCTION

1. These written comments are submitted by the Helsinki Foundation for Human Rights (hereinafter referred to as the “HFHR”), with its seat in Warsaw, Poland at Zgoda 11 Street, pursuant to a leave granted on 28 January 2008 to the HFHR by the President of the Chamber of the European Court of Human Rights (hereafter: the “Court”) under Rule 44 § 2 of the Rules of the Court.

2. These submissions do not include any comments on the facts or merits of the case and address only the following matters:
   - The manner of arrest in applicant’s case in the light of the prohibition of torture and other forms of degrading and inhuman treatment and the specific context of the present case.
   - The status of the assistant judge in Polish judiciary and the constitutionality of this institution in the light of the Polish Constitutional Court judgment of 24 October 2007. In particular, whether a court presided over by the assistant judge has the status of “court” in accordance with Article 6.
   - The issue of Respect for the presumption of innocence by public officials and international standards concerning this principle;

II. INTEREST OF THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

3. The Helsinki Foundation for Human Rights is one of the most recognizable and powerful non-governmental organization in Poland. It was established in 1989 by members of the Helsinki Committee in Poland in order to promote human rights and the rule of law, as well as to contribute to the development of an open society in Poland. The Articles of Association of the HFHR include legal actions undertaken in the public interest, including the representation of parties and preparation of legal submissions to national and international courts and tribunals, particularly within the framework of the Strategic Litigation Program. The aim of such submissions is to influence the process of changing laws and practices that the HFHR finds to be contrary to human rights standards.

4. Since its establishment, the HFHR has been promoting the standards of the European Convention on Human Rights (the “Convention”), including the protection of human rights established by Article 3 and Article 6 of the Convention. With reference to the present case, please note that lawyers from HFHR initiated the proceedings before the Polish Constitutional Court which resulted in the judgment of 25 October 2007 concerning the constitutionality of the assistant judge’s status. This issue will play significant role in assessment the present case.

5. What is more, we are involved in many cases and activities concerning standards of fair criminal trial. We carry out continuous activities monitoring the use of pre-trial detention in Poland. Furthermore, we try to promote the standards created by the European Court of Human Rights with respect to this preventive measure.
III. THE MANNER OF ARRESTS – POLISH EXPERIENCE ON “DEMONSTRATION ARRESTS”

6. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in all of the major international and regional human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 3 of the Convention prohibits torture and inhumane or degrading treatment or punishment in absolute terms and, unlike most of the other substantive articles of the Convention, makes no provision for exceptions.

7. HFHR intends to present the manner of applicant’s arrest in the broader context of other operations carried out by the Central Anti-corruption Bureau (hereinafter: CAB) and other Polish special services not just confined to the ECHR’s and international standards of prohibition inhumane and degrading treatment. However, we are aware of the fact that the Court has in the past dealt with cases requiring examining the manner of arrests. From this point of view, the attention should be focus on the judgment in case of Kucera v. Slovakia. The Court found that a risk of abuse of authority and violation of human dignity is inherent in a situation such as the one which arose in this case where the applicant was confronted by a number of specially trained masked policemen at the front door of his apartment very early in the morning. In the Court's view, safeguards should be in place in order to avoid any possible abuse in such circumstances and to ensure the effective protection of a person's rights under Article 8 of the Convention. Such safeguards may include the adoption of regulatory measures which confine the use of special forces both to situations where ordinary police intervention cannot be regarded as safe and sufficient and, in addition, prescribe procedural guarantees, for example ensuring the presence of an impartial person during the operation or the obtaining of the owner's clear, written consent as a pre-condition to entering his or her premises.

8. We would like to present the applicant’s case as one of the most controversial examples of possible abusing by special services officers their competences. In the recent past in Poland, we have observed an alarming tendency to use the spectacular arresting as a method to achieve propaganda or political goals. This strategy is assuming notable proportions and developing into a systemic problem. We are afraid that in some “politically sensitive” cases the manner of arrest (with cameras, journalists, photos in tabloids, using the means of direct coercion, handcuffs) plays significant role in creating the atmosphere of a battle by humiliating the person being arrested in order to undermine his authority. What is more, it could be used by the Government to weaken the professional or political group represented by the arrested person, especially when this group has come into conflict with the authorities.

9. We would first, like to mention the case of Andrzej Modrzejewski, former CEO of the largest refinery and distributor of oil in Poland, PKN Orlen. He was arrested in 2002. The spectacular arrest was broadcast on the evening news and took place a day before a meeting of the company's supervisory board. The prosecutor charged Modrzejewski with disclosing confidential information concerning a company from an investment fund he had previously headed. Modrzejewski was released several hours before the board meeting but the arrest provoked the board to fire him.

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10. In April 2004, a former treasury Minister, Wiesław Kaczmarek, publicly declared that Modrzejewski's arrest was politically motivated. He described a meeting attended by high officials of the government of the time including the then Prime Minister, Leszek Miller, the then Justice Minister, Barbara Piwnik, the head of the civil foreign intelligence service, Zbigniew Siemiątkowski, and himself where the decision was made to arrest Modrzejewski. Modrzejewski's arrest was supposed to lead to his dismissal as CEO and thus prevent him from signing a large contract to supply Orlen with oil from J & S, an intermediary firm dealing with imports of Russian oil to Poland.

11. The second example of possible abuse of special services to achieve political goals is the case of Emil Wąsacz, former Treasury minister in the government of Jerzy Buzek. He was arrested on 18 September 2006 by Central Bureau of Investigation (CBŚ) officers. According to the spokesman for the Appeal Prosecutor's Office in Gdańsk, Wąsacz was arrested in connection with suspicions that he neglected his duties concerning the protection of the Treasury's interests during the privatization of the PZU insurance company. The assessment of the Court was, that there were no reasons for this action. In particular, there was no ground to suspect that Mr. Wąsacz would abscond or would try to run away from Poland. What is more, the Constitutional Court repealed the regulation of the Code of the Criminal Procedure which was the legal basis of Wąsacz's arrest.

12. As to the CAB’s operations, we would like to observe that during its functioning (Bureau was established in 2006) many of its actions have been criticized by both lawyers and the media. In the opinion of many people, some of these operations were targeted at persons or groups who had come into conflict with the government with examples of some doctors, a deputy prime minister from coalition party and a deputy from opposition party. The applicant’s case is a glaring example of the controversial CAB’s activities like other operations against doctors.

13. The case of Witold B., a businessman arrested under corruption charges has been by a number of articles in the press. The manner of his arrest was very characteristics of the CAB operations. He was led out from his house by the CAB officers at 6 a.m. The operation was filmed by the other officers. When it turned out that the quality of the film was poor, the officers decided to repeat the operation and led out Witold B. from his house once again.

14. There are other operations conducted by CAB that have also been controversial and doubtful. We would like to mention the actions against the former Deputy Prime Minister Andrzej Lepper and a deputy Beata Sawicka from opposition party – Civic Platform. The circumstances of these cases point out that CAB in its activities teetered on the edge of legality. When it comes to the operations against the doctors, it should be noted that they was carried out- when the doctors came into conflict with the government. Broadcasting of the arrest of the applicant and other doctors could aimed at undermining their to authority and weakening their position in the negotiations with the government. As much as we would not want to accuse the government of such ill intentions, we find the coincidences presented by the facts rather puzzling. We do not want to accuse the government of such “diabolical” intentions. However, the coincidence between these facts is puzzling.

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3 K. Wójcik, Zatrzymanie Wąsacza bezzasadne, „Rzeczpospolita”, 28-29 October 2006
4 See para 14 below.
5 M.T. Nowak, Jak CBA zatrzymało prezesa Kama Foods, „Kurier Lubelski”, 17.08.2007.
15. During the campaign period in last elections, the future of CAB was one of the main issues. Law and Justice strongly recommended to hold the Central Anti-corruption Bureau with its head – Mariusz Kamiński, former PiS deputy. A November 2007 poll found that only 10% of Poles wanted to see the CAB disbanded. Nearly a third would want it remain in its present form, while only 41% wanted to see it reformed. The Opposition has no common and coherent position concerning the future of this institution. Civic Platform, signaled conducting independent investigation on CAB activities. The Left and Democrats strongly demand liquidation of the Bureau and appointing parliamentary investigative committee to examine its activities. Some non-governmental organizations represent the opinion that CAB should be transformed into anti-corruption "think tank" using "soft" anti-corruption tools such as education and raising the awareness of corruption's threats.

16. In January 2008 the Sejm appointed a parliamentary investigative committee to examine the instances where political pressure was put on the special services during last two last two years. The main goal of this committee is to assess the legality of CAB’s operations against Andrzej Lepper and Beata Sawicka.

17. The last point of the considerations about the manner of applicant’s arrest relate to using means of direct coercion against the applicant. The HFHR considers this as excessive and could be designed to achieve propaganda goals. However, we would like also to point out that the Polish Commissioner for Citizens’ Rights (Rzecznik Praw Obywatelskich) has submitted to the Constitutional Court an application requesting to it consider the constitutionality of the regulation permitting the CAB’s officers to use means of direct coercion even against persons who do not resist arrest by the officers. The Commissioner claims that the regulation is not compatible with the specific authorization contained in Law on CAB, which does not permit the use direct coercion against persons who do not resist arrest by the CAB’s officers. If the Constitutional Court confirms the Commissioner’s assessment, there will be strong legal basis to claim that the manner of the applicant’s arrest violated not only the provisions of the Convention, but also the Law on CAB and the Polish Constitution.

IV. THE ORDER OF PRE-TRIAL DETENTION BY THE ASSISTANT JUDGE

18. The second problem that the HFHR would like to be considered is the order of the pre-trial detention by the assistant judge (asesor), as the measure that was used in the present case. From our point of view, this issue should be taken into consideration in the context of the above mentioned judgment of the Constitutional Court, in which the Court dealt with the constitutionality of this institution. Our goal is to present main points of this judgment and its impact on resolving the present case.

7 H. Davies, Keeping the law within the law, “Poland Monthly”, December 2007
8 A. Bodnar, D. Sześciło, Rekomendacje w dziedzinie przeciwdziałania i zwalczania korupcji, ISP 2008, (forthcoming)
10 Judgment of 24 October 2007, sign. SK 7/06.
19. At the onset, we would like to point out that the judgment of the Constitutional Court was preceded by intensive discussions in which lawyers and politicians participated. It should be noted that in 2006 – before pronouncing final judgment- the Constitutional Court gave a signal decision, which recommended taking into consideration preparation of some legislative proposals to modify the assistant judges’ status. This decision resulted in draft bills submitted by the President and the National Judiciary Council. The problem of the status of assistant judges was also mentioned in special report prepared by the International Bar Association’s Human Rights Institute (IBAHRI) and the Council of Bars and Law Societies of Europe (CCBE) concerning the threats to the judiciary in Poland\textsuperscript{11}. The IBAHRI and CCBE delegation noted that members of the legal community in Poland are opposed to assessors on the grounds that they are appointed by the Minister of Justice and are therefore considered ‘political’ and ‘dependent’, thereby jeopardising the independence of the judiciary. However, the IBAHRI and the CCBE expressed concern about the implications of the legislation which appears to bestow judicial powers on persons not suitably qualified for judicial office\textsuperscript{12}.

20. The status of assistant judge is regulated by sections 134-136 of the Law on Courts of General Jurisdiction (\textit{Ustawa o ustroju sądów powszechnych}). In the judgment of 24 October 2007 the Constitutional Court decided to repeal Article 135 (1) of the Law on Courts of General Jurisdiction. The main conclusion flowing from this judgment is that the status of the assistant judge differs from the status of a judge since it does not guarantee its complete independence from the executive. As a result, the Constitutional Court found that the provision regulating the status of the assistant judges is not compatible with the Article 45 of the Polish Constitution guaranteeing fair trial before a “competent, impartial and independent court”. The judgment was based on the following arguments:

- **The assistant judges do not enjoy the guarantees of the stability similar to the judges.** In this context, the Constitutional Court referred to ECHR’s judgments in case of 
  \textit{Benthem v. Holland} (application no. 8848/80), \textit{Campbell and Fell v. Great Britain} (application no. 7819/77) and \textit{Sramek v. Austria} (application no. 8790/79). The Court observed that the regulation of the status of assistant judges does not provide the minimum and maximum term of their employment and exercising judicial power.

- **The assistant judges may be recalled during the their judicial training.** In the Court’s opinion, recalling of the assistant judge may be compatible with the constitutional principles if the recalling conditions would be the same as those applicable to judges. What is more, the provisions of the Law on Courts of General Jurisdiction do not point out the specific circumstances which justify the recalling. Moreover, the decision to dismiss the assistant judge is taken by the Minister of Justice and not by an independent court. The Constitutional Court concluded that, under such regulations, there was no sufficient guarantees to prevent the recalling of an assistant judge because of his judicial activity.

- **The exercising of judicial power by persons without strong guarantees of independence is a threat to the social trust for the administration of justice.** The Court's opinion was that citizens who take part in judicial proceedings should perceive these proceedings as compatible with the fair trial requirements. The exercising the judicial power by the assistant judges, who do not enjoy the guarantees of independence and


\textsuperscript{12} Ibidem, p. 28.
stability similar to the judges, provokes speculations and suspicions that undermine the courts’ authority and legitimization of their judgment. From this point of view, the current status of the assistant judges has harmful influence on the citizens’ approach to the administration of justice.

21. In conclusion, it should be emphasized that the position of an assistant judge differs from that of a judge since it does not guarantee its complete independence from the executive represented by the Minister of Justice. As a result, the exercising by the assistant judges of judicial power should be found as incompatible not only with the Article 6 of the Convention, but also with Article 45 (1) of Polish Constitution.

22. With respect to applicant’s case, we would also like to put emphasis on the fact that the assistant judge, who considered the order pre-trial detention, related to the facts, which were previously commented and assessed by the Minister of Justice Zbigniew Ziobro. There is little doubt that Mr. Ziobro was personally involved in the applicant’s case and that he was interested in obtaining a particular decision as confirmed by his comments made at the press conference. In HFHR’s opinion, this seriously undermined the independence and impartiality of the assistant judge, as his professional future depended par excellence on Mr. Ziobro’s decisions.

V. THE PRESUMPTION OF INNOCENCE: DEFINITION, SCOPE, INTERNATIONAL STANDARDS

A. Presumption of innocence in ECHR standards

23. The presumption of innocence is one the fundamental principles of criminal justice in democratic societies. It states that no person shall be considered guilty until finally convicted by a court. The burden of proof is thus on the prosecution, which has to convince the court that the accused is guilty beyond a reasonable doubt. It is often said that the presumption of innocence is not just a procedural requirement hence it requires the treatment of the accused person by both the agents in the criminal justice system and by public official to be consisted with this presumption of innocence. Under the Convention, the presumption of innocence is expressed by the Art. 6 (2), (The right to a fair trial): “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. This general principle has been further developed in the jurisprudence of the European Court of Human Rights. It is necessary to evoke some thesis from the Court’s judgments.

24. In case of Barbera, Messegue and Jabardo v. Spain, the Court stated that the presumption of evidence requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.\(^{13}\)

\(^{13}\) Barbera, Messegue and Jabardo v. Spain, application no. 10590/83, judgment of 6 December 1988, para. 77.
25. In *Minelli v. Switzerland* the Court recalled that the presumption of innocence will be violated if, without the accused’s having previously been proved guilty according to law and, notably, without an opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty. However, the authorities may inform the public of investigations and voice a suspicion of guilt, as long as the suspicion is not a declaration of the accused’s guilt and they show discretion and circumspection.

26. In case of *Allenet de Ribemont v. France*, the Court dealt with the facts similar to the present case – possible violation of the presumption of innocence by the public officials (French Minister of the Interior and the senior police officers accompanying him) at the press conference. The Court examined in this case the connection between the Article 6 (2) enshrining the presumption of innocence and Article 10 guaranteeing freedom of expression, including the freedom to receive and impart information.

27. In the Court’s view, the remarks made by the Minister of the Interior and, in his presence and under his authority, by the police superintendent in charge of the inquiry and the Director of the Criminal Investigation Department, were incompatible with the presumption of innocence. The Court noted that in the instant case some of the highest-ranking officers in the French police referred to Mr Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder. This was clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. A breach of Article 6 para. 2 (art. 6-2) was therefore found in this case. There has therefore been.

28. The relations between public officials’ freedom of expression and the protection of citizens’ rights were also the subject of the judgment in the case of *Bączkowski v. Poland*. The case concerned the decision of the Mayor of Warsaw to refuse to grant permission for the Equality Parade. One of the specific issues raised in this judgment was the declaration of the Mayor of Warsaw that he would ban the demonstration regardless of what the applicants had written in their request for permission. The Court reiterated that the exercise of the freedom of expression by elected politicians, who at the same time are holders of public offices in the executive branch of the government, entails particular responsibility. In certain situations it is a normal part of the duties of such public officials to personally take administrative decisions which would be likely to affect the exercise of individual rights, or that such decisions were given by public servants acting in their name. Hence, the exercise of the freedom of expression by such officials may unduly impinge on the enjoyment of other rights guaranteed by the Convention (as regards statements by public officials, amounting to declarations of a person's guilt, pending criminal proceedings). When exercising their freedom of expression they may be required to show restraint, bearing in mind that their views can be regarded as instructions by civil servants, whose employment and careers depend on their approval. In HFFR’s opinion, this principle should be taken into consideration in the applicant’s case, especially in the context of the order of the pretrial detention against the applicant by the assistant judge whose career – in some way – depends on the Minister of Justice.

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16 *Bączkowski v. Poland*, application no. 1543/06, judgment of 3 May 2007, para. 98.
29. One of the most relevant judgment to the present case is the case of Butkevicius v. Lithuania. Audrius Butkevicius, a Lithuanian national, was the Minister of Defence and a Member of the Seimas (Parliament) from 1996 to 2000. On 12 August 1997 the applicant was apprehended in a hotel lobby by the security intelligence and the prosecuting authorities while accepting an envelope containing 15,000 United States dollars (USD) from KK, a senior executive of an oil company. KK had previously informed the intelligence authorities that the applicant had requested 300,000 USD for his assistance in obtaining the discontinuance of criminal proceedings concerning the company's vast debts. The Seimas agreed to initiate criminal proceedings against the applicant. Then, the applicant was charged with attempting to obtain property by deception. The Prosecutor General requested permission from the Seimas to detain the applicant who was duly detained on remand. He was eventually found guilty of attempting to obtain property by deception and sentenced to five years and six months imprisonment, a 50,000 Lithuanian litai fine and confiscation of half of his property.

30. One of the most important elements of this case concerned the presumption of innocence. The applicant alleged that certain statements of the Prosecutor General and the Chairman of the Seimas published in the media had breached this principle. In particular, on 14 August 1997 an article entitled “MP's whitewash looks hogwash, says prosecutor” was published in the biggest national daily “Lietuvos Rytas”: “The Prosecutor General confirmed that [he had] enough sound evidence of the guilt of A. Butkevicius.” On 15 August 1997 an article entitled “The Chairman of the Seimas does not doubt A. Butkevicius’s guilt” was published in “Lietuvos Rytas”: “When asked whether or not he doubts that A. Butkevicius accepted a bribe, the Chairman of the Seimas said: ‘on the basis of the material in my possession I entertain no doubt.’” The Prosecutor General was quoted in an article entitled “A. Butkevicius prepares for battle and prison” of 16 August 1997 in the daily “Respublika”: “I qualify the offence as an attempt to cheat ... ” The Chairman of the Seimas, quoted in an article entitled “A. Butkevicius will be prosecuted” of 20 August 1997 in “Lietuvos Rytas”: “One or two facts were and are convincing. [The applicant] took the money while promising criminal services.”

31. The Court recalled that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities (Daktaras v. Lithuania, no. 42095/98, §§ 41-42). In Daktaras case the Court emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence17. In the Court’s view, such declarations of public officials – as presented in the applicant’s case - encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority18.

32. Finally, it should be noted that the application of the presumption of innocence was the subject of one judgment in Polish case – Garycki v. Poland (application no. 14348/02). The Court notes that in the grounds for its decision of 30 October 2001 on the prolongation of the applicant’s detention, the Court of Appeal stated that the defendants, including the applicant, had committed the offences with which they had been charged. The Government argued that, having regard to the overall context of that decision, the Court of Appeal had referred to the existence of evidence pointing to a likelihood that the applicant had committed the offences in issue, and not to the question of his guilt or innocence.

18 Ibidem, para. 53.
33. However, the Court emphasizes that there is a fundamental distinction to be made between a statement that someone is merely suspected of having committed a crime and a clear judicial declaration, in the absence of a final conviction, that the individual has committed the crime in question. Having regard to the explicit and unqualified character of the impugned statement, the Court finds that it amounted to a pronouncement of the applicant’s guilt before he was proved guilty according to law. The Court underlines that there could be no justification for a court of law to make a premature expression of this kind.19

34. To sum up, in the Court’s jurisprudence, the presumption of innocence enshrined in paragraph 2 of Article 6 (art. 6-2) of the Convention is perceived as one of the core elements of the fair criminal trial that is required by paragraph 1 of Article 6. It refers not only to the court’s, but also to the public officials, who are obliged to maintain neutrality in their statements before a person has been tried and found guilty of an offence. The freedom of expression guaranteed by the Article 10 of the Convention should not be interpreted as entitling to prejudge the final outcome of a trial.

B. The presumption of innocence under EU Law

35. The presumption of innocence is mentioned not only in Art. 6(2) ECHR, but also in Art. 48 Charter of Fundamental Rights of European Union (Presumption of innocence and right of defence): “1. Everyone who has been charged shall be presumed innocent until proved guilty according to law. 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.” What is more, the Commission prepared in 2006 The Green Paper: The Presumption of Innocence. According to this document, “the Commission is interested in whether the presumption of innocence is understood in the same way throughout the EU. The Green Paper will examine what is meant by the presumption of innocence and what rights stem from it. If consultation suggests that there is a need, we will consider including them in a proposal for a Framework Decision on evidence based safeguards”20.

36. The principle of the presumption of innocence appears also in the jurisprudence of the EU courts. In recent judgment in case of Pergan Hilfsstoffe für industrielle Prozesse GmbH v. Commission (T-474/04), the Court of First Instance stated that, presumption of innocence prevents the Commission from disclosing incriminating evidence which the undertaking in question has not had the opportunity to contest in court.21 The Court also observed that the presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of defence in the normal course of proceedings resulting in a decision on the merits of the case.22

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22 Ibidem, par. 76.
C. Presumption of innocence in ICCPR standards

37. The principle of presumption of innocence in protected not only by ECHR and CFREU standards. It is also guaranteed by the International Covenant on Civil and Political Rights. In Article 14(2) we can read: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” This general provision was developed in many cases before the Human Rights Committee.

38. The ICCPR General Comment 13 (Twenty-first session, 1984) para 7 said: “The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial”

39. In a case Gridin v. Russian Federation (Communication No 770/1997), the Human Rights Committee found violation of Article 14 (2) on presumption of innocence where a public officials make comments tending to show that the accused was guilty even before he had been found guilty by a court of law. It said: “With regard to the allegation of a violation of the presumption of innocence, including public statements made by high ranking law enforcement officials portraying the author as guilty which were given wide media coverage, the Committee notes that the Supreme Court referred to the issue, but failed to specifically deal with it when it heard the author’s appeal. The Committee refers to its General Comment No 13 on article 14, where it has stated that: "It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial". In the present case the Committee considers that the authorities failed to exercise the restraint that article 14, paragraph 2, requires of them and that the author’s rights were thus violated.

D. The presumption of innocence in U.S. Supreme Court jurisprudence

40. Finally, the HFHR would like to mention that the presumption of innocence is not only guaranteed by the European legal systems. It has also long tradition in Anglo-saxon legal order. Although the Constitution of the United States does not cite it explicitly, presumption of innocence is widely held to follow from the 5th, 6th and 14th amendments. As to the U.S. Supreme Court jurisprudence, the principle of presumption of innocence originate from the judgment in case of Coffin (1895): “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. It is stated as unquestioned in the textbooks, and has been referred to as a matter of course in the decisions of this court and in the courts of the several states (Coffin v. U.S., 156 U.S. 432 (1895))”.

VI. CONCLUSIONS

41. In the opinion of the Helsinki Foundation for Human Rights the following general principles should be taken into account at resolution of the Garlicki v. Poland case:

- The manner of the applicant’s arrest should be assessed in the specific context of the Central Anti-corruption Bureau activity. There is a reason to claim that CAB has become in Poland a symbol of excessive use of special services in order to achieve political goals. In present case, the manner of arrest, which results in the applicant’s degrading treatment, could be perceived as an element of the political and propaganda action against the doctors, who came into conflict with government.

- According to the judgment of the Polish Constitutional Court of 24 October 2007, there is no legal basis to give the assistant judges (asesorzy) the right to order pre-trial detention. The assistant judge differs from the status of a judge since it does not guarantee complete independence from the executive. As a result, the ordering of the pre-trial detention in applicant’s case by the assistant judge should be assessed as incompatible not only with the Article 6 of the Convention, but also Article 45 (1) of Polish Constitution.

- The presumption of innocence enshrined in paragraph 2 of Article 6 (art. 6-2) of the Convention is one of the core elements of the fair trial in criminal justice that is required by paragraph 1 of Article 6. It refers not only to the court’s, but also to the public officials. The freedom of expression guaranteed by the Article 10 should not be interpreted as entitling to prejudge the outcome of a trial. Particularly, the protection of freedom to receive and impart information does not include the right to pronounce the individual’s guilt before he was proved guilty according to law.

On behalf of the Helsinki Foundation for Human Rights:

Danuta Przywara

On behalf of the Helsinki Foundation for Human Rights these written comments were also prepared by Adam Bodnar and Dawid Sześciło.