



Warsaw, 16 March 2018

Ministry
of Foreign Affairs
Department for Proceedings
before International Human
Rights Protection Bodies
DPOPC.432.43.2018/9

Mr José Guevara
Chair-Rapporteur
Working Group on Arbitrary Detention

Dear Sir,

With reference to your letter of 18 December 2017 presenting the communication of the case concerning Mr Mateusz Piskorski ("Mr Piskorski"), the Government of the Republic of Poland would like to submit the following information in reply to the source's submissions alleging that the detention of Mr Piskorski constituted an arbitrary deprivation of his liberty under categories I, II and III.

At the beginning, the Government wish to complete information on the factual circumstances of the case, by holding that:

1. The investigation against Mr Piskorski was instituted on 27 July 2015 by the Warsaw Appeal Prosecutor at that time and carried out by the Department of Criminal Proceedings of the Internal Security Agency.

2. On 4 March 2016 the Ordinance of the Minister of Justice of 19 February 2016 on establishing the branches of the Department for Organized Crime and Corruption of the National Prosecutor's Office's, the district prosecutor's offices, the regional prosecutor's offices and the appeal prosecutor's offices (*Rozporządzenie Ministra Sprawiedliwości z dnia 19 lutego 2016 r. w sprawie utworzenia Wydziałów Zamiejscowych Departamentu do Spraw Przestępczości Zorganizowanej i Korupcji Prokuratury Krajowej, prokuratur regionalnych, okręgowych i rejonowych oraz ustalenia ich siedzib i obszarów właściwości*) entered into force. Consequently, the proceedings at stake were transmitted to the Mazowiecki Branch of the Department for Organized Crime and Corruption of the National Prosecutor's Office and were conducted under case no. PK V WZ Ds.29.2016.

3. The investigation was instituted on the basis of the information gathered in 2013-2015 and earlier. Due to the confidential nature of the information and the nature of the investigation itself, the public opinion was informed about the investigation on 18 May 2016 when Mr Piskorski was arrested by the Internal Security Agency under the charge of participating in the activity of the foreign intelligence directed against the Republic of Poland. The arrest was performed on order of the prosecutor of the Mazowiecki Branch of the Department for Organized Crime and Corruption of the National Prosecutor's Office. On the same day, 18 May 2016 criminal charges were presented to Mr Piskorski.

4. The Government confirm that on the date of his arrest, the criminal charges were presented to Mr Piskorski. The information on the charges presented by the source in para. 7 of its submission is however not exhaustive and should be supplemented. The charges were formulated as follows:

“within the period from an unknown date, not later than from 2013, to 18 May 2016, in Warsaw and other Polish cities and in the Russian Federation, he participated in the activities of the Russian civilian intelligence directed against the Republic of Poland, namely those of the Foreign Intelligence Service (SWR) and the Federal Security Service (FSB), in such a way that he repeatedly participated in operational meetings on the territory of the Russian Federation with some specified persons who formally represented the Russian non-governmental organisations, but in fact were contact persons of the above-mentioned intelligence services, and being aware of this fact, he received from those persons operational tasks to be carried out within the scope of the information warfare conducted by the Russian Federation in order to propagate statements (*tezy*) convergent with the Russian Federation’s interests, manipulate the social moods and influence the attitude of the Polish society, and for the realisation of these tasks he received financial means and the remuneration for their accomplishment, and so:

- in March 2014 Mr Piskorski participated in organising an international mission of observers under the label of the European Observatory of Demarcation and Elections (*Europejskie Obserwatorium Demokracji i Wyborów*) (with headquarters in Brussels, controlled and financed by the Russian Federation) in order to present to the public opinion the assessments and the course of the referendum in Crimea in a way that would meet the expectations of the authorities of the Russian Federation; and he ensured the participation of two Polish parliamentarians in that mission in order to use their presence for propaganda, and thereby to undermine the Polish Government’s official stance holding the referendum in Crimea to be contrary to the international law standards; and through the financing of these parliamentarians stay by the Russian intelligence services, he created a possibility to put pressure on them;

- Mr Piskorski led to the creation of the political party called “Change” on 21 February 2015, the creation and registration of “the Ukrainian Committee” association on 24 March 2015 and the creation of the “Borderland Trust” association (*Powiernictwo Kresowe*), that were controlled and financed by the Russian intelligence services and which he instrumentally used in order to realise the operational tasks assigned to him consisting of antagonising the Polish-Ukrainian relations by means of organising demonstrations, rallies and pickets against the Ukrainian authorities with an aim of creating anti-Ukrainian reactions in Poland that could be used by the Russian Federation to propagandise,

including:

- in order to antagonise the Polish-Ukrainian relations, under the sign of “the Ukrainian Committee”, on 28 February 2015 he organised a trip for the Polish citizens for commemorations in the Huta Pieniacka in Ukraine and then he coordinated provocative actions of the activists of the “Change” Party consisting of devastation of the monument of S. Bandera and painting anti-Ukrainian slogans, the contents of which was suggesting the involvement of the Polish inhabitants of Ukraine in these acts of vandalism; and the photographic documentation of these activities that was prepared he conveyed to his principals with an aim of using it for propaganda to antagonise the relations between Poland and Ukraine;

- on 27 June 2015 he organised, under the sign of “the Ukrainian Committee”, a picket concerning the federalisation of the Ukraine, near to the Ukrainian Embassy in Warsaw, so that it could be propagandistically used by the Russian Federation to antagonise the relations between Poland and Ukraine,

thus, the acts under Article 130 § 1 of the Criminal Code.”.

5. During the investigation, the initial charges were supplemented twice: by adding a charge of the second act, namely taking part in the intelligence activities of the People’s Republic of China directed against the Republic of Poland, qualified as an offence under Article 130 § 1 of the Criminal Code, and by extending

the description of the above-mentioned act under Article 130 § 1 of the Criminal Code presented to him in a decision of 18 May 2016.

6. The motion for Mr Piskorski's detention on remand was lodged with the Warsaw-Wola District Court on 19 May 2016. Mr Piskorski had access to the case-file.

7. On 20 May 2016 the Warsaw-Wola District Court (case no. III Kp 832/16) issued a decision on Mr Piskorski's detention on remand until 16 August 2016 (for 3 months). Mr Piskorski was present at the hearing and was heard by the court. The court held that there was a high probability that he had committed the offence he had been suspected of. Moreover, the court considered that there was the likelihood that a severe penalty would be imposed on him as the crime under Article 130 § 1 of the Criminal Code is punishable to more than 8 years' imprisonment (10 years' imprisonment). Furthermore, the court held that there was a reasonable risk that Mr Piskorski would abscond or go into hiding. The court also considered that there had been a justified fear that he would attempt to induce witnesses to give false testimony or to obstruct the proper course of proceedings by any other unlawful means. The court found that only the detention on remand could secure the proper conduct of the proceedings and could ensure that the suspect would be at the disposal of the authorities conducting preparatory proceedings while no other preventive measure could secure this, thus it was not possible to apply other remedies of non-isolating character in respect of him.

8. Mr Piskorski and his defence counsels appealed against this decision.

9. On 27 June 2016 the Warsaw Regional Court (case no. IX Kz 487/16) upheld the decision of the Warsaw-Wola District Court. The court confirmed the findings of the court of first-instance. The court also answered Mr Piskorski's complaint on the lack of effective access to the case-file by holding, on the basis of the list, provided by the prosecutor, of the persons staying at the secret registry of the court, that there were no reasons to consider that Mr Piskorski's defence counsels' access to the case-file was restrained in a way that could prevent his effective defence.

10. On 10 August 2016 the Warsaw Regional Court (case no. XII Kp 666/16) extended Mr Piskorski's detention on remand to 14 November 2016. This decision was upheld by the Warsaw Court of Appeal on 27 September 2016 (case no. II AKz 580/16). The domestic courts found that the grounds for applying detention on remand were still present. Moreover, they held that the presence of the accused at the court hearing was not provided by law and the presence of his defence counsels was sufficient.

11. On 8 November 2016 the Warsaw Regional Court (case no. XII Kp 923/16) extended Mr Piskorski's detention on remand to 11 February 2017. The courts found that the grounds for applying detention on remand were still present, what was more, Mr Piskorski's pregnant common-wife had left Poland and moved to the Russian Federation.

12. On 15 December 2016 the Warsaw Court of Appeal (case no. II AKz 580/16) upheld the decision issued by the Warsaw Regional Court. The court noted that only the defence counsels were informed about the date of the hearing and the accused's presence was not required by the law in force. The court also noted that the defence counsels had access to classified part of the case-file and could make notes. The court stressed that at the current stage of the proceedings it did not assess the evidence collected during the investigation but only assessed the necessity to apply detention on remand on the basis of the evidence gathered in the case.

13. On 7 February 2017 the Warsaw Regional Court (case no. XII Kp 92/17) extended Mr Piskorski's detention on remand to 18 February 2017. This decision was upheld by the Warsaw Court of Appeal on 15 March 2017 (case no. II AKz 134/17). The court found that Mr Piskorski's complaints were identical to those previously submitted. The court reiterated that there was no legal requirement to inform the accused about the hearing. The court noted that he had access to that part of the case-file, on the basis of which the motion to extend his detention on remand had been lodged. The court further held that the case was very complex and there were many actions that were needed to be taken by the prosecutor.

14. On 28 April 2017 a motion for extension of Mr Piskorski's detention on remand was lodged. In the public part of the motion, there was information that Mr Piskorski got acquainted with the public and classified parts of the case file on 20, 24 and 25 April 2017. On the same dates the case file had been made available to his defence counsels.

15. On 11 May 2017 the Warsaw Court of Appeal (case no. II AKp 22/17) extended Mr Piskorski's detention on remand to 10 August 2017. The court held that the case was very complex and there were still actions that were needed to be taken by the prosecutor, as enumerated in his motion for extension of detention on remand.

16. On 8 June 2017 the Warsaw Court of Appeal (case no. II AKz 377/17) upheld the decision issued on 11 May 2017. The court explained that it took into account the private expert opinion submitted on the request and by Mr Piskorski's defence counsels but the assessment of the evidence gathered in the case would be made by the trial courts on the later stage of the proceedings. In the present decision, the court agreed with Mr Piskorski that he had been unduly refused to consult the motion of 28 April 2017 on the extension of his detention on remand and the attached evidence. Nevertheless, the court held that it could not be demonstrated that this situation had any real impact on the court's decision taking into account the fact that his defence counsels had been acquainted with the motion and the evidence attached to it and Mr Piskorski had become acquainted, in the earlier period, with the vast majority of the evidence constituting a basis for this and previous motion for extension of detention on remand. Moreover, the Warsaw Court of Appeal had created a possibility for Mr Piskorski to become acquainted with the motion of 28 April 2017 and the evidence attached to it at the secret registry of the court before the hearing on the interlocutory appeal against the decision and requested Mr Piskorski to be present at that hearing in order to enable him to complete his complaints submitted before in writing. Mr Piskorski did not raise any new arguments at that hearing.

17. As Mr Piskorski during the hearing on 8 June 2017 held that he could not get acquainted with the entire reasoning of the motion of 28 April 2017, on 19 and 20 June 2017 when he got acquainted with the further case-file in the prosecutor's office, he also got acquainted with the copy of the classified part of the motion of 28 April 2017.

18. On 4 August 2017 the Warsaw Court of Appeal (case no. II AKp 39/17) extended Mr Piskorski's detention on remand to 8 November 2017. The court reiterated that the grounds for detention on remand were still present, especially on the basis of the evidence, notably a copy of Mr Piskorski's correspondence, the documents seized after the search and the witnesses' statements.

19. On 21 September 2017 the Warsaw Court of Appeal (case no. II AKz 633/17) upheld the decision issued on 4 August 2017.

20. On 25 October 2017 a motion for extension of Mr Piskorski's detention on remand was lodged with the court. The prosecutor noted that the charges against him had been already extended and contained several actions constituting acts under Article 130 § 1 of the Criminal Code. At the same time, the prosecutor informed the court that Mr Piskorski had had access to the public and classified parts of the case-file on 18 and 24 October 2017. On 24 October 2017 the access to the case-file had also been granted to his defence counsels.

21. On 6 November 2017 his detention on remand was extended until 18 January 2018 by the Warsaw Court of Appeal (case no. II AKp 51/17). Mr Piskorski took part in the hearing and he held that he had not have enough time to consult the case-file and requested the court to allow him a break in order to get acquainted with the case-file. The court granted him additional time to consult the case-file.

22. On 3 and 4 January 2018 Mr Piskorski had access to the classified reasoning of the motion for extension of his detention on remand of 28 December 2017.

23. On 17 January 2018 the Warsaw Court of Appeal (case no. II AKp 2/18) extended Mr Piskorski's detention on remand to 8 March 2018. The court held that there was a high probability that the

applicant had committed the offence he had been suspected of on the basis of the documents collected in the case (such as the copies of Mr Piskorski's correspondence and photos), the outcome of the operational control, the intelligence report forwarded on 23 October 2015 to the Chinese intelligence, the witnesses' testimonies and the outcome of the search. Moreover, taking into account the nature of the offence, the court considered that there was the likelihood that a severe penalty would be imposed. The court further held that the reasonable risk that Mr Piskorski would abscond or go into hiding was still present. The court also considered that there had been a justified fear that he would attempt to induce witnesses to give false testimony or to obstruct the proper course of proceedings by any other unlawful means.

24. On 6 March 2017 Mr Piskorski's detention on remand was extended until 7 May 2018.

The Government wish to present hereunder their reply to the source's submissions.

1. As to the first submission of the source holding that there was no legal basis for Mr Piskorski's arrest and detention on remand

A. Relevant domestic law

The provisions on the arrest are included in chapter 23 of the Code of Criminal Proceedings of 1997, which entered into force on 1 September 1998. Article 244, in its relevant part, reads:

"1. The Police shall be authorised to arrest a suspected person if there is good reason to suppose that he or she has committed an offence, and it is feared that such a person may abscond, go into hiding or destroy the evidence of his/her offence or if his/her identity could not be established or there are grounds to conduct accelerated proceedings against this person.

(...)

2. The arrested person shall be informed immediately about the reasons for his/her arrest and his/her rights, including the right to benefit from attorney or legal counsellor, to benefit from an interpreter free of charge, if his/her command of Polish is not enough, to submit the statement or refuse to submit the statement, to be granted a copy of a record of the arrest, to have access to initial medical examination and about his/her rights under Article 245, 246 § 1 and 612 § 2, as well as about the content of Article 248 §§ 1 and 2 and he/she shall be heard.

3. A record of the arrest shall be made in which the following should be included: the name, surname and position of the person conducting the action, the name and surname of the arrested person, and in the event that identity of the arrested person could not be established, a description of the said person, and the day, hour, place and reason for the arrest, and act of which he/she is suspected. The statements by the arrested person should also be recorded and the fact noted that he has been informed of his/her rights. The copy of the record shall be served on the arrested person.

4. After the arrest of the suspected person, the measures necessary for the collection of essential information should be taken and the prosecutor shall be informed about the arrest without delay. In the event that the grounds referred to in Article 258 § 1 through 3 occur, a motion to the prosecutor shall be made, requesting him to lodge a motion for detention on remand with the court.

(...)"

Article 245 of the Code of Criminal Proceedings provides:

"1. The arrested person, upon his/her demand, shall be immediately given the opportunity to contact an attorney or legal counsellor by any means available, and also to talk directly with the latter; exceptionally, when it is justified by the special circumstances, the person who arrested may reserve the right to be present when such a conversation takes place.

(...)"

According to Article 246 of the Code of Criminal Proceedings:

"1. The arrested person shall have the right to lodge an interlocutory appeal with the court. In this appeal the arrested person may request an examination of the grounds and legality of his/her arrest and the correctness thereof.

2. The interlocutory appeal shall be immediately referred to the district court having jurisdiction for the place of arrest or the place of preparatory proceedings, which shall examine the matter without delay.

3. In the event that the arrest has been found to be unjustified or illegal, the court shall rule the immediate release of the arrested person.
4. In the case of finding lack of justification or illegality of the arrest or irregularities in the conduct thereof, the court shall notify the prosecutor and the authority in control of the authority which made the arrest.
5. A joinder of interlocutory appeals against arrest and detention on remand may be examined together.”.

Pursuant to Article 247 of Code of Criminal Proceedings:

“1. The prosecutor may order the arrest and compulsory appearance of a suspected person, if there is a reasonable fear that:

- 1) they would fail to come at the request in order to conduct actions with them, referred to in Article 313 § 1 or Article 314, or examinations or actions, referred to in Articles 74 §§ 2 and 3;
- 2) In any other way they could hinder the proceedings .

2. The arrest and compulsory appearance, referred to in § 1, could also take place, when there is an immediate need to apply a preventive measure.

3. A search may be ordered in relation with the arrest. Articles 220 through 222 and 224 shall be applied accordingly.

(...)

5. Deciding on the preventive measure, the prosecutor shall immediately release the arrested person or lodged with the court a motion for detention on remand.

6. Article 246 shall be applied accordingly to the arrest, referred to in § 1.

7. The order, referred to in § 1, shall be executed by the police or other authorities referred to in Article 312, within their competence if the law entitle them to arrest a person (...).”.

Article 248 of the Code of Criminal Proceedings reads:

“1. The arrested person should be released without delay after the reasons for his/her arrest have ceased to exist, and also if he/she has not been handed over to the court within 48 hours of his/her arrest by an authorised authority together with a motion to apply detention on remand; he/she shall also be released upon an order from the court or prosecutor.

2. If, within twenty-four hours of the handing over of the arrested person to the court the decision on his/her detention on remand has not been served on him/her, he/she shall be released.

3. Re-arresting the suspected person on the grounds based on the same facts and evidence shall be inadmissible.”.

The Code of Criminal Proceedings defines detention on remand as one of the so-called “preventive measures”. The other measures are bail, police supervision, guarantee by a responsible person, guarantee by a social entity, temporary ban on engaging in a given activity and prohibition to leave the country.

Article 249 § 1 of the Code of Criminal Proceedings sets out the general grounds for imposition of the preventive measures. That provision reads:

“Preventive measures may be applied in order to secure the proper conduct of the proceedings, and exceptionally, to prevent a new serious offence from being committed by the accused; they may be applied only if the evidence collected indicates a high probability that the accused committed an offence.” .

Further in § 2, this Article reads:

“In the preparatory proceedings, preventive measures may only be applied to a person to whom the charges had been presented.”.

The Code of Criminal Proceedings sets out the margin of discretion as to the continuation of a specific preventive measure. Article 257 reads, in so far as relevant:

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

Article 258 of the Code of Criminal Proceedings lists grounds for detention on remand and provides, in so far as relevant:

“1. Detention on remand and other preventive measures may be imposed if:

- 1) there is a reasonable risk that an accused will abscond or go into hiding, in particular when his/her identity cannot be established or when he/she has no permanent abode;
- 2) there is a justified fear that an accused will attempt to induce [witnesses or co-defendants] to give false testimony or to obstruct the proper course of proceedings by any other unlawful means;

2. If an accused has been charged with a serious offence or an offence for the commission of which he/she may be liable to a statutory maximum sentence of at least 8 years' imprisonment, or if a court of first instance has sentenced him/her to at least 3 years' imprisonment, the need to continue detention to ensure the proper conduct of proceedings may be based on the likelihood that a severe penalty will be imposed.”.

Article 259, in its relevant part, reads:

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

- (1) seriously jeopardise his/her life or health;
- (2) entail excessively harsh consequences for the accused or his/her family.”.

The Code of Criminal Proceedings also sets out maximum statutory time-limits for detention on remand in Article 263, which stipulates:

“1. During preparatory proceedings, when applying detention on remand the court shall designate a period not exceeding three months.

2. If in view of the special circumstances of the case, the preparatory proceedings cannot be completed within the time-limit specified in § 1, detention on remand may be extended on a motion from the prosecutor, by a court of the first instance for an additional prescribed period, if necessary, for a period not exceeding altogether twelve months.

3. The combined period for applying detention on remand until the delivery of the first judgment by the court of the first instance may not exceed two years.

{...}

4. The extension of detention on remand for the specified period of time, over the periods specified in § 2 and 3, may be applied only by the court of appeal, in jurisdiction of which the proceedings are conducted, on a motion from the court before which the case is pending, and in the course of preparatory proceedings on a motion from the prosecutor, who is a direct supervisor over the prosecutor conducting or supervising the investigation. This can be done if such a need arises in connection with a suspension of criminal proceedings, conducting actions in order to establish or confirm the identity of the accused, conducting evidentiary action in a particularly complex case or conducting them abroad and also in connection with intentional protraction of proceedings by the accused.

4a. {abrogated}

4b. The extension of detention on remand, referred to in § 4, could not be applied in respect of the period of time-limit specified in § 2, when the realistically threatening penalty for the offence with which the accused is charged does not exceed 3 years' imprisonment, and in respect of the time-limit specified in § 3, when it does not exceed 5 years' imprisonment, unless a necessity of such an extension results from the intentional protraction of proceedings by the accused.

5. An interlocutory appeal against the decision issued by the court of appeal pursuant to § 4 may be lodged with the court of appeal sitting with three judges.

6. A motion for extension of detention on remand should be lodged not later than 14 days before the expiry of the current time-limit for applying detention on remand, while at the same time the case file should be sent to the competent court.

{...}”.

B. International law and practice

Article 9 of the Universal Declaration of Human Rights provides:

“No one shall be subject to arbitrary arrest, detention or exile.”

Article 9 of the International Covenant on Civil and Political Rights, in so far as relevant, stipulates:

“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

{...}”.

The Working Group, in its Deliberation No. 9, had already confirmed its position on the definition of arbitrary detention. The notion of “arbitrary” *stricto sensu* includes both the requirement that

a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary (para. 61). The Human Rights Committee, in its General Comment No. 35 on Article 9 also stated that “An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity, and proportionality.” (para. 12, as was reiterated in para. 61 of the Deliberation No. 9 of the Working Group).

C. The application of the law in the present case

The Government strongly uphold that the source’s allegations concerning the lack of a legal basis for Mr Piskorski’s arrest and detention on remand are completely unfounded. Nothing in the case proves the source’s submissions concerning the alleged arbitrariness.

As stated in paragraph 7 of the circumstances of the case, on 20 May 2016 the Warsaw-Wola District Court issued a decision on Mr Piskorski’s detention on remand. The court held that there was a high probability that he had committed the offence he had been suspected of. Moreover, there was the likelihood that a severe penalty would be imposed on him (10 years’ imprisonment). Furthermore, there was a reasonable risk that Mr Piskorski would abscond or go into hiding. The court also considered that there had been a justified fear that he would attempt to induce witnesses to give false testimony or to obstruct the proper course of proceedings by any other unlawful means.

This detention was subsequently prolonged by the domestic courts and Mr Piskorski is still detained on remand. In the decision on the detention on remand and decisions on the extension of the detention on remand up to one year, the courts referred to Article 249 § 1, Article 258 §§ 1 and 2 of the Code of Criminal Proceedings, and in their decisions on extending the detention on remand over one year, the courts referred also to Article 263 § 4 of the Code of Criminal Proceedings. Every time Mr Piskorski and his defence counsels lodged an interlocutory appeal against the decision to apply or extend his detention on remand and on each occasion the court decisions were subject to scrutiny by second-instance courts.

In each and every decision on applying or extending detention on remand, as stated above in paragraphs 8-18 of the circumstances of the case, the courts gave detailed reasons for Mr Piskorski’s detention on remand.

What is particularly worth stressing here is the fact that in Mr Piskorski’s case **the risk of his going into hiding abroad was directly based on the case-files**. At the outset, this was classified information. During the investigation, one of the witnesses testified that Mr Piskorski had said that the Russian passport was waiting for him. Moreover, Mr Piskorski’s document written in Russian and addressed to a deputy of the Russian State Duma in order to get his support towards the Russian President W. Putin in obtaining a Russian passport in a special procedure was found on one of the electronic carriers. Ultimately, a conversation on the chat with one of Mr Piskorski’s operational contacts concerning *inter alia* the fact that his passport had been approved was disclosed. Against such circumstances and bearing in mind the nature of the offence he was charged with and the fact that his common-law wife, a Russian citizen and his minor child, to whom he is very attached, live abroad, a document issued by the Russian Embassy (and submitted by Mr Piskorski’s defence counsel) stating the Mr Piskorski was not in possession of the Russian citizenship, did not eliminate the risk of his absconding abroad.

Moreover, **the risk of obstruction of the proper course of proceedings** was in detail presented and justified in the reasoning of the motions for detention on remand and its extension. Such a risk transpires from the acquired classified information as well as from public information concerning a circle of persons – Mr Piskorski’s collaborators, and also from the fact that some of the persons working closely with Mr

Piskorski were never heard in the investigation as they had gone abroad after his arrest. Furthermore, the nature of the acts he is charged with and his connections with citizens of the Russian Federation justify the fear that he would attempt to induce witnesses to give false testimony.

The Government are convinced that all relevant international standards, as interpreted by the Working Group (see section B above) were fully complied with in the present case and the situation of Mr Piskorski does not meet in any aspect the definition of "arbitrary detention". The Polish law, as described above in section A, contains all necessary and detailed provisions that lay down the premises, procedures and safeguards with regard to applying arrest and detention on remand and the Polish law is fully in line with international standards, including those laid down in Article 9 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights.

All relevant legal provisions were complied with in the present case and nothing indicates that there could be any elements of arbitrariness in the courts' decisions applying those legal provisions. The Government also wish to underline that it were the independent courts that issued all decisions on applying and prolonging detention on remand in Mr Piskorski's case. They based all their decisions on an in-depth analysis of the situation and the particular circumstances of his case and of the evidence gathered by the prosecution authorities in the course of investigation. On each and every occasion the courts gave full justification of their decisions and relied on serious, relevant and sufficient grounds and on the comprehensive evidence. Throughout the whole period of applying the detention on remand the court considered that there was the likelihood that the applicant committed the crime he was charged with. Moreover, the risk of applicant's going into hiding abroad and the risk of obstruction with the proper course of proceedings were additionally and specifically confirmed by the data gathered in the case-file. When deciding on detention on remand, the courts also evaluated the possibility to apply other preventive measures and they acted free from any arbitrariness. The decision to apply detention on remand served securing the proper conduct of criminal proceedings in this case only. All the courts' decisions on applying and prolonging his detention on remand were subject to review by higher-instance courts based on Mr Piskorski's appeals and on each and every occasion they were confirmed in appeal. His detention on remand is and was applied on the basis of and in full conformity with domestic regulations which are precise, clear and compatible with international standards. The case concerns charges of highest importance that were presented under Article 130 concerning one of the crimes against the Republic of Poland. The well-reasoned courts' decisions complied with all standards of reasonableness, necessity and proportionality.

Taking into account all the above-mentioned facts and arguments, **it should be concluded that Mr Piskorski's deprivation of liberty is not arbitrary and this case does not fall into category I.**

2. As to the source's second submission that the detention on remand resulted from the exercise of Mr Piskorski's right to freedom of opinion and expression and his right to freedom of peaceful assembly and association

A. Relevant domestic law

Article 130 of the Criminal Code stipulates:

- "1. Whoever takes part in the activities of a foreign intelligence service against the Republic of Poland shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years.
2. Whoever, taking part in the activities of a foreign intelligence service or acting for the benefit thereof, furnishes it with information, the passing of which may be detrimental to the Republic of Poland, shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.
3. Whoever, in order to furnish a foreign intelligence service with information specified under § 2, collects or stores information, connects to a computer network with the purpose of obtaining it, or declares a readiness to work for the

benefit of a foreign intelligence service against the Republic of Poland, shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years.

4. Whoever organises or leads the activities of a foreign intelligence service, shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years, or the penalty of deprivation of liberty for 25 years."

Article 11 of the Polish Constitution:

"1. The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means.(...)"

B. International law and practice:

Article 19 of the International Covenant on Civil and Political Rights stipulates:

- "1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

Article 21 of the International Covenant on Civil and Political Rights stipulates:

"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."

Article 29 of the Universal Declaration of Human Rights provides:

- "1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

C. The application of the law in the present case

The Government reiterate that the charges against Mr Piskorski in the pending case, as stated in paragraph 4 of the circumstances of the case, were presented under Article 130 of the Criminal Code (in details recalled above in section A) and this provision was invoked in all the decisions on applying his detention remand.

The Government would like to firstly stress that no judgment on the merits has been issued in respect of Mr Piskorski in the present case yet. The Government thus fully respect the presumption of innocence of Mr Piskorski. In line with this principle the Government do not prejudge at this stage Mr Piskorski's culpability for the crime he is charged with. The above and the following explanations should all be read as having no intention to prejudge Mr Piskorski's criminal responsibility and are presented only to the extent necessary to explain the current stage of domestic proceedings and the bases for the courts' decisions on his detention on remand.

In this respect, one should first and foremost understand that for the purpose of the court's decisions on detention on remand only the probability that Mr Piskorski has committed the alleged offence is relevant and taken into account by courts. Currently, only the grounds for his detention on remand are evaluated and the type of crime he is charged with is taken into account.

Once again the Government recall that during the proceedings at stake Mr Piskorski's detention on remand and its extension was on each and every occasion subject to careful examination by the competent courts on the basis of the evidence gathered in the case-file. Thus, the domestic courts took into account the probability that the applicant had committed the offence described in Article 130 § 1 of the Criminal Code and they considered that on the basis of the documents gathered in the case during the investigation, this probability was high as required by Article 258 of the Code of Criminal Proceedings (cited above). Mr Piskorski's detention on remand was ordered on the basis of court's fully reasoned decisions and those decisions invoked and examined only the premises for applying the detention on remand as laid down in the Code of Criminal Proceedings (and as laid down in paragraphs 7-23 of the circumstances of the case). All decisions were subject to appeal and were examined by the second-instance courts – who again examined those decisions only from the point of view of the premises for applying the detention on remand.

Nothing indicates that behind Mr Piskorski's detention there were other motives than those indicated in the courts' decisions and related to the premises for his detention on remand as laid down in the above-mentioned provisions of the Code of Criminal Procedure, notably Article 258. Throughout the whole period of applying the detention on remand the courts relied on the continued existence of suspicion of commission of crime Mr Piskorski was charged with and on the need to secure the proper conduct of the proceedings by preventing the risk of absconding and the risk of attempting to induce witnesses to give false testimony. The domestic courts in their decisions also explicitly highlighted that the evidence would be analysed in details by the trial court at the later stage. The question of the applicant's culpability and his arguments would be assessed by the domestic trial courts in fair and adversarial proceedings on the merits on the later stage - if and once the bill of indictment would be lodged with the trial court.

The source has not submitted any evidence whatsoever to support its allegations that the detention on remand resulted from the exercise of Mr Piskorski's right to freedom of opinion and expression and his right to freedom of peaceful assembly and association, and those allegations should therefore be considered as wholly unsubstantiated. The source's allegations in paragraphs 29 and 30 are completely unfounded.

In so far as those allegations may concern the legal qualification of acts under which Mr Piskorski is charged or the attribution of criminal responsibility they are also premature and irrelevant here as this matter concerns the merits of the still pending criminal proceedings and not the procedure for applying and prolonging the detention on remand in order to secure their proper course.

As regards the nature of the crime in question, the Government also recall that the constituent elements of the offence under Article 130 § 1 of the Criminal Code are stated above in section A. One should bear in mind that this crime and these elements are similar to those applied in many other countries. The mere fact that a given activity is open and public does not exclude as such the assessment of such an activity from the perspective of participation in the operation of foreign intelligence against the Republic of Poland if there are evidentiary elements pointing to such participation. The breach of Article 130 can take many forms – including those making the appearance of the exercise of freedom of expression, association or assembly.

Furthermore, the subject matter protected under Article 130 of the Criminal Code concerns the characteristic "against the Republic of Poland", so the subject matter protected by its provisions consists of the internal and external security. All being parts of the national security. These two forms are linked and currently they cannot be evaluated separately. Contrary, to the source's allegations, the espionage does not rely only on providing information to the intelligence service of another country.

The Government also would like to draw attention to the fact that the aim of the information warfare is to subordinate the elite and society of other countries unnoticeably by means of different, public and secret, channels (the secret service, diplomatic service and media).

On the other hand, the Government recall that neither freedom of expression nor freedom of association and peaceful assembly have an absolute nature. One could not allege that those freedoms exclude a possibility to criminalise acts covered by Article 130 of the Criminal Code. In accordance with Article 29 of the Universal Declaration of Human Rights and Articles 19 and 21 of the, International Covenant on Civil and Political Rights, as recalled in section B, both those freedoms may be subject to legitimate limitations. Those rights and freedoms have never been intended as justification for committing acts, including crimes, to the detriment of national security and public safety.

Again, the Government reiterate in accordance with the presumption of innocence that the assessment of all these issues in the context of the present case is a task for the trial court (and earlier – for the prosecution authority deciding on whether to bring the case to the court or not) and those are to be decided on the basis of all established circumstances, evidence gathered and arguments raised, including those of the defence party.

In light of the above, it should be concluded that **there are no reasons to find that the deprivation of liberty resulted from the exercise of the rights or freedoms guaranteed by Articles 19 and 20 of the Universal Declaration of Human Rights and Articles 21 and 22 of the International Covenant on Civil and Political Rights.** The Government wish to underline that the political pluralism is fully ensured in Poland as guaranteed by the Polish Constitution (see section A). Mr Piskorski's detention on remand is based only on the application of the premises of the detention on remand as laid down in the Code of Criminal Proceedings and on the courts' assessment based on the evidence gathered that there was a high likelihood that he committed crimes he is charged with under Article 130 of the Criminal Code and on the existence of risk that he may try to influence the proper conduct of criminal proceedings by unlawful means. As a result, the Government refutes the source's allegation that Mr Piskorski's deprivation of liberty falls under category II, as completely unsubstantiated and unfounded.

3. As to the source's third submission concerning the access to the case file

A. Relevant domestic law

The issue of access to the file in the course of investigation is governed by Article 156 of the Code of Criminal Proceedings of 1997, which provides as follows:

" 1. The court files pertaining to a case shall be made available to the parties, their defence counsels, their plenipotentiaries and their legal representatives who shall have possibility to obtain excerpts (*odpisy*) and copies from them. Other persons may access the case-file provided that the president of the court agrees to it. The information on the case-file also may be made available through the teleinformative system unless technical considerations prevent this.

1a. (abrogated)

2. Upon a request from the accused or his/her defence counsel, the copies of the documents of the case-file shall be provided at their expense. Upon a request from the other parties, their plenipotentiaries and their legal representatives, the copies of the documents of the case also shall be provided at their expense. An order concerning the request could be issued also by the court officer. If the copies are made by oneself, they are free of charge.

3. The president of the court or the court officer may on justifiable grounds, order certified excerpts to be made from the files of the case at the expense of the applicant.

4. If there is a danger of revealing the classified information with a clause "top secret" or "secret", the inspection of case-file, making certified excerpts and copies shall be done under conditions imposed by the president of the court or by the court. Certified excerpts and copies shall not be released unless provided otherwise by law.

5. Unless there is a necessity to secure the proper conduct of the proceedings or the protection of the important interest of the State, in the course of preparatory proceedings the parties, their defence counsels, their plenipotentiaries and their legal representatives shall have access to the case-files, have a possibility to make excerpts or copies or shall be granted

the certified excerpts or copies; this right is also conferred upon the parties after the preparatory proceedings have been terminated. In the subject of the access to the files, making the excerpts or copies or issuing the certified excerpts the authority conducting the preparatory proceedings shall issue orders. If the access to case file is denied to the suspect upon his/her request, he/she should be informed about the possibility to access the case-file at the later date. When the suspect or his/her defence counsel is notified about the deadline of the final time-limit in which to be acquainted with the preparatory proceedings' case-file, the inspection of these files, making certified excerpts and copies could not be denied to he/she, his/her plenipotentiary or his/her legal representative. Upon approval of the prosecutor, during the preparatory proceedings, in exceptional cases, the access to the case-file could be granted to other persons. The prosecutor can make an electronic version of case-file available.

5a. If in course of the preparatory proceedings, a motion for applying detention on remand or the motion for extending the detention on remand is lodged, the case-file in the part concerning the evidence attached to that motion, without the witnesses' statements to which Article 250 § 2b refers, shall be made available to the suspect and his/her defence counsel without delay.

(...)"

On 2 January 2011 the Law of 5 August 2010 on the protection of classified information entered into force. Pursuant to its section 1(1), this Act sets out principles for "the protection of information whose unauthorised disclosure, also in the course of its preparation and regardless of its form and the manner of its communication, hereinafter referred to as 'classified information', would or could cause damage to the Republic of Poland or would be to the detriment of its interests". Section 1(2) (1) states that the Law applies to public authorities, in particular to the Parliament, the President of the Republic of Poland, the public administration, the self-government authorities and its subordinate units, the courts and tribunals, the State audit authorities and "the authorities responsible for the protection of law". Classified information should be rated "top secret" if its unauthorised disclosure would cause an exceptionally grave damage to the Republic of Poland and "secret" if such a disclosure would cause a grave damage to its interests.

On 13 March 2012, the Ordinance of the Minister of Justice of 20 February 2012 entered into force regulating the handling of interrogation records or other documents or objects which are covered by obligation to preserve secrecy of classified information or to preserve secrecy linked to the exercise of profession or function (*rozporządzenie Ministra Sprawiedliwości z dnia 20 lutego 2012 r. w sprawie sposobu postępowania z protokołami przesłuchań i innymi dokumentami lub przedmiotami, na które rozciąga się obowiązek zachowania w tajemnicy informacji niejawnych albo zachowania tajemnicy związanej z wykonywaniem zawodu lub funkcji*).

Paragraph 4.2 of the Ordinance provides that the court, or at the investigation stage, the prosecutor shall classify the case file or particular volumes of it as "top secret", "secret", "confidential" or "restricted" if the file includes circumstances covered by the duty of secrecy of information classified as a State secret, an official secret or a secret related to the exercise of a profession or function. The case file, other documents or items classified as "top secret", "secret" or "confidential" are to be deposited in the court's or the prosecution's secret registry.

Paragraph 6.1 of the Ordinance provides that classified files, documents or items shall be made available to parties, counsels and representatives only on the basis of an order issued by the court or its president, or, at the investigation stage, by the prosecutor. In accordance with paragraph 6.2, an order referred to in the preceding provision, should indicate the person authorised to inspect the classified documents, case file or items and specify the scope, manner and place of the inspection. If the person concerned asks for the creation of a bound set of documents (*trwale oprawiony zbiór dokumentów*) for the purposes of taking notes, such a bound set of documents shall be made and classified appropriately. In accordance with paragraph 6.3, a bound set of documents for taking notes shall be created for each person concerned separately. It shall be deposited and made available only in the court's or the prosecution's secret registry.

B. International law and practice

Article 9 of the International Covenant on Civil and Political Rights, in so far as relevant, stipulates:

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

(...)”.

Article 10 of the Universal Declaration of Human Rights provides:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

The General Assembly, in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (see resolution 43/173), established that any form of detention should be ordered by, or be subject to the effective control of, a judicial or other authority (principle 4); a person detained on a criminal charge should be brought before a judicial or other authority promptly after his or her arrest (principle 37) and not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority (principle 11); and such authority should decide without delay upon the lawfulness and necessity of detention (principle 37).

Article 5 § 4 of the European Convention on Human Rights, reads, in so far as relevant:

“4. 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.”

The European Court of Human Rights reiterates that proceedings conducted under Article 5 § 4 of the Convention before a court examining an appeal against detention must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person. Equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention (see, among other authorities, *Mooren v. Germany* [GC], no. 11364/03, § 124, 9 July 2009; *Svipsta v. Latvia*, no. 66820/01, § 129, ECHR 2006-III (extracts); *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I; and *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001).

Any restrictions on the right of the detainee or his representative to have access to documents in the case file which form the basis of the prosecution case against him must be strictly necessary in the light of a strong countervailing public interest. Where full disclosure is not possible, Article 5 § 4 requires that the difficulties this causes are counterbalanced in such a way that the individual still has a possibility effectively to challenge the allegations against him (see *Piechowicz v. Poland*, no. 20071/07, § 203, 17 April 2012, with further reference to *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 205, ECHR 2009).

In the judgment issued on 1 March 2011, in the case *Welke and Bialek v. Poland* (no. 15924/05), the Court found:

“that the obligation to consult the case file exclusively in the secret registry and the related restrictions did constitute a limitation on the exercise of the rights of the defence. However, it takes the view that in the circumstances of the case the measures applied can be considered permissible under Article 6 § 1 as strictly necessary restrictions of the rights of the defence. The issue of the alleged breach of the rights of the defence on account of the restricted access to the case file, including the prohibition on taking notes on the contents of classified evidence, was put before the Court of Appeal, which examined it and found that the restrictions did not affect the rights of the defence to any significant degree (...).”

C. The application of the national and international law in the present case

The prosecutor's motion for applying detention on remand submitted on 19 May 2016, as presented in paragraph 4 of the circumstances of the case (similarly as in case of further motions for extension of detention on remand), was composed of two parts: public and classified. The public part included the suspect's personal data, the texts of the charges, their legal basis and the grounds for detention on remand, the information on arrest and the data of the suspect's legal representatives. The classified part included the reasoning of the motion.

In full conformity with the law in force, the public part of the motion of 19 May 2016 was transferred to Mr Piskorski and his legal representatives by the court, whereas the classified reasoning of the motion was made accessible to them by the court at the secret registry of the court. It should be added that even before the motion was transferred to the court, the prosecutor, pursuant to Article 156 § 5a of the Code of Criminal Proceedings had made the case-file concerning the evidence mentioned in the motion available to Mr Piskorski and his legal representatives. This procedure was followed every time the motion for extension of detention on remand was lodged with the court by the prosecutor.

The prosecutor, when lodging motions for extension of detention remand, every time made the case-file, in accordance with Article 156 § 5a of the Code of Criminal Proceedings, accessible to Mr Piskorski and who was brought from the remand centre in order to consult the case file. The case-file was accessible to his defence counsels at the same time.

Regardless of this, when transferring motions for extension of detention remand to the court, the prosecutor expressed agreement to bringing Mr Piskorski to the court in order to make the access to the classified part of the reasoning available to him and agreed to make the case-file available to him and his defence counsels. Such motions were lodged with the court 14 days before the expiry of the time-limit of the detention on remand.

Due to the volume of the last motion for extension of detention on remand, its classified reasoning was made available to Mr Piskorski even at the prosecutor office. It was decided that even if this obligation was on the court, the accused should have more time to analyse this document taking into account the volume of the motion.

Yet another important guarantee for the possibility of the defence counsel to consult the case-file – and on an ongoing basis – is the fact that the defence counsels were informed every time about the dates of witness hearings, which meant that they could participate in these actions. They thus were able to take their independent decisions whether to be present at the respective witness hearings. All those witness hearings were in any case recorded on the request of the defence counsels. The admission of the defence counsels to these actions results also in that they are entitled to request the excerpt of the record of the hearing whether they participated or not.

The evidence gathered in the case at stake was made available to Mr Piskorski and his defence counsels in accordance with the Law of 5 August 2010 on protection of classified information and its executive acts. The fact the he and his defence counsels had access to the classified documents was every time confirmed in writing. The 26 volumes of the classified investigation case-file were made accessible to the parties by the prosecutor conducting the proceedings in accordance with the law in force.

According to information provided to the Government by the National Prosecutor's Office, the applicant had access to the case file on 19 May 2016, 17 June 2016, 1 and 2 August 2016, 20, 21 and 24 October 2016, 15 and 17 November 2016, 20 and 25 April 2017, 19 and 20 June 2017, 14 and 17 July 2017, 8 September 2017, 5 and 18 October 2017, 15 December 2017 and 3 and 4 January 2018. His lawyer had access to the case file on the following days: 19 May 2016, 6, 14 and 17 June 2016, 1 and 2

August 2016, 20 and 21 October 2016, 25 and 26 January 2017, 20 and 25 April 2017, 14 July 2017, 8 September 2017, 5 and 18 October 2017, 15 December 2017 and 4 January 2017.

The Government admit that on one occasion, in its decision on extension of detention on remand issued on 8 June 2017 (paragraph 15 of the circumstances of the case) the Warsaw Court of Appeal agreed with Mr Piskorski that he had been unduly refused to consult the motion of 28 April 2018 on the extension of his detention on remand and the attached evidence. Nevertheless, the court held that it was not demonstrated that this situation had any real impact on the court's decision taking into account the fact that his defence counsels had been acquainted with the motion and the evidence attached to it and Mr Piskorski had become acquainted, in the earlier period, with the vast majority of the evidence constituting a basis for this and previous motion for extension of detention on remand. Moreover, the Warsaw Court of Appeal had created a possibility for Mr Piskorski to become acquainted with the motion of 28 April 2017 and the evidence attached to it at the secret registry of the court before the hearing on the interlocutory appeal against the decision and requested Mr Piskorski to be present at the hearing in order to enable him to complete his complaints submitted before in writing. Mr Piskorski did not raise any new arguments at that hearing.

The procedure in the present case was conducted in full conformity with the European Convention on Human Rights and the standards developed by the European Court of Human Rights (as recalled above in section B). The fact that the classified part of the case-file could be consulted exclusively in the secret registry served important legitimate public interests related to the protection of the State security and the State secrets of the highest level, and the related restrictions did not constitute any undue limitation on the exercise of Mr Piskorski's rights of the defence and did not affect them negatively in practice.

Moreover, equality of arms was fully ensured as neither Mr Piskorski nor his counsel were denied access to those documents in the investigation file that were essential in order effectively to challenge the lawfulness of his detention. In fact, the source has not substantiated in any way its allegations that applicant's defence rights were impaired.

Furthermore, the principles established in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, as mentioned in section B above, had been observed in Mr Piskorski's case.

Therefore, contrary to the allegations submitted by the source, in the present case the domestic and international norms relating to the right to a fair trial and to the procedure for review of Mr Piskorski's detention and his due process rights were fully respected, including as far as the access to the case file of Mr Piskorski and his defence counsels were concerned and the one shortcoming on one occasion was speedily examined, rectified and already redressed by the appellate court and the applicant did not suffer any negative consequences thereof.

Taking into account the guarantees presented by the Polish law and their diligent application in the present case, including by the Warsaw Court of Appeal which dealt speedily and adequately with the shortcomings emerging at the earlier stage of the proceedings, **the Government consider that Mr Piskorski fully and effectively benefited from access to the case-file.**

4. As regards the source's allegation on limiting or refusing Mr Piskorski to take part in court hearings and presenting his own statements before the court

A. Relevant domestic law

Article 249 § 3 of the Code of Criminal Proceedings states:

“Before a preventive measure is applied, the court or the prosecutor applying the measure shall examine the accused, unless it is not possible due to the latter being in hiding or abroad. The appointed defence counsel shall be admitted to be present if he appears; notifying the defence counsel of the date of examination is not obligatory, unless requested by the accused and provided that it does not render the action difficult. The prosecutor is notified about that date by the court.”.

Article 249 § 5 of the Code of Criminal Proceedings stipulates:

“The prosecutor and the defence counsel shall be entitled to participate in the court session concerning the extension of the detention on remand and the examination of an interlocutory appeal lodged against the application or extension of this measure. Upon a request of the accused, who is not represented by a defence counsel, the ex officio defence counsel shall be appointed for this action. That order could be issued also by the court officer. A failure to appear by a defence counsel or a prosecutor, who have been properly notified of the date, shall not prevent the examination of the case.”.

Article 252 of the Code of Criminal Proceedings stipulates:

“1. The decision on preventive measures shall be subject to interlocutory appeal pursuant to general provisions, except if the law provides otherwise.

2. A decision of the prosecutor relating to preventive measure shall be subject to interlocutory appeal to the district court, in jurisdiction of which the proceedings are conducted.

3. An interlocutory appeal against a decision on preventive measure shall be examined by the court without delay, and an interlocutory appeal against a decision on detention on remand shall be examined not later than 7 days from the date on which the interlocutory appeal together with the essential case file have been transmitted to the court.”.

Pursuant to Article 464 of the Code of Criminal Proceedings:

“1. 1. The parties, the defence counsels and the plenipotentiaries shall be entitled to participate in the session of the appellate court hearing the interlocutory appeal against a decision concluding proceedings in the case, against a decision on preventive measure other than detention on remand, against a decision on financial guarantee and against a decision on arrest. They shall be entitled to participate in the session of the appellate court also when they are entitled to participate in a session of the first-instance court.

2. In other cases the appellate court may allow the parties, or a defence counsel or a plenipotentiary to participate in the session.”.

B. International law and practice

Although Article 5 § 4 of the European Convention on Human Rights, mentioned above, does not compel the Contracting Parties to set up a second level of jurisdiction for the examination of the lawfulness of detention, according to the European Court of Human Rights, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance (*Kučera v. Slovakia*, § 107; *Navarra v. France*, § 28; *Toth v. Austria*, § 84).

The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (*A. and Others v. the United Kingdom* [GC], § 203; *Idalov v. Russia* [GC], § 161).

The opportunity for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (*Kampanis v. Greece*, § 47). However, Article 5 § 4 does not require that a detained person be heard every time he lodges an appeal against a decision extending his detention, but that it should be possible to exercise the right to be heard at reasonable intervals (*Çatal v. Turkey*, § 33; *Altınok v. Turkey*, § 45).

Moreover, the European Court of Human Rights Court reiterates the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for a trial hearing (see *Kamasinski v. Austria*, 19 December 1989, § 106, Series A no. 168).

C. The application of the law in the present case

As presented above, domestic courts assess prosecutor's motions for detention on remand at hearings, at which an accused is present and is examined by the court. If the accused is represented by a defence counsel, he is also informed about the time of the hearing. The decision on detention on remand is served on the accused who has the possibility to lodge an interlocutory appeal against it. However, according to the Polish law in force, only the defence counsel shall be notified of the date of the court session regarding the extension of the detention on remand and examining an interlocutory appeal against the application or extension of this preventive measure.

The Government wish to recall that Mr Piskorski was present at the court hearing at which the motion for applying detention on remand was considered and he was heard by the court (see paragraph 7 of the circumstances of the case).

As stated in paragraph 21 of the circumstances of the case, Mr Piskorski also participated in person in a hearing on which the motion for extension of detention on remand of 25 October 2017 was examined.

In its decision on extension of detention on remand issued on 8 June 2017 (case no. II AKz 277/17), the Warsaw Court of Appeal explained that pursuant to Article 249 § 5 of the Code of Criminal Proceedings (mentioned above) only the defence counsel and prosecutor are entitled to participate in the court session concerning the extension of the detention on remand and the examination of an interlocutory appeal lodged against the application or extension of this measure, thus Mr Piskorski's complaint that he had not participated in a court hearing should be treated as unfounded as not provided by the law.

It appears from the case-file that Mr Piskorski's defence counsel always participated in the court's hearings concerning the imposition and extension on his detention on remand, as well as in the appellate court's hearings.

The Government are strongly convinced that the presence of defence counsels at all hearings before the courts of first and second instance fully secured the applicant's right to a fair trial and it does not give any reasons to find his deprivation of liberty arbitrary.

The regulations of the Polish Code of Criminal Proceedings concerning the defendant's participation in the court's hearings are in conformity with all international agreements binding on Poland.

Consequently, the source's submissions in paragraph 36 are unfounded and do not refer to the law in force.

Thus, the observance of the international norms relating to the right to a fair trial with regard to the issue of the defendant's participation in the court hearings, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the Republic of Poland, has been provided in the case at stake and the deprivation of liberty of Mr Piskorski does not have an arbitrary character under category III.

5. As regards the source's allegation that Mr Piskorski's detention on remand cases were recognised by a number of judges from the Warsaw Court of Appeal

A. Relevant domestic law and practice

Article 40 § 1 of the Code of Criminal Proceedings provides:

"A judge shall be *ex lege* excluded from his/her participation in a case, if: ...

- 6) he/she has participated in the delivery of a decision subject to an appeal or has delivered an order subject to an appeal ..."

Article 42 of the Code of Criminal Proceedings provides for the procedure for disqualification of a judge:

- “ 1. An exclusion shall be effected upon the judge’s request, ex officio or upon an application made by a party to the proceedings.
2. If the judge considers that grounds for his disqualification by virtue of Article 40 occur, he/she shall exclude himself/herself by a written statement to be included in the case-files; another judge shall be substituted in his/her place.
3. A judge against whom an application to challenge him/her has been lodged pursuant to the provisions of Article 41 may submit an appropriate written statement to be included in the case-files. An application shall be examined without delay. Upon the exclusion of the judge procedural acts performed with his/her participation after the motion has been lodged, shall become ineffective.
(...).”

As can be seen from a decision of the Katowice Court of Appeal, delivered on 19 October 2005 (no. II AKz 644/05), the wording “[a judge] shall be excluded” (*wyłączony od udziału w sprawie*), which is used in Article 40 § 1 of the Code of Criminal Proceedings, does not mean that such a judge should be excluded from delivery of a judgment only. In the opinion of the court the provision in question should also apply to all procedural decisions during the criminal proceedings, such as, for example, the imposition of detention on remand. The court underlined the fact that in respect of such procedural decisions the broad definition “participation in a case” should apply. On the contrary, if the exclusion of a judge only meant that no second judgment could be given by the same judge, then the legislator would have adopted a narrower definition, namely, “participation in examination of the merits of the case” (*wyłączony od udziału w rozpoznaniu sprawy*). A similar opinion was expressed by the Supreme Court in its decision of 10 August 2004 (no. III KZ 9/04) and of 10 March 1997 (no. V KZ 24/97). The Supreme Court underlined the fact that Article 40 § 1 of the Code of Criminal Proceedings provides for procedural guarantees, which cannot be interpreted narrowly.

B. International law and practice

Article 10 of the Universal Declaration of Human Rights:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Article 14 of the International Covenant on Civil and Political Rights, in so far as relevant, stipulates:

“1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.(...)”.

Article 6 § 1 of the European Convention on Human Rights, reads, in so far as relevant:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...”.

The European Court of Human Rights reiterates that there are two tests for assessing whether a tribunal is impartial within the meaning of Article 6 § 1: the first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, *Gautrin and Others v. France*, § 58, 20 May 1998, Reports of Judgments and Decisions 1998-III). As regards the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Wettstein v. Switzerland*, no. 33958/96, § 43, ECHR 2000-XII). As regards the objective test, it must be determined whether, quite apart from the judge’s conduct, there are ascertainable facts which may raise justified doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks

impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, Reports 1996-III and *Micallef v. Malta*, no. 17056/06, § 74, 15 January 2008).

C. The application of the law in the present case

As mentioned in section A of the first part of the present observations, Article 263 of the Code of Criminal Proceedings stipulates in § 4 that the extension of detention on remand for the specified period of time may be applied only by the court of appeal, in jurisdiction of which the proceedings are conducted, on a motion from the prosecutor, who is a direct supervisor over the prosecutor conducting or supervising the investigation. Pursuant to § 5 of the same provision, an interlocutory appeal against the decision issued by the court of appeal may be lodged with the court of appeal sitting with three judges. The procedure was followed in Mr Piskorski's case.

The Government wish to submit that in the present case, the interlocutory appeal against the extension of Mr Piskorski's detention on remand was examined on 14 December 2017 by the Warsaw Court of Appeal, which was composed of three judges, including D.T., as provided by Article 263 § 5 of the Code of Criminal Proceedings. What is important, none of these judges had issued a decision on extension of his detention on remand.

On 17 January 2018 the Warsaw Court of Appeal, composed of one judge (D.T.), pursuant to Article 263 § 4 of the Code of Criminal Proceedings, extended Mr Piskorski's detention on remand. However this judge did not decide in the appellate proceedings against this decision. Therefore, the same judge did not deliver a decision on the extension on detention on remand and subsequent decision concerning an interlocutory appeal against this decision.

The Government observe that, according to Article 40 § 1 of the Code of Criminal Proceedings, a judge is *ex lege* excluded from his participation in a case, if he has participated, in a lower court, in the delivery of a decision subject to an appeal. However, in the proceedings at stake it was not the case.

The decision on extending the detention on remand issued by D.T. was subsequently reviewed by the second-instance court composed of other judges. In the instant case, the Government is convinced that there is no sufficient evidence to establish that any personal bias was shown by judges of the Warsaw Court of Appeal.

The Government wish to underline that Mr Piskorski could avail himself of the domestic remedies and lodge an application for the judge to step down, as mentioned in Article 42 § 1 of the Code of the Criminal Proceedings cited in section A above. Moreover, he could also present his complaints concerning the impartiality of a judge together with an interlocutory appeal.

What is more, in the present case judges did not adopt a judgment finding the applicant guilty or innocent and no evidence relevant for the determination of these issues was ever assessed. Judges were solely concerned with ascertaining whether the conditions for detention on remand are fulfilled in Mr Piskorski's case.

The Government consider that in these circumstances there were no ascertainable facts which could give rise to any justified doubt as to judges' impartiality, nor did the applicant have any legitimate reason to fear this.

Bearing the above standards in mind, the Government are convinced that the Polish law, as described above in section A, contains all necessary and detailed provisions relating to the right to a fair trial and the Polish law is fully in line with international standards, including those laid down in Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights. Thus, **the observance of the international norms relating to the right to a fair trial with regard**

to the issue of impartiality of the judges has been provided in the case at stake and the deprivation of liberty of Mr Piskorski does not have an arbitrary character under category III.

Final remarks:

For all the aforementioned reasons, the Government of Poland respectfully submit that Mr Piskorski's detention is not in contravention of Article 9 of the International Covenant on Civil and Political Rights or Article 9 of the Universal Declaration of Human Rights. The Polish domestic law fully ensures due process for all individuals subject to detention on remand, and requires the competent authorities to ensure that detention is only maintained when strictly necessary.

The proceedings concerning Mr Piskorski's detention on remand are conducted in line with the Polish legal provisions and all international legal standards binding upon Poland and Mr Piskorski benefited from full guarantees of a fair trial as provided above.

The Government of Poland ensure the physical and mental integrity of Mr Piskorski.

The Government of Poland find the allegations presented by the source to be totally unsubstantiated and unreliable. At the same time they are at disposal of the Working Group on Arbitrary Detention should the Group wish to obtain any further information or clarification.

Yours faithfully,


Justyna Chrzanowska

Director