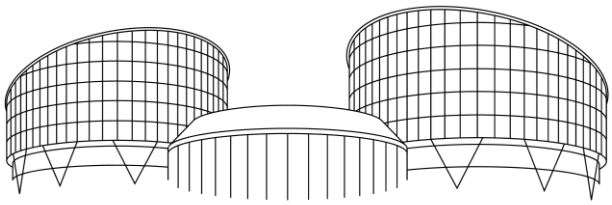

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KUPCZAK v. POLAND

(Application no. 2627/09)

JUDGMENT

STRASBOURG

25 January 2011

FINAL

20/06/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kupczak v. Poland**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi,
Vincent A. de Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 4 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 2627/09) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Edward Kupczak ("the applicant"), on 22 December 2008.

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

3. The applicant alleged, in particular, that he had not been offered adequate medical care while in custody.

4. On 9 March 2009 the President of the Fourth Section decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1). The President also gave priority to the application, pursuant to Rule 41 of the Rules of the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and lives in Kraków.

A. The criminal proceedings

6. In 1998 the applicant was in a car accident which left him disabled. He suffered a fracture of the spine which resulted in paraplegia. He was also diagnosed with paralysis of the urethral and anal sphincters. Since then the applicant has suffered from severe back pain and sudden pain in the legs. From 2000 until 29 October 2006 the applicant had been using a special morphine pump made for him in Germany which had been implanted in his body and infused morphine directly into his spinal fluid.

7. On 26 October 2006 the applicant was arrested by the police.

8. On 27 October 2006 the Kielce District Court decided to remand him in custody in view of the reasonable suspicion that he had been leading an organised criminal gang, the "Kantor Wielopole" group, specialising mainly in money laundering and usury. The applicant's lawyer argued before the court that the applicant's state of health was incompatible with detention. However the court considered that the applicant could be detained and that the morphine pump he had been using could be managed in the detention centre. In particular, the doctors from the detention centre would be able to operate the pump and refill it with morphine.

9. The applicant appealed against the decision.

10. On 23 November 2006 the Kielce Regional Court dismissed his appeal. The court considered that if the applicant continued to receive treatment for his pain he could stay in detention.

11. After the applicant's arrest the morphine in his pump ran out, but the detention centre authorities filled it with sodium chloride (saline solution) as a substitute to keep the pump working.

12. The applicant's lawyer requested an expert opinion to evaluate his client's state of health. He submitted that the court, when deciding on his detention, had been misled by the detention authorities as regards the functioning of his pump, and the expert opinion could clarify the importance of the latter in the treatment of the applicant's chronic pain.

13. On 24 January 2007 the applicant's detention was extended by the Kraków Regional Court. The court also dismissed the applicant's lawyer's request for an expert opinion. As regards the applicant's state of health, the court expressed, in one sentence, the opinion that it was not incompatible with detention. An appeal by the applicant against this decision was dismissed on an unspecified date.

14. On 16 April 2007 the applicant's detention was further extended. The court relied on the risk that a severe sentence would be imposed and on the possibility that the applicant would interfere with the proper course of the proceedings. As regards the applicant's state of health, the court reiterated that he had available to him a specialised machine to administer the painkiller – the morphine pump – and that it was thus possible to treat him in the detention centre. Specialist cleaning of the pump would take

place in the near future in the civil hospital in Radom or in the Warsaw Prison hospital. The court made no reference to the fact that the pump had not been working properly for at least four months.

15. The applicant appealed against this decision. He argued that the pump had not been functioning properly since the beginning of his detention, as it had not been possible for the detention centre to refill the pump with the special mixture of morphine and other drugs put together individually for the applicant in a clinic in Germany. In place of the morphine the pump had been refilled with an ordinary saline solution, which had no painkilling properties. Instead, the applicant had been receiving strong painkillers (opiates) orally and as injections, which were addictive and had not been properly adapted to his needs. This treatment did not provide sufficient relief from pain; moreover, it caused narcotic stupor and possible dependence.

16. The applicant's appeal against this decision was dismissed on 11 May 2007 by the Kraków Court of Appeal. It found that the applicant's lawyer had not substantiated his argument that the applicant's medical care was inadequate.

17. On 17 April 2007 the Kielce Regional Prosecutor dismissed the applicant's request for a comprehensive examination by specialists in several medical fields and a medical opinion on his state of health.

18. On 23 July 2007 Kraków Regional Court further extended the applicant's pre-trial detention. The court repeated previously raised arguments almost word for word, namely that the applicant possessed a morphine pump which made his treatment in the detention centre possible.

19. The applicant appealed against the decision, but on 8 August 2007 the Kraków Court of Appeal dismissed the appeal without making any reference to the applicant's state of health.

20. On 11 October 2007 the Kielce Regional Prosecutor dismissed the applicant's application to have the investigation stayed because of his state of health.

21. The applicant's pre-trial detention was further extended in October 2007 and on 21 April 2008 by the Kraków Regional Court. In the latter decision the court stated as follows:

> "As regards the state of health of [the applicant] the Detention Centre had not yet submitted their position on whether there had been circumstances posing a threat to the applicant's life or health. Such a threat could not be credibly invoked by reference to his [morphine pump] breakdown as it had happened a long time ago and the Detention Centre had not informed [the court] of any negative consequence for the applicant's life and health (except for stating that he was suffering pain). It should also be added that the court ordered an expert opinion on neurology to assess whether continued stay of [the applicant] in detention posed a threat to his life or health..."

22. On 2 September 2008 the same court dismissed the applicant's request for release.

23. On an unspecified date the applicant was indicted before the Kraków Regional Court.

24. On 8 October 2008 the Kraków Regional Court requested the Kraków Court of Appeal to extend the applicant's detention beyond the statutory time-limit of two years laid down in Article 263 § 3 of the Code of Criminal Procedure (*Kodeks postępowania karnego*).

25. On 24 October 2008 the Kraków Court of Appeal allowed the request and extended the applicant's pre-trial detention until 30 May 2009. The court relied on a reasonable suspicion against the applicant, the severity of the penalty that might be imposed and a risk that he would interfere with the proper course of the proceedings. As regards the applicant's state of health the court held as follows:

> "Pre-trial detention does not pose a threat to the life or health of any of the co-accused, including [the applicant]. [The applicant] has been suffering severe pain since a fracture of the spine ten years ago, for which there is no treatment other than palliative care consisting of painkillers. Although efforts to implant a morphine pump have taken some time, [the applicant] is under the care of the prison health service, he takes opiates orally and the court always checks whether [the applicant] is able to participate in the trial. It cannot thus be said that [the applicant's] detention poses a threat to his life or health, and this has been confirmed by the expert opinions. It would not be correct to assume that [the applicant] has been subjected to inhuman or degrading treatment, because the authorities have displayed due care in protecting [the applicant's] health and in preventing his suffering, as they have created special conditions for his outdoor exercise, allowed him to buy food during his hunger strike, examined him (unless he opposed it, claiming that it was pointless), treated him by administering painkillers and taken steps to implant a new morphine pump.
>
> However, since the suffering of [the applicant] is real and he has raised the possibility of having a procedure outside Poland which would bring it to an end, the situation should be resolved decisively so that justice is not achieved by [tolerating] the suffering of a human being. From the correspondence relating to the Detention Centre's efforts it is not clear whether it is actually possible to carry out the medical intervention needed by [the applicant] and whether the drugs administered orally cause harmful side effects. Therefore the Court of Appeal instructs the Regional Court, which is supervising the applicant's pre-trial detention, to urgently confirm with the Central Administration of Prisons (*Centralny Zarząd Zakładów Karnych*) whether the Polish prisons are able to continue [the applicant's] detention without allowing his health to deteriorate, by organising a medical intervention that would allow the proper functioning of the morphine pump so that the pain suffered by [the applicant] would be at least substantially diminished. If the prison authorities are not able to secure the above and [the applicant] continues to suffer, the pre-trial detention should not be continued because it would become non-humanitarian. Even if [the applicant] were guilty of the crimes he is charged with, were to receive a severe punishment, or, if released, were to avoid justice, it would not be correct to achieve an act justified in the interests of justice by tolerating suffering which (allegedly) could have been prevented..."

26. An appeal by the applicant against the decision was dismissed by the Kraków Court of Appeal on 13 November 2008.

27. At the hearing on 14 May 2009 the Kraków Regional Court decided to lift the applicant's pre-trial detention. The court decided that the detention of the applicant and his two co-accused was no longer necessary, particularly since eleven other co-accused had already been released. The court also found that the argument of severity of the possible sentence lost its importance with the lapse of time, relying on the case-law of the Court, and that detention should not amount to anticipation of the penalty of imprisonment. Similarly, it did not consider the risk of the applicant and other co-accused interfering with the course of proceedings decisive for extending the measure against them. As regards the state of health of the applicant, the court indicated that surgery was imminent and that this justified release. The court acknowledged that for a long time the prison authorities had been attempting to find a solution for the applicant, who at the same time had been telling them he was suffering pain. As a result, the situation could justify the Court of Appeal's conclusion on 24 October 2008 that his pre-trial detention amounted to an inhumane measure and that "it would not be correct to achieve an outcome justified in the interests of justice by tolerating his suffering".

28. The applicant was released and travelled to a hospital in Germany, but given the high cost of the intervention he decided to have the new pump implanted in Poland.

29. On 13 August 2009 the applicant had a new morphine pump implanted in the Kraków University Hospital.

30. On 23 September 2009 the Kraków District Court decided to impose a preventive measure on the applicant, prohibiting him from leaving the country and ordering the seizure of his passport. The applicant's trial is pending.

B. The medical certificates

31. A medical expert opinion of 31 May 2004, issued by the Jagiellonian University Chair of Forensic Medicine, sets out, in so far as relevant:

> "[Since the applicant's accident, despite having undergone numerous operations, he still suffers severe pain] and as a result has had a pump implanted which administers morphine twenty-four hours a day. However, as he submits, there are days when the pain is more severe and he injects additional doses of morphine himself. It should be made clear that a person suffering from chronic pain, no matter what the cause, who is treated with morphine in a stable dose administered by a pump, is able to function normally in society and would be able to take part in a trial. However, in the present case, when his pain worsens [the applicant] takes additional doses of morphine, which can change his perception of reality and in particular can influence the statements he makes. Also, according to [a medical certificate the applicant] is due to undergo another operation on his spine ... Taking the above into account it is established that [the applicant] is unable to participate in criminal proceedings for a period of six months (*niezdolny do czynności procesowych*)."

32. The certificate issued on 15 December 2005 by the same Chair of Forensic Medicine confirmed that the applicant was unable to participate in the criminal proceedings for a period of twelve months.

33. A medical opinion of 26 October 2006 confirmed that the applicant, who had been treated with the morphine pump, could participate in the proceedings but might need a break during questioning in the event of severe pain. The expert considered that a detention centre could not provide the necessary medical care and that the appropriate place to detain him would be a prison hospital.

34. An information card from the Warsaw Detention Centre Hospital of 8 November 2006 confirmed that there were difficulties in obtaining the morphine needed to fill up the pump; therefore, the pump was filled up with sodium chloride to keep it functioning. The applicant was treated with the painkiller *Tramal*.

35. An information card of 27 January 2007 from Radom Hospital confirmed that the applicant's pump, during a period of three months, had been filled up with saline solution.

36. It appears from a medical certificate of 16 November 2007 that the applicant's morphine pump was filled up with morphine on 25 September 2007. From the documents invoked below, it is clear that there had been some irregularities in the functioning of the pump and it broke down either in October or November 2007.

37. On 31 January 2008 the head of the surgical unit of the Kraków Detention Centre Hospital wrote to the Kraków Regional Court in reply to that court's questions. He informed the court that the applicant was not a patient in the unit but that he had been placed there due to the fact that there was no suitable cell for a disabled person in the detention centre.

> "4. The present state of health of the applicant allows his stay in a prison, to be indicated by a court, which has a cell for disabled persons and on condition that his morphine pump is replaced. The chronic pain which the applicant has been suffering from for over ten years can be controlled only by the constant administration of a painkiller twenty-four hours a day.
>
> 5. Other methods of treating the applicant's pain tried by the hospital have been ineffective. This fact indicates that a surgical intervention is urgently required - implantation of a morphine pump. Otherwise, the [applicant's] chronic pain may constitute a ground for applying for release from detention."

38. According to a letter sent to the head of the hospital at the Kraków Detention Centre by the Palliative Medicine Institute in Warsaw on 6 February 2008 the applicant's morphine pump had not been functioning correctly. It suggested enlisting the services of a clinic that specialised in treating pain and a diagnosis the deficiency in the functioning of the pump.

39. According to the forensic medical opinion of 7 February 2008 the applicant, who had been using a wheelchair, could testify and take part in the trial, although transporting him to the Kielce Regional Court could

increase his pain. The expert stated that "sudden pain attacks do not limit the [applicant's] mental capacity, provided that in the event of severe pain [the court] would interrupt the hearing for a moment."

40. On 3 March 2008 the Kraków Detention Centre Hospital informed the court that the applicant's morphine pump had been broken since 29 November 2007.

41. On 12 March 2008 the director of the hospital at the Kraków Detention Centre informed the Kraków Regional Court that the applicant was receiving orally five different painkillers, including *Tramal*, which was also injected in case of need.

42. In 2008 the Kraków Detention Centre asked several hospitals in Poland whether they could implant the morphine pump. After several negative replies, on 13 March 2008, the head of the neurosurgical department of Mielec Hospital informed the Kraków Detention Centre that they would be able to replace the applicant's morphine pump. A hospital in Gdańsk also agreed to carry out that intervention but later refused for technical reasons.

43. On 18 July 2008 the Jagiellonian University Pain and Palliative Care Clinic issued an expert opinion. The experts established that the applicant was suffering from attacks of severe pain, approximately once an hour, lasting from a few to a dozen minutes. The morphine pump had been implanted about eight years previously, but in October 2007 it had stopped functioning. The applicant had thus been receiving several types of painkillers administered orally and had injections of morphine and *Tramal* in case of severe pain.

II. RELEVANT DOMESTIC LAW

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

45. The relevant domestic law and practice as well as international documents regarding conditions of detention are stated in *Sławomir Musiał v. Poland*, no. 28300/06, §§48-63, ECHR 2009-... (extracts).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

46. The applicant complained that he had been subjected to inhuman and degrading treatment in breach of Article 3 of the Convention in that throughout his entire pre-trial detention his morphine pump had not been functioning. This Article reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

47. The Government contested that argument.

A. Admissibility

48. The Government raised a preliminary objection as to the non-exhaustion of domestic remedies by the applicant. They argued that the applicant could have, but had not, made use of the remedies of a compensatory nature governed by the provisions of Articles 23 and 24 of the Civil Code, in conjunction with Article 448 of the Civil Code, in order to bring an action for compensation for his allegedly unsatisfactory medical care during his detention.

Secondly, the Government averred that the applicant could have lodged a constitutional complaint with the Constitutional Court alleging that Article 263 of the Code of Criminal Procedure, which allowed the extension of detention without any time-limits, was contrary to the Constitution.

49. The Court however notes that the arguments raised by the Government are similar to those already examined and rejected in previous cases against Poland (see, among other authorities, *Sławomir Musiał*, cited above, §§ 65-81) and that the Government have not submitted any new circumstances which would lead the Court to depart from that finding.

50. Finally the Government argued that the applicant should have resorted to yet another remedy, namely an action for compensation under Article 552 § 4 of the Code of Criminal Procedure. However the Court reiterates that a request for compensation for manifestly unjustified detention under Article 552 of the Code of Criminal Procedure of 1997 enables a detainee to seek a retrospective ruling as to whether his detention in criminal proceedings which have already been terminated was justified, and to obtain compensation when it was not. The proceedings relating to such a request are essentially designed to secure financial reparation for damage arising from the execution of unjustified detention (see *Włoch v. Poland*, no. 27785/95, judgment of 19 October 2000, § 91). Moreover, an action for compensation is not a remedy which has to be made use of, because the right not to be subjected to inhuman and degrading treatment

and the right to obtain compensation for any deprivation of liberty incompatible with Article 5 are two separate rights (see, *mutatis mutandis*, *Feliński v. Poland*, no. 31116/03, § 41, 7 July 2009, and *Zdebski, Zdebska and Zdebska* v. Poland (dec.), no. 27748/95, 6 April 2000).

51. The Court notes that the applicant raised his health problems and in particular the necessity to have the morphine pump replaced in all his appeals against the decisions extending his pre-trial detention. He also requested expert opinions which could further clarify his medical needs. It is clear from the case file, and the Government do not seem to contest it, that the prison authorities and courts were aware of the applicant's medical condition.

52. The Court observes that, in the circumstances of the present case, the remedies referred to by the Government were not capable of providing redress in respect of the applicant's complaint. Having regard to the above considerations, the Court dismisses the Government's preliminary objection as to the non-exhaustion of domestic remedies.

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

B. Merits

1. The parties' submissions

54. The applicant submitted in general that he had not been provided with appropriate medical care in detention, in that the authorities had caused his morphine pump to break down and had not allowed him to replace it. The medical staff in the detention centre hospital were not properly trained to operate such equipment and were not able to refill the pump or to keep it maintained. The applicant acknowledged that the authorities had been providing him with strong painkillers but that, given his state of health, the morphine pump, which administered the drugs directly to his spine, was the only efficient method of reducing his pain. He also alleged that he had been forced to take orally or by injection increasing doses of very potent narcotic drugs of which he was quickly becoming tolerant. As a consequence they not only did not offer relief from pain but adversely affected his perception and ability to concentrate which was necessary for him to be able to participate in his own trial.

55. In sum, the applicant submitted that during his two-and-a-half-year detention he had suffered pain which amounted to inhuman and degrading treatment.

56. The Government submitted that the applicant had been correctly treated and had not suffered any treatment contrary to Article 3 of the Convention. They submitted that throughout his detention he was placed in

a Detention Centre Hospital, in a room customised to the needs of people with health problems, in particular to the use of a wheelchair.

According to the Government the applicant received the medical attention he required and had received various painkillers (opiates), such as *Tramal* and morphine. He complained about his pain but on the other hand refused to take a higher dosage of these painkillers.

57. The Government maintained that the authorities did everything to enable the replacement of the applicant's morphine pump; they indicated the exchange of correspondence between the Detention Centre and various medical centres in Poland between 31 January 2008 and his release in May 2009. The Government maintained that the applicant's pump could be expected to function for about seven years, and thus its failure had been a normal consequence of time and rundown of batteries.

2. The Court's assessment

58. The Court reiterates that according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, Series A no. 215, p. 36, § 107; *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI; and *Peers v. Greece*, no. 28524/95, § 67, ECHR 2001-III).

59. The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. As regards prisoners or detainees, the Court has repeatedly noted that measures depriving a person of his liberty may often involve such an element. However, under Article 3 of the Convention the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła*, cited above, §§ 91-94, and *Wenerski v. Poland*, no. 44369/02, § 55, 20 January 2009).

60. Turning to the facts of the instant case, the Court observes that the applicant is suffering from a serious medical condition and his treatment is limited to relieving him from chronic pain. Since 2000 he has been using a pump which administers a mixture of painkillers specially designed for him directly into his spinal fluid (see paragraphs 6 and 29 above).

It is not disputed before the Court that the applicant's morphine pump stopped delivering painkiller shortly after his arrest in October 2006, as it

was refilled with a saline solution, and that a new pump was implanted in August 2009. During this time the applicant was treated with a series of powerful painkillers, taken either orally or intravenously.

61. It also appears from the medical documents in the file that before it broke down in October or November 2007, the applicant's pump had been refilled with morphine at least once, in September 2007 (see paragraphs 36, 40 and 43 above). However, although specifically asked by the Court, the Government failed to clarify whether the applicant's pump had been working properly and administering him morphine from his arrest in October 2006 until it broke down in 2007 and, if it was, for how long. Consequently the Court considers that it had not been established that during the applicant's detention his morphine pump had worked properly for any significant period of time.

62. The Government appeared to dispute that the morphine pump was essential to the applicant, and submitted that his pain had been correctly treated with painkillers.

63. However, the Court notes that the domestic courts clearly considered the fact that the applicant had a morphine pump implanted an important ground for finding his state compatible with detention. For the first two years the authorities relied on the above, without taking any note of the fact that his pump had in reality not been working since the beginning of his detention. In particular, in its decisions of 16 April and 23 July 2007, the court repeated the same justification that the applicant "had available to him a specialised machine to administer the painkiller – the morphine pump – and that it was thus possible to treat him in the detention centre" (see paragraphs 14 and 18 above). The courts failed to take into consideration objections raised by the applicant's lawyer, that the pump had been useless to the applicant since October 2006, which had been confirmed by medical certificates of 8 November 2006 and 27 January 2007 (see paragraphs 34 and 35 above). It was only on 21 April 2008 that the court acknowledged for the first time that his pump had not been working for a long time but was satisfied that the Detention Centre had not considered this to be of excessively severe detriment to the applicant (see paragraph 21 above).

The Court further observes that the detention authorities also considered, from the beginning of 2008, that the applicant needed to have a new pump implanted and contacted several hospitals in Poland. The Court acknowledges the difficulty encountered by the authorities in finding a medical centre prepared to carry out this kind of intervention. However it does not appear that the detention centre's attempts produced any concrete and prompt improvement for the applicant and cannot be considered a diligent reaction to his suffering.

64. In this connection the Court underlines that this case is not concerned with the issue of whether a detainee has a right to be provided with a free morphine pump and it is not suggested that the State was

required to pay for one (see *Wenerski v. Poland*, no. 44369/02, §§ 62 and 66, 20 January 2009 and *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002). The essential issue raised by the case at hand is whether the applicant had had the possibility to have a morphine pump implanted. Such a possibility was not given to the applicant during the entire period of his two-and-a-half-year detention. It also notes that the applicant managed to have a new pump implanted in the Kraków University Hospital three months after his release (see paragraph 29 above).

65. The Court also notes that there is no indication in the case file that during the applicant's detention the courts ordered an expert medical opinion, which could have assessed the adequacy of the current treatment of the applicant's pain, given the fact that his pump had been filled with a saline solution and not morphine. Requests for such an assessment had been repeatedly made by the applicant's lawyer and dismissed by the courts.

In his letter of 31 January 2008 the head of the surgical unit of the Kraków Detention Centre Hospital, addressed to the court, clearly indicated that a working morphine pump was essential to treat the applicant's pain (see paragraph 37 above). The Government did not submit that during the applicant's detention there had been any other medical assessment that would contradict these findings.

66. The Court considers that the first time the trial court diligently examined the compatibility of the applicant's state of health with detention was exactly two years after his arrest, on 24 October 2008, when the court recommended that the possibility of providing him with a functioning morphine pump should be investigated, so that his detention did not become inhumane (see paragraph 25 above). Nevertheless, the applicant remained in detention for the next six months without any improvement in his situation.

67. The Court is satisfied with the reasons for the decision to release him from detention given on 14 May 2009. This took place after two years, six months and eighteen days of the applicant's pre-trial detention (see paragraph 27 above).

The Court reiterates that the applicant was detained on the orders of the Regional Court, which had been obliged to display diligence in the examination of the prosecutor's requests for extension of his detention. The authorities conducting criminal proceedings against the applicant continued to extend his detention, relying repeatedly on the reasonable suspicion against him and on the complexity of the investigation as justifying his continued detention. Regard being had to the finding above, the Court concludes that the domestic courts failed to give serious consideration to the applicant's state of health, except for general statements (see decision of 24 January 2007 in paragraph 13 above) or repeatedly justifying his allegedly appropriate medical care by the existence of the morphine pump, which was in fact not working (see paragraph 63 above). Accordingly, the grounds given by the domestic authorities were particularly unsatisfactory,

given the serious state of the applicant's health, and could not justify the overall period of the applicant's detention.

68. The foregoing considerations are sufficient to enable the Court to conclude that by tolerating the failure of the applicant's morphine pump from the beginning of his detention and for the next two and a half years, given the particular state of health of the applicant, who was suffering chronic pain, the authorities responsible for his detention had acted in breach of their obligations to provide effective medical treatment and that the applicant was subjected to inhuman and degrading treatment in violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 5§3 AND 8 OF THE CONVENTION

A. Article 5§ 3

69. The applicant complained that his pre-trial detention had been too lengthy, in violation of Article 5 § 3 of the Convention.

70. The Government contested that argument.

71. The Government raised a preliminary objection as to the non-exhaustion of domestic remedies by the applicant. They maintained that the applicant could have lodged a constitutional complaint with the Constitutional Court, that Article 263 of the Code of Criminal Procedure, which allowed the extension of detention without any time-limits, was contrary to the Constitution. The Court however notes that the arguments raised by the Government are similar to those already examined and rejected in previous cases against Poland (see, among other authorities, *Bruczyński v. Poland*, no. 19206/03, §§ 38-45, 4 November 2008, and *Bišta v. Poland*, no. 22807/07, §§ 26-30, 12 January 2010) and that the Government have not submitted any new evidence which would lead the Court to depart from that finding.

72. The Court notes that these complaints are linked to the one examined above and must therefore likewise be declared admissible.

73. Having regard to the finding relating to Article 3 (see paragraph 68 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 5 § 3 (see, among other authorities, *Dzieciak v. Poland*, no. 77766/01, § 115, 9 December 2008).

B. Article 8

74. With regard to the issue of the authorities' positive obligations to protect the applicant's right to respect for his physical and mental integrity,

and to the fact that his morphine pump had not been working, the Court considered it appropriate to raise of its own motion the issue of Poland's compliance with the requirements of Article 8 of the Convention.

75. The Court notes that this complaint is linked to the one examined above under Article 3 of the Convention and must therefore likewise be declared admissible.

76. However, having found a violation of Article 3 above, the Court considers that it is not necessary to examine the issues arising under Article 8 of the Convention with regard to the conditions of the applicant's detention and the medical treatment he received (see *Sławomir Musiał*, cited above, § 101).

III. REMAINDER OF THE APPLICATION

77. Finally, the applicant complained that his trial had been unfair in that he had been forced to participate in it either in a state of severe pain or in a narcotic stupor. Moreover, he alleged a breach of the presumption of innocence, in that the authorities had intentionally deprived him of properly administered morphine to treat his pain, because they were trying to force him to cooperate with the prosecution authorities and confess.

78. However, the applicant's trial is still pending, and it will be open to the applicant, if convicted, to raise his complaints on appeal and, further, in a cassation appeal.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

81. The applicant claimed 10,000 euros (EUR) in respect of pecuniary damage for the reimbursement of the costs of the surgery he underwent in Germany in connection with replacing the pump. The applicant also claimed EUR 50,000 for non-pecuniary damage.

82. The Government contested these claims.

83. The Court does not discern any causal link between the violation found and the pecuniary damage alleged, in particular since the applicant

had finally had his new morphine pump implanted in Poland. It therefore rejects this claim. On the other hand, it awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

84. The applicant, who was represented by a lawyer, did not claim any sum in respect of costs and expenses.

C. Default interest

85. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints concerning the length of the applicant's pre-trial detention under Article 5 § 3 and his conditions of detention under Articles 3 and 8 admissible and the remainder of the application inadmissible;

2. *Holds* by 6 votes to 1 that there has been a violation of Article 3 of the Convention;

3. *Holds* by 6 votes to 1 that it is not necessary to examine the complaint under Article 5 § 3 of the Convention;

4. *Holds* unanimously that it is not necessary to examine the complaint under Article 8 of the Convention;

5. *Holds* by 6 votes to 1
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Polish zlotys at the rate applicable on the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Deputy Registrar	Nicolas Bratza President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge V.A. de Gaetano is annexed to this judgment.

N. B.
F. A.

DISSENTING OPINION OF JUDGE DE GAETANO

1. I regret that I cannot share the majority view in this case.

2. To my mind the issues under Articles 3 and 5 § 3 should have been kept separate and distinct. Whereas the main issue under Article 5 § 3 is whether the judicial authorities had properly weighed all the relevant facts and circumstances in order to decide whether or not to release the applicant on bail pending the proceedings against him (or, in the instant case, to decide whether or not to prolong his detention), the issue for the purposes of Article 3 is whether the State – represented in this case by the authorities directly responsible for his detention, that is the detention or prison authorities – had done all that was reasonably possible to alleviate the applicant's pain while in detention.

3. I would have found no difficulty in finding a violation of Article 5 § 3. The Polish courts cavalierly dismissed or ignored on many occasions the fact that the applicant was not only wheelchair bound but had an additional serious health problem. They repeatedly refused to properly put into the equation, for the purpose of deciding on the release or otherwise of the applicant, his overall physical condition. Even when, rather late in the day (see paragraph 25), the Kraków Court of Appeal took the trouble to consider at some length the applicant's general medical condition, it wrongly equated his main health problem – which was basically the condition engendering bouts of severe pain in the applicant, with the correlative decrease in his ability to act in a way capable of frustrating the proper administration of justice in the proceedings against him – with "a threat to [his] life or health". It simply missed the wood for the trees.

4. As to Article 3, on the other hand, I am satisfied that the authorities at the places where the applicant was detained did all that was reasonably possible to alleviate his pain. The applicant, it must be remembered, arrived in the detention centres with a medical or health condition pre-existing his arrest. The Court has already had occasion to observe that Article 3 should not be construed as laying down a general obligation to release detainees on health grounds; rather it imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty by, among others, providing them with the requisite medical assistance (see, among others, *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002 IX). Moreover, the medical care that the applicant was entitled to receive while in detention was the standard level of health care available to the population generally (see *Kaprykowski v. Poland*, no. 23052/05, § 75, 3 February 2009), and not some form of extraordinary medical care, particularly so when his life was not at any time at risk. First (at the Warsaw Detention Centre Hospital),

difficulties were encountered to obtain the morphine to fill the pump (when this was still in working order); the pump was filled with a solution to keep it in working order and the applicant was given a particular drug to alleviate the pain (see paragraph 34). After the pump broke down and it was evident that the best solution was to have a new one implanted rather than to administer painkillers in a different way, the detention centre authorities (this time of the Kraków Detention Centre Hospital) sought to find a hospital where the implantation could take place (see paragraph 42). Several replied in the negative, but two Polish hospitals stated that they were able to replace the pump (one of the two later withdrawing the offer "for technical reasons"). Why the implantation was not performed by the other hospital before the applicant's release we simply do not know. When the applicant was released, he travelled to Germany to have the pump implanted there, was put off by the cost, went back to Poland, and the implantation was effected by the Kraków University Hospital on the 13 August 2009 (almost three months to the day after his release).

5. In the opinion of the majority it is stated (second part of paragraph 63): "The Court acknowledges the difficulty encountered by the authorities in finding a medical centre prepared to carry out this kind of intervention." To say, however, that it was the detention authorities' (or the State's) fault, or that it was due to their lack of diligence, that these attempts did not produce "any concrete and prompt improvement for the applicant" is, in my view, to jump to unwarranted conclusions – as is unwarranted the assertion in paragraph 64 that the State was at fault for not making it possible for the applicant to have a morphine pump implanted. It is quite evident that the intervention necessary for the implantation of such a pump cannot be equated to a simple tooth extraction or other run of the mill intervention.