

Warsaw, 21st January 2020

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To:
The Secretary of the Committee of Ministers
Council of Europe
Avenue de l'Europe
F-67075 Strasbourg Cedex

**COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN
RIGHTS**

CONCERNING

**EXECUTION OF ECtHR JUDGMENT IN CASE *MIERZEJEWSKI AGAINST
POLAND* (APPLICATION NO. 9916/13)**

To the attention of:

1. Mr. Jan Sobczak

Plenipotentiary of the Minister of Foreign Affairs for cases and procedures before the
European Court of Human Rights
Agent of Polish Government

2. Mr. Adam Bodnar

Commissioner for Human Rights

EXECUTIVE SUMMARY

- In its judgment of 4 November 2014 made in the case of *Mierzejewski v. Poland* (no. 9916/13), the ECtHR assessed the practical application of pre-trial detention in Poland.
- In December 2019, the Government of Poland presented an Action Report in which it expressed the hope that the general measures taken would be a sufficient basis for concluding that the judgment has been executed. In the Action Report, the Government referred to, among other things, the action report issued in the case of *Trzaska v. Poland*, which resulted in the adoption of a resolution to close the examination of the execution of group judgments on pre-trial detention.
- However, since the *Trzaska* resolution was adopted on 4 December 2014, there have been a number of legislative and practical developments that the Committee should take into account when assessing the execution of the most recent pre-trial detention judgments.
- In the opinion of the Helsinki Foundation for Human Rights measures implemented by the Polish Government in relation to *Mierzejewski v. Poland* have not achieved the expected results. As a consequence, they could not be sufficient to conclude that Poland complied with its obligations under Article 46, paragraph 1 of the Convention.
- The comments that the Helsinki Foundation submitted to the Committee of Ministers on 21 August 2019 with reference to the case of *Burza v. Poland*, arguing the systemic nature of the abuse of pre-trial detention in Poland, remain fully valid and relevant. The observations made in recent months also show that the adoption of a final resolution would be premature.
- Our position expressed in this communication has a solid statistical basis. According to statistical data, the number of persons in pre-trial detention has significantly increased over the last five years (from 4,162 at the end of 2015 to 8,520 at the end of 2019). The gravity of the problem is also demonstrated by the percentage of pre-trial detainees in the general prison population, which has risen alarmingly, from 5.88% in 2015 to 11.49% at the end of 2019.
- More worryingly, current statistics seem to suggest that the problem with the application of pre-trial detention is likely to deepen even further, since in a one-year period (December 2018 - December 2019) the number of persons in pre-trial detention increased by more than 1,100.
- The position of the HFHR is also reinforced by the results of a study published in December 2019 by the Court Watch Foundation, which concluded that the pre-trial detention decision-making process was not fully compliant with the recommendations made by the ECtHR.
- The HFHR respectfully argues that legislative changes are needed in order to ensure that the *Mierzejewski* judgment is fully executed.

I. Introduction

1. The Helsinki Foundation for Human Rights (“HFHR” or “the Foundation”) is a non-governmental organisation whose statutory objects include human rights defence and advocacy. A focal point of the Foundation’s human rights work is the protection of personal liberty. Accordingly, since its inception, the HFHR has been paying particular attention to the practice of application of pre-trial detention in criminal proceedings. In doing so, the Foundation engages in intervention, monitoring and educational activities. One of the objectives of the Foundation's work is to ensure that the practices of state authorities comply with the standards stemming from the European Convention on Human Rights and the guidelines set by the European Court of Human Rights (“ECtHR” or “the Court”).

2. Operating within its statutory objects, the Helsinki Foundation for Human Rights respectfully presents the Committee of Ministers of the Council of Europe with a communication on Poland's execution of the ECtHR judgment delivered on 4 November 2014 in the case of *Mierzejewski v. Poland*, no. 9916/13. We hope that the Committee will find our communication useful in the process of assessing the measures taken by the Government of Poland in the wake of the *Mierzejewski* judgment as well as that our comments will serve as a basis for further discussions at the national and European level.

II. The judgment in *Mierzejewski v. Poland*

3. In *Mierzejewski*, the ECtHR assessed the practical application of pre-trial detention in Poland. The applicant was held in pre-trial detention for three years, three months and one day. The applicant was detained in 2010 on charges of drug trafficking and participation in an organised criminal group. His detention has been repeatedly extended until the end of his criminal trial in 2014.

4. In the judgment, the Court held that the grounds invoked by domestic authorities in the pre-trial detention orders issued against the applicant, namely the high probability that he had committed the imputed offence, the fear that he would obstruct the proceedings and – later – the severity of penalty faced by the applicant, were relied on incorrectly and could not justify the overall period of the applicant’s detention. The above Court's assessment was unaffected by the complexity of the applicant's case resulting from the criminal group charges made against him. The Court awarded to the applicant EUR 2,500.00 under the head of non-pecuniary damage.

III. General measures

5. First and foremost, we would like to reiterate the relevance of the Foundation’s comments submitted to the Committee of Ministers on 21 August 2019 in the case of *Burza v. Poland* (no. 15333/15)¹. Given the validity of our previous observations and conclusions, which are already known to the Committee of Ministers, below we will only briefly refer to the arguments presented by the Government in the Action Report of 19 December 2019.² At the

¹ Communication from Helsinki Foundation for Human Rights concerning execution of ECtHR judgement in case *Burza against Poland*, no. 15333/15, 21 August 2019, available at: https://www.hfhr.pl/wp-content/uploads/2019/09/HFHR_Submission_Burza_Poland.pdf

² Communication of the Government of the Republic of Poland of 19th December 2019, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168099696a

same time, we will only consider the measures taken by the Polish Government at the general level.

6. In the Action Report (hereinafter: AR) of 19 December 2019 (see pages 1-2), the Polish government stressed that:

„Detailed information on general measures taken in order to address the issue of excessive length of detention on remand was presented in the action reports concerning the execution of the judgments in the Trzaska v. Poland group of cases (application no. 25792/94, see document DH-DD(2014)1312) and in the case Porowski v. Poland (application no. 34458/03, judgment of 21/03/2017, final on 21/06/2017). In addition a number of general measures have been taken with respect to the present case³.

Moreover, in the Action Report it was stated that:

„The Government is of the opinion that (...) measures of a general nature described above, will be sufficient to conclude that Poland has fulfilled its obligations under Article 46 § 1 of the Convention.

7. The HFHR would like to submit clarifications and concerns regarding the Government's observations. At the outset, we respectfully submit that the problem of the abuse of pre-trial detention in Poland remains of a systemic nature. Our opinion on the matter is supported by observations of international bodies, and in particular the most recent report of the UN Committee Against Torture⁴, as well as studies of both domestic and international non-governmental organisations.

8. Our position is further reinforced by the conclusions of a report on the practice of pre-trial detention published in December 2019 by Court Watch Poland Foundation⁵. The report reads as follows: *“Data obtained from a random sample of 310 cases in which pre-trial detention was applied show that some of the irregularities identified by the ECtHR were widely replicated by Polish courts, and thus prove that we are dealing with a systemic problem in Poland.” Pre-trial detention is used even in cases where the evidence in the case file does not show the need to detain a person who is by law presumed innocent until convicted.*⁶

9. The Court Watch Report confirms the findings of the HFHR's studies carried out over many years as well as the conclusions of a recent Foundation's report *The Trials of Pre-trial Detention* on the application of pre-trial detention in Poland, which includes a number of important recommendations for lawmakers⁷.

⁴ Concluding observations of Committee against Torture adopted by the Committee at its sixty-seventh session (22 July-9 August 2019), available at: https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/POL/CAT_C_POL_CO_7_35715_E.pdf.

⁵ B. Pilitowski, *Aktualna praktyka stosowania tymczasowego aresztowania w Polsce. Raport z badań empirycznych*, Toruń 2019, available at: https://courtwatch.pl/wp-content/uploads/2019/12/tymczasowe_aresztowania_FCWP.pdf.

⁶ *Ibidem*, p. 2.

⁷ A. Klepczyński, P. Kładoczny, K. Wiśniewska, *The Trials of Pre-trial Detention. A review of the existing practice of application of pre-trial detention in Poland*, July 2019, available at: http://www.hfhr.pl/wp-content/uploads/2019/07/HFPC_Raport_-Tymczasowe-aresztowanie-nietymczasowy-problem-EN.pdf.

III. 1. Detailed comments on the Action Report of 19 December 2019

10. On page 2 AR, the Government presents statistics on the practice of application of pre-trial detention in Poland. The HFHR respectfully submits that a broader time perspective is necessary to assess the effectiveness of the actions taken by the Polish authorities.

III. 1.a. The number and effectiveness of pre-trial detention requests filed during preliminary proceedings

11. In the AR, the Government indicates that in 2018 prosecutors filed 19,655 pre-trial detention requests. Notably, this figure exceeds the number of pre-trial detention requests filed in 2017 and 2016 by more than 900 and 4,483, respectively. At the same time, the effectiveness of the requests continues to be very high, exceeding 90%. The slightly lowered (by 1%) effectiveness in 2018 cannot be considered a positive development as may be a consequence of the increasing number of pre-trial detention requests filed by prosecutors.

Year ⁸	Pre-trial detention requests filed in preliminary proceedings	Decisions ordering pre-trial detention in preliminary proceedings	Percentage of granted pre-trial detention requests
2009	27,693	24,755	89.39%
2010	25,688	23,060	89.77%
2011	25,452	22,748	89.37%
2012	22,330	19,786	88.60%
2013	19,410	17,490	90.11%
2014	18,835	17,231	91.48%
2015	13,665	12,580	92.06%
2016	15,172	13,791	90.90%
2017	18,750	17,140	91.41%
2018	19,655	17,762	90.46%

12. The aforementioned high effectiveness of pre-trial detention requests must raise reasonable concerns about the accuracy and comprehensiveness of the judicial examination of prosecutorial requests. In its Report, Court Watch Foundation emphasises that *“the key flaw of pre-trial detention orders issued by courts is the laconic, even ostensible rationale given to justify pre-trial detention. Often neither the accused nor his lawyer is able to find out why the court decided to order such a severe preventive measure. Equally important, contrary to what law says, statements of grounds for pre-trial detention often fail to show that non-custodial alternatives to pre-trial detention or circumstances justifying a waiver of the accused's confinement have at all been contemplated.”*

13. It should be noted that in its response to the Foundation's observations in *Burza*, dated 6 September 2019, the Government indicated that the increase in the number of pre-trial detention requests was proportional to the increase in the number of cases referred to

⁸ The table was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at <https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/>.

prosecutor's offices⁹. However, such an increase does not correspond to the fact that the crime rates recorded in Poland have consistently been decreasing (in 2015, 509,473 criminal offences were recorded, while the figure for 2018 was 447,406).¹⁰

III. 1.b. Number of persons in pre-trial detention

14. The above data on the number and effectiveness of prosecutorial requests must be compared with the number of persons held in pre-trial detention. According to the statistical data shown below, the number of persons in pre-trial detention has significantly increased over the last five years (from 4,162 at the end of 2015 to 8,520 at the end of 2019). The gravity of the problem is also demonstrated by the percentage of pre-trial detainees in the general prison population, which has risen alarmingly, from 5.88% in 2015 to 11.49% at the end of 2019. In its response to the HFHR's communication in *Burza*, the Government noted that an increase in the number of persons held in pre-trial detention was visible when comparing 2016 to 2017, but less apparent between 2017 and 2018. The HFHR respectfully argues that in order to assess the effectiveness of the measures taken by the Government to execute the *Mierzejewski* judgment, a focus should be put on the pre-trial detention statistics for 2010 (the year in which the applicant was detained), 2013 (the year in which the applicant submitted his ECtHR application) and 2014 (the year in which the ECtHR issued the judgment) as well as on statistical data for recent months, i.e. the period during which the Committee will be resolving the matter at hand. The trend assessed over the last 9 years will best illustrate the changes taking place and the impact of the ECtHR's judgment on the practice of Polish criminal justice authorities.

Year ¹¹	Number of persons in pre-trial detention as of 31 December	Population of inmates of prisons and detention centres as of 31 December	Percentage share of pre-trial detainees in the general population of penitentiary institutions
2009	9,460	84,003	11.26%
2010	8,389	80,728	10.76%
2011	8,159	81,382	10.02%
2012	7,009	84,156	8.33%
2013	6,589	78,994	8.34%
2014	6,238	77,371	8.06%
2015	4,162	70,836	5.88%
2016	5,396	71,528	7.54%
2017	7,239	73,822	9.8%
2018	7,360	72,204	10.19%
2019 ¹²	8,520	74,130	11.49%

⁹ Reply from the Polish Government to the Communication from Helsinki Foundation for Human Rights concerning execution of ECtHR judgement in case *Burza* against Poland, no. 15333/15, 6 September 2019, p. 2, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680973322

¹⁰ National Police Headquarters, *Mniej przestępstw w 2018 roku*, a press release from 31 January 2019 r., available at: <http://www.policja.pl/pol/aktualnosci/169053.Mniej-przestepstw-w-2018-roku.html>.

¹¹ The table is based on statistics published by the Prison Service at <https://www.sw.gov.pl/strona/statystyka-roczna>.

¹² Data obtained from the Prison Service website, available at: <https://www.sw.gov.pl/assets/50/86/16/fa8131bad0166d682585cccf75281d612deb0906.pdf>

15. The ineffectiveness of the measures taken by domestic authorities is also reflected by the practical application of pre-trial detention during the last year. The statistics suggest that the problem with the application of pre-trial detention is likely to exacerbate even further, since in a one-year period (December 2018 - December 2019) the number of persons in pre-trial detention increased by more than 1,100.

III. 1.c. The number and effectiveness of requests to extend pre-trial detention filed in preliminary proceedings

Year ¹³	Requests to extend pre-trial detention (filed in preliminary proceedings)	Granted requests to extend pre-trial detention	Effectiveness of extension requests (%)
2009	11,951	11,427	95.61%
2010	11,433	10,841	94.82%
2011	10,780	10,272	95.29%
2012	9,789	9,308	95.08%
2013	8,809	8,445	95.86%
2014	8,621	8,289	96.14%
2015	6,509	6,264	96.23%
2016	7,659	7,242	95.55%
2017	10,684	10,156	95.06%
2018	12,841	12,189	94.92%

16. Since 2016, the number of requests to extend pre-trial detention filed in preliminary proceedings has markedly increased. Between 2015 and 2018 the increase was nearly twofold. At the same time, the effectiveness of extension requests continues to be high, at around 95%.

III. 1.d. Number of persons held in pre-trial detention for a period exceeding two years

17. In the *Mierzejewski* judgment, the ECtHR found a violation of Article 5 § 3 of the Convention precisely because of the length of the pre-trial detention period. Unreasonable length of pre-trial detention is also one of the most frequently raised allegations in Polish applications lodged with the European Court of Human Rights. For this reason, the HFHR believes that the Committee should pay particular attention to the problem of the excessive length of pre-trial detention (both from the perspective of the practice of criminal justice authorities and of legislative actions).

18. In the AR, the Government indicates that only 18 persons were held in pre-trial detention for a period exceeding two years in the course of preliminary proceedings. Notably, although this number does not appear to be high in comparison to the total number of persons held in pre-trial detention, it is nevertheless worrying. The main reasons for this dichotomy are as follows:

- the number of persons held in pre-trial detention for a period exceeding two years at the stage of preliminary proceedings has sharply increased within the last two years

¹³ The table was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at <https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/>.

(from 2, recorded at the end of 2013 and 2014, to 18 at the end of 2018, which is a ninefold increase).

- at the same time, there is an increase in the percentage of persons held in pre-trial detention for more than two years of the number of all pre-trial detainees held in the course of preliminary proceedings (0.43% in 2018, as compared to a mere 0.09% in 2016).
- one may expect that the upward trend is likely to continue, as there has also been an increase in the number of persons held in pre-trial detention for a period lasting from 1 to 2 years (from 38 in 2016 to 161 in 2018, in preliminary proceedings, from 155 in 2016 to 255 in 2018, in proceedings pending before district courts and from 490 in 2016 to 727 in 2018 in proceedings before regional courts)

Year ¹⁴		2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Preliminary proceedings	1-2 years	62	64	30	47	39	41	39	38	96	161
	over 2 years	1	2	0	0	2	2	5	3	7	18
District courts	1-2 years	393	362	389	317	319	295	231	155	258	250
	over 2 years	74	60	42	38	28	44	28	15	15	22
Regional courts	1-2 years	1,194	1,123	1,068	941	812	719	553	490	643	727
	over 2 years	683	604	589	454	383	370	276	242	221	261

Number of persons in pre-trial detention over 2 years - preliminary proceedings



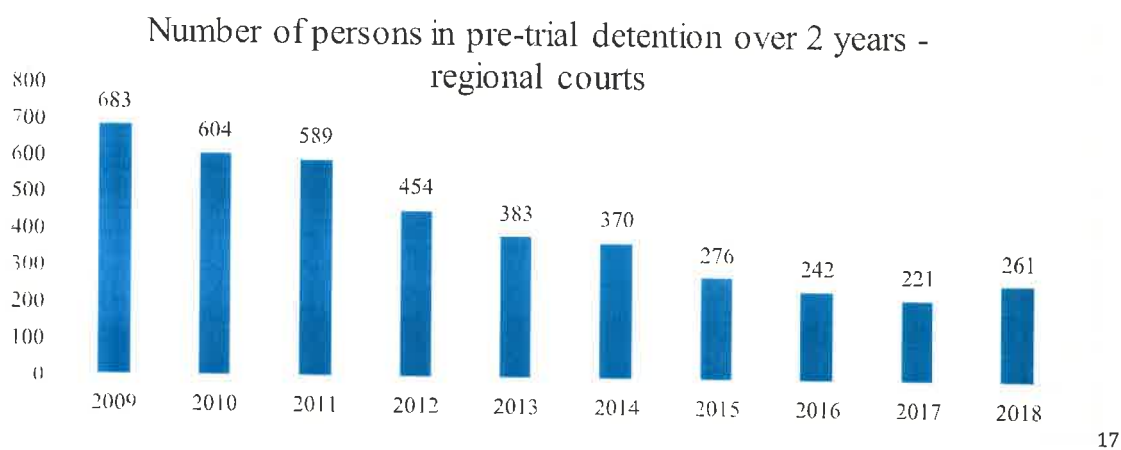
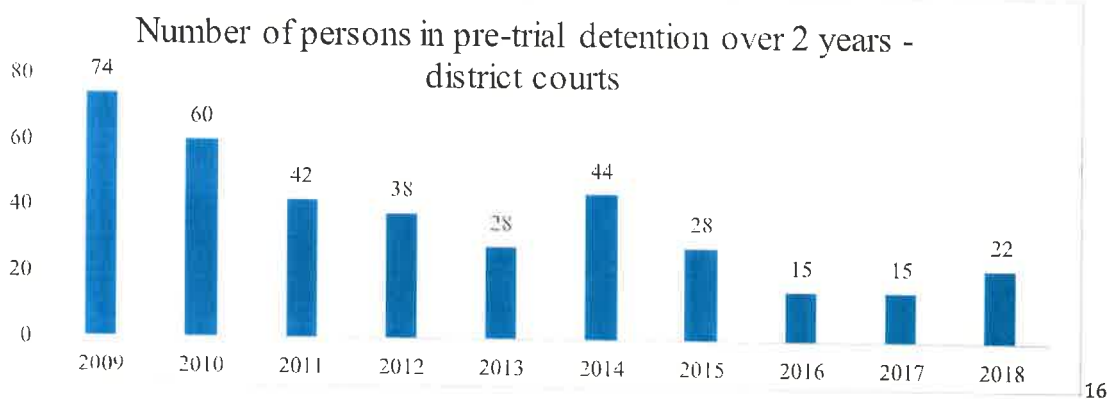
¹⁴ The table was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at <https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/> and on the basis of the statistics entitled *Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018* (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download.2853.52.html>

¹⁵ The chart was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at <https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/>.

19. In the AR, the Government argues as follows:

“By the end of the first half of 2019 in cases pending before district courts 3,013 persons were detained on remand, including 38 persons detained on remand longer than 2 years. In cases pending before regional courts 2 124 persons were detained on remand, including 322 persons detained longer than 2 years.

By the end of 2018, in cases pending before district courts 2,603 persons were detained on remand, including 22 persons detained on remand longer than 2 years. In cases pending before regional courts 2,062 persons were detained on remand, including 261 persons detained longer than 2 years”.



20. The summary of statistical data presented by the Government should, in itself, convince the Committee to continue its supervision over the execution of the *Mierzejewski* judgment. This is because the data show a gradual increase in the number of persons held in pre-trial

¹⁶ The chart was prepared on the basis of the statistics entitled *Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018* (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download.2853.52.html>.

¹⁷ The chart was prepared on the basis of the statistics entitled *Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018* (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download.2853.52.html>.

detention for a period longer than 2 years in the course of preliminary proceedings pending before district and regional courts. This increase is evident especially if one compares the data from the end of 2018 to these for mid-2019. The above information shows that this trend has been present since 2017.

21. Court Watch Poland Foundation has also noticed the gravity of the problem of excessive length of pre-trial detention in its report, stating that: *“As follows from the analysis of case files provided, the average duration of pre-trial detention ending with a final court judgment issued at the end of court proceedings is 439 days in cases pending before regional courts and 223 days in cases adjudicated by district courts. In the cases we have examined, the longest time a person was held in detention pending a final court judgment was 43 months (over 3 years). However, we had no access to cases that were still pending in mid-2019. Accordingly, it can be assumed that, in reality, the average length of pre-trial detention in Poland may be longer and is certainly increasing in recent years.”*¹⁸

22. Last but not least, it is also worth noting that the lawmakers have yet failed to properly address the issue of lengthy pre-trial detention. The legislative branch has not introduced any legal reforms despite the passage of more than 7 years from the delivery of the Constitutional Tribunal’s judgment of 20 November 2012 (No. SK 3/12), which reads as follows: *“Article 263 § 7 of the Code of Criminal Procedure ..., insofar as it fails to clearly define the grounds for an extension of pre-trial detention after the first instance court has issued a judgment in the case, is inconsistent with Article 41(1) of the Constitution, read in connection with Article 31(3) of the Constitution and with Article 40 of the Constitution read in connection with Article 41(4) of the Constitution.”*

IV. Recommendations

23. Having regard to the above-mentioned argumentation, the HFHR requests that the Committee of Ministers continues its supervision of the execution of the *Mierzejewski v. Poland* judgment. In our opinion, the implemented measures have not achieved the expected results. As a consequence, the adopted measures could not be sufficient to conclude that Poland complied with its obligations under Article 46 paragraph 1 of the Convention. Therefore, we claim that examination of *Mierzejewski cases* should not be finished, as the systemic problem underlining the violation of human rights has still not been fully resolved.

IV. 1. Recommendations for the CoE Committee of Ministers

24. The HFHR respectfully recommends that Council of Europe's Committee of Ministers should consider asking the Government the following questions:

- In the curricula of the professional education courses for judges, how many class hours are devoted to the application of pre-trial detention?
- What professional education courses for prosecutors on the application of pre-trial detention have been carried out?

¹⁸ Pilitowski, *Aktualna praktyka...*, p. 18.

- What actions the coordinators for international cooperation and human rights have taken to promote the relevant Convention standards at the level of regional courts' circuits?
- Has any work been undertaken on developing guidelines for prosecutors about the submission of pre-trial detention requests?

IV. 2. Recommendations for the lawmakers

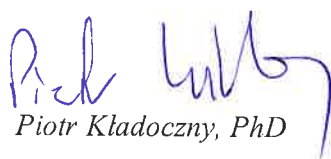
25. The Foundation considers the detailed recommendations for the lawmakers included in its observations on *Burża v. Poland* to be fully relevant to the case at hand. Our position remains unaffected by the arguments raised by the Government in its reply submitted in September 2019.

26. The Foundation does not share the Government's view that there is no justified need to introduce legislative changes aimed at limiting the application of pre-trial detention. A review of the above data should arguably lead to the conclusion that a discussion about legislative changes is necessary and that the existing legal framework fails to provide sufficient safeguards against the abuse of pre-trial detention as a custodial preventive measure. In support of its view, the Foundation would like to emphasize that such a necessity is also recognized by other legal scholars and practitioners. In this context, the December 2019 report of the Court Watch Foundation should be noted. We hope that the position expressed by NGOs and experts will serve as a basis for a broader discussion on changes in law.

27. The HFHR wishes to reiterate its suggestion to amend the Code of Criminal Procedure by adding an additional preventive measure in the form of house arrest or electronic monitoring. In its communication regarding the *Burża* case, the Government indicates that there are currently no grounds for adding an additional preventive measure due to the lack of data or information leading to the conclusion that the introduction of such a measure would reduce the number of cases in which pre-trial detention is applied. However, the HFHR is not the only human rights organisation that has advocated the above solution. In its December 2019 Report, Court Watch Foundation also recommended the introduction of a preventive measure based on electronic monitoring into Polish law.¹⁹

28. HFHR would like to express its readiness to cooperate with the Committee of Ministers in matters related to the monitoring of the effective implementation of the ECtHR judgement.

On behalf of Helsinki Foundation for Human Rights,



Piotr Kładoczny, PhD
Secretary of the Board

Helsinki Foundation for Human Rights



Danuta Przywara

President of the Board

Helsinki Foundation for Human Rights

¹⁹ *Ibidem.*, p. 8.