FLIGHTRISK.

NATIONAL REPORT - POLAND

HELSINKI FOUNDATION
FOR HUMAN RIGHTS

Flightrisk. National report - Poland

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TABLE OF CONTENTS

1. INTRODUCTION

1.1. About the project

This report was produced as part of the Flightrisk project, which is being carried out by the Helsinki Foundation for Human Rights together with non-governmental organisations from Austria, Bulgaria, Belgium and Ireland. The project is co-ordinated by Fair Trials. It is funded exclusively by the European Commission's Justice Programme.

The Flightrisk project aims to sensitise participants in the justice system to the regional and national standards for the use of pre-trial detention based on the risk of a suspect fleeing or going into hiding.

At the same time, Flightrisk is an attempt to answer the question of why the risk of the suspect going into hiding or fleeing is not minimised by the judicial authorities through the use of non-custodial preventive measures. These answers will provide a deeper understanding of the reasons why the reason of fleeing from justice becomes the basis for requesting (and subsequently applying) pre-trial detention. They will also show to what extent it is possible to defend a suspect against pre-trial detention based solely on the ground of risk of flight or going into hiding.

An important element of the survey is also to answer the question of whether the practice of pre-trial detention based on the risk of the suspect fleeing or going into hiding is discriminatory and negatively affects the situation of members of certain groups or persons with a certain social or ethnic origin or status. In this way, poor legal solutions and negative practices of national authorities can be identified and such findings can form the basis for legislative initiatives at the level of the European Union and individual Member States.

1.2. Methodology

This report is based on a desk research analysis supplemented by a file survey conducted at selected courts in late 2022 and early 2023. The purpose of this study was to determine how the courts and the prosecutors invoke the risk of a suspect fleeing or going into hiding as a reason for pre-trial detention. As part of the study, the HFHR requested access to the files of criminal proceedings conducted between 2019 and 2023 from the presidents of the individual district and regional courts on the basis of Article 156 § 1 of the Code of Criminal Procedure (CCP). On each occasion, the Foundation requested access to the files of 10 randomly selected court proceedings in which pre-trial detention was ordered on the basis of Article 258 § 1 (1) CCP, i.e. due to a well-founded concern that the accused might flee or go into hiding.

The HFHR submitted its requests to two regional courts (the Regional Court in Warsaw, the Regional Court in Częstochowa) and 9 district courts (District Court for the Capital City of Warszawa in Warsaw, Wrocław Śródmieście District Court in Wrocław, Katowice-Wschód District Court in Katowice, and the District Courts in Piaseczno, Płock, Piotrków Trybunalski, Brzeg, Wałbrzych, Żory). Apart from the Katowice-Wschód District Court in Katowice, which required the submission of an application on an internally created form (without a valid legal basis), access to the files was granted by the other courts without any major problems.

The analysis of the files was carried out on the basis of a standardised questionnaire, which was slightly simplified after a pilot file study was carried out at the Regional Court in Warsaw. The questionnaire contained information about the person subject to pre-trial detention, in particular his or her gender, age, education, number of dependants and whether he or she belongs to a group of people particularly vulnerable to exclusion.

Secondly, the analysis aimed to determine whether the suspect had been arrested prior to his or her pre-trial detention and, if so, on what legal basis, in particular whether the law enforcement authorities indicated as the reason for the arrest a reasonable suspicion that an offence has been committed and the concern that the suspect might flee or go into hiding.

The researchers also paid attention to the legal classification of the offence with which the suspect was charged. They also analysed the suspect's attitude to the criminal proceedings, in particular whether he or she had admitted to committing the alleged offence at the first hearing in the case and whether he or she had testified, as these circumstances may, in the researchers' view, influence the court's assessment of the risk to the proper conduct of the criminal proceedings.

Another subject of the analysis was the prosecutors' requests for pre-trial detention. The HFHR paid particular attention to the circumstances cited in the request for this preventive measure involving deprivation of liberty and whether these circumstances were related to the risk that the suspect may flee or go into hiding.

When analysing the court decisions on the use of pre-trial detention, the HFHR researchers examined the duration of the pre-trial detention and the circumstances cited by the court to justify the detention. In this context, the way inwhich the court justified the existence of grounds for the request of pre-trial detention was also analysed, in particular whether the court's pre-trial detention order stated specific circumstances justifying the existence of a particular ground for pre-trial detention or whether it merely declared that such a ground existed.

Similarly, the HFHR researchers analysed the requests for pre-trial detention submitted by the prosecutors, paying particular attention to the circumstances that were supposed to indicate the risk of the suspect fleeing or going into hiding. In addition, they analysed whether the pre-trial detention was justified by a severe penalty that the suspect was facing. If this was the case, the way in which this ground was justified was also examined, in particular whether, in the court's opinion, such a risk was real or merely resulted from the threat of a criminal sanction for committing the offence in question.

With regard to the pre-trial detention orders issued based on the risk of the suspect fleeing or going into hiding, the relevant arguments of the defence lawyers and the approach of the courts of second instance to this issue were analysed.

Finally, the researchers also recorded whether the suspect, whose pre-trial detention was ordered by the court, was found guilty of the alleged offence and what sentence he or she received. They also checked the duration of pre-trial detention in a given case.

The requests submitted in accordance with Article 156 CCP enabled the HFHR to access the files of 91 criminal proceedings in which pre-trial detention was applied. Unfortunately, not all of these files contained pre-trial detention orders based on the risk of the suspect fleeing or going into hiding. In only 56 cases did the files contain a direct reference to the existence of such a risk.

It also proved to be a problem that not all courts made the complete criminal case file (the one with the "K" reference in the file number) available to the researchers. Two courts limited themselves to providing access only to the court files relating to the pre-trial proceedings (with the "Kp" reference). The latter files did not contain all the information covered by the questionnaire. Among other things, they did not contain details of the suspect or information about the final ruling that was made in the case.

Furthermore, not all of the files made available contained complete documents relating to pre-trial detention. In some files, the prosecutor's request for pre-trial detention or the defence lawyer's interlocutory appeal against the pre-trial detention order was missing.

2. THE CONVENTION STANDARD

Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms allows a person to be deprived of his or her liberty by, inter alia, the lawful arrest or detention of a person for the purpose of bringing them before a competent legal authority, or when it is necessary to prevent them fleeing after having committed a punishable offence. Pursuant to Article 5 (3), any person arrested or detained must be brought promptly to trial and has the right to trial within a reasonable time or to release pending trial.

The Convention therefore allows pre-trial detention to be ordered solely on the basis of the risk of flight following the commission of an offence. The term "flight" should be understood in its own right. However, there is nothing to prevent the term "flight" within the meaning of the ECHR from being understood as describing both a situation in which a suspect flees (in the strict sense of the word) and one in which the suspect goes into hiding, the latter expression being used by the Polish legislator in the Code of Criminal Procedure.

In its case law, the ECtHR refers to circumstances which, in its view, may justify the use of pre-trial detention to prevent a suspect from fleeing. At the same time, it repeatedly emphasises that the severity of the penalty and the strength of the evidence gathered to prove the commission of the offence are not decisive in this respect.[1] Furthermore, the case law of the ECtHR emphasises that the relevance of the argument relating to the penalty facing the suspect diminishes the longer the suspect is held in pre-trial detention.[2]

According to the Convention, national law cannot limit the scope of the regulation of how pre-trial detention is applied exclusively to the aspects of statutory limits of penalty and the probability of the offence having been committed. Provisions discussing grounds related to the flight risk should also require a proof of additional circumstances justifying the existence of such grounds. Among the potential factors that may be assessed in this context, the Court lists the[3] personal circumstances of the suspect, including his or her moral character, place of residence, occupation, resources, family ties, and other connections to the country where the proceedings are being conducted. Importantly, in its case law, in particular with regard to the solutions adopted in Poland, the Court argues that the absence of a suspect's permanent residence does not in itself constitute a risk of flight.[4]

On the other hand, against the background of the arguments relating to the need to release the suspect (or to ensure that he is brought to trial within a reasonable time), the ECtHR emphasises that the Parties are obliged to put forward convincing arguments to demonstrate the necessity of the use of pre-trial detention.[5] In this context, the ECtHR considers that the burden of proof for the necessity of pre-trial detention should not be reversed and transferred to the suspect.[6] Furthermore, according to the ECtHR, State Parties are expressly obliged to check whether the appearance of the suspect in court cannot be achieved by preventive measures other than pre-trial detention.[7]

The question of the use of pre-trial detention due to the risk of flight also arises in the pre-trial detention cases brought against Poland. In *Kudło v. Poland*[8], the European Court of Human Rights recalled that the Polish courts justified the necessity of the suspect's pre-trial detention on the grounds that he could have fled or gone into hiding. They referred to the fact that the suspect's defence lawyer had not submitted a medical certificate in time to justify the suspect's absence during the proceedings. According to the ECtHR, however, this circumstance could not serve as a basis for the assumption that the suspect was at risk of fleeing for the entire duration of his pre-trial detention. In *Kauczor v. Poland*[9], the ECtHR found a violation of Article 5(3) of the Convention and emphasised that the seriousness of the offences of which the suspect was accused could not in itself justify prolonged pre-trial detention. At the same time, the Court emphasised that the national authorities had not sufficiently justified the risks that the suspect allegedly posed to the proper conduct of the proceedings.

Furthermore, the failure of courts to apply alternative preventive measures to ensure the proper conduct of proceedings remains a persistent problem in Polish criminal proceedings. This type of infringement was found, for example, in the recent judgment in *Dłużewska v. Poland.*[10]

1 Panchenko v. Russia, no. 45100/98, 8.02.2005, § 106.
2 Neumeister v. Austria, no. 1936/63, 27.06.1968, § 10.
3 Becciev v. Moldova, no. 9190/03, 04.10.2005, § 58.
4 Sulaoja v. Estonia, application no. 55939/00, 15.02.2005, § 64.
5 Aleksanyan v. Russia, no. 46468/06, 22.12.2008, § 179.
6 Bykov v. Russia, 10.03.2009, no. 4378/02, § 64.
7 Merabishvili v. Georgia (GC), no. 72508/132, 28.11.2017, § 223.
8 Kudła v. Poland, no. 30210/96, 26.10.2000.
9 Kauczor v. Poland, no. 45219/06, 3.02.2009.
10 Dłużewska v. Poland, no. 39873/18, 15.04.2021.

3. THE POLISH CRIMINAL PROCEDURE

3.1. Preliminary remarks

The Polish model of criminal procedure, which is laid down in the Code of Criminal Procedure, is a mixture of inquisitorial and adversarial elements, with the former predominating. The criminal process is based on many procedural principles, the most important of which are the principles of material truth, free evaluation of evidence, equality of arms and the presumption of innocence. In practice, these principles are implemented and observed with varying degrees of efficiency.

At every stage of the proceedings, the suspect has the right to a defence and to have a defence lawyer. The role of defence lawyer (*obrońca*) can be performed by members of two legal professions – *adwokaci* and *radcowie prawni* – as well as by persons enrolled in professional training programmes in these professions (under certain conditions). The *adwokaci* and *radcowie prawni* form self-governing professional organisations that are completely independent of other authorities.

A suspect may not have more than 3 defence lawyers. Although the Code of Criminal Procedure provides for the possibility of obtaining ex officio (free) legal aid, both for a specific step in the proceedings and for the entire proceedings, in practice it is very difficult to obtain legal assistance immediately after arrest[11], mainly due to the formalised procedure for appointing ex officio defence lawyers.

In some cases, the participation of a defence lawyer in the proceedings is mandatory. In some cases, the participation of a defence counsel in the proceedings is mandatory. This applies, inter alia, to situations in which a minor is suspected (the minimum age for criminal responsibility in Poland is 17 years; in some cases, criminal responsibility may also be assumed by a suspect who is only 14 years old), as well as in cases where the suspect's mental state does not allow him to defend themselves. Although the assistance of a defence lawyer is mandatory in certain cases, suspects who should receive such assistance are often unable to obtain it at the initial questioning stage of the case.[12]

3.2. The conduct of criminal proceedings

Criminal proceedings in Poland comprise of two phases: pre-trial (preparatory) proceedings and judicial proceedings.

There are two types of pre-trial proceedings: investigation (*śledztwo*) or inquiry (*dochodzenie*). Investigations are carried out in cases of serious crimes and crimes committed by public officials. In addition, a prosecutor may initiate an investigation in any case in which an inquiry is conducted by default.

Investigations are carried out, as a rule, by the police or other authorised service.[13] In such cases, investigations are supervised by a prosecutor. The prosecutor only conducts proceedings in person that concern more serious offences and those that he or she has taken over.

Inquiries account for a vast majority of pre-trial proceedings. In 2022, investigations constituted a mere 13% of all initiated pre-trial proceedings.[14] Moreover, the statistics of the National Prosecutor's Office show that each year ca. 5,000–6,000 investigations (out of a total of ca. 80,000 investigations) are conducted by the prosecutor in person.[15] The rest are conducted by the police and other authorised services under the supervision of a prosecutor. What is particularly important, in investigations entrusted to the police, the police may not carry out any procedural steps related to presenting charges or amending or supplementing a decision to present charges or close the investigation.

Regardless of the form in which the pre-trial proceedings are conducted, non-custodial preventive measures are applied in the course of the proceedings by decision of the prosecutor; pre-trial detention is ordered by the court at the request of the prosecutor. In both cases, the role of the police is therefore limited to collecting evidence and information that demonstrates the necessity to apply a preventive measure. It is the public prosecutor's responsibility to prove the grounds for pre-trial detention during the proceedings, including the risk of flight or going into hiding. At the same time, it should be noted that the court examining the prosecutor's request is not bound by the reasons stated in the request and may find other circumstances and bases that justify the request of pre-trial detention than those stated by the prosecutor.

11 Helsinki Foundation for Human Rights, Impact of the Coronavirus Pandemic on the Criminal Justice System, Access to a Lawyer in Criminal Proceedings in Times of the Pandemic (all online sources accessed on 29 March 2024).
12 See, for example, Lalik v. Poland, no. 47834/19, 11.05.2023.
13 Regulation of the Minister of Justice of 22 September 2015 on non-police bodies authorised to conduct inquiries and bodies authorised to file and prosecute charges before first instance courts in cases in which inquiries have been conducted, and on matters delegated to these bodies (consolidated text: Journal of Laws 2018, item 522).
14 NPO Report.
15 NPO Report.

Criminal proceedings are based on the principle of free evaluation of evidence. This means that criminal justice bodies form their opinions on the basis of all the evidence collected, whose assessment is guided by the principles of reasonable argumentation and the indications of knowledge and life experience. There are no formal rules of evidence that would oblige criminal justice bodies to establish certain facts solely by means of certain measures of evidence. Furthermore, a provision regulating criminal proceedings, namely Article 168a CCP, generally obliges the criminal justice bodies to also utilise evidence obtained in violation of the law.

The Code of Criminal Procedure does not contain any special rules for the procedural authorities to prove the risk of a suspect fleeing or going into hiding. Prima facie evidence of such circumstances may be established by the same means of evidence as those used to present prima facie evidence of a criminal offence. A means of evidence that can be used for this purpose is the community-based checks. The purpose of community-based checks is, among other things, to establish the suspect's family and financial circumstances, the suspect's employment status and the amount and sources of the suspect's income. The community-based checks report should also include a brief biography of the suspect.

After an indictment is filed, the prosecutor acts as a party to criminal proceedings. In recent years, there has been a clear tendency to strengthen the powers of prosecutors, in some cases even at the expense of the independence of the courts. The amendments introduced have authorised the prosecutor to object against a court order to convert pre-trial detention into financial surety. If such an objection is lodged, the conversion order does not become enforceable when it is issued, but only when it becomes final and can no longer be appealed.

A person who has been held in pre-trial detention and subsequently acquitted of the offence with which he or she has been charged is entitled to compensation for the financial and moral damage he or she has suffered as a result of being detained. According to the statistical data provided by the Ministry of Justice, in 2023 alone, 116 persons were awarded compensation for the use of obviously wrongful pre-trial detention.[16] The total amount of compensation paid exceeded EUR 1.17 million.[17]

3.3. The structure of the judicial system

The judicial system in Poland consists of common courts, military courts, administrative courts and the Supreme Court. The common courts are organised into three levels. The first, lowest level are the district courts (*sądy rejonowe*). The district courts are entrusted, among other things, with the supervision of pre-trial proceedings and the application and (as a rule) extension of pre-trial detention. These courts hear all cases that are not reserved for the jurisdiction of the regional courts (*sądy okręgowe*). The latter constitute the second level of the judicial system. Their task is to examine appeals against decisions of the district courts. In addition, the regional courts hear criminal cases involving serious offences. In some cases, the regional courts also decide on the extension of pre-trial detention. The highest level of the common courts are the courts of appeal (*sądy apelacyjne*), established to hear appeals against decisions of the regional courts. The courts of appeal are also involved in the procedure for extending pre-trial detention and apply this measure in long-term cases in which the duration of pre-trial detention reaches the limits prescribed by law.

Judicial proceedings in criminal cases are conducted by a court consisting of one judge. In the case of serious offences, the court is composed of a professional judge and lay judges (*ławnicy*).

The judicial proceedings are a two-stage procedure. In the second instance, the court examines the cases either in a one-judge formation or in the formation of 3 (or 5) professional judges, depending on the subject matter of the case.

The Supreme Court (*Sąd Najwyższy*) supervises the judicial functions of common and military courts.

The Constitutional Court (Trybunał Konstytucyjny) is another element of the legal system and the only body authorised to perform the hierarchical review of the conformity of legal norms with higher-level norms. In the past, the Constitutional Court has issued several decisions on the constitutionality of the application of pre-trial detention.[18]

3.4. Effects of changes in the justice system on the application of pre-trial detention

The organisational model of the prosecution service remains a pressing problem in Poland. The current structure of the prosecution service means that it is strongly tied to the executive. The function of Prosecutor General is exercised ex officio by the Minister of Justice. The chief deputy of the Prosecutor General, the National Prosecutor, who is directly responsible for supervising the work of prosecutors, is appointed by the Minister of Justice with the consent of the President of the Republic of Poland. At the same time, the Prosecutor General has far-reaching powers that enable him or her to intervene in the course of criminal proceedings. This also includes issuing binding instructions for certain procedural steps, e.g. filing a request for the pre-trial detention of a suspect. In recent years, there have been situations in which the Prosecutor General has instructed subordinate prosecutors, for example, to issue an interlocutory appeal against the court order dismissing the request for pre-trial detention of a particular suspect.[19]

16 Ministry of Justice Statistical Guide, https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,39.html.
17 Ministry of Justice Statistical Guide, the exchange rate as of 12 March 2024.
18 Judgment of the Constitutional Court of 12 September 2005, case no. SK 3/12, published in OTK ZU vol. 8/A/2005, item 123.
19 Wyborcza.pl, Polak podejrzany o gwałt na 19-letniej Ukraince na wolności. Interweniuje Ziobro.

At the same time, changes in the justice system have led to a decline in the independence of the judiciary from theexecutive. The changes introduced have had a negative impact on the way in which the courts hearing the case are organised, raising questions about respect for the individual's right to have his or her case heard by an independent and legally constituted court. In addition, the atmosphere that the executive has created around the judiciary has been an attempt to exert a chilling effect on judges. An example of such a situation is the disciplinary proceedings against judge Alina Czubieniak, who revoked the pre-trial detention of a suspected rape offender who had not received guarantees of due process from the criminal justice authorities during the proceedings.[20]

The changes in the judiciary have had the greatest impact on the functioning of the Constitutional Court, which has led to a reduction in its independence and consequently to a decline in the importance and authority of this institution. These changes also partly influenced the perception of the Supreme Court. In the area of criminal justice, the Supreme Court continues to demonstrate great independence from the executive.

3.5. Pre-trial detention procedure

The procedure for the application of pre-trial detention and other preventive measures is fully regulated in the Code of Criminal Procedure. According to the provisions of the CCP, these measures may generally only be applied to persons who have been granted the status of suspect in criminal proceedings. Before this measure is taken, it is necessary to hear the suspect (also via a video link). The exception to this rule are situations in which the hearing of a suspect is impossible because he or she is hiding or abroad. At the same time, the courts have assumed that, apart from the exceptions discussed, the suspect's failure to attend the pre-trial detention hearing is a violation of the right to a defence and evidence of an unfair proceedings.[21]

Such hearing may be attended by a defence lawyer in addition to the suspect. However, law enforcement authorities are not obliged to notify the defence lawyer of the date of hearing. They also do not have to postpone the hearing until the defence lawyer attends the hearing.

Preventive measures are applied by the court, and in pre-trial proceedings – by the prosecutor. Importantly, only the court may order pre-trial detention. In pre-trial proceedings, the district court in whose district the proceedings are being conducted has jurisdiction to apply pre-trial detention.

The request for pre-trial detention must fulfil certain requirements. First, the prosecutor is required to show evidence that the suspect has committed the offence. In addition, the request must state the circumstances that indicate that there is a risk to the proper conduct of the proceedings or that the suspect could commit a new, serious offence, as well as the need for pre-trial detention.

The common courts have established that the prosecutor bears the burden of proof for the grounds for the application of preventive measures. "Therefore, the prosecutor is obliged to demonstrate in the request for pre-trial detention the high probability that the suspect will commit the offence with which he or she is charged and the circumstances that demonstrate a threat to the proper conduct of the proceedings."[22] This rule applies not only to the request for pre-trial detention, but also to any subsequent request for its extension. "[I]t is the duty of the prosecutor to examine whether the grounds for the application of [pre-trial detention] persist in the case or whether there are grounds justifying its revocation or conversion."[23]

Similar rules apply to the courts that decide on the application of pre-trial detention (and other preventive measures). When applying pre-trial detention, the court is obliged to specify the person concerned by the measure, the offence with which he or she is charged, its legal classification and the basis for the application of the measure. In addition, the court must specify the duration of pre-trial detention in a decision to apply this measure.

The law also regulates the way in which the courts must justify a decision on the application of a preventive measure. Such The justification of a decision should present evidence that the defendant has committed an offence and a description of circumstances that indicate that the proper conduct of proceedings is at risk or that the defendant may commit another serious crime if the preventive measure is not imposed, as well as the specific grounds of, and the need for, the application of a given measure. In the case of pre-trial detention, the court must also explain why it considers another preventive measure to be inadequate.

20 Prawo.pl, SN: Sędzia Czubieniak winna, ale nie ukarana.
21 Order of the Court of Appeal in Wrocław of 7 March 2018, II AKz 142/18, OSAW 2018, no. 1, item 374.
22 Order of the Court of Appeal in Wrocław of 16 May 2018, II AKz 307/18, OSAW 2018, no. 1, item 375.
23 Ibid.

3.6. Grounds for the application of preventive measures

The Code of Criminal Procedure provides that preventive measures (including pre-trial detention) may be used primarily to secure the proper conduct of pre-trial proceedings. Exceptionally, these measures can also be used to prevent a suspect from committing a new offence against life, health or public safety.

At the same time, the courts emphasise in some decisions that certain factors must be taken into account in the assessment of the risk of jeopardising the proper conduct of the proceedings. In this context, the courts mention, inter alia, the degree of progress of the proceedings, the characteristics of the suspect, including the actual possibilities of the suspect to influence the proper conduct of the proceedings, and the public interest. The public interest should be assessed both in terms of the seriousness of the offences imputed to the suspect and the possible consequences of disrupting the proper conduct of the proceedings.[24]

3.6.1. General grounds for the application of pre-trial detention

The request of pre-trial detention and other preventive measures presupposes the establishment of circumstances indicating that the suspect is highly likely to commit the offence with which he or she is charged (this is referred to as "general grounds for pre-trial detention"). The courts emphasise in their decisions that the absence of evidence of a high probability that the suspect has committed the offence with which he or she is charged should prevent the application of preventive measures.[25]

At the same time, the courts point out that the degree of probability that must be proven in this context must be close to certainty with regard to the suspect's perpetration (the actus reus element) and guilt (the means rea element). This requirement is justified by the fact that preventive measures represent a far-reaching interference with the freedom and personal integrity of the suspect.[26] The case law also points out this assessment should concern the likelihood of committing the offence the suspect is charged with and not any other offence.[27] However, this does not alter the fact that, when assessing the degree of probability that the suspect has committed the offence of which he or she is accused, the court is obliged to assess the correctness of the legal classification of the offence of which the suspect is accused made by the prosecutor against the background of the grounds for the pre-trial detention.[28] The common courts have recognised that the assessment of the degree of probability that the offence has been committed must relate to all (and not just some) of the characteristics of the offence in question.[29] In this context, the offences with which the suspect was charged at the time when the pre-trial detention is applied must be examined and not those with which he or she may be charged in the future.[30]

However, the courts also emphasise that the examination of the perpetration element is limited in this context and point out that the role of the court is only to review the existence of the legal grounds for applying pre-trial detention and not to decide what evidence the court should consider credible.[31] At the same time, the courts emphasize that this assessment is preliminary, non-final and incomplete.[32]

Importantly, since 2015, the Code of Criminal Procedure requires that court decisions to apply or extend pre-trial detention must be based on evidence available to the accused and his or her defence lawyer. To this end, the Code of Criminal Procedure stipulates that the accused and his or her defence lawyer must be given access to a part of the file containing the evidence attached to the request for pre-trial detention. The provisions on criminal procedure provide for the only exception in this respect for witness statements if the statement poses a risk to the life, health or freedom of the witness concerned. Such evidence, held in a separate bundle, may form the basis for a decision on the application or extension of pre-trial detention. However, it is not made available to the suspect and his or her defence lawyer, which raises doubts from the perspective of EU law.[33]

24 Order of the Court of Appeal in Kraków of 27 April 2018, II AKz 194/18, KZS 2018, no. 5, item 37.
25 Judgment of the Court of Appeal in Łódź of 25 March 2014, II AKa 6/14, LEX no. 1444757.
26 Order of the Court of Appeal in Kraków of 9 June 2020, II AKz 319/20, KZS 2020, no. 7–8, item 52.
27 Ibid.
28 Resolution of a seven-judge formation of the Supreme Court of 27 January 2011, I KZP 23/10, OSNKW 2011, no. 1, item 1, see also: order of the Court of Appeal in Kraków of 18 June 2020, II AKz 357/20, LEX no. 3036469.
29 Judgment of the Court of Appeal in Katowice of 6 February 2014, I ACa 950/13, LEX no. 1441390.
30 Order of the Court of Appeal in Kraków of 13 February 2019, II AKz 69/19, KZS 2019, no. 2, item 51.
31 Order of the Court of Appeal in Kraków of 9 August 2018, II AKz 405/18, LEX no. 2633151.
32 Order of the Court of Appeal in Kraków of 19 February 2020, II AKz 94/20, KZS 2020, no. 6, item 69.
33 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right of access to information in criminal proceedings (Official Journal L. of 2012 No. 142, p. 1) establishes the requirement that documents which are essential to effectively challenging the lawfulness of a suspect's arrest be made available to the suspect and his or her defence lawyer.

3.6.2. Specific grounds for the application of pre-trial detention

In order to apply pre-trial detention, the court examining the prosecutor's request must be satisfied that the general grounds for the request of preventive measures and one of the specific grounds apply. The specific grounds include the risk of incitement to give false testimony and the risk of committing an offence against life, health or public safety. With regard to the objectives of this study, the risk of a suspect evading justice and the risk of the suspect being sentenced to a severe penalty play the most important role.

According to the Code of Criminal Procedure, preventive measures, including pre-trial detention, may be applied when there is a justified concern that the accused will flee or go into hiding, in particular when the accused's identity cannot be established or when he or she has no permanent place of residence in Poland. Case law explains that a suspect "goes into hiding" when he avoids contact with criminal justice bodies or fails to appear when summoned. This concept also extends to situations in which contact with the suspect is impossible due to ignorance of his or her whereabouts, if the suspect has deliberately caused this ignorance.[34] The Supreme Court considers the departure of the suspect from the place of his stay without providing the address to the procedural bodies and without the intention of returning soon[35].

As in the context of the high probability that the suspect has committed the offence with which he or she is charged, the concern that the accused will flee or go into hiding must be substantiated by the court in the course of the proceedings. "The evidence gathered in the course of the pre-trial proceedings must point to circumstances that suggest the possibility of unlawful obstruction of the proceedings by the suspect."[36] The courts state that the prerequisite for the request of pre-trial detention is the well-founded concern that events can occur that could jeopardise the proper conduct of the pre-trial proceedings and not the *certainty* that the proceedings will be obstructed.[37]

The case law of the common courts and the Supreme Court contains numerous examples of how the courts understand the risk of a suspect fleeing or going into hiding. In the past, this risk was justified by reference to the prior search for the suspect under the European arrest warrant procedure[38], the suspect's failure to appear to serve his sentence[39], the fact that the suspect is a foreign national[40] and the use of false information or false documents by the suspect[41]. Similarly, the courts assessed the suspect's nomadic (itinerant) lifestyle, lack of residence or unemployment. The suspect's lack of family relationships[42] and the circumstances of the offence, including the commission of the offence within an organised criminal structure and the level of criminal income[43], were cited as negative factors for the suspect in this context. The courts assessed in a similar way a suspect's attempt to flee[44] and the failure to appear combined with failure to make contact the court handling the case[45]. In the context of the risk of going into hiding or flight, the mobility of suspects has also been considered a negative factor, e.g. for those who live, work and carry out a business activity in another Member State of the European Union.[46]

On the other hand, one should also point out the circumstances that were not recognised by the courts as justification for pre-trial detention. These circumstances include the provision of a false residential address by the suspect, especially when attending court hearings[47], the fact that he or she lives at an address other than the registered address[48], the use of false personal data in the commission of the offence[49], the fact that Poland is a member of the Schengen area[50], or the fact that another suspect in the case has fled abroad[51].

Importantly, an analysis of the case law also reveals a list of circumstances that were ostensibly intended to work in favour of suspects, but were not considered by the courts to mitigate the risk of a suspect fleeing or going into hiding. These include, inter alia, the absence of past behaviour that hinders proceedings[52], *the conduct of a business activity at the stated place of residence*[53], *the long-term residence of a foreigner with his family in the territory of Poland*[54], *the existence of a registered address*[55] *or the fact that the suspect has consecutively served a prison sentence*[56].

34 Order of the Court of Appeal in Kraków of 9 March 2018, II AKz 105/18, LEX no. 2574275.
35 Ibid.
36 Order of the Supreme Court of 17 April 2008, WZ 27/08, OSNwSK 2008, no. 1, item 926.
37 Order of the Court of Appeal in Kraków of 19 February 2020, II AKz 94/20, KZS 2020, no. 6, item 69.
38 Judgment of the Court of Appeal in Katowice of 24 February 2016, II AKz 96/16, Biul.SAKa 2016, no. 2, items 12–13.
39 Ibid.
40 Order of the Court of Appeal in Katowice of 27 November 2018, II AKz 908/18, Biul.SAKa 2019, no. 2, item 5.
41 Order of the Court of Appeal in Katowice of 14 February 2018, II AKz 90/18, Biul.SAKa 2018, no. 1, item 35.
42 Order of the Court of Appeal in Kraków of 13 February 2014, II AKz 42/14, KZS 2014, no. 2, item 44.
43 Order of the Court of Appeal in Kraków of 30 October 2019, II AKz 607/19, KZS 2019, no. 12, item 39.
44 Order of the Court of Appeal in Katowice of 2 December 1998, II AKz 338/98, Biul.SAKa 1999, no. 1, item 15.
45 Order of the Court of Appeal in Katowice of 15 December 1999, II AKz 366/99, LEX no. 42103.
46 Order of the Court of Appeal in Kraków of 13 February 2019, II AKz 69/19, KZS 2019, no. 2, item 51.
47 Order of the Court of Appeal in Katowice of 8 June 2016, II AKz 288/16, LEX no. 2139309.
48 Order of the Court of Appeal in Katowice of 11 October 2000, II AKz 384/00, OSA 2001, no. 9, item 57.
49 Order of the Court of Appeal in Katowice of 10 March 2010, II AKz 145/10, LEX no. 603304.
50 Order of the Supreme Court of 17 April 2008, WZ 27/08, OSNwSK 2008, no. 1, item 926.
51 Order of the Court of Appeal in Katowice of 10 March 2010, II AKz 145/10, LEX no. 603304.
52 Order of the Court of Appeal in Kraków of 13 February 2014, II AKz 42/14, KZS 2014, no. 2, item 44.
53 Order of the Court of Appeal in Katowice of 27 May 2009, II AKz 359/09, LEX no. 519608.
54 Order of the Court of Appeal in Katowice of 27 November 2018, II AKz 908/18.
55 Order of the Court of Appeal in Katowice of 28 October 2015, II AKz 604/15, LEX no. 1959455.
56 Order of the Court of Appeal in Katowice of 30 April 2014, II AKa 250/14, KZS 2014, no. 10, item 76.

3.6.3. Severity of the penalty that may be imposed on the suspect as a basis for the application of pre-trial detention

According to the Code of Criminal Procedure, the use of preventive measures can also be justified by a severe penalty that the accuse may face if convicted. According to Article 258 § 2 of the Code of Criminal Procedure, if the accused is charged with a felony or misdemeanour punishable by deprivation of liberty (imprisonment) of at least 8 years, the need to apply pre-trial detention to ensure the proper conduct of the proceedings may be justified by a serious penalty that the accused is facing. At the same time, the law allows for the use of pre-trial detention if the first instance court convicted the accused to a term of imprisonment of not less than 3 years.

The interpretation of the earlier version of this provision[57] posed certain problems. It was unclear whether the risk of severe penalty was an independent ground for pre-trial detention. These doubts were resolved by the Supreme Court, which ruled that it indeed may constitute an independent rationale for the application of pre-trial detention.[58] In the said ruling, the Supreme Court emphasised in this context that the court applying or extending pre-trial detention should do more than just refer to the upper limit of the sentencing range. "The relevant legal provisions therefore require the court deciding on pre-trial detention to make a kind of sentencing prognosis."[59] The case law also draws attention to whether the prospect of a severe sentence being imposed on the suspect gives rise to a well-founded fear of unlawful obstruction of the criminal proceedings.[60] Against the background of the aforementioned regulation, the courts assume that the wording of art. 258 § 2 of the Code of Criminal Procedure introduces a special type of presumption that the accused, facing the prospect of receiving a severe penalty, may unlawfully obstruct the proceedings.[61] The presumption arising from the above provision that there is an act of obstruction of the proceedings "normally relieves [the requesting authority] of the burden of proving that the suspect can actually commit such an act".[62]

As a result, the courts are of the opinion that the very risk of the imposition of a severe penalty gives rise to the presumption that it is necessary to ensure the proper conduct of the proceedings through the use of pre-trial detention.[63] This necessity "is not eliminated by the argument that the accused has a permanent place of residence or that the accused's behaviour does not contain any indications of obstruction of the proceedings".[64] Furthermore, the courts found that the presentation of the accused's testimony, even if it contains an admission of guilt, does not per se exclude the risk of obstruction of the proceedings and does not create the condition for the revocation of the preventive measure applied.[65]

On the other hand, there are voices in the case law of the courts of appeal that restrict the application of Article 258 § 2 CCP as a basis for pre-trial detention. In this context, they point, for example, to the need to demonstrate how the prospect of penalty affects the purpose of the application of preventive measure.[66] According to the Court of Appeal in Krakow, "[a] contrary interpretation is in conflict with the guarantees of the Constitution and the Convention and is unacceptable for this reason alone."[67]

At the same time, the courts emphasise that "the importance of the ground of severity of the penalty decreases over time"[68], as the duration of pre-trial detention is taken into account when calculating the sentence and the actual possibility of obstructing the proceedings decreases as the proceedings progress[69].

3.7. Negative grounds for pre-trial detention

The use of pre-trial detention is also constrained by negative grounds. According to the provisions of the Code of Criminal Procedure, pre-trial detention may not be used if another preventive measure is sufficient. However, case law assumes that if the basis for the request for pre-trial detention is Article 258 § 2 CCP, a provision that creates a presumption of obstruction of criminal proceedings, the court is not obliged to justify why it did not consider another preventive measure sufficient.[70] However, this type of reasoning raises doubts from the point of view of the Strasbourg standard, which requires the court to explain fully why non-custodial preventive measures were not considered sufficient to safeguard the conduct of the proceedings.

57 Pursuant to Article 258 § 2 of the Code of Criminal Procedure in force until 1 July 2015, in the case of an accused who has been charged with a felony or a misdemeanour punishable with a prison sentence with the upper limit of at least 8 years or who has been sentenced by a first instance court to imprisonment for more than 3 years, the fears of obstructing the proper conduct of the proceedings referred to in Article 1, justifying the application of a preventive measure, may also result from the severity of the penalty imposed on the accused.
58 Resolution of a seven-judge formation of the Supreme Court of 19 January 2012., I KZP 18/11, OSNKW 2012, no. 1, item 1.
59 Resolution of a seven-judge formation of the Supreme Court of 19 January 2012., I KZP 18/11, OSNKW 2012, no. 1, item 1.
60 Order of the Court of Appeal in Kraków of 9 April 2003, II AKz 120/03, Prok.i Pr.-wkł. 2003, no. 10, item 22.
61 Resolution of a seven-judge formation of the Supreme Court of 19 January 2012., I KZP 18/11, OSNKW 2012, no. 1, item 1.
62 Order of the Court of Appeal in Wrocław of 5 January 2012, II AKz 4/12, LEX no. 1108804.
63 Order of the Court of Appeal in Katowice of 28 February 2001, II AKz 133/01, Prok.i Pr.-wkł. 2001, no. 11, item 25.
64 Ibid.
65 Order of the Court of Appeal in Katowice of 4 July 2001, II AKz 488/01, OSA 2002, no. 2, item 15.
66 Order of the Court of Appeal in Kraków of 6 March 2018, II AKz 104/18, KZS 2018, no. 3, item 29.
67 Ibid.
68 Order of the Court of Appeal in Kraków of 23 August 2018, II AKz 439/18, KZS 2018, no. 9, item 36.
69 Resolution of a seven-judge formation of the Supreme Court of 19 January 2012., I KZP 18/11, OSNKW 2012, no. 1, item 1.
70 Order of the Court of Appeal in Katowice of 24 September 2019, II AKz 878/19, LEX no. 3222198.

However, the requirement to use pre-trial detention only as a last resort is also reinforced by the rule expressed in Article 258 § 4 CCP, which obliges the criminal justice bodies to take into account the nature, character and severity of the concerns regarding the proper conduct of the proceedings when choosing a preventive measure. Against this background, some courts argue that "[t]he rule is that the accused should be released pending trial and pre-trial detention should be used only exceptionally."[71] *This results in the need for a strict interpretation of the grounds for pre-trial detention as a means of interfering with an individual's personal freedom.*[72] *Furthermore, the courts point out that securing the proper conduct of proceedings through pre-trial detention is only justified if these proceedings are conducted efficiently.*[73]

In addition, the Code obliges the criminal justice bodies to refrain from applying pre-trial detention, in particular if the deprivation of liberty would pose a serious threat to the life or health of the suspect or would cause exceptional hardship to the suspect or his or her immediate family. The burden of proof for the circumstances justifying the waiver of pre-trial detention lies with the party who makes the relevant submission.[74]

One reason that, in a court's view, justifies the waiver of pre-trial detention was, for example, the need for the suspect to undergo specialised medical treatment in connection with a serious illness. On the other hand, the courts did not consider the need to continue an education[75] or to accompany a family member during a surgical procedure[76], or the deterioration in the standard of living of the suspect's family[77], as circumstances justifying the waiver of pre-trial detention.

In addition, the provisions of the Code of Criminal Procedure state that pre-trial detention may not be used if the facts of the case give rise to the presumption that the accused would receive a conditionally suspended custodial sentence or a more lenient sentence if convicted, or that the duration of pre-trial detention would exceed the expected duration of the suspended custodial sentence.

Pre-trial detention may also not be applied if the offence is punishable by a custodial sentence of no more than one year. However, this proviso has only limited practical effect due to the significant increase in the scale of penalties for criminal offences in recent years.

Importantly, however, these restrictions do not apply in cases where the suspect went into hiding, persistently fails to appear when summoned, obstructs the proceedings in any other unlawful manner, or where the suspect's identity cannot be established.

3.8. The choice of a preventive measure and its duration

When deciding on the application of a particular preventive measure, the court is obliged to take into account the nature and character of concerns regarding the proper conduct of the proceedings (or the risk of committing a new serious offence) that have been argued as the basis for the application of a particular measure. The court should also consider whether the above-mentioned risks to the proper conduct of proceedings are particularly high at a specific stage of the proceedings.

Polish law does not contain any rule establishing a general maximum duration for the application of preventive measures, including pre-trial detention. However, the law provides for various grounds for the application of pre-trial detention, depending on its duration. In the case of long-term pre-trial detention, the decision on its extension must be taken in a special procedure and based on special grounds. As a rule, however, the preventive measures can be applied until the execution of the sentence given to the person convicted of the offence begins.

According to the Code of Criminal Procedure, the length of the period for which pre-trial detention is ordered cannot, as a rule, exceed 3 months. At the same time, in cases where it was not possible to conclude the pre-trial proceedings within the period in question due to the particular circumstances of the case, the Code allows pre-trial detention to be extended for a further fixed period, which may not, however, exceed three months. The total period for which an extension of pre-trial detention may be granted under these conditions may not exceed 12 months. What is more, other provisions of the Code provide that the total period of pre-trial detention until the date of the first judgment of the court of first instance may not exceed 2 years.

It is still possible to exceed these time limits. In this case, however, the substantive jurisdiction to decide on the extension of pre-trial detention is transferred to another court, namely the court of appeal. Furthermore, in the above-mentioned situation, the legislator requires that new, additional grounds for pre-trial detention exist. Consequently, pre-trial detention can only be extended in such cases if this is necessary in connection with the suspension of criminal proceedings, with measures to establish or confirm the identity of the accused, with the conduct of evidence-taking procedures in a particularly complex case or abroad and with the deliberate delay of the proceedings by the accused. The courts have taken the view that the accused "deliberately delays the proceedings" if, among other things, he or she makes excessive and unjustified use of his or her procedural rights.[78]

71 Order of the Court of Appeal in Szczecin of 17 June 2020, II AKz 327/20, OSASz 2020, no. 2, item 26–45.
72 Ibid.
73 Order of the Court of Appeal in Kraków of 16 February 2011, II AKz 361/10, KZS 2011, no. 3, item 43.
74 Order of the Court of Appeal in Kraków of 29 December 2015, II AKz 479/15, KZS 2016, no. 2, item 45.
75 Order of the Court of Appeal in Rzeszów of 25 September 2012, II AKz 136/12, LEX no. 1237649.
76 Order of the Court of Appeal in Katowice of 16 January 2008, II AKz 33/08, LEX no. 578235.
77 Order of the Supreme Court of 30 August 2005, WZ 62/05, OSNwSK 2005, no. 1, item 1568.
78 Order of the Court of Appeal in Katowice of 27 January 2010, II AKp 8/10, LEX no. 574486.

The courts point out that the provisions on the duration of pre-trial detention constitute a guideline for the proper organisation of the pre-trial proceedings. "The law enforcement authorities should therefore conduct pre-trial proceedings in such a way that the pre-trial detention of a suspect does not last longer than one year."[79] For this reason, the prosecutor who requests an extension of pre-trial detention beyond the limits provided for by law must exercise the utmost care to ensure the smooth running of the pre-trial proceedings and focus the procedural steps on limiting the duration of this measure to the minimum necessary.[80]

Due to the exceptional nature of the discussed grounds for the application of pre-trial detention beyond the legal limits, each of them should be interpreted strictly.[81] Furthermore, the courts emphasise that the significance of pre-trial detention diminishes over time.[82]

3.9. Other preventive measures

Theoretically, the list of preventive measures that can be used as an alternative to pre-trial detention is extensive. It may be possible for criminal justice bodies to apply a preventive measure in the form of financial surety (*poręczenie majątkowe*), which can be provided in the form of money, securities, pledges and mortgages, instead of pre-trial detention. The assets or claims covered by the surety are forfeited or collected if the accused flees or goes into hiding. It is worth noting that the amendments introduced in 2021[83] significantly restrict the applicability of the financial surety: according to the amended provisions, the object of the financial surety may not be obtained (by the accused or another person providing the surety) as a financial contribution made specifically for this purpose.

Another preventive measure is the "community guarantee" (*poręczenie społeczne*), i.e. a statement from the suspect's employer, the authorities of the suspect's school or a social organisation assuring that the suspect will comply with the summonses and will not obstruct the proceedings. A similar guarantee can also be given by a "trustworthy person".

As a precautionary measure, the court or the prosecutor's office may place the suspect under the supervision of the police. A person placed under police supervision is obliged to fulfil the requirements set out in the order applying the preventive measure. The obligations imposed in this way may consist of a ban on leaving a certain place of residence, reporting to the supervisory authority at certain intervals, informing it of the intended departure and the date of return, a ban on contacting the victim or other persons, a ban on approaching certain persons at a certain distance, a ban on staying in certain places, as well as other restrictions on the freedom of the suspect that are necessary to carry out the supervision. The person placed under police supervision is obliged to appear at the indicated organisational unit of the police with a document confirming his or her identity, to execute orders intended to document the course of the supervision and to provide the necessary information to determine whether he or she meets the requirements imposed in the decision ordering the supervision.

A criminal justice body may, as a precautionary measure, order a person suspected of having committed an act of violence against a person living with the accused to temporarily leave the jointly occupied premises or order the accused to maintain a certain distance from the victim if there is reasonable cause to believe that the accused will commit such an offence against that person again, in particular if the accused has threatened to do so.

Another non-custodial preventive measure is the possibility of depriving the accused of the right to hold an office or engage in a trade or profession or prohibiting him from carrying out certain activities or operating certain types of vehicles. As a preventive measure, the suspect may also be prohibited from seeking public procurement contracts for the duration of the proceedings.

If there are reasonable grounds for concern that the accused might flee, the preventive measure of the prohibition on leaving the country may also be imposed on the accused, which may be combined with the confiscation of his or her passport or other document authorising him or her to cross the border.

In the practical operation of the judicial system, the list of alternatives to pre-trial detention discussed is of limited relevance. They do not ensure the proper conduct of criminal proceedings against the risk that the suspect will flee or go into hiding. A preventive measure intended to serve this purpose, such as police supervision, has essentially the same form as the solutions already contained in the 1969 Code of Criminal Procedure.[84] A similar impression arises if one compares the content of the current and the original regulation introducing the prohibition on leaving the country combined with the confiscation of the passport.[85]

79 Order of the Court of Appeal in Wrocław of 6 November 2019, II AKz 879/19, OSAW 2019, no. 3–4, item 391.
80 Ibid.
81 Ibid.
82 Order of the Court of Appeal in Katowice of 24 October 2007, II AKp 208/07, LEX no. 370555.
83 The Act of 20 April 2021 amending the Criminal Code and certain other acts (Journal of Laws, item 1023).
84 The provisions of Article 235 of the 1969 Code of Criminal Procedure allowed for placing the suspect under the supervision of the Citizen's Militia, the Communist-era state police force. Under the 1969 Code, a person placed under police supervision was obliged to fulfil the requirements set out in the court's or prosecutor's order applying the preventive measure. These requirements could include the prohibition to leave a certain area, the obligation to appear before the supervisory authority at certain intervals and the obligation to inform it of the intended departure and the date of return.
85 Added by the Act of 29 June 1995 amending the Code of Criminal Procedure, the Military Courts Organisation Act, the Fees in Criminal Matters Act and the Juvenile Proceedings Act (Journal of Laws No. 89, item 443, as amended).

The form of both types of preventive measures can therefore be characterised as anachronistic and incompatible with the current nature of criminal proceedings and the risks associated with their proper conduct, including the possibilities offered by freedom of movement. This could lead courts to no longer consider these measures as real alternatives to pre-trial detention and to ensure the proper conduct of proceedings only through pre-trial detention. Such a situation may lead to cases of abuse of pre-trial detention. In an attempt to address this problem, non-governmental organisations have for years been formulating public postulates for the introduction of house arrest in combination with electronic monitoring as an alternative to pre-trial detention. In 2021, the Council of Ministers began work on a legal framework for this solution. In 2021, the Council of Ministers began work on a legal framework for this solution. However, the proposal was withdrawn under the influence of criticism of the fact that this preventive measure was to be applied by the prosecutor and not by the court.[86] The regulatory choice raised doubts regarding the requirements of the *habeas corpus* procedure.

3.10. The interlocutory appeal

The prosecutor's decision to apply a preventive measure may be reviewed by the district court. The relevant interlocutory appeal (*zażalenie*) should be examined immediately. The interlocutory appeal against the order of the district court to apply pre-trial detention is heard by the regional court.

In addition, the suspect may apply for a change or revocation of a preventive measure at any time. The request is examined by the prosecutor in pre-trial proceedings, and by the court in judicial proceedings. The suspect may lodge an interlocutory appeal against the decision on his or her request provided that at least 3 months have elapsed since the previous decision on the preventive measure was issued.

86 Prawo.pl, Koronawirus wprowadza areszt domowy – są wątpliwości konstytucyjne.

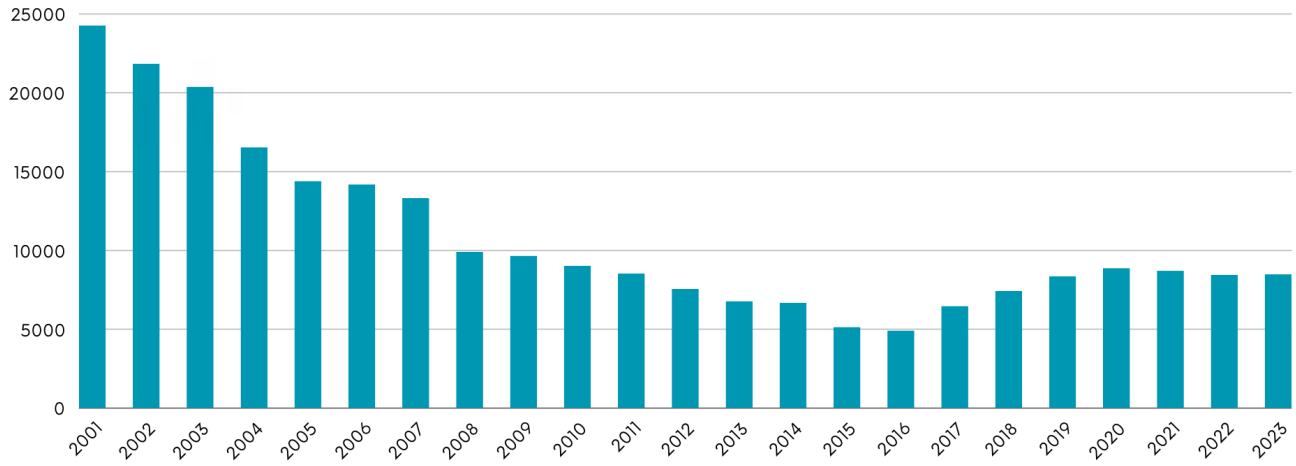
4. STATISTICS

The excessive use of pre-trial detention in Poland continues to be a major problem. It appears again and again in the case law of the ECtHR. In the last five years alone, the ECtHR has ruled in the cases of Meroń v. Poland[87], Mariański v. Poland[88], K.P. v. Poland[89], Stefański and others v. Poland[90], Kaszubski v. Poland[91], Russjan v. Poland[92], Czeszel v. Poland[93], Zubel v. Poland[94], Rudnicki v. Poland[95], Dłużewska v. Poland[96], Łabudek v. Poland[97], Burża v. Poland[98], among others, that Poland had violated Article 5 § 3 of the Convention due to the excessive length of pre-trial detention.

Until recently, the excessive use of pre-trial detention was one of the reasons for the significant overcrowding in Polish prisons. Until 2015, there was a clear downward trend in the overuse of pre-trial detention, but after 2015, the number of requests for pre-trial detention submitted to the courts by prosecutors from the general units of the public prosecutor's office increased again.

In 2015, the number of requests for pre-trial detention amounted to 13,665, while in 2023 it reached almost 23,000. This change is not explained by the general increase in the number of pre-trial proceedings conducted by law enforcement authorities. A comparison of the number of applications with the number of pre-trial proceedings initiated shows that this preventive measure was used more frequently after 2015. At the same time, these changes cannot be linked to organisational changes in the prosecutor's office itself, including the restriction of its independence through its subordination to the executive.

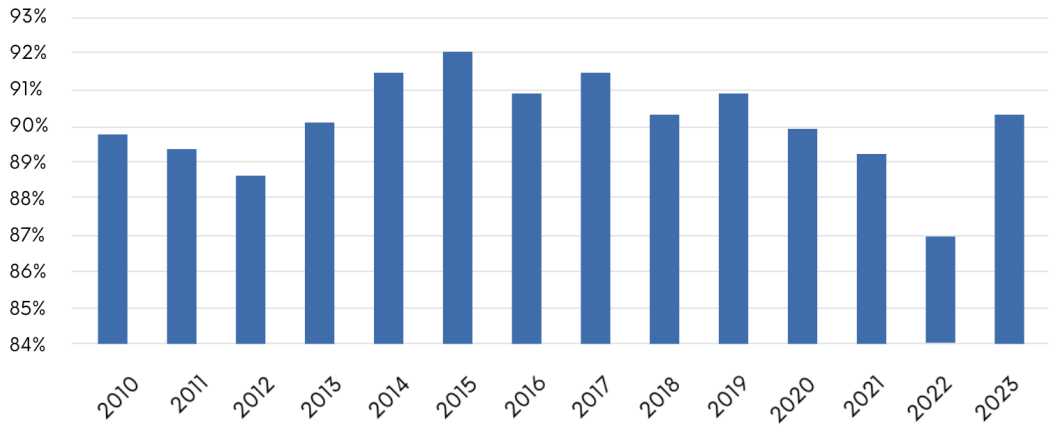
The result of these changes was a significant increase in the number of persons in pre-trial detention, which almost doubled to almost 9,000, a level not seen for 10 years.



Average number of persons in pre-trial detention in each year

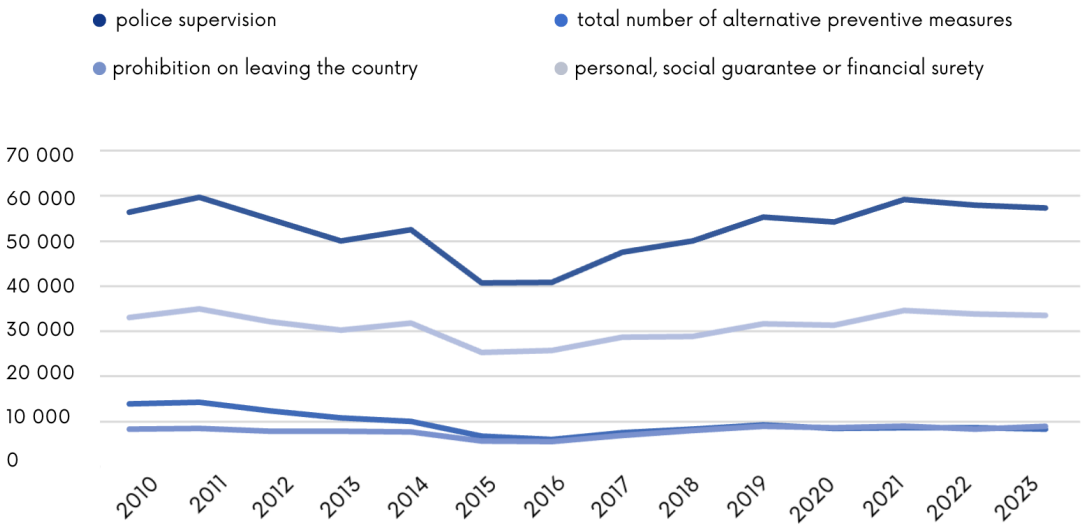
However, a persistent problem is the high rate of judicial approval of requests for pre-trial detention. For years, it has been between 86% and even 92%.[99] In 2023, it was 90.31%. The HFHR has revealed[100] that the statistics on the effectiveness of interlocutory appeals against pre-trial detention orders are even worse: only 3.5% of appeals are successful in the district courts, while the figure does not even exceed 1% in the regional courts[101]. The statistics on the judicial approval rate for requests to extend pre-trial detention are equally pessimistic (around 95.65% in 2022).

87 Meroń v. Poland, no. 42770/21, 18.01.2024.
88 Mariański v. Poland of 30.11.2023, no. 14630/22, 30.11.2023.
89 K.P. v. Poland, application no. 52641/16, 26.10.2023.
90 Stefański and Others v. Poland, nos. 53844/20, 728/21, 57170/21, 11.05.2023.
91 Kaszubski v. Poland, no. 15466/19, 10.11.2022.
92 Russjan v. Poland, no. 79509/17, 27.10.2022.
93 Czeszel v. Poland, no. 47731/19, 13.10.2022.
94 Zubel v. Poland, no. 10932/18, 09.06.2022.
95 Rudnicki v. Poland, no. 22647/19, 3.02.2022.
96 Dłużewska v. Poland, no. 39873/18, 15.04.2021.
97 Łabudek v. Poland, no. 37245/13, 4.06.2020.
98 Burża v. Poland, no. 15333/16, 18.10.2018.
99 Based on the reports of the Prosecutor General and the National Prosecutor submitted in 2010-2023.
100 P. Kładoczny (Ed.), O standardzie, który się nie przyjął (w Polsce). Praktyka stosowania tymczasowego aresztowania w świetle przepisów Europejskiej Konwencji Praw Człowieka.
101 Ibid.



Effectiveness of the requests for pre-trial detention

In recent years, there has been a trend towards more frequent use of alternatives to pre-trial detention, both in absolute terms and in relation to the total number of pre-trial proceedings initiated. Police supervision remains the most commonly used measure in this respect. In 2023, police supervision was ordered in nearly 33,500 cases. Among the other measures, sureties and guarantees are used relatively frequently (8,287 cases in 2023[102], as is the prohibition on leaving the country (almost 8,900 cases in 2023). The last measure worth mentioning is the obligation to leave premises occupied together with the victim, which is mainly used in cases of domestic violence (approx. 5,500 cases in 2023). The remaining measures are either very specialised in terms of protecting the public from the commission of a criminal offence or have a low probability of ensuring the proper conduct of the proceedings. It is therefore not surprising that they are rarely or even very rarely used.

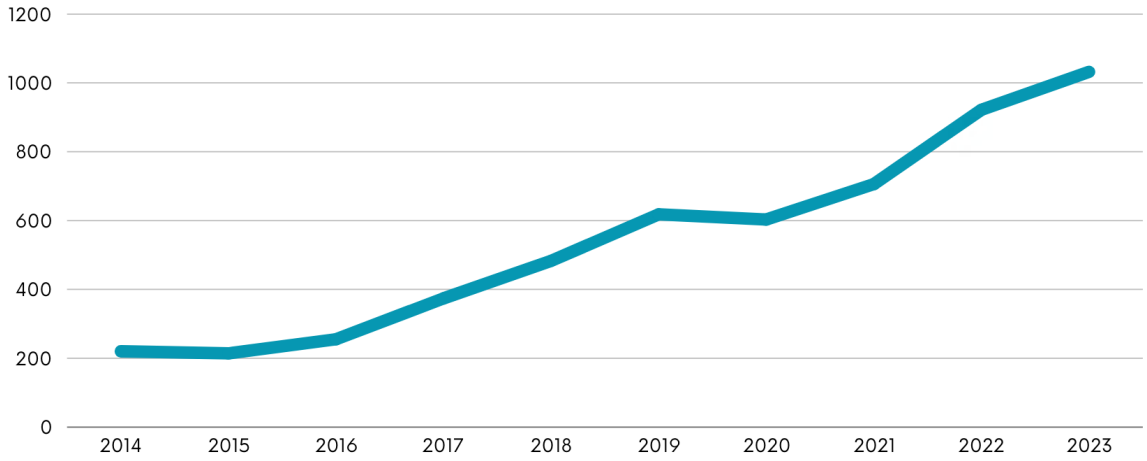


Alternative preventive measures, total

The statistics on the length of pre-trial detention are particularly worrying. Compared to 2015, there has been a significant increase in the number of persons detained in a given year in every category. The number of persons who have been in pre-trial detention for more than 2 years has risen from 21 to 140 during this period. The number of those detained for at least a year and less than 2 years increased fivefold, from 130 in 2015 to 722 in 2023. The situation is no better in the group of persons detained for a period of 6 to 12 months and 3 to 6 months (an increase from 1538 to 3180 and from 3177 to 5307 respectively). At the same time, the number of persons detained in a given statistical year has increased by about 5,000. According to the Prison Service, on 22 March 2024, 8,270 individuals were held in pre-trial detention.[103]

102 The data include.
103 Służba Więzienna (Polish Prison Service), Komunikat o zaludnieniu jednostek penitencjarnych w dniu 22.03.2024 r.

The current statistics published by the National Prosecutor's Office do not include the number of foreign nationals in pre-trial detention.[104] Such information was recorded in the reports of the National Prosecutor's Office, but only for the years 2016–2019. These reports show a strong upward trend, with the total number of foreign nationals in pre-trial detention doubling (from 568 in 2016 to 1043 in 2019). The claim that pre-trial detention is being used more frequently against foreign nationals is also confirmed by Prison Service data.[105] These data show an almost five-fold increase in the average number of foreigners in pre-trial detention in the years 2014–2023. Among the foreigners in pre-trial detention, the largest group are citizens of Ukraine, Georgia and Belarus.



Average number of foreign nationals held in pre-trial detention in a given year

104 The HFHR has requested the National Prosecutor's Office to provide the aforementioned information as part of the proceedings for access to public information. The NPO responded that it does not currently collect this type of data.

105 Own elaboration of the HFHR, based on monthly statistics published by the Prison Service at https://sw.gov.pl/strona/Statystyka.

5. RESULTS OF THE FILE SURVEY

The survey of court files carried out by the HFHR covered a total of 91 court proceedings conducted in 2019–2023 in which the prosecution requested pre-trial detention. In 56 of these proceedings, pre-trial detention was applied due to the concern that the suspect might flee or go into hiding. Only in two of these cases did the courts not apply pre-trial detention.

5.1. Suspects subject to pre-trial detention

In the vast majority of the cases investigated, pre-trial detention was imposed on male suspects. Only 8 females appeared in the studied group.

The most numerous age groups in the population analysed were 17–29 and 40–49. In both cases, HFHR researchers recorded 27 suspects in these age groups, while a slightly smaller group (21) were pre-trial detainees aged 30–39. The remainder of the suspects in pre-trial detention were 11 persons aged 50–59 and 4 over 60 years old. In one case, there was no information on the suspect's age in the case file.

Most of the detained suspects have a primary or secondary school education. Slightly fewer have a vocational school education. A group of less than 20 people have secondary or secondary technical school education. A large minority of the detained suspects have a university degree. Two stated that they have no education at all. No education details of the detained suspects were found in a number of files.

In most cases, the suspects have no dependents. In several cases, the researchers failed to determine whether the suspects have a dependant. In several tens of cases, the suspect has at least one dependant. In six cases, the suspect has 3 to 5 children.

A significant group of the persons detained in the analysed cases were those qualifying as particularly vulnerable. The researchers included in this group persons in crisis of homelessness, minors, foreigners, persons suffering from a mental illness and addiction and members of ethnic minorities. The analysis of the files revealed that 47 suspects fell into this category, which corresponds to more than 50% of the sample analysed. The largest subset of the particularly vulnerable group were persons affected by the homelessness crisis (17). The second largest one were foreign nationals (16). Persons who were addicted to drugs or undergoing drug treatment also formed a noticeable group (12 persons).[106] Four pre-trial detainees received psychiatric treatment.[107] In addition, the studied group included two members of an ethnic minority and a person under the age of 18.

5.2. Offences in relation to which pre-trial detention was used

The sample of cases examined contained a very diverse catalogue of offences for which pre-trial detention was applied. The largest percentage of them involve crimes against property, in particular robbery, theft with violence, theft with burglary and theft. The second most frequent type of offences was those described in the Drug Abuse Prevention Act (in particular, the possession of a significant quantity of narcotic drugs). An important group of offences for which pre-trial detention was applied was also criminal threats. A small percentage of the offences included in the analysed sample were offences against sexuality and offences against life and health, including mainly offences related to causing minor bodily harm. In addition, in three cases, pre-trial detention was imposed on absconding perpetrators of the offence of non-payment of child support.

5.3. The risk of fleeing or going into hiding as grounds for arrest

As part of the study, the HFHR examined the relationship between the grounds for the suspect's arrest and the rationale for his or her pre-trial detention.

The decision to arrest the suspected person was made in 68 of the cases studied. In 45 of these cases, a reasonable suspicion that an offence has been committed or the concern that the perpetrator might flee or go into hiding were mentioned. However, in some of these cases, the above reasons did not constitute the basis for issuing a pre-trial detention order based on the grounds of the risk of flight or going into hiding. Almost 30% of the statement of reasons for the pre-trial detention orders contain no arguments suggesting the existence of any of the discussed risks. This raises the question of whether the arrest of the suspects was a proportionate measure and implies that the reasons for the arrest may merely be cited pro forma by criminal justice bodies in order to ensure only the formal legality of the measure.

106 Three of them were persons affected by the homelessness crisis.
107 Two of them were persons addicted to drugs or undergoing drug treatment.

5.4. The relationship between the behaviour of the suspects and the pre-trial detention order

No provision of the Code of Criminal Procedure guarantees that a suspect who pleads guilty and gives evidence is entitled to be released pending trial. Nevertheless, the fact that the suspect pleads guilty and testifies must be assessed from the perspective of the function that preventive measures fulfil in criminal proceedings, namely the need to ensure the proper conduct of the proceedings. Similar conclusions should also be drawn in cases where the offender has been caught in the act. In practice, however, the factors of the suspect's admission of guilt, the suspect's testimony or the clear circumstances under which the offence was committed were not duly taken into account in the studied cases. On the contrary, against the background of the drug cases studied, where the suspects were arrested in the act, some criminal justice bodies referred, among other things, to the fact that the case was "evolving" and that certain procedures had to be carried out to take evidence that would allow the identification of other persons accompanying the perpetrators in their criminal behaviour. The mere fact that the suspects pleased guilty and gave testimony did not prompt the courts to apply alternative preventive measures. In the sample analysed, the HFHR recorded 81 cases in which the suspect was questioned before pre-trial detention. In 40 of these cases, the suspects confessed to the alleged offence and gave statements. However, this did not prevent the application of pre-trial detention to these suspects.

5.5. Duration of pre-trial detention

In the vast majority of the cases analysed (61), the duration of pre-trial detention was set at a maximum of three months in the pre-trial detention orders issued by the courts. In about a dozen of cases, pre-trial detention was applied for two months. In only three cases was the initial period for which the court ordered pre-trial detention four weeks, and in one case six weeks. In five cases involving absconding perpetrators, pre-trial detention was imposed only for a period of 14 days.[108]

Arguably, the reason for imposing such a long period of pre-trial detention is the lengthy nature of the pending pre-trial proceedings, in particular the lack of a realistic chance of concluding them within the statutory three-month period. Imposing the maximum permissible period of pre-trial detention undoubtedly also enables the courts to minimise the frequency of extensions of pre-trial detention, which saves them work, at the expense of the proportionality of the application of this measure.

5.6. Application of pre-trial detention

The HFHR was particularly interested in the quality of the reasons given for the use of pre-trial detention. The CCP requires that the statement of reasons of an order to apply a preventive measure should include, inter alia, the presentation of evidence that the suspect has committed a criminal offence, circumstances indicating the existence of risks to the proper conduct of the proceedings and/or the possibility that the suspect will commit a new, serious criminal offence if the preventive measure is not applied.

On the basis of this regulation, the HFHR analysed the extent to which the statements of reasons for the pre-trial detention orders met these requirements, in particular whether they presented evidence or circumstances on the basis of which the court assumed that the suspect was highly likely to commit a criminal offence. The HFHR also reviewed whether a particular pre-trial detention order indicated facts that pointed to risks for the proper conduct of the pre-trial proceedings. Similarly, the HFHR analysed the negative grounds for pre-trial detention, including the possibility of securing the proper conduct of the criminal proceedings by other preventive measures, as well as the existence of specific reasons for waiving the application of pre-trial detention.

The issues discussed were assessed from the perspective of the person concerned and boiled down to checking whether the statement of reasons of the order contained concrete circumstances demonstrating the existence of certain grounds or whether it was merely stated that these grounds existed without providing concrete facts to substantiate such an assertion. At the same time, it should be recalled that the HFHR did not review whether the circumstances stated by the courts were actually corroborated by the material in the case file, i.e. whether, for example, the evidence that the court considered showed a high probability that the alleged offence was committed by the suspect actually pointed to such a probability.

It should be emphasised that in the vast majority of the orders examined, the courts have included evidence which, in their opinion, indicates that the suspect is highly likely to have committed the offence with which he is charged. Of the 108 pre-trial detention orders issued by the courts of first instance, only 17 contained no such evidence. In the remaining cases, it is possible to find the circumstances which, in the opinion of the court, demonstrate such a probability. The way in which the courts proceeded on this point mostly amounted to pointing to specific measures of evidence indicating that the suspect had committed the offence (with reference to the relevant case file sheet number).

108 In four cases, the completed questionnaires did not record the duration of the applied pre-trial detention.

A similar approach of the courts was found in relation to the circumstances concerning unlawful interference with the conduct of the criminal proceedings resulting from, among other things, inducing witnesses to change their testimony, the suspect's flight or going into hiding. Of the 105 orders in which such circumstances were invoked, 18 contained a declaratory reference which did not stated any circumstances that, in the court's opinion, would affect the occurrence of specific risks to the conduct of the proceedings.

However, the quality of the analysed statements of reasons of pre-trial detention orders was lower in terms of the use of alternative preventive measures to ensure the proper conduct of the proceedings. In only nine of the orders analysed did the courts provide a valid, fact-based justification as to why they decided against the use of a non-custodial preventive measure. In the vast majority of cases (75), the courts merely stated that other preventive measures would not ensure the proper conduct of the criminal proceedings. In 25 cases, they did not address this issue at all, despite the legal obligation to do so.

5.7. Flight risk as a basis for the application of pre-trial detention

In the group of cases analysed, there were 57 pre-trial detention orders based directly on the risk of the suspect fleeing or going into hiding. The criminal justice bodies have invoked various circumstances which they considered to be grounds for establishing this risk.

5.7.1. The risk of the suspect fleeing and going into hiding in prosecutors' requests for pre-trial detention

In the prosecutors' requests for pre-trial detention, a large proportion of the arguments put forward related to the suspect's lack of a fixed abode or place of residence. In several cases, prosecutors pointed out that the suspect's homelessness was a ground for pre-trial detention, as there was a risk that the suspect would flee or go into hiding. In some cases, this justification was expressed more euphemistically by referring to the fact that the suspect leads an "unstable lifestyle". In addition, a prosecutor, justifying the risk of a suspect fleeing or going into hiding, indicated that the suspect had left his permanent place of stay and the fact that it was impossible to determine his present fixed abode. An important set of circumstances justifying the use of pre-trial detention was also the possibility of imposing a severe penalty on the suspect. In addition, certain requests for pre-trial detention referred to the personal characteristics of the suspects: marital status, age, childlessness, lack of family ties and employment status. Another circumstance that strongly indicated (in the prosecutors' opinion) the need for pre-trial detention was that the suspect was either categorised as a foreign national or had links to foreign countries, e.g. had previously lived or worked abroad or had family abroad. In one case, the fact of Russian aggression against Ukraine and the associated possibility of the Ukrainian national being called up for military service was considered to be a circumstance justifying pre-trial detention. In another case, the argument in favour of applying pre-trial detention was the suspect's illegal stay on Polish territory.

Another set of factors that justify the use of pre-trial detention is the behaviour of the suspects themselves. These factors include an attempt to flee during the arrest, non-compliance with preventive measures imposed in other proceedings or the fact that a suspect was wanted on a domestic arrest warrant or a European arrest warrant. In practice, however, such special circumstances, which demonstrate the high probability of the suspect fleeing, only accounted for a significant minority of the cases analysed.

Only in two of the cases analysed was the prosecutor's request for pre-trial detention was denied by the court (it should be noted, however, that the HFHR's request for access to the case files explicitly mentioned proceedings in which pre-trial detention was used). In one of the cases in question, the court refused to impose pre-trial detention on a person exercising a profession of public trust who is suspected, among other things, of having made untrue written statements. The court found that there was no risk that the suspect would go into hiding and emphasised that this person had no criminal record and that the prosecutor had not presented any circumstances that would indicate a risk of the suspect obstructing the proceedings or going into hiding. The court also disagreed with the prosecution's assessment that the suspect could face a severe penalty. The court found that the prospect of a severe penalty must be real and that the prosecution's reference to the maximum penalty for the offence is not a sufficient reason for pre-trial detention. The court also stated that even if the suspect is convicted, there is a good chance that he receives a suspended sentence.

5.7.2. The courts approach to the risk of the suspect going into hiding or fleeing

The courts have adopted a similar approach in their justifications for the risk of the suspect fleeing or going into hiding. The circumstances cited in this context can be categorised into four groups.

The first group relates to the personal characteristics of the suspect. In this group, the most common reason for a suspect fleeing or going into hiding was the lack of a fixed abode, which was mentioned in 25 cases. In the context of this ground for pre-trial detention, the courts also pointed to the lack of the suspect's registration of residence (*zameldowanie*).

Another important group of arguments put forward in this context concerned the suspects' lack of connections to Poland. Circumstances cited by the courts to prove this were the absence of family ties, the absence of dependants, the fact that they are unemployed or only occasionally employed, the absence of income or assets. In several cases, the courts have accepted that a suspect is at risk of fleeing or going into hiding because he is a foreign national. In one of the cases, the court additionally emphasised that the suspect is a citizen of a country outside the European Union.

A separate category of grounds shown as demonstrating the actual risk of the perpetrator fleeing or going into hiding were those relating to his or her behaviour in the course of the proceedings. In this context, the inability to contact the suspect, the inability to determine his whereabouts, the fact that he is absent from the address given for service should be mentioned in particular. Behaviour that the courts considered to be prima facie evidence that the suspect might flee or go into hiding included giving a different contact address to where he or she actually lived and not giving a contact address when questioned as a suspect (whereas he or she gave it when arrested). This group of circumstances also includes the failure to indicate the place where the suspect would be staying during the proceedings and the failure to inform about the change of such a place. Furthermore, in one of the proceedings, the court considered the manner in which the suspect answered a question about his whereabouts as grounds for ordering pre-trial detention on the basis of a reasonable risk of flight. In the court's opinion, such a risk was demonstrated by the suspect's considerable hesitation before answering this question.

In addition, in some orders, the courts have drawn attention to the suspects' behaviour in other criminal proceedings conducted previously or in parallel. In this context, they pointed out the necessity of a prior search for the suspect or the ineffectiveness of the preventive measures applied so far (e.g. disregard of a police supervision order in connection with travelling outside the place of residence).

The third group of arguments justifying pre-trial detention on the grounds of risk of flight are those relating to suspects' life circumstances. These facts had essentially no connection with the criminal proceedings against the suspects. According to the courts, however, they influenced the assessment of the risk of the suspects going into hiding or fleeing. In this group of circumstances, the courts have referred, among other things, to the suspect's then-current lifestyle. In addition, circumstances such as living in a building in which the flats are rented to several people, the short rental period of the flat currently occupied, a longer stay abroad and a centre of life abroad also played a role.

A severe penalty is the last of the identifiable circumstances that constitute prima facie evidence of the risk of flight or going into hiding by a suspect. It was cited as such a ground in 15 analysed cases. In these cases, the courts have expressly accepted that the risk of punishment faced by the accused may cause him or her to take steps to obstruct the criminal proceedings. At the same time, they did not refer to the presumption under Article 258 § 2 CCP.

5.7.3. Risk of severe punishment as a basis for the application of pre-trial detention

Notwithstanding the severity of the penalty being relied on as a justification for the risk of going into hiding, in the analysed cases the courts also applied pre-trial detention on the basis of Article 258 § 2 of the Code of Criminal Procedure. According to this provision, if the accused is charged with a felony or misdemeanour punishable by deprivation of liberty (imprisonment) of at least 8 years, the need to apply pre-trial detention to ensure the proper conduct of the proceedings may be justified by a serious penalty that the accused is facing.

In only 21 of the orders analysed did the courts, when applying pre-trial detention, refer to circumstances indicating that the penalty that may be imposed on the suspect in the future would be severe. In seven cases, the courts took the view that the serious penalty facing the suspect gave rise to the presumption that the suspect would obstruct the pre-trial proceedings by fleeing, going into hiding, destroying evidence of the offence or influencing witnesses.

In most of the cases examined in which the courts referred to the provisions of Article 258 § 2 CCP, the reference to the risk of severe punishment related only to the classification of the offence with which the suspect was charged. The analysed statements of reasons of pre-trial detention orders did not contain any discussion of whether there was a real chance that the suspect would actually be sentenced to a severe penalty. Such a state of affairs must give rise to doubts from the point of view of Article 5 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which obliges the state parties to thoroughly examine the possibility of ensuring the suspect's appearance in court by alternative means to pre-trial detention. Such an examination cannot be altered by courts applying pre-trial detention on the presumption that the suspect will obstruct the pre-trial proceedings by fleeing, going into hiding, destroying evidence of the offence or influencing witnesses, given the severity of the sentence he may receive.

At the same time, it should be emphasised that in some cases, the courts have erred in their assessment of the two categories of cases mentioned above (those in which the courts referred to the circumstances that could lead to a severe penalty against the suspect and those that referred only to the legal classification of the alleged offence). Of 16 completed cases in which the courts indicated the prospect of a severe penalty, only three ended with a prison sentence of more than three years. In the remaining cases, the sentence was approximately 18 months of imprisonment. Moreover, in two cases the execution of custodial sentences was suspended and in another the court handed down a mixed sentence.

A minimum penalty of 2 years and 8 months was imposed in 50% of the 22 completed cases in which the courts cited a severe penalty as grounds for pre-trial detention solely based on the legal classification of the offense charged to the suspect. This group also included very severe sentences, of around 8 (or even 13) years of imprisonment. On the other hand, this group included six cases in which the suspects received lenient sentences. In four cases, the court imposed a custodial sentence of one year or slightly more. In one case, the execution of the custodial sentence imposed on the accused was suspended and in another the court handed down a mixed sentence. In the remaining cases, the sentences ranged from 20 to 32 months imprisonment.

None of the completed cases included in the survey ended in an acquittal.

5.7.4. The risk of the suspect fleeing or going into hiding and the reasoning of defense lawyers

Defence lawyers appeared relatively rarely in the cases examined. At the same time, not every interlocutory appeal they lodged against pre-trial detention orders related directly to the risk that the suspect might flee or go into hiding. Nevertheless, in about twenty cases, the defence arguments related to the risk of the suspect fleeing or going into hiding were present.

The defence lawyers put forward a wide range of arguments. In particular, the defence lawyers pointed out that it was not necessary to ensure the proper conduct of the pre-trial proceedings at a certain point in time, as important evidence had already been seized by law enforcement authorities during the phase of the proceedings that was ongoing at the time. They also pointed out that the court had failed to indicate any specific circumstances that would prove that the suspect had jeopardised the proper conduct of the proceedings and emphasised the fact that the suspect had pleaded guilty, made statements and cooperated with the prosecution authorities.

They also disputed the court's assertion that the suspect was in risk of going into hiding or fleeing and pointed out that there were no circumstances in this case that indicated such a risk. They also argued whether the mere fact that a suspect is a homeless person or does not live at his registered address should in itself be sufficient to impose pre-trial detention.

In some interlocutory appeals, the defence lawyers also pointed to their clients' excusable ignorance of the fact that criminal proceedings were pending against them (e.g. after an acquittal had been overturned). They also addressed the concerns expressed by the courts by pointing out, among other things, the circumstances demonstrating that the suspect will remain in a particular location upon release pending trial. They also pointed to the suspect's stable lifestyle, including the fact that he has a fixed abode. The argument that, according to the defence lawyer, proved the absence of a flight risk was also the ongoing COVID-19 outbreak at the time. The pandemic was presented as a circumstance preventing flight. It was argued that the socio-economic consequences of the pandemic, including the loss of the suspect's job abroad, should be an indication that the risk of the suspect fleeing abroad is lower.

The arguments put forward by the defence lawyers also dealt with the possibility of alternatively ensuring the proper conduct of the criminal proceedings by means of less intrusive preventive measures, such as the compulsory appearance of the suspect for the purpose of certain procedural steps or the application of non-custodial preventive measures. Defence lawyers also disputed that the imposition of a severe penalty on the suspect was a realistic prospect on the facts of a given case.

In addition to the above allegations, some of the defences put forward related directly to the high probability that the suspect had committed the offence or to errors in establishing the facts. In addition, in some cases, the defence lawyers drew attention to the existence of circumstances against the application of a custodial preventive measure. In this context, the defence lawyers argued, among other things, the need for the suspect to care for one of his sick parents, the risk of losing his or her job as a result of pre-trial detention, or the need for the female suspect to care for her two-year-old child. However, these arguments was not accepted by the courts of second instance.

The effectiveness of the interlocutory appeals lodged by the defence against the pre-trial detention orders in the cases analysed more or less corresponded to that recorded in the general statistics on the effectiveness of appeals against pre-trial detention. In the group of cases analysed, only two cases were identified in which the interlocutory appeal against the pre-trial detention order proved to be effective and led to the order being lifted. In one of these cases, the appellate court criticised the actual likelihood of the risk that the suspect would go into hiding. Among other things, the court pointed out that the search for the suspect was not properly organised as the relevant order was sent to a police station with no local jurisdiction. The court further argued that the suspect's presence at the specified location had not been properly verified. This is because the information was given to the police officers by one of the residents of the care home where the suspect was allegedly staying and not by its manager.

5.8. Total duration of pre-trial detention

It was not possible to determine the total duration of pre-trial detention in each case studied. However, during the survey, the HFHR researchers did not come across any examples of excessively long pre-trial detention. The longest period of pre-trial detention was 21 months and concerned the accused charged with physical assault causing death and later received a harsh sentence. In other proceedings, the average duration of pre-trial detention ranged from a few days to several months and correlated strongly with the duration of the criminal proceedings against the suspect.

6. CONCLUSIONS

- The current formulation of the grounds for pre-trial detention, which is based on the concern that the suspect will flee or go into hiding, contributes to automatism in the judicial application of this preventive measure. This leads to pre-trial detention being applied or extended in cases where such a strict preventive measure should not be applied for so long, if at all.

- The current framing of the grounds for pre-trial detention based on the risk that the suspect will flee or go into hiding means that pre-trial detention is more likely to be applied to those in a crisis of homelessness and to foreign nationals.

- Another ground for pre-trial detention, namely the risk that a serious penalty may be imposed on the suspect, makes it possible to automatically impose pre-trial detention without examining the extent to which the suspect jeopardises the proper conduct of the proceedings.

- When ordering pre-trial detention on the grounds of a serious penalty, in most of the cases examined, the courts did not assess the actual prospects of imposing such a penalty on the suspect and merely referred to the legal classification of the alleged offence, sometimes stating that the risk of a serious penalty justifies the presumption that the suspect will obstruct the criminal proceedings.

- This presumption, as laid down in Article 258 § 2 CCP, violates the principle of *preasumptio boni viri*, which is an element of the European legal order.

- The application of the presumption of obstruction of criminal proceedings effectively shifts the burden of proof to the suspect and places an obligation on him or her to prove that he will not obstruct the criminal proceedings. It is very difficult to prove circumstances which indicate that the suspect *will not* obstruct the criminal proceedings. This directly prevents an effective defence of the suspect and leads to a very limited effectiveness of the legal remedies against pre-trial detention brought by the defence.

- The way in which the courts justify the ordering of pre-trial detention deviates from the requirements of the Code of Criminal Procedure. Not in all the orders examined did the courts prove circumstances that indicated a high probability that the suspect had committed the alleged offence. Moreover, the courts that ordered pre-trial detention merely referred to the existence of the grounds for the application of pre-trial detention stated in the Code without, however, setting out the factual circumstances demonstrating their existence.

- When applying pre-trial detention, the courts do not sufficiently examine whether other preventive measures were not suitable to ensure the proper conduct of the proceedings. Neither the courts sufficiently consider whether there are negative grounds for the application of pre-trial detention in the case.

- The current catalogue of preventive measures that can be considered as an alternative to pre-trial detention is narrowly defined and cannot effectively guarantee the proper conduct of proceedings. As a result, criminal courts are more inclined to apply pre-trial detention.

7. RECOMMENDATIONS

7.1. For the legislative

- It is necessary to amend the grounds justifying the use of pre-trial detention. The reference to the impossibility of establishing the suspect's identity or the suspect's lack of a fixed place of residence in the country should be deleted from the wording of Article 258 § 1 (1) CCP.

- It is necessary to delete Article 258 § 2 from the Code of Criminal Procedure, which provides for the application of pre-trial detention in the event that the accused is charged with a felony or offence punishable by a maximum term of imprisonment of at least 8 years, or if the court of first instance has sentenced the accused to a term of imprisonment of not less than 3 years.

- It is necessary to expand the list of preventive measures that can be considered as alternatives to pre-trial detention. These measures should make greater use of new technologies. In this context, the introduction of a preventive measure in the form of house arrest (in two forms: with and without electronic monitoring) and a preventive measure in the form of permanent monitoring of the place of residence by means of GPS devices and permanent authentication of the place of residence (e.g. by means of biometric solutions requiring recurrent authentication) should be considered.

- It is necessary to consider the introduction of solutions that allow courts applying pre-trial detention to oblige the prosecutor to carry out certain procedural steps, on pain of converting pre-trial detention into a non-custodial preventive measure.

- The legislator should consider amending Article 259 § 3 CCP by increasing the minimum duration of applicable penalty of imprisonment that does not mandate ordering pre-trial detention. Such an amendment would bring the criminal procedure into line with changes in criminal policies.

7.2. For the judiciary

- The courts, when applying pre-trial detention, should refer only to the actual (and not hypothetical) risk of obstruction of criminal proceedings.

- When invoking the risk of a severe penalty faced by the suspect, courts should examine the actual prospects of imposing such a penalty and consider this ground solely on the basis of the risk that the suspect will flee, go into hiding or otherwise unlawfully obstruct the proceedings.

- Pre-trial detention orders should be more in line with the requirements of the Code. All such orders should refer to the possibility of properly ensuring the proper conduct of proceedings in a proper manner and analyse whether there are negative grounds for the application of pre-trial detention in the case.

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