Court Watch Poland Foundation

Current practice of applying pre-trial detention in Poland.

Report from empirical research

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Constitution of the Republic of Poland, art. 41:

1. Everyone is guaranteed personal inviolability and personal freedom. Deprivation or restriction of liberty may occur only on the terms and in the manner specified in the Act.

2. Everyone detained not on the basis of a court judgment has the right to appeal to a court in order to immediately determine the legality of this detainment. The detainment is immediately reported to the family or a person indicated by the detainee.

3. Everyone detained should be immediately and in a way understandable to them informed about the reasons for their detention. They should be brought before the court within 48 hours of their detainment. The detainee should be released if, within 24 hours of being brought before the court, he or she is not served with the court's decision on pre-trial detention with the charges presented.

4. Everyone held in custody should be treated in a humane manner.

5. Anyone unlawfully detained has the right to compensation.

Use of pre-trial detention. Why is that important?

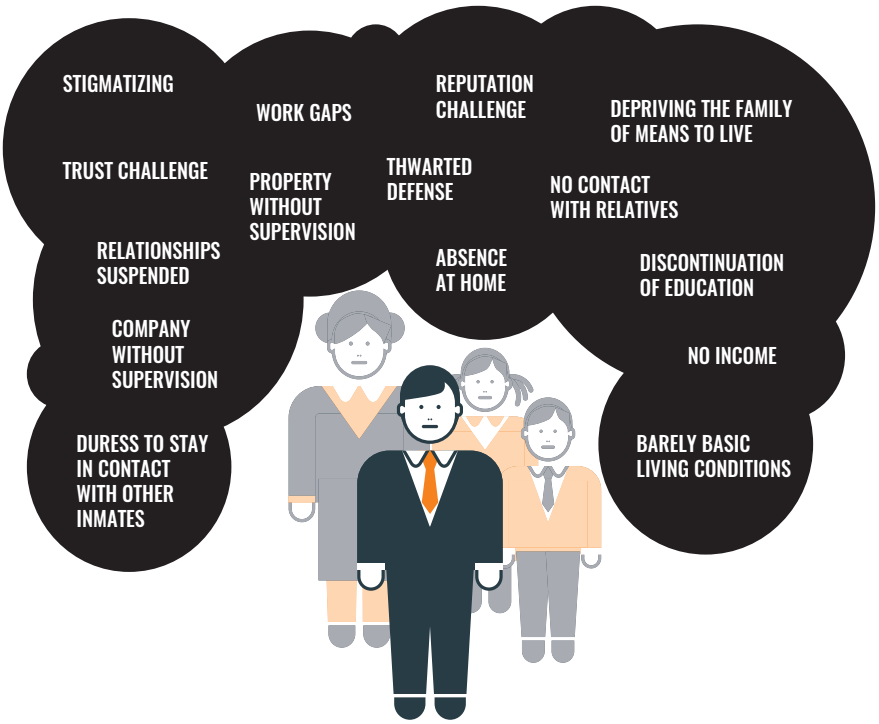
Each of us has the right to freedom. However, there are exceptional situations in which personal freedom can be restricted or taken away from us. One of these exceptions is pre-trial detention. It is a preventive measure established to safeguard a proper conduct of preparatory or judicial proceedings. Both the law in force in Poland and the jurisprudence of Polish and European courts indicate that pre-trial detention should be used as a last resort only in situations where it is not possible to secure the pending criminal proceedings otherwise than by depriving the accused[1] freedom. People whose guilt has not yet been proven face the inconvenience associated with pre-trial detention. Since pre-trial detention is subject to very strict rules, this preventive measure may in practice prove even more severe than the imprisonment that the accused potentially faces.

The application of pre-trial detention affects not only the person subjected to this measure, but also his/her immediate surroundings. Social consequences of detainment - is borne, first of all, by the family of the accused, especially their children. There are also economic consequences because a detained person cannot perform his/her duties as an employee, debtor or entrepreneur. The consequence of prolonged detention may be the fading of social, economic and even personal ties. The accused is not the only one who suffers, but also all persons isolated from him, with whom he or she has any ties. Even short-term deprivation of liberty by the judiciary, e.g. pre-trial detention lifted after a few weeks as a result of a complaint, can undoubtedly leave a mark on the psyche of the person subjected to this preventive measure, and also damage his/her good name.

One of the most important consequences associated with the detention itself and the submission of a request for pre-trial detention is the limitation of the option to defend oneself. Pre-trial detention means the deprivation of liberty for a person who has not yet been proven guilty. Therefore, the deprivation of liberty, which goes beyond the 48 hour detention period, is decided by an independent court.

1 When we use the term defendant in our report, we also mean suspects, i.e. persons charged with an offence, but not yet indicted. We do this because the provisions of the CCP will equalize the procedural rights of these people in the event of pre-trial detention (Article 71 § 3 of the CCP). In addition, in our data corps all persons subjected to pre-trial detention were finally charged.

Pre-trial detention application consequences



OVER 3.5K PLN PER PERSON
costs of pre-trial detention for the state budget

Constitution of the Republic of Poland, Article 47:
Everyone has the right to the legal protection of private and family life, honor and reputation, and to decide on their personal lives.

The most important conclusions

1. We know from the rulings of the European Court of Human Rights that the Polish state has sometimes broken the standards of applying pre-trial detention. The survey conducted by the Court Watch Polska Foundation shows that these are not individual cases. Data obtained on a random sample of 310 cases of this preventive measure show that some of the irregularities identified by the Court are widely duplicated by Polish courts, and thus constitute evidence that we are dealing with a systemic problem in our country.
2. Analysis of the collected data leads to the conclusion that in Poland pre-trial detention plays in practice a role of a default and not final preventive measure. Most judges, instead of reaching for them after considering alternatives such as bail, police custody or passport impounding, seem to start their analysis with the belief that the prosecutor's request for pre-trial detention alone generates a presumption of the need for this preventive measure.

3. Most of the decisions on pre-trial detention are justified only seemingly. It meets formal requirements, but does not include an analysis of the actual grounds for the application of pre-trial detention, nor the circumstances determining whether deprivation of the accused's freedom at this stage of criminal proceedings is necessary.

4. Pre-trial detention in the vast majority of cases examined was used throughout the criminal proceedings. The courts hardly check whether the grounds for the necessity of an isolation measure remain at later stages of the proceedings and commonly approach the pace of law enforcement activities uncritically, valuing the „good of the investigation" over the right to personal freedom.

5. There are a number of recommendations that can be implemented to improve the pre-trial detention practice. However, the most depends on people who, in accordance with international standards and the Polish Constitution, have the sole right to decide on deprivation of liberty, i.e. judges. Critical analysis of applications submitted by prosecutors and exhaustive justification of decisions is a condition that in Poland pre-trial detention should be used only in necessary cases.

A detailed discussion of the research results and the justification of the conclusions derived from them is provided in the In-depth Report, which is available online at: courtwatch.pl/TA

Recommendations

The following recommendations are inspired in many cases by solutions successfully used in other European countries. Others result from the specifics of the social context and tradition of the practice of applying pre-trial detention in Poland. Each of the recommendations can be implemented and can bring benefits regardless of the others. The most important, however, is the first recommendation, whose implementation is not dependent on any changes in law or actions of the executive. This is a recommendation addressed to judges

whom the Constitution of the Republic of Poland entrusted with the exclusive right to decide when in practice we may be deprived of liberty.

1. **Reliable analysis of the applications and comprehensive justification of the provisions** by the judges is a condition that this measure is applied as a last resort and that human rights are realistically protected against abuse of power. The court may not apply this preventive measure arbitrarily. It must justify such far-reaching interference with human rights. Exhaustive justification is also a condition of real instance control. Last but not least fairness in the assessment of the request and the justification of the judgment legitimizes the decision of the court in the eyes of the accused and public opinion, thereby building confidence in the fact that in Poland the right to personal freedom and the presumption of innocence are respected.

2. **The presence of a defender at the first procedural steps** should be guaranteed not only formally but also practically. When we give the suspect information about his rights and obligations, we completely ignore the question of whether he or she actually understood the instruction - the presence of a lawyer would certainly facilitate this task, and would also guarantee the proper exercise of the right of defense from the first action in the case. In order to ensure this right in practice, the introduction of a full-time defense service organized by law authorities should be considered.

3. **Shortening the maximum length of pre-trial detention which the prosecutor may apply for on single occassion** (in particular in the case of an application for pre-trial detention) will allow more frequent verification of the existence of grounds for applying and prolonging pre-trial detention. Consequently, the postulate of continuous examination of the circumstances of the case would be fulfilled, thereby reducing the risk of abuse of this preventive measure.

4. **Change of name to preventive isolation** with a purpose of better reflection of the purpose for which this measure is used and to distinguish it from imprisonment. The current name of pre-trial detention is misleading. Such a change should be made, first and foremost, in order to build a long-term social understanding of the different function of pre-trial detention from detention and in order to destigmatize those detained before trial in the eyes of

both society and the judiciary.

5. **Electronic tagging system** (ETS) should be introduced as an optional reinforcement of the preventive measure which is police supervision (Article 275 of the CCP). The ETS is a less costly alternative to society and the accused comparing to being held at a pre-trial detention centre. It allows him or her to continue to play social roles in the family and at work, ensure their and their dependents' livelihood, and at the same time it hinders escape or hiding, as well as unlawful influence on the investigation. ETS could also serve to increase the safety of victims with whom the accused lived, in the event that the pre-trial detention was withdrawn, provided he or she left the premises.

6. **Flat-rate compensation for unjustified pre-trial detention** set at a decent level, expressing the state's respect for the citizens' right to personal freedom, should be paid ex officio to all persons who have been cleared of the charges. Last year, 103 people who were in pre-trial detention were legally acquitted. For a person who has not committed a crime, the necessity to seek compensation is humiliating. Making a claim for compensation higher than the flat rate should be a right, not a necessity.

7. **Default adjudication of a property bond within the meaning of the old classic bail concept** due to society growing rich. More and more people have material goods the loss of which would be a significant ailment. Property bond should be one of the first preventive measures considered by the authorities conducting the proceedings. However, if the court decides to pursue pre-trial detention, e.g. because of fear of escape, it should always (and not exceptionally) give the accused the an option to leave the detention center after an adequate property bond (as a manifestation of the concept of bail). This would be an additional opportunity for practical implementation of Strasbourg standards, according to which it is necessary to ensure that the court considers alternatives to the use of pre-trial detention.

8. **Mediation** in the scope of the preventive measure applied, will allow to take into account the needs of victims. Thanks to mediation, it would be easier to determine such a form of securing the trial that will be the least inconvenient for the accused (who, mind you, at this stage is innocent), but at the same time will secure the correct course of proceedings (including the sense of security of any victim).

Recommendations of Court Watch Poland Foundation

Reliable analysis of requests and thorough decision justifications

Presence of defense counsel from the first procedural activities

Cutting down on the maximum pre-trial detention length a prosecutor can request on a single-case basis

Change of name of pre-trial detention

Electronic tagging

Flat-rate compensation for groundless pre-trial detention

Default adjudication of property bond

Mediation

Time to familiarize oneself with the request

Risk assessment algorithm

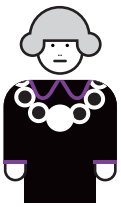
9. **Time to review the request** for pre-trial detention should be guaranteed not only formally but also practically. The prosecutor should be required to submit a request for pre-trial detention and two copies of the file of evidence on which he or she relies, 24 hours before the detainee is brought before the court. This would make getting familiar with the request and evidence more realistic by both the court and the defendant and his/her lawyer. This makes the right to counsel real and a fair assessment of the request by the court.

10. **Risk assessment algorithms** of escaping or obstructing the investigation serve in many jurisdictions as a hint for a judge in the selection of preventive measures or as a basis for determining the amount of effective property bond. Initially, judeges might be offered a checklist with the characteristics of the accused to which attention should be paid. In the future, based on empirical data on the behavior of people with certain characteristics (demographic, economic, social), an algorithm may be created that estimates the level of risk of obstruction by persons with specific characteristics.

What does the pre-trial detention application proceedure look like?

Since the entry into force of the Constitution of the Republic of Poland and the new Code of Criminal Procedure of 1997, detention for more than 48 hours may take place only on the basis of a court order. This is a very important guarantee for detainees.

When the prosecutor requests pre-trial detention of the defendant (ART. 250 §2 of the CCP)

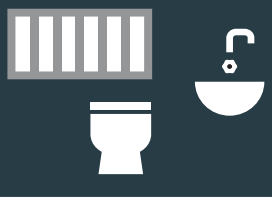


District Court can apply pre-trial detention (ART. 250 §1 of the CCP)

to secure the flow of penal procedure

or

so, as the defendant could not commit a new, heavy crime



PRE-TRIAL DETENTION

is solely for securing penal procedure, not for meting out primitive punishment for the defendant (ART. 249 §1 of the CCP)

Pre-trial detention can be applied when (ART. 258 of the CCP):

The suspect is subject to at least 8 years of imprisonment

Or there is a justified fear that the suspect will:

run away or hide

illegally impede penal procedure

commit a new, serious crime

Pre-trial detention CANNOT be applied when (ART. 257 of the CCP):

It would bring about serious threat to life or health of the defendant.

It would involve exceptionally heavy consequences for the suspect or his/her immediate family.

The suspect faces imprisonment shorter than 1 year.

The court can be predicted to adjudicate the following:

- suspended imprisonment
- punishment milder than pre-trial imprisonment
- punishment milder than imprison

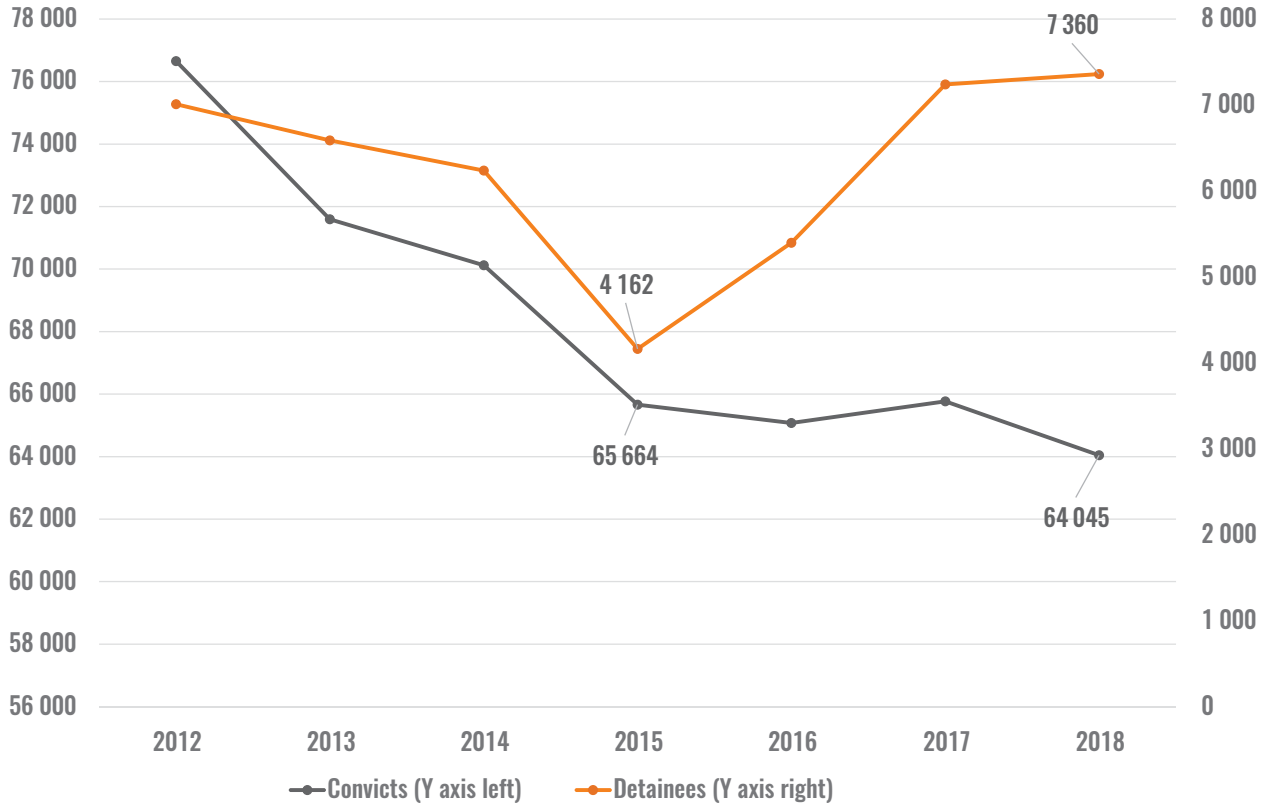
*CODE OF PENAL PROCEDURE

Practice of using pre-trial detention in numbers

For the last couple of years, the number of people held in detention centres has been increasing. This trend is in contradiction with both widespread efforts in the world to limit the frequency and length of isolation preventive measures, as well as crime falling in Poland for years.

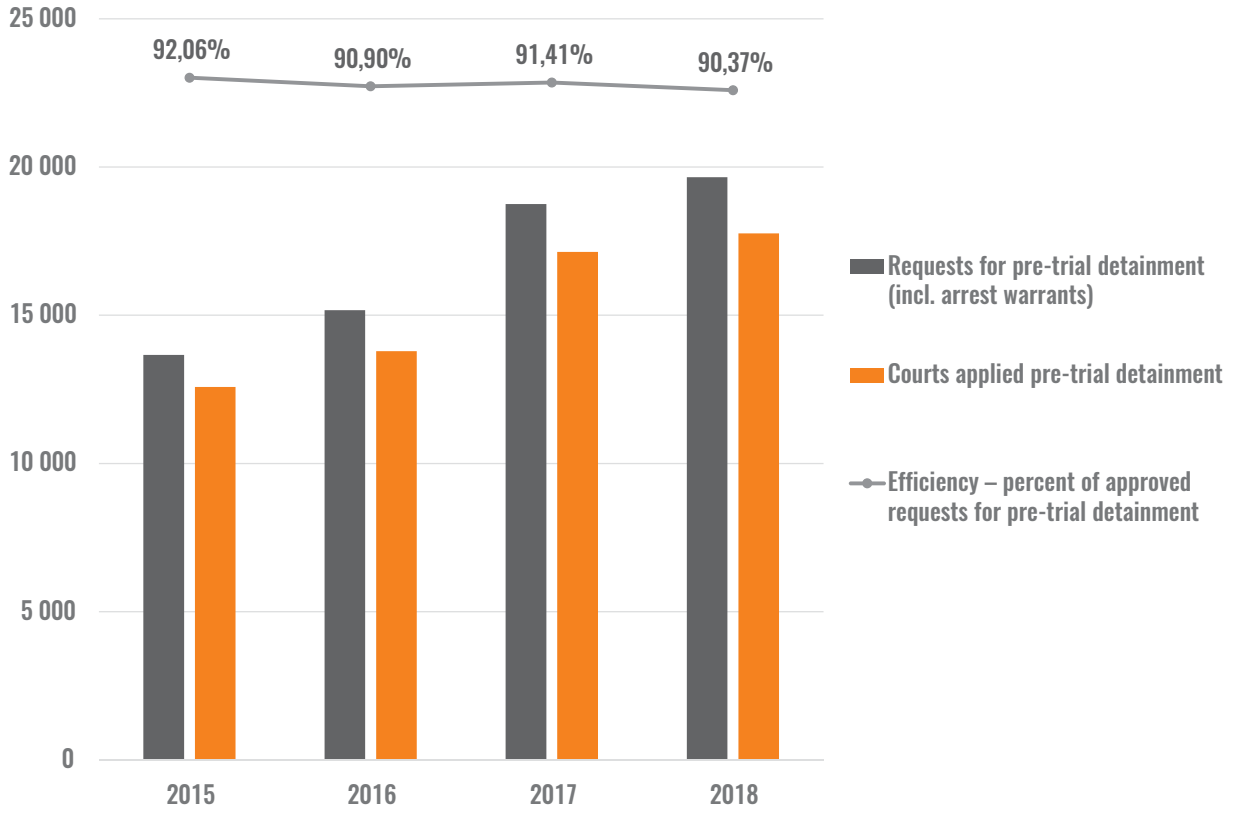
Although the number of prisoners had been decreasing until 2015, in the case of those detained on remand, the trend reversed. From the end of 2015 to the end of 2018, the number of prisoners in Polish detention centers grew by 3198. At the same time, the number of people serving imprisonment after sentence dropped by 1619. By the end of October 2019, the number of people in detention increased even more - by whopping 8,617, and is twice as high as 4 years earlier.

Chart 1. Number of inmates in correctional facilities (at the end of the year).



Source: own study based on data from the Prison Service

Chart 2. Number of requests for pre-trial detention submitted by prosecutors and approved by courts.



Source: own study based on the data of the National Prosecutor's Office

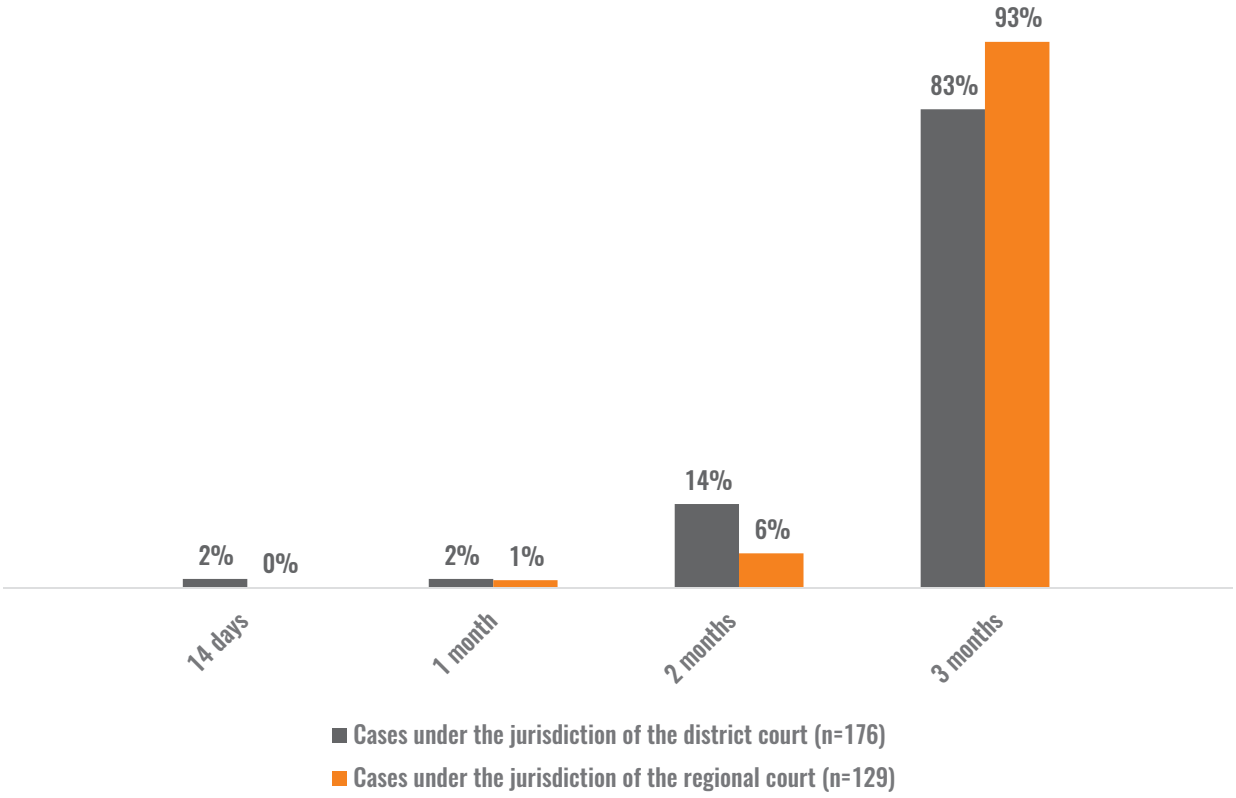
Effectiveness of requests for pre-trial detention

Despite the steady increase in the number of requests, district courts agree to the use of pre-trial detention just as often. Invariably, 90% of prosecutor's requests for detention are approved by the courts. Every year, regional courts also take into account a similar percentage (approx. 25%) of prosecutors' appeals against decisions to refuse detention. In 2015, 78 such appeals were taken into account, and in 2018 the decision of the first instance court was amended as a result of the prosecutor's complaint as many as 183 times. In the event of a prolongation of detention, the courts are even more in line with the prosecutors' requests, constantly approving 95% of them.

The applied lengths of pre-trial detention

Pre-trial detention may be adjudicated for a maximum period of three months. At the request of the prosecutor, it may be extended by the court - during the preliminary proceedings, each time by a maximum of 3 months. The courts agree with

Chart 3. Share of adjudications of varying length of pre-trial detainment in the case of the first decision in the preliminary procedure[2]



Source: own study based on research of a sample of criminal files from 2016-2018

prosecutors regarding the length of pre-trial detention to be imposed. Only in two district courts we have encountered cases of applying a longer period than requested. This is hardly surprising, given that in the vast majority of cases prosecutors request a maximum three-month detention period.

Courts follow these conclusions in the vast majority of cases. Only in 4% of cases in which the indictment went to the district court and in 13% of cases in which the indictment went to the district court, the court by ruling on the detention decided to make its time shorter than requested by the prosecutor.

As a result, although formally the courts are responsible for the detention, in fact the number of prisoners is determined by the guidelines of the Public Prosecutor General and the assessment of

2 Despite the fact that the maximum time for which a preliminary detention order may be issued in pre-trial proceedings is 3 months, we have encountered one case in which the court decided to extend pre-trial detention for 4 months. It was done.

investigators in which cases to request isolation measures and in which not. Even with such a rapid increase in the number of people who, according to the Public Prosecution Service, should be deprived of the liberty we have seen in recent years, the courts followed the prosecutors' arguments as often as when prosecutors were of the opinion that proceedings could lead to deprivation of liberty by half fewer people than at present. The analysis of statistical data therefore supports the conclusion of the file analysis that judges, when examining applications for detention, tend to trust prosecutors in their assessments. They seem to forget or accept the fact that in the case of prosecutors, assessments of the legitimacy of using an isolation measure are determined not only by the analysis of the individual case, but also by the guidelines of the Public Prosecutor General[3].

When the pre-trial detention ends

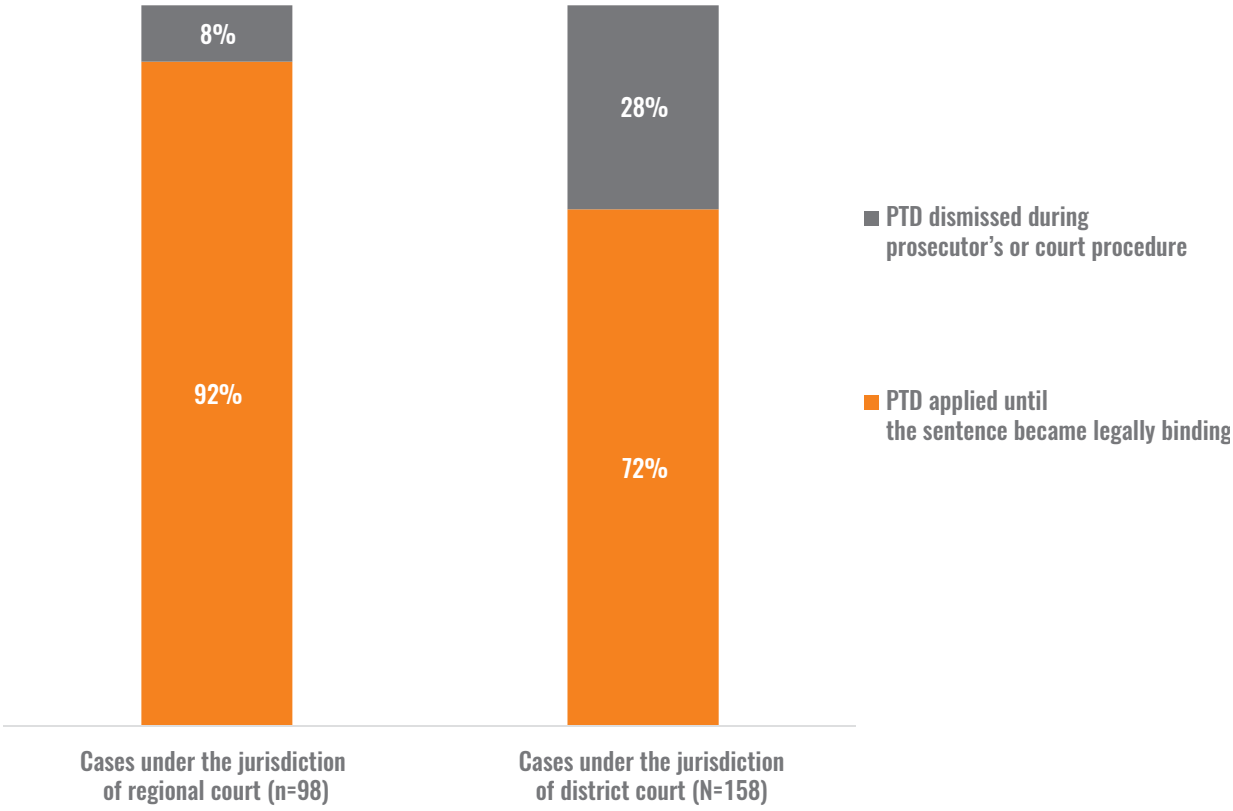
An important conclusion from the study is also that detention in most cases is used not only throughout the prosecutor's proceedings, but also in court proceedings. It had been very rare for a pre-trial detention to be lifted or replaced by other preventive measures before a final judgment was passed. In several percent of cases pending before a regional court and in every fifth detention case pending before a district court, the release of detention was related to the cessation of the conditions for isolation. We found the release of pre-trial detention due to the dismissal of the case less frequent than 1 in 100 cases of pre-trial detention. In cases in which the indictment was filed with the district court, in every 20 cases the detention was lifted in connection with the application of one of the consensual procedures for ending the case.

Duration of pre-trial detention

The average total duration of pre-trial detention is not reported in Poland. Official statistics only inform about the number of people in detention for a certain period. The average time of pre-trial detention ongoing until the end of court proceedings by a final judgment, which results from

3 An example of this may be the „Guidelines of the Public Prosecutor General of 22 Feb 2016 regarding the rules of conduct of common organizational units of the Public Prosecution Service in the prevention of domestic violence", in which temporary detention seems to be treated as a default measure, and other precautions should be considered only if it cannot be used: „In every case against a suspected offender related to domestic violence, in the absence of reasons to request a precautionary measure in the form of pre-trial detention, the appropriateness of applying the preventive measure set out in Article 275a of the CCP should be considered."

Chart 4. Share of cases in which pre-trial detention was applied until the sentence became binding (exclusively for cases that were legally finalized by the first half of 2019)

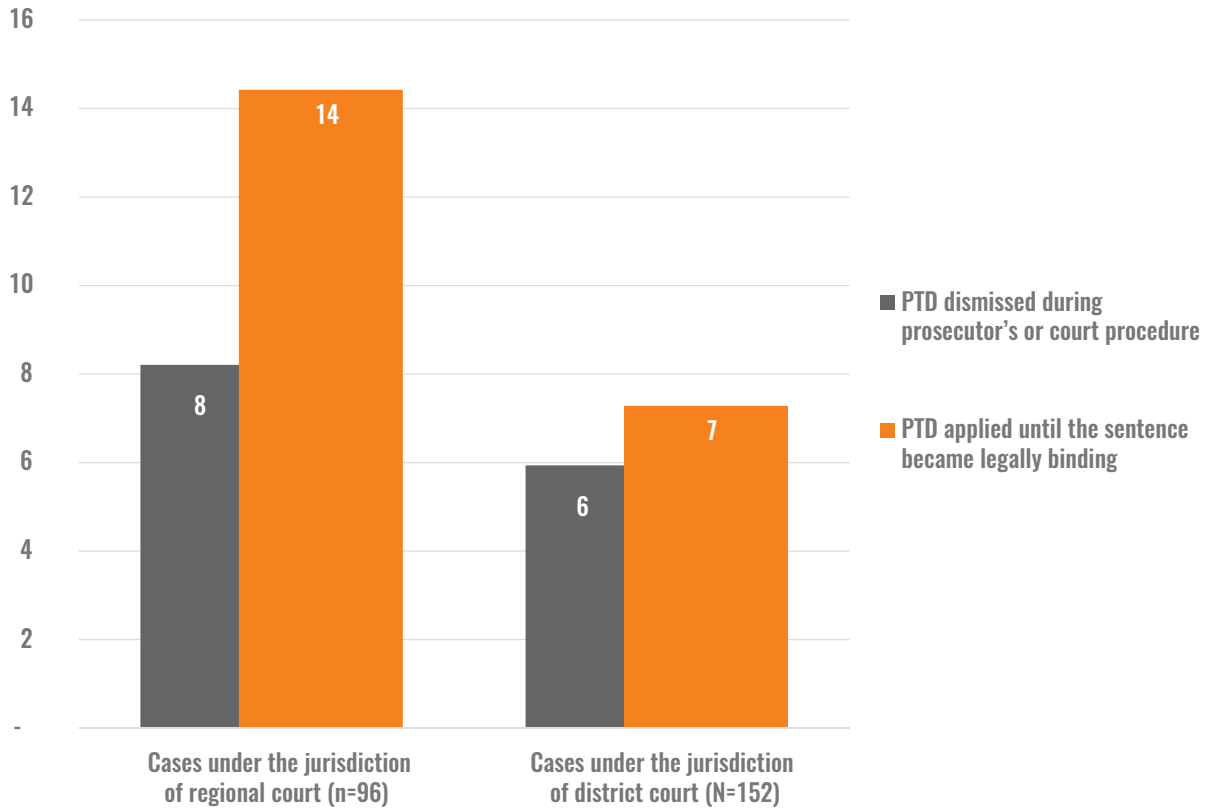


Source: own study based on research of a sample of criminal files from 2016-2018

the analysis of the files made available to us, is 439 days for cases that are pending before regional courts and 223 days for cases which are pending before district courts. The longest waiting time in custody for a final and binding judgment, which we examined was 43 months (over 3 years). However, we did not have access to cases that were still ongoing in mid-2019. It can therefore be presumed that, in fact, the average length of pre-trial detention may be longer in Poland and has certainly increased in recent years. There are about half a thousand people who have been currently in detention in Poland for over a year (487 people by the end of 2018). Although only two years earlier there were only 151.

Based on international data, we know that a higher level of quality of justice correlates with lower average detention times. According to the latest edition of the World Justice Project survey, Poland ranks 17 out of 24 European and North American countries surveyed with a score of 0.61 on a scale of 0 (worst) to 1 (ideal). According

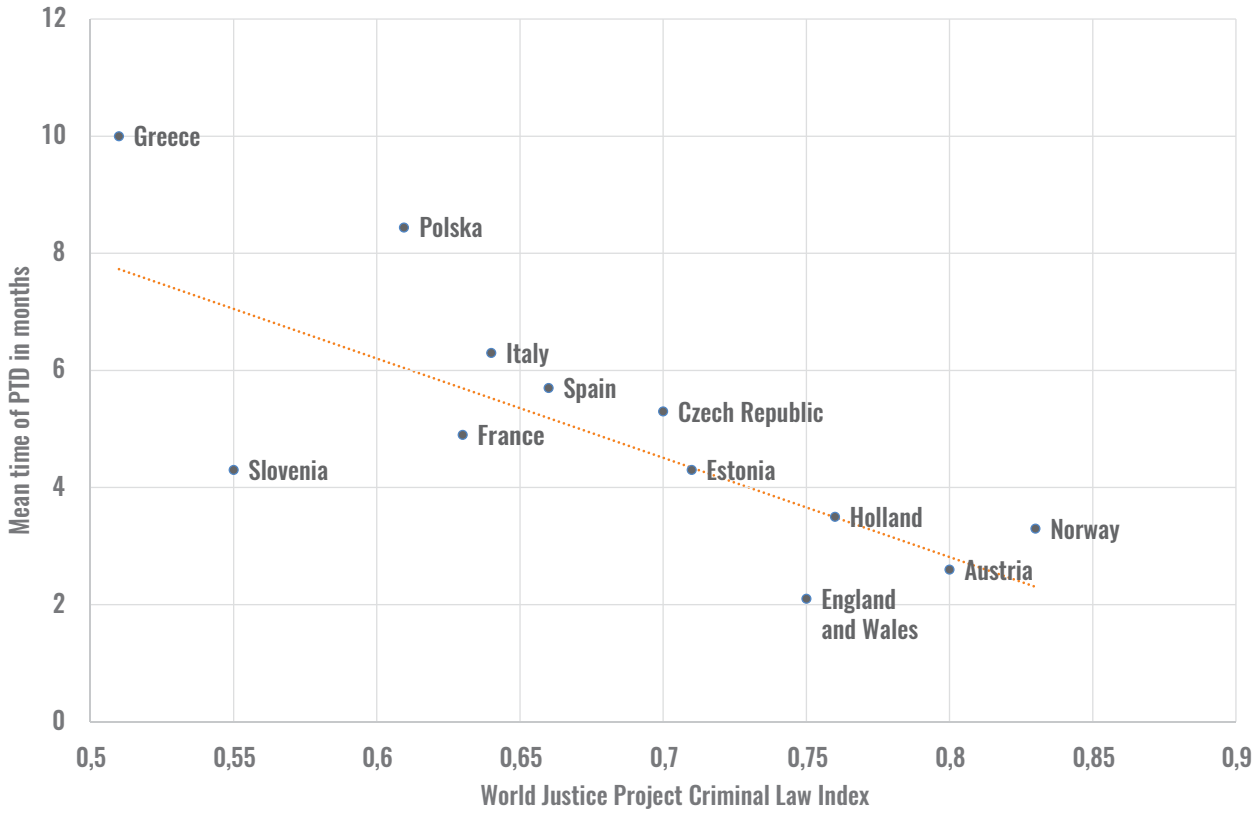
Chart 5. Mean length of pre-trial detention until first instance court sentence was issued in months (exclusively for cases that were legally finalized by the first half of 2019)



Source: own study based on research of a sample of criminal files from 2016-2018

to this research, Northern European countries are role models, where we also observe the shortest periods of pre-trial detention and the lowest rates of criminal cases in which this preventive measure was used.

Chart 6. Mean time of pre-trial detainment vs. the value of World Justice Project 2019 justice index in European countries where data is available



Source: own study based on World Justice Project 2019 and Council of Europe data (SPACE I 2018)

Justification for the application of pre-trial detention

Under the Polish criminal procedure, the issue of justification of detention orders has been regulated in Article 251 § 3 of the CCP. According to its content: „Justification of the decision on the application of preventive measures should include the presentation of evidence of the offense being committed by the accused, an indication of the circumstances indicating the existence of threats to the proper course of the proceedings or the possibility of the defendant committing a new, serious offense in the event of failure to apply preventive measures and the specific basis for its application and the need for application of a given measure. In the event of pre-trial detention, it should also be explained why it was not considered sufficient to apply another preventive measure.

Since deprivation of liberty is the most drastic form of interference with a life of an individual available to state authority, and pre-trial detention exceeds the ailment of imprisonment, meticulous justification for each detention order should be required. Otherwise, there is a risk that pre-trial detentions will be used lightly, neglecting the consideration of constitutional goods. The lack of justification in which the court presents the course of its inference, as a result of which it decided to resort to the most severe preventive measure, in practice prevents defense. How can you challenge a decision whose reasons are not fully known to us?

The court is obliged to explain to the parties and the public why it took such a partial decision, which is a prerequisite for the application of pre-trial detention. The duty of the court is not only to determine that in a given situation, for instance, trickery may occur, but also to explain why, in its opinion, such fear takes place.

When deciding whether to apply pre-trial detention, the court should first explain:

ECtHR: Arguments in favor of detention should include references to detailed facts and personal circumstances regarding the suspect and justifying detention (Aleksanyan v. Russia, § 179)

- what evidence and why does it indicate a high probability of an offense being committed by the accused (Article 249 § 1 of the CCP) and
- why other preventive measures do not suffice (Article 257 § 1 of the CCP).

If the court has adopted one of the special conditions as the basis for pre-trial detention, it should also explain:

- why it is afraid that the accused is going to run away or hide (Article 258 § 1 point 1 of the CCP); or/and
- why it is afraid that the accused will resort to trickery, i.e. hide evidence, urge others to conceal the truth (Article 258 § 1 item 2 of the CCP).

If it invokes a provision allowing pre-trial detention for fear of committing an offense against life, health or public security again, it should justify:

- why the fear that the accused will commit such an offense is real (Article 258 § 3 of the CCP).

If the court invokes a provision allowing pre-trial detention as the accused is in serious danger, it should explain:

- why it is reasonable to suppose that the accused faces a high penalty (Article 258 § 2 of the CCP).

Otherwise, the court should explain why, in its opinion, one of the negative conditions does not apply, namely:

- why in a given case it is reasonable to suppose that the court will impose a prison sentence longer than the time the accused is to spend while being detained on remand (art. 259 § 2 of the CCP) and
- whether the deprivation of the accused would not cause a serious danger to his/her life or health, or would not result in extremely severe consequences for the accused or his/her immediate family (Article 259 § 1 of the CCP).

However, if the pre-trial detention is extended, the court should explain:

- what special circumstances prevent the preparatory proceedings from being completed within 3 months (Article 263 § 3 of the CCP).

Functions of the justification for the pre-trial detention

First of all, the justification is actually the only evidence that the court has considered the case - and therefore took into account all the circumstances of the case, taking into account both the circumstances against the accused and in his/her favor. The lack of proper justification may indicate that the court did not carry out an independent assessment of the circumstances of the case, but in its decision took the position of the prosecutor. Therefore, scrupulous justification for each provision should be required and these justifications should be monitored – which this study is a manifestation of. Otherwise, there is a risk that pre-trial detentions will be used lightly, neglecting the consideration of constitutional goods.

Secondly, the justification of the detention order allows you to follow the court's inference. The decision on deprivation of liberty ceases to be arbitrary and intuitive, and gains the value of rationality. This, in turn, legitimizes the court's decision in the eyes of the accused and the public, but is also a condition for constructive polemics in the context of an appeal.

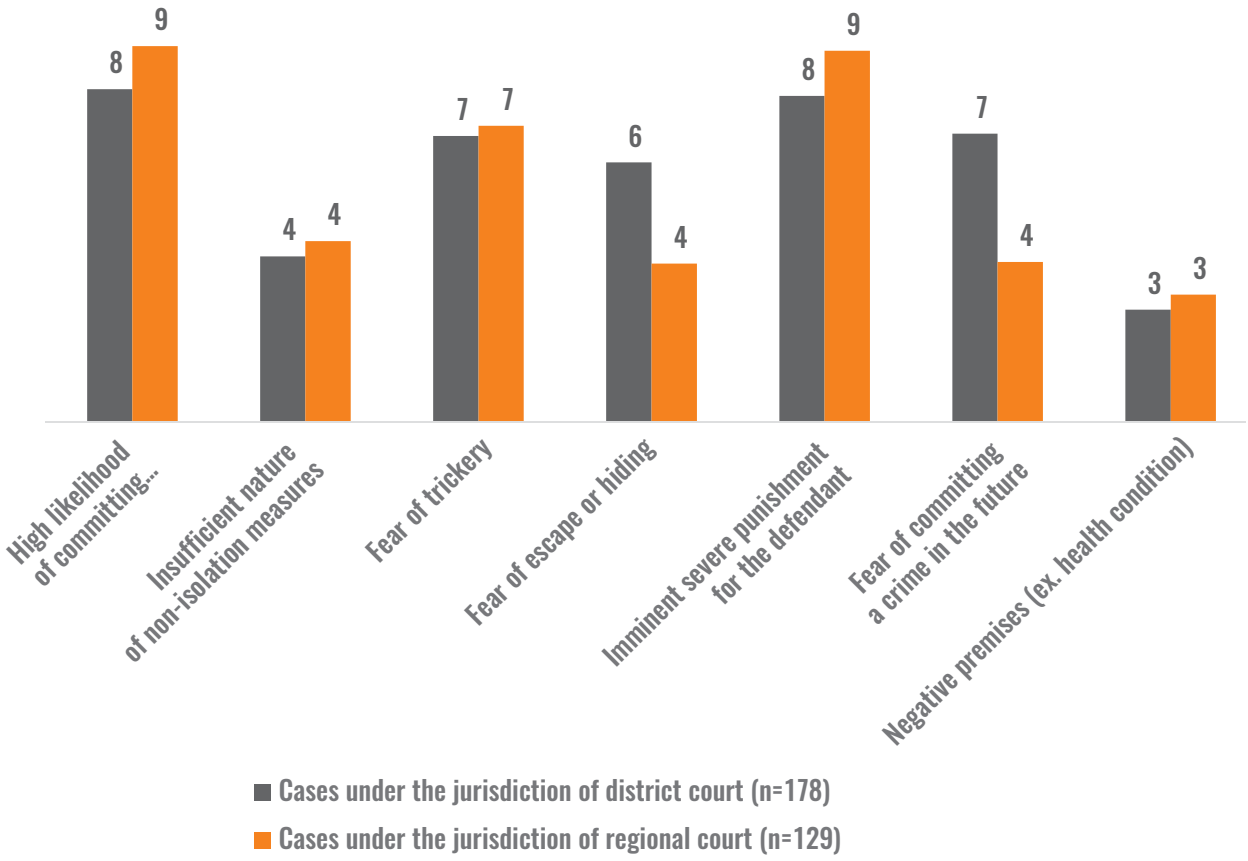
Why do people in Poland end up in detention centers?

Our research shows that the practice of applying pre-trial detention does not meet the expectations arising from laws, standards and social studies. That is why it is not easy to answer - both in an individual case - and in general why people in Poland go to detention centers. It would be different if the provisions on pre-trial detention were duly substantiated. In most cases, we are dealing with the grounds required by law, allowing the use of pre-trial detention, supplemented by the laconic justification for their occurrence. One can get the impression that the courts commonly assume their existence. This is indicated even by the average length of justifications regarding the occurrence of positive

prerequisites. On average, these justifications take between 4 and 9 lines of text. This is even more striking when we read the justifications for the absence of negative premises, which take on average 3 or 4 lines.

ECtHR: The failure to state reasons in the detention orders is one of the elements taken into account by the Court when assessing the lawfulness of a deprivation of liberty within the meaning of Article 5 § 1 section 1 ECHR. (Stašaitis v. Lithuania, §§ 66-67)

Chart 7. Mean length of justifications related to particular premises to apply pre-trial detention



Source: own study based on the case file of criminal cases from 2016-2018

Prerequisite 1. High probability of committing the alleged crime (Article 249 § 1 of the CCP).

The analysis of the files led to the conclusion that the courts usually only mention evidence of an offense committed by the accused, without analyzing them at all. A rare good practice is to indicate the number of file cards with the content of evidence, which significantly facilitates both the understanding of the grounds on which the court based its decision, and in particular referring to them under the defendant's right of defense. Although we know from individual interviews about cases where the court referred to pages of files, pointing to non-existent evidence.

The exceptions included justifications, from which one could learn not only about the evidence taken, but also about how the court assessed it.

It should be noted, however, that both the pleading guilty or not guilty have actually always worked to the detriment of the accused. In the first case, the court referred to pleading guilty, arguing that it speaks in favor of a preventive measure because it indicates a high probability of committing a crime. In the second case, the pleading not guilty also spoke in favor of detention, because according to the courts, it meant the risk of trickery.

ECtHR: „Justified suspicion" of committing a criminal offense presupposes the existence of facts or information that would convince an objective observer that the person may have committed the offense (Erdagöz v. Turkey, § 51; Fox, Campbell and Hartley v. The United Kingdom, § 32)

Prerequisite 2. Exclusion of other preventive measures (Article 257 § 1 of the CCP).

Article 257 § 1 of the CCP clearly prohibits pre-trial detention if another preventive measure is sufficient. We are dealing here with a kind of presumption that there is no need for pre-trial detention, which must be refuted during the trial.

However, the arguments in most decisions boil down to the conclusion that the application of other measures is insufficient. It happened that by referring to Article 257 § 1 of the CCP, its logic was directly reversed, as if the use of non-custodial measures, and not pre-trial detention, should be justified:

Alternatives to detention

ECtHR: Authorities should consider the possibility of applying less severe preventive measures than deprivation of liberty (Ambruszkiewicz v. Poland, § 32)

„the isolation preventive measure in the present case should be applied, because there are no premises for the use of non-custodial measures" (RC Otwock II K 154/18).

The exceptions were those cases where the main premise for the use of pre-trial detention was the threat of a new crime against a relative or the need to isolate accomplices (RC Szczecin-Pr. Zach VK 362/18) – the need for pre-trial detention arose there because of the lack of other possibilities to isolate the accused from specific people (RC Stargard II K 78/18). It is possible that judges believe that measures such as an eviction order or police supervision are not safe enough for victims. Perhaps closer cooperation with the police or the introduction of electronic supervision would allow achieving similar goals without placing the accused in pre-trial detention center.

Prerequisite 3. Fear of escaping or hiding (Article 258 § 1 point 1 of the CCP)

Fear of escape was cited as the basis for the use of pre-trial detention in 86 cases out of 200 analyzed in detail. Of these, in 55 cases the courts did not carry out any risk assessment at all, citing only the existence of a given circumstance. When assessing the risk of escaping or hiding, the courts have never actually pointed out those circumstances that could reduce such risk. Even where the content of the justification indicates that the accused has a family, permanent residence, etc., these circumstances (reducing the risk, and thus acting in a way to the benefit of the accused) are not taken into account when assessing the risk of escape.

ECtHR: The risk of escape should be assessed „in the light of factors related to the person's character, morality, home, work, property, family relationships and any relationship with the country in which the proceedings were initiated" (Becciev v. Moldova, § 58)

Prerequisite 4. Fear of trickery (Article 258 § 1 point 2 of the CCP)

Trickery is to be understood as incitement to give false testimonies or explanations or obstructing criminal proceedings in another unlawful manner. Trickery can also include destroying or hiding material evidence, intimidating witnesses or creating false evidence to hide clues.

The fear of trickery cannot be presumed alone from the very high probability of committing a crime. Its risk should be assessed.

It is particularly worrying to justify the fear of trickery with not admitting one's guilt. This violates the fundamental principles of the right to counsel. At the same time, pleading guilty was rarely treated as an argument against the fear of trickery. As indicated above - the courts considered it rather a prerequisite proving a high degree of probability from Article 249 of the CCP. The decision of the RC in Tczew (II K 117/16) indicated that the accused was pleaded partly guilty, which was at the same time an argument for a high probability of committing the act and for trickery.

The fear of trickery in the vast majority of cases (98%) was associated with the pressure to exert pressure on witnesses or co-defendants. Nevertheless, the judges indicated the necessity of questioning further witnesses only in every fourth decision, and only every tenth decision mentioned specific persons or even their number. The jurisprudence of the ECtHR clearly indicates that the fear of trickery is subject to becoming obsolete (see, e.g., Jarzynski v. Poland, § 43; Clooth v. Belgium, § 44). When evidence is secured in the course of the proceedings and the testimonies of subsequent witnesses are collected, the possibility of obstructing the proceedings wanes. Therefore, it is important that the courts referring to this prerequisite indicate precisely which investigative activities are to be secured by pre-trial detention.

ECtHR: The risk of the accused interfering with the proper course of the proceedings cannot be indicated in abstracto, but justified on the basis of factual evidence (Becciev v. Moldova, § 59)

We found a comprehensive analysis of the prerequisites for fear of trickery only in a decision issued against the prosecution's expectations. The conclusion is that in the practice of the courts, it is the authorities and not to the defendants who deserve fuller explanations of decisions on the application of pre-trial detention.

Prerequisite 5. Threat of severe punishment (art. 258 § 2 of the CCP)

The arguments regarding the sentence were usually of a very general nature in the cases examined. The following provision can serve as an example here, which only indicates that: „The defendant is liable for severe absolute imprisonment, and this kind of prediction does not result only from referring to the statutory threat framework, but from the specific factual circumstances of the case" (RC Zakopane II K 171/17). We do not find out what „specific circumstances", or why it would be in favor of considering this threat real.

Referring to the prerequisite of punishable offenses, the courts virtually never relied on directives of the judicial sentence, and thus on the circumstances that ultimately determine to a large extent the intensity of the judgment.

The analysis of circumstances affecting its intensity was selective and biased. It was somewhat standard to recall point arguments, which may prove its high intensity. The following were pointed out: prior criminal record, acting under the influence of alcohol (without explaining why such a circumstance would affect the increased punishment), crime committal qualifying as recidivism, hooligan nature of the act, perpetrating an offense of high social harm (without explanation what makes it highly harmful), common nature of committed crimes. More in-depth considerations regarding the sentence of punishment were rare.

ECHR: The risk of escape cannot be determined solely on the basis of the severity of the anticipated penalty. This risk should be assessed taking into account certain important factors that may confirm the existence of the danger of escape or indicate that it is so low that it cannot justify pre-trial detention (Panchenko v. Russia, § 106)

In half of the provisions referring to the high intensity of impending punishment, the courts identified the real threat of punishment with the statutory threat. The provision that can serve as example

here is as it was pointed out: „due to the legal qualification of the acts the accused is charged with, the prerequisite of Article 258 § 2 of the CCP is met." (RC Zakopane II K 260/17).

It is also worth remembering that, according to the ECtHR's adjudication, the severity of the applicable punishment should not automatically determine the use of detention. The impact it can have on the suspect's behavior in an individual situation should be considered. Unless other circumstances support it in a situation of low risk of escaping or obstructing the investigation, the threat of a intense penalty alone should not be a reason for deprivation of liberty.

Social context and consequences of current practice of pre-trial detention

Application of detention in Poland is based on a long tradition and history of this measure, as the most effective safeguard of the correctness of the course of criminal proceedings. Pre-trial detention excludes escape and direct contact with witnesses and other suspects, guarantees investigators and the court access to the defendant at any time. The pursuit of social functions of pre-trial detention that goes beyond the needs of the proceedings itself is also significant here. These include providing the public with a sense of security in the face of a threat that the defendant will commit a new crime and guarantee punishment. It materializes not only in the fact that while being in custody, the defendant cannot evade responsibility and punishment, but also because in the common sense pre-trial detention is (despite its official function) a stopgap penalty.

Contrary to the declarations of many judges, similar treatment of pre-trial detention is quite common. The conducted file research shows that, although they justify it with legal prerequisites, in most cases they treat the defendant's isolation as a matter of course, which does not require an in-depth analysis of the circumstances or comprehensive justification. Not surprisingly, since by judges' experience nearly 100% people against whom the prosecution files an indictment are found guilty. If the judge anticipates the defendant's guilt, his/her detention may not seem like an interference with his/her rights, since he/she will still be sentenced to imprisonment, to which

the time spent in detention will simply be added.

As a result of this tradition, the right to personal freedom in Poland loses with the „good conduct" and the presumption of innocence with cognitive errors and the theory of probability („since 98% of people[4], who the prosecutor puts before my face turns out to be guilty, the next defendant is also probably guilty").

Such disregard for the right to personal freedom and respect for private, family, honor and good name does not hurt only those who are detained on remand, all the more wrongly. It is also a very negative signal for all citizens that if they face an accusation from the Public Prosecution Service, they cannot in practice count on the presumption of innocence, taking into account their previous lawful life, family situation, or the will to cooperate with law enforcement agencies and court. It is an awareness that takes away confidence in the justice system, a sense of security and a practical sense of dignity.

4 In 2018, only 1.86% defendants were lawfully acquitted. Source: Report on the activities of common organizational units of the Public Prosecution Service in criminal cases for 2018

Description of the survey and thanks

This report is a collection of the most important conclusions and recommendations from the study that the Court Watch Poland Foundation conducted in 2019 on the practice of applying pre-trial detention in Poland in recent years. The case study included a stratified random sample of 310 cases of pre-trial detention. We examined both cases that were finally heard in the first instance district and regional courts. We made photocopies of 200 decisions issued at the pre-trial stage, which we subjected to thorough qualitative analysis. We also analyzed all cases made available to us in terms of quantitative indicators, collecting a database of over 50,000 data.

Until now, no one has tackled in Poland such a large, nationwide sample of proceedings in which pre-trial detention has been used. It was possible thanks to a huge commitment of the research coordinator - Zofia Branicka and the team helping her colleagues. The vast majority of them have proven themselves as volunteers - observers of hearings under the Foundation's largest research program - Civic Monitoring of Courts. Bogna Kociołowicz-Wiśniewska and Bartosz Pilitowski helped them to analyze the data. He was also responsible for preparing the report with recommendations and the most important results of the study, which you are holding in your hands.

We also invited experts, lawyers dealing with the issues we study to cooperate with us. Qualitative analysis of applications and court decisions on the application of pre-trial detention was carried out by Dr. Dominik Zając and Jolanta Kajfasz, associated with the Department of Criminal Law of the Jagiellonian University. Comparison of statistics and models of the use of pre-trial detention in Poland with selected European countries was made by counsel Jakub Michalski, PhD. In this task, the help of DLA Piper lawyers, who along with colleagues from other European offices of the firm, could not be overestimated. They verified pro bono the validity of the legal status described by us in Germany, the Czech Republic, Austria, Finland, France, the Netherlands as well as England and Wales. Thanks are also due to presidents and employees of courts, who made it possible for us to access files, as well as to those who agreed to be anonymously interviewed, sharing their knowledge and experience.

Carrying out such an extensive study would not have been possible without

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The English version of the report and the in-depth research report are available online:
www.courtwatch.pl/TA

Court Watch Poland Foudation is a not-for-profit organization supporting positive changes in the Polish system of justice through citizen court monitoring.

The aim of Foundation's activities is to increase the public accountability of the Polish judicial system. This aim is to be achieved through monitoring the work of courts to see if they fulfill their social functions, helping to implement and promote positive examples and good practices, as well as eliminating negative practices, in Polish courts.

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