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

SECOND SECTION

CASE OF DALLOS v. HUNGARY

(*Application no. 29082/95*)

JUDGMENT

STRASBOURG

1 March 2001

In the case of Dallos v. Hungary,

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

Mr G. BONELLO, *President*,
Mr A.B. BAKA,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr E. LEVITS,
Mr A. KOVLER, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 8 February 2001,

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

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), by a Hungarian national, Mr Zoltán Dallos ("the applicant"), on 29 October 1999 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. The case originated in an application (no. 29082/95) against the Republic of Hungary lodged by the applicant with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention on 9 January 1995.

3. The applicant alleged that criminal proceedings against him had been unfair, in breach of Article 6 of the Convention, in that – since he had been prosecuted for, and at first instance convicted of, embezzlement – the appeal court's reclassification of the offence as fraud had prevented him from exercising his defence rights properly.

4. The Commission declared the application admissible on 10 September 1998. In its report of 8 September 1999 (former Article 31 of the Convention) [*Note by the Registry.* The report is obtainable from the Registry], it expressed the unanimous opinion that there had been a violation of Article 6 § 3 (a) and (b) of the Convention taken in conjunction with Article 6 § 1.

5. Before the Court the applicant, who had been granted legal aid, was represented by Mr L. Noll, a lawyer practising in Nagykanizsa, Hungary. The Hungarian Government ("the Government") were represented by their Agent, Mr L. Höltzl, Deputy State Secretary of the Ministry of Justice.

6. On 6 December 1999 a panel of the Grand Chamber determined that the case should be examined by one of the Sections of the Court (Rules 100 § 1 and 24 § 6 of the Rules of Court). On 13 December 1999 the application was assigned to the Second Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. The applicant and the Government each filed a memorial.

8. After consulting the Agent of the Government and the applicant's lawyer, the Chamber decided that it was not necessary to hold a hearing (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a Hungarian national, born in 1949 and resident in Vonyarcvashegy, Hungary.

10. On 25 November 1992 the Zala County public prosecutor's office preferred a bill of indictment against the applicant, charging him with aggravated embezzlement. The public prosecutor's office alleged that between July 1990 and May 1991 the applicant, then the managing director of a Hungarian limited liability company ("E. Kft"), had been involved in a foreign-trade commission-contract between a Dutch company and a Hungarian business partner. According to the public prosecutor's office, the applicant had failed to transfer, on behalf of E. Kft, part of the amounts due under the contract to the Hungarian partner and had spent it for E. Kft's own purposes, thus causing damage of some 1.4 million Hungarian forints.

11. On 30 June 1993 the Keszthely District Court convicted the applicant of aggravated embezzlement and sentenced him to one year and four months' imprisonment and a fine, under Article 317 §§ 1 and 5 (a) of the Criminal Code.

The District Court found that, in the context of a commission-contract scheme valid between July 1990 and May 1991, the applicant, acting on behalf of E. Kft, had failed to transfer part of the amounts collected from the Dutch partner to the Hungarian partner, contrary to what he should have done under the contract; in fact, he had spent it for E. Kft's own purposes.

The District Court noted the applicant's defence that he had simply failed to pay the necessary attention to his contractual duty to transfer the amounts in question; that he had not been aware until April 1991 that the amounts in question had been available for transfer; that E. Kft's subsequent failure to fulfil its contractual obligations had simply been due to its inability to

recover some outstanding debts; and, finally, that he had entered into a verbal agreement with the Hungarian partner about the use of part of the amounts in question.

However, taking into consideration the testimony of a Mr S. and of two further witnesses, the District Court was convinced that the applicant had deliberately failed to transfer the amounts in question in order to finance the activities of E. Kft.

12. The applicant appealed against the District Court's judgment, whereas the public prosecutor's office accepted it.

In his appeal the applicant sought to be acquitted on the ground that the findings of fact in his case had been erroneous.

13. On 12 November 1993 the Zala County Regional Court upheld the applicant's conviction and sentence, but reclassified his offence as aggravated fraud, under Article 318 §§ 1 and 5 (a) of the Criminal Code.

The Regional Court held that the facts of the case, as outlined in the bill of indictment and established by the District Court, did not constitute the offence of embezzlement. However, the Regional Court was satisfied that the applicant's conduct, namely that in the context of the transaction in question he had, on several occasions, given the Hungarian partner false information about the payments actually made by the Dutch partner, had constituted the offence of aggravated fraud.

Completing the findings of fact with some further details, the Regional Court essentially relied on the contents of the case file as compiled at first instance, and in particular on the statements made by the applicant and the witness Mr S. during the first-instance hearings and on investigation documents.

The Regional Court's decision was served on the applicant on 8 December 1993.

14. The applicant and his defence counsel lodged a petition for review with the Supreme Court. He maintained that he had been convicted erroneously. He also submitted that the reclassification of his offence at second instance had run counter to Article 9 § 2 of the Code of Criminal Procedure, and had thus constituted a serious breach of procedural rules.

In its observations in reply, the Attorney-General's Office proposed that the decisions of the lower courts be upheld.

15. On 16 June 1994 the Supreme Court held a "public session" (*nyilvános ülés*) in the case. The Supreme Court heard addresses by defence counsel, who argued that the applicant's liability was of a civil-law nature and requested the Supreme Court to quash, under Article 291 § 3 of the Code of Criminal Procedure, the first- and second-instance judgments and to acquit the applicant, and by the Attorney-General's Office, proposing that the applicant's conviction be upheld.

16. On 28 June 1994 the Supreme Court upheld the applicant's conviction for aggravated fraud.

Concerning defence counsel's arguments about a serious breach of procedural rules, the Supreme Court observed that, while it was true that courts were bound by the factual contents of the bill of indictment, this did not apply to the legal classification of the offences. It held that the elements of fact, which – in the second-instance proceedings – had warranted the reclassification of the offence, had already been contained in substance in the bill of indictment.

In reply to defence counsel's arguments of a substantive-law character disputing the applicant's conviction of fraud, the Supreme Court held that the applicant's duty under the contract in question would have been to inform the Hungarian partner about his receipt of payments without delay. The decision concluded, *inter alia*, that the applicant, having failed to do so and, instead, having transferred the money into E. Kft's own bank account,

> "... committed the offence of fraud. ...
>
> ... In this manner, the defendant secured unlawful gains for E. Kft and, to that end, had maintained from the outset [the Hungarian partner's] deception, as a consequence of which it suffered damage in the amount of 1,440,680 Hungarian forints. This conduct of his constituted the offence of fraud, prohibited by Article 318 § 1 of the Criminal Code."

On that ground, the Supreme Court upheld the Regional Court's decision, in accordance with Article 291 § 7 of the Code of Criminal Procedure.

The Supreme Court's decision was served on the applicant on 18 August 1994.

II. RELEVANT DOMESTIC LAW

A. Code of Criminal Procedure (as in force in the relevant period) (Act no. I of 1973)

1. Miscellaneous rules

17. Article 9 § 2 provides that proceedings before the criminal court may be initiated only upon lawful indictment. The court decides on the criminal responsibility of the indicted person exclusively by reference to facts contained in the bill of indictment.

18. Article 132 § 1 provides that where there is a strong suspicion, based on the available information, that a person has committed an offence, the authority must inform him of the substance of the suspicion against him and of the relevant laws.

19. Article 146 § 2 provides that the bill of indictment must contain a brief description of the facts on account of which the defendant is being prosecuted.

20. Article 203 § 1 requires that documents, the contents of which are regarded by the court as evidence, be read out at the hearing.

21. According to Article 239 § 1, the second-instance court must, when passing its decision, rely on the findings of fact reached by the first-instance court, unless the first-instance judgment lacks factual support.

22. Article 241 provides that a defendant acquitted at first instance may be convicted, or a convicted defendant's sentence increased, only if an appeal has been lodged to his detriment. An appeal is to be regarded as being to the defendant's detriment if aimed at having him convicted, or convicted of a more serious offence, or at increasing his sentence.

23. According to Article 258 § 1 (a), where the proper establishment of the facts of the case can be achieved on the basis of the case file, the second-instance court completes or rectifies the establishment of the facts and thereafter examines the first-instance judgment on this new factual basis.

24. According to Article 260, where the first-instance court has applied the law erroneously but its judgment need not be quashed, the second-instance court amends the judgment and passes a decision in accordance with the law.

2. Rules on review by the Supreme Court

25. Article 284 § 1 provides that a final decision is subject to review if:

(a) the defendant's acquittal or conviction, or the discontinuation of the proceedings, has taken place in breach of the provisions of substantive criminal law; or

(b) an unlawful punishment or measure has been imposed on the defendant as a consequence of an incorrect classification of the offence or of another breach of the rules of substantive criminal law.

According to paragraph 2, in the latter case no review may take place if the punishment imposed is within the limits laid down for the offence that corresponds to the classification which is correct in law.

26. According to Article 284/A § 1 (I), a petition for review in favour of the defendant may be filed by, *inter alios*, the defendant, the public prosecutor or defence counsel.

Paragraph 2 provides a further ground for review where certain serious breaches of procedural criminal law have affected the taking of the decision in question.

27. Under Article 288 § 1, if a petition for review is not rejected on formal grounds, it must be sent to the Attorney-General's Office for comments.

Article 288/A § 1 grants the petitioner the right to submit comments in reply.

28. According to Article 289/A § 1, the Supreme Court examines, as a general rule, the petition for review at a "session" (*ülés*). The attendance of defence counsel and the public prosecutor is required; the defendant must be notified of the session and, if detained, must be conveyed thereto.

29. Article 290 provides that, at the session, one of the judges sitting in the case must orally present the petition, the decision challenged and relevant details of the case file. After this introduction, the public prosecutor, defence counsel and the defendant, *inter alios*, address the court.

30. As a result of the review, the Supreme Court may, under Article 291 § 1, quash the decision reviewed and instruct the lower-instance court to resume its proceedings.

Under Article 291 § 3, where the second-instance decision has been taken in breach of the provisions of substantive criminal law within the meaning of Article 284 § 1, the Supreme Court may itself deliver a rectified decision, if this will result in the acquittal of the defendant, the discontinuance of the proceedings, or the imposition of a less severe punishment.

Paragraph 7 provides that if the Supreme Court dismisses the petition, it must uphold the decision challenged.

B. Criminal Code (Act no. IV of 1978)

1. Embezzlement

31. According to Article 317 § 1, a person who unlawfully appropriates for himself an asset in his charge, or disposes of such an asset as if it were his own, commits the offence of embezzlement. Paragraph 5 (a) provides that embezzlement committed with regard to assets of a substantial value is punishable by one to five years' imprisonment.

2. Fraud

32. According to Article 318 § 1, a person who deceives someone, or maintains someone's deception, in order to make unlawful gains, commits the offence of fraud, provided that actual damage has occurred as a result of his conduct. Paragraph 5 (a) provides that fraud committed in respect of a substantial sum is punishable by one to five years' imprisonment.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

33. The Government submitted that, in the proceedings before the Commission – prior to the decision as to the admissibility of the application – they had assumed that the applicant's petition for review by the Supreme Court had been an effective remedy for the purposes of former Article 26 of the Convention. The application had been introduced within six months from the delivery of the Supreme Court's decision.

For the Government, it transpired only from the Commission's report that the petition for review might not have qualified as an effective remedy in the case, given that the Commission had focused exclusively on the Regional Court's decision. Had that been the Commission's view, the Government argued before the Court that the applicant had failed to introduce the application within six months from the Regional Court's decision of 12 November 1993, as required by former Article 26 of the Convention, which provides:

> "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

34. The applicant submitted that the Regional Court's decision had been susceptible, on account of its procedural shortcomings and pursuant to Article 284/A § 2 of the Code of Criminal Procedure, to being quashed by the Supreme Court. He had therefore not been in a position to file a comprehensive complaint about the domestic proceedings with the Commission until after the service of the Supreme Court's decision.

On the other hand, he referred to Article 284 § 2 of the Code of Criminal Procedure (see paragraph 25 above) which, in his view, virtually deprived his petition for review of all prospects of success, given that his punishment had been within the lawful limits of both offences in question.

35. The Court reiterates that it takes cognisance of preliminary objections in so far as the State in question has already raised them, at least in substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see, for example, *Ergi v. Turkey*, judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1769, § 59).

36. The Court recalls that its jurisdiction "to rule on the submissions made by a respondent Government based on [former] Article 26 as a bar to claims directed against it, does not in any way mean that the Court should disregard the attitude adopted by the Government in this connection in the course of the proceedings before the Commission.

It is in fact usual practice in international and national courts that objections to admissibility should as a general rule be raised *in limine litis*. This, if not always mandatory, is at least a requirement of the proper administration of justice and of legal stability. ... [I]t results clearly from the general economy of the Convention that objections to jurisdiction and admissibility must, in principle, be raised first before the Commission to the extent that their character and the circumstances permit" (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, p. 30, §§ 53-54).

37. In the present case, it is undisputed that the question whether the applicant's petition for review was an effective remedy did not arise in the course of the proceedings before the Commission. The Court is therefore satisfied that the Government's objection to the admissibility of the application based on the six-month time-limit – observance of which was indeed, in the circumstances, closely interrelated with the effectiveness of the review – is of a character that prevented them from making it earlier.

38. Having regard to the above circumstances, the Court concludes that the Government cannot be considered estopped from raising their objection of non-observance of the six-month rule.

39. The Court must next determine whether the review proceedings constituted an available remedy which was sufficient to afford the applicant redress in respect of his Article 6 complaint. The Court reiterates in this regard that a domestic remedy whose exhaustion is required to meet the conditions laid down in former Article 26 of the Convention must be an effective one, available in theory and in practice at the relevant time, that is to say that it must have been accessible, capable of providing redress in respect of the complaint and must have offered reasonable prospects of success (see, *mutatis mutandis*, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1211, § 68).

40. In the present case, the Court observes that the possibility of filing a petition for review was undisputedly available to the applicant (see Article 284/A § 1 (I) of the Code of Criminal Procedure, paragraph 26 above). Neither is it disputed that the review proceedings were capable of providing redress in respect of the applicant's complaints about shortcomings in the lower courts' procedure (see Article 291 §§ 1 and 3 of the Code of Criminal Procedure, paragraph 30 above).

As regards prospects of success, the Court, while noting the applicant's doubts in this respect (see paragraph 34 *in fine* above), observes that the Supreme Court in fact entertained the applicant's petition for review, held a review session and, in its decision, addressed defence counsel's arguments in detail. In these circumstances, it cannot be said that the review as such did not offer the applicant any reasonable prospects of success.

41. Having regard to these considerations, the Court concludes that the applicant's petition for review was an effective remedy in the

circumstances. Its exhaustion was therefore necessary to meet the conditions laid down in former Article 26 of the Convention. Consequently, the applicant cannot be considered to have failed to observe the six-month time-limit. The Government's preliminary objection must accordingly be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

42. The applicant complained that since he had been prosecuted for, and at first instance convicted of, embezzlement, the appeal court's reclassification of the offence as fraud had prevented him from exercising his defence rights properly and that this had rendered the criminal proceedings against him unfair.

43. Article 6 of the Convention, in its relevant parts, provides:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> ..."

A. Arguments of the parties and the Commission

1. The Government

44. The Government maintained that the review proceedings had constituted an effective remedy in the case in that the proceedings before the Supreme Court had in fact provided a remedy for the applicant's grievances arising from the reformulation of the charges against him by the second-instance court.

Making an assessment of the fairness of the proceedings as a whole, the Government – while admitting that the applicant had not had an opportunity before the Regional Court to defend himself against the charge of fraud – emphasised that the final decision on the legal classification of the offence had not been taken by the Regional Court. The applicant had had the opportunity to put forward his defence against the reformulated charge in the review proceedings before the Supreme Court, to argue that the Criminal

Code had been erroneously applied to his conduct and to seek to convince the judges that his conviction for fraud had been unlawful since the new classification had not been supported by facts. The Supreme Court had taken cognisance of the applicant's arguments and dismissed them on the merits.

2. The applicant

45. The applicant maintained that the Regional Court had convicted him of an offence constituted by facts not fully contained in the bill of indictment. In these circumstances, he could not be regarded as having been properly informed of the nature of the charges against him, and there had accordingly been an infringement of his rights under Article 6 § 3. Furthermore, since he had not been informed of the possibility that his offence might be reclassified in the appeal proceedings, he could not properly exercise his defence rights in regard to the offence of which he was eventually held guilty in the course of those proceedings. Since the Supreme Court's ruling on his petition for review had not remedied these shortcomings of the proceedings, he maintained that his trial had not been fair within the meaning of Article 6 § 1 of the Convention.

3. The Commission

46. The Commission found that it could not be established that the applicant had been aware that the Regional Court might return an alternative verdict of aggravated fraud. Having regard to the need for special attention to be paid to the notification of the accusation to the defendant, the Commission held that the procedure had not complied with Article 6 § 3 (a) of the Convention.

Furthermore, the Commission – while refraining from speculating as to the merits of the defence the applicant could have relied on, had he had an opportunity to make submissions to the Regional Court on the charge of fraud – took it for granted that the defence would have been different from the defence to the initial charge, given the evident differences between the definitions of "embezzlement" and "fraud" under Hungarian law.

Since fraud did not constitute an element intrinsic to the accusation, the Commission considered that the Regional Court should have afforded the applicant the possibility of exercising his defence rights on the issue of fraud in a practical and effective manner and, in particular, in good time.

The Commission concluded that the applicant's right to be informed in detail of the nature and cause of the accusation against him and his right to have adequate time and facilities for the preparation of his defence had been infringed, resulting in a violation of paragraph 3 (a) and (b) of Article 6 of the Convention taken in conjunction with paragraph 1 of that Article.

B. The Court's assessment

47. The Court recalls that the fairness of proceedings must be assessed with regard to the proceedings as a whole (see, for example, *Miailhe v. France (no. 2)*, judgment of 26 September 1996, *Reports* 1996-IV, p. 1338, § 43, and *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, pp. 13-14, § 38). The provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him (see *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79). Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should be detailed (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 51, ECHR 1999-II).

The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair. In this respect it is to be observed that Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him. The Court further recalls that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence (ibid., §§ 52-54).

48. In the present case, the Court observes that the applicant was indeed not aware that the Regional Court might reclassify his offence as fraud. This circumstance certainly impaired his chances to defend himself in respect of the charges he was eventually convicted of.

49. However, unlike the Commission, the Court attributes in this respect decisive importance to the subsequent proceedings before the Supreme Court.

50. It is to be noted that the Supreme Court entirely reviewed the applicant's case, both from a procedural and a substantive-law point of view. In addition to having studied the lower courts' case file and submissions by the applicant and the prosecution, the review bench heard, at a public session, oral addresses from the applicant's defence counsel and the

Attorney-General's Office (see paragraph 15 above). Moreover, under Article 291 § 3 of the Code of Criminal Procedure (see paragraph 30 above), the Supreme Court itself could have replaced the applicant's conviction with a decision of acquittal.

51. The Court observes that the Supreme Court rejected the applicant's defence seeking acquittal from the charge of fraud. It held that his failure to respect his contractual duties had resulted in the victim's deception, whilst the transfer of the money in question into E. Kft's bank account had amounted to making unlawful gains. The Supreme Court was satisfied, when upholding the applicant's conviction, that the constituent elements of the offence of fraud were present.

These circumstances lead the Court to find that the Supreme Court itself examined whether or not the applicant was guilty of fraud.

52. Accepting the Government's argument on this point, the Court therefore considers that the applicant had the opportunity to advance before the Supreme Court his defence in respect of the reformulated charge. Assessing the fairness of the proceedings as a whole – and in view of the nature of the examination of the case before the Supreme Court – the Court is satisfied that any defects in the proceedings before the Regional Court were cured before the Supreme Court.

The Court is therefore convinced that the applicant's rights to be informed in detail of the nature and cause of the accusation against him and to have adequate time and facilities for the preparation of his defence were not infringed.

53. It follows that Article 6 of the Convention was not violated.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 1 March 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Giovanni BONELLO
President