AS TO THE ADMISSIBILITY OF

Application No. 23198/94
by László BECK
against Hungary

The European Commission of Human Rights (First Chamber) sitting in private on 15 January 1997, the following members being present:

Mrs. J. LIDDY, President
MM. E. BUSUTTIL
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to:

- Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

- the application introduced on 21 June 1993 by László BECK against Hungary and registered on 6 January 1994 under file No. 23198/94;

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 14 July 1994 and the observations in reply submitted by the applicant on 22 September 1994 and by his representative on 28 February 1996;

- the supplementary observations of 7 May 1996, submitted by the respondent Government;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1953, is a Hungarian national. He resides in Kaposvár, Hungary. When lodging his application, he was serving a sentence in the Budapest Prison (Budapesti Fegyház és Börtön). Before the Commission he has been represented by Mr. István Horváth and Mr. Attila Horváth, lawyers practising in Budapest, as from December 1995.

A. Particular circumstances of the case

The facts, as they have been submitted by the parties, may be summarised as follows.

1. In 1990 criminal proceedings were instituted against the applicant on charges of larceny. It appears that in 1991 the Kaposvár

District Court (Kaposvári Városi Bíróság) convicted him of larceny and sentenced him to six years' imprisonment, as confirmed by the Somogy County Regional Court (Somogy Megyei Bíróság) in 1992.

In March 1992, apparently subsequent to the applicant's final conviction, one of his accomplices, who had been co-accused and heard as a witness in the above proceedings, informed the applicant that he had been allegedly forced by police officers to give false evidence.

Shortly afterwards the applicant initiated criminal proceedings before the Investigation Office of the Kaposvár Prosecution (Kaposvári Ügyészségi Nyomozó Hivatal) against the police officers, who had conducted the investigations in his case. He accused the police officers in question of having committed the offence of abuse of official power (hivatali visszaélés) in that they had influenced his accomplice to state that he had committed the offences together with the applicant.

On 3 February 1993 the Investigation Office discontinued the investigations against the police officers in question. The Office found that the applicant had failed to substantiate his allegations.

On 10 March 1993 the Kaposvár District Public Prosecutor's Office (Kaposvári Városi Ügyészség) dismissed the applicant's complaint about the decision of 3 February 1993.

On 27 April 1993 the Somogy County Public Prosecutor's Office (Somogy Megyei Foügyészség), upon the applicant's further complaint, quashed the decisions of 3 February and 10 March 1993 and instructed the Kaposvár District Public Prosecutor's Office to provide for a full investigation of the matter.

On 13 September 1993 the Somogy County Public Prosecutor's Office, in the resumed proceedings, again discontinued the investigations against the police officers in question. On 9 February 1994 the Attorney General's Office (Legfobb Ügyészség) dismissed the applicant's complaint.

2. Whilst detained in the Budapest Prison, apparently from August 1992 onwards, the applicant exchanged correspondence with his family and also sent and received other mail.

In her correspondence, the applicant's wife complained that the applicant had allegedly received some letters with considerable delay, whereas some others had allegedly never reached him, and that his letters to his family were also delayed. She also complained to the authorities of the Budapest Prison about the alleged interference with her correspondence with the applicant.

In particular, in her letter of 7 August 1992, the applicant's wife enquired whether the applicant had received one of her previous letters containing photographs of their daughter. In her letter of 24 August 1992 she, referring to the applicant's letter in reply, complained that the applicant had apparently not received the said letter containing the photographs and that it took the applicant's letter in reply ten days to reach her. In her letter of 29 September 1992, she enquired why the applicant had not answered her letter mailed in early September. In her letter of 9 November 1992, received by the applicant on 17 November 1992, she expressed the fear that her three letters mailed during October 1992 might not have been handed over to her husband. In her letter of 15 November 1992 she complained in general terms that letters might not have been handed over to the applicant.

The applicant allegedly complained about the alleged interference with his correspondence to the prison authorities.

On 5 November 1992 the applicant lodged a complaint regarding the interference with his correspondence with the Somogy County Public Prosecutor's Office. On 4 December 1992 the Public Prosecutor's Office informed him that it would take no action upon the complaint. The Prosecutor's Office found that it was not clear that the complaint had in fact concerned the alleged on-going interferences within the Budapest Prison, where the applicant was actually serving his sentence.

Moreover, the official letter containing the decision of the Investigation Office of the Kaposvár Prosecution, dated 3 February 1993, apparently received at the Budapest Prison on Friday, 19 February 1993, was opened by the prison authorities. The text of the decision was handed over to the applicant allegedly three days after its arrival.

On 9 March 1993 the applicant raised complaints about the interference with his correspondence before the Budapest Public Prosecutor's Office. On 26 May 1993 the penitentiary supervising public prosecutor (bv. felügyeleti ügyész), on the occasion of one of his regular visits to the Budapest Prison on behalf of the Budapest Public Prosecutor's Office, heard the applicant and established that no interferences by the prison authorities had occurred. The applicant accepted the prosecutor's findings.

Meanwhile, the official letter containing the decision of the Somogy County Public Prosecutor's Office, dated 27 April 1993, was received at the prison and opened by the prison authorities on 1 May 1993. The text of the decision was handed over to the applicant allegedly ten days after its arrival.

Apparently in October 1993 the applicant was transferred to the Márianosztra Prison (Márianosztrai Büntetésvégrehajtási Intézet).

Furthermore, the applicant's letter to the Commission, dated 18 October 1993, in which he complains inter alia about previous interferences with his correspondence, reached the Commission on 8 November 1993. The date of mailing was illegible on the envelope.

According to the applicant's submissions of 6 November 1993, his two letters addressed to his wife, dated 1 November 1993, were allegedly stopped by the prison authorities in the Kaposvár Prison, where he had been temporarily transferred.

On 29 June 1995 the Governor of the Budapest Prison heard the applicant concerning his complaints about interference with his correspondence.

On 12 April 1996 the penitentiary supervising public prosecutor heard the applicant who stated not to have any actual complaints about the interference with his correspondence in the Budapest Prison.

B. Relevant domestic law and practice

According to S. 36 para. 1 (b) of Law-Decree No. 11 of 1979 on the enforcement of punishments and measures (a büntetések és intézkedések végrehajtásáról szóló 1979. évi 11. törvényereju rendelet), as amended, inmates are entitled to correspond with their relatives and persons designated by them and approved by the prison authorities; the frequency and length of letters are not subject to any restrictions. S. 36 para. 5 provides for a control of inmates' correspondence for reasons of security, except for letters sent to public authorities and to international organisations; inmates are entitled to be informed about the possibility of control. According to S. 36 para. 1 (g), the inmate may state, or complain about, alleged violations of his rights with the prison authorities or with other state organs.

Order No. 8/1979. /VI.30./IM (8/1979. /VI.30./IM r.), issued by the Minister of Justice (igazságügyi miniszter), sets out the Prison Rules. According to Rule 22 of the Prison Rules, an inmate may lodge complaints and apply for the remedying of any individual injury. His complaint and application shall be settled by the competent special service of the institution, except when the matter belongs to the competence of the governor. If the inmate is not satisfied with the measures taken by the competent special service, he may complain with the governor, and afterwards with the National Headquarters of the Penal Institutions. No further complaint lies against the measures taken by the National Headquarters. Complaints have no suspensive effect. According to Rule 27 para. 2, the inmate may request to be heard by the competent public prosecutor.

S. 11 (a) of Act No. V of 1972 on Public Prosecution (a Magyar Köztársaság Ügyészségérol szóló 1972. évi V. törvény), as amended, provides inter alia that the public prosecutor may supervise the lawfulness of the conditions of detention, detention on remand, forced medical treatment and the execution of the detention. According to S. 11 (c), the public prosecutor may hear inmates and examine complaints concerning the execution of sentences. The organs competent for the execution of sentences are required to comply with the public prosecutor's instructions concerning the lawfulness and the conditions of detention on remand.

According to S. 70/K of the Hungarian Constitution (Alkotmány), as amended by Act No. XXXI of 1989 (1989. évi XXXI. törvény), claims based on the violation of fundamental rights and objections regarding decisions taken by public authorities in the performance of their functions can be brought before a court. It follows from the official commentary, attached to Act No. XXXI of 1989, that S. 70/K was intended to create the possibility of access to court in respect of claims against other persons or the state in connection with the fundamental rights. Section 59 para. 1 of the Constitution ensures the right to a good reputation, the right to respect for one's home and the protection of private secrets and personal data.

The Hungarian prison authorities do not keep registers on the dates when letters are handed over to them by prisoners and when they are actually mailed.

COMPLAINTS

1. The applicant complains about his conviction and the alleged unfairness of the proceedings concerned. He submits in particular that his co-accused was influenced by police officers to give evidence against him.

2. The applicant further complains about interference with his correspondence to and from his family and also with Hungarian authorities and the Commission. He claims that the letters, opened by the prison authorities, were often either delayed or stopped. He also submits that his complaints were to no avail. The applicant does not invoke any specific provision of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 21 June 1993 and registered on 6 January 1994.

On 11 May 1994 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 14 July 1994. The applicant replied personally on 16 September 1994 and also

filed further correspondence.

On 24 October 1995 the Commission granted the applicant legal aid.

The Commission's Secretariat subsequently provided assistance to the applicant in arranging for his legal representation. The applicant was represented as from 14 December 1995. Observations in reply to the Government's observations were submitted by the applicant's representative on 2 March 1996.

On 7 May 1996 the Government submitted supplementary observations.

THE LAW

1. The applicant complains about his conviction and the alleged unfairness of the proceedings concerned. He submits in particular that his co-accused was influenced by police officers to give evidence against him.

The Commission notes that the applicant's conviction by the Kaposvár District Court dates back to 1991 and was confirmed by the Somogy County Regional Court some time in 1992.

The Commission recalls that Hungary ratified the Convention on 5 November 1992 and that the Convention only governs, for each Contracting Party, facts subsequent to its entry into force with respect to that Party. Consequently only proceedings subsequent to this date fall within the competence of the Commission.

Even, however, assuming its competence ratione temporis to examine these proceedings and compliance with Article 26 (Art. 26) of the Convention, the Commission finds that the applicant has failed to substantiate his allegations as to the unfairness of the proceedings. His submissions do not disclose any appearance of a violation of his Convention rights and, in particular, of his rights under Article 6 (Art. 6).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains about interference with his correspondence to and from his family and also with Hungarian authorities and the Commission. He claims that the letters, opened by the prison authorities, were often either delayed or stopped. He also submits that his complaints were to no avail.

The applicant's complaints fall to be considered under Article 8 (Art. 8) of the Convention which, as far as relevant, provides as follows:

> "1. Everyone has the right to respect for ... his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

a. The Government submit that the Commission is not competent ratione temporis to examine the applicant's complaints to the extent that they concern events prior to 5 November 1992, the date of entry

into force of the Convention in respect of Hungary.

The applicant submits that the several occasions of interference with his correspondence shortly before the date of ratification of the Convention cannot be separated from events of interference subsequent to the ratification. He argues that the interferences in question in fact were of a continuous character.

The Commission notes that part of the applicant's complaints about interferences with his correspondence, in particular his correspondence with his wife, relate to a period prior to 5 November 1992, which is the date of the entry into force of the Convention with respect to Hungary. However, the Convention only governs, for each Contracting Party, facts subsequent to its entry into force with respect to that Party (cf. No. 7742/76, Dec. 4.7.78, D.R. 14 p. 146).

These events cannot, therefore, be examined by the Commission ratione temporis. In this respect the Commission notes that the alleged interferences with the applicant's correspondence in fact constituted a series of distinct occasions, rather than a practice of continuous interference. Moreover, the applicant failed to show that any decision on complaints relating to the period prior to 5 November 1992 was taken after that date and could accordingly be examined by the Commission.

Consequently, this part of the applicant's complaint under Article 8 (Art. 8) is outside the competence ratione temporis of the Commission.

b. The Government further maintain that the applicant failed to exhaust, as required by Article 26 (Art. 26) of the Convention, the domestic remedies available to him under Hungarian law. According to the Government, the applicant, in addition to complaints to the prison authorities and to the public prosecutor, could have also brought the matter before a court, pursuant to S. 70/K of the Hungarian Constitution. They consider that S. 70/K, which was introduced in 1989, created an effective remedy for the purposes of Article 26 (Art. 26), although there is no case-law on the application of this provision.

The applicant considers that this remedy as set out by the Government could not be regarded as effective for the purposes of Article 26 (Art. 26). According to the applicant, the possibility of a complaint with the public prosecutor's office does not allow for a review of the matter complained about by an independent and impartial body or tribunal. He is also of the opinion that S. 70/K of the Constitution is of a declaratory nature and does not as such create an effective remedy.

Under Article 26 (Art. 26) of the Convention, 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.

The Commission recalls that the only remedies which Article 26 (Art. 26) of the Convention requires to be exercised are those that are both available and sufficient in respect of the violation alleged. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. Moreover, it is for the State to prove that there exist available remedies which have not been utilised by those concerned (see Eur. Court HR, Deweer v. Belgium judgment of 27 February 1980, Series A no. 35, pp. 15 and 16, paras. 26 and 29, with further references; De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77, p. 19, para. 39).

The Commission notes that the applicant complained about interferences with his correspondence to the Governor of the Budapest

Prison, and also to the public prosecutor of the Budapest Public Prosecutor's Office on the occasions of the latter's visits in prison.

As regards the court action referred to in S. 70/K of the Hungarian Constitution, the Commission notes that the Hungarian Government were unable to cite a single instance in which a plaintiff had instituted court proceedings under S. 70/K of the Constitution, as amended in 1989. This absence of case-law indicates the uncertainty of this remedy in practical terms. Accordingly, the Government have not shown that this action could constitute an available and sufficient remedy that the applicant ought to have exhausted.

It follows that the applicant's complaint about interference with his correspondence cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

c. The Commission has next examined the applicant's submissions about the alleged interferences with his correspondence to the extent that the period subsequent to the Hungarian ratification is concerned, namely, the opening of private letters and of letters transmitting decisions of Hungarian authorities upon complaints raised by the applicant in the course of his detention, as well as the alleged stopping and delays in the delivery of letters.

The Commission considers that the opening of the letters in question amounts to an interference with the applicant's right to respect for correspondence, which falls to be justified under Article 8 para. 2 (Art. 8-2).

The Government submit that the opening of the letters in question was lawful and necessary in the interest of prison security.

As to the lawfulness of the said interference, the applicant argues that the Hungarian legislation authorising interference with prisoners' correspondence lacks the sufficient clarity and detailed criteria for the control of a prisoner's correspondence.

The Commission finds that the opening of the letters was based inter alia on S. 36 para. 5 of Law-Decree No. 11 of 1979 on the enforcement of punishments and measures, which provides for a control of inmates' correspondence for reasons of security, except for letters sent to public authorities and to international organisations; inmates are entitled to be informed about the possibility of control. The Commission, having due regard to the applicant's submissions on this point, finds that the legal provisions concerned complied with the requirements as to clarity and foreseeability. The interference was thus "in accordance with the law".

Moreover, the Commission considers that the letters were opened for "the prevention of disorder and crime" within the meaning of Article 8 para. 2 (Art. 8-2).

As regards the question of necessity, the Commission recalls that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but it goes hand in hand with European supervision (Eur. Court HR, Crémieux v. France judgment of 25 February 1993, Series A no. 256-B, p. 62, para. 38).

The Government claim, in particular, that the prison authorities were entitled to open the letters arriving from the prosecution authorities to confirm that they had been in fact sent by an official body. In their view, there existed a risk that letters which appeared to come from the prosecution authorities could be used as a channel for illicit materials. Moreover, having regard to the length of the applicant's imprisonment and to the amount of mail apparently received and sent out by the applicant, the Government argue that the incidence of the openings, as complained of by the applicant, shows the merely

occasional character of the control. They assert that the randomised control of the inmates' correspondence - let alone that of letters sent by official bodies - is necessary for the security of prisons.

The Commission recalls that the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions of, in the instant case, confidentiality of correspondence. To be compatible with the Convention, such an interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued". In assessing whether an interference with the exercise of the right of a convicted prisoner to respect for his correspondence was "necessary" for one of the aims set out in Article 8 para. 2 (Art. 8-2), regard has to be paid to the ordinary and reasonable requirements of imprisonment. Moreover, the Court has recognised that some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention (cf., Eur. Court HR, Silver and others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, pp. 37-38, paras. 97-98).

Problems may arise under the Convention inter alia where there has been an interference with an inmate's correspondence with his solicitor or with European human rights control bodies (cf., Eur. Court HR, Campbell v. the United Kingdom judgment of 25 March 1992, Series A no. 233).

The Commission notes that, in the present case, the control exercised by the Hungarian prison authorities related to the applicant's private correspondence and to letters transmitting decisions of Hungarian authorities upon complaints raised by the applicant in the course of his detention.

As regards the opening of some letters transmitting decisions of the domestic authorities, the Commission considers that there were no particular reasons, such as the maintenance of the confidentiality of correspondence, militating against the opening of the letters in question. In the Commission's opinion, what might be at stake for the applicant due to the eventual disclosure of the contents of these letters by the prison authorities, does not outweigh the State's general concerns as to the security of prisons.

As regards the control of the applicant's incoming private mail, the Commission considers that the occasional opening of a prisoner's letters, chosen at random, does not exceed the scope of control measures warranted by the ordinary and reasonable requirements of imprisonment, as recognised by the Court in its case-law, and is not beyond the limits of a permissible control of prisoners' correspondence.

Accordingly, the Commission finds that the opening of the letters in question can reasonably regarded as "necessary in a democratic society" within the meaning of Article 8 para. 2 (Art. 8-2). Thus this interference with the applicant's correspondence was justified under Article 8 para. 2 (Art. 8-2) of the Convention.

As to the alleged further interferences, the Government maintain that the applicant has failed to substantiate that his correspondence was delayed or not delivered due to interferences on the part of the prison authorities.

The applicant maintains that the official letter containing the decision of the Investigation Office of the Kaposvár Prosecution, dated 3 February 1993 and received at the Budapest Prison on 19 February 1993, was handed over to him three days later. Another official letter containing the decision of Somogy County Public Prosecutor's Office, dated 27 April 1993, was received at the prison on 1 May 1993 and the text of the decision was handed over to him allegedly ten days after its arrival. His letter to the Commission, dated 18 October 1993,

reached the Commission on 8 November 1993. His two letters addressed to his wife, dated 1 November 1993, were allegedly stopped by the prison authorities in the Kaposvár Prison.

The Commission finds that the applicant's submissions are not sufficient to show whether, as a result of the control of the applicant's correspondence or otherwise on account of the handling of mail by the prison authorities, any unacceptable delays occurred or that in fact letters were stopped.

In sum, the applicant's submissions do not, therefore, disclose any breach of his rights under Article 8 (Art. 8) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber