AS TO THE ADMISSIBILITY OF

Application No. 36924/97
by Ivan FLEISCHHACKER
against the Slovak Republic

The European Commission of Human Rights (Second Chamber) sitting in private on 9 September 1998, the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. ŠVÁBY
P. LORENZEN
E. BIELIŪNAS
E.A. ALKEMA
A. ARABADJIEV

Ms M.-T. SCHOEPFER, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 7 April 1997 by Ivan FLEISCHHACKER against the Slovak Republic and registered on 18 July 1997 under file No. 36924/97;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Slovak national born in 1971, is serving a sentence in the Banská Bystrica prison. The facts of the case, as submitted by the applicant, may be summarised as follows.

A. The particular circumstances of the case

On 10 May 1995 the applicant was accused of preparing a theft and remanded in custody. On 10 November 1995 the Bratislava Regional Court (Krajský súd) convicted the applicant of the aforesaid offence and of illegal keeping of a rifle.

The Regional Court established that the applicant had initiated a theft of some fifty kilogrammes of narcotics from a police laboratory which he had visited as a student of the Police Academy. He had prepared the theft with two other policemen who had disclosed this fact in the context of different criminal proceedings.

According to the Regional Court's finding, the theft was originally planned for 4 March 1995. However, the applicant and his partners failed to find a locksmith whom the applicant had previously engaged with a view to breaking into the laboratory. They therefore agreed to proceed with their plan a week later. Subsequently two other policemen became involved in the plan.

On 11 March 1995 the four partners of the applicant and the locksmith met at the agreed place. As the applicant failed to appear, they refrained from further action.

The Regional Court established the above facts from statements made by the two policemen with whom the applicant had planned to carry out the theft on 4 March 1995. These statements were supported also by the statement of the locksmith whom the applicant had engaged and the other evidence available. The Regional Court found the applicant's defence inconsistent and unreliable.

The applicant unsuccessfully asked the Regional Court to hear two witnesses with a view to establishing his whereabouts on 11 March 1995. In its judgment the Regional Court pointed out that the applicant had committed the offence imputed to him on 4 March 1995 in that he intended to break into a police laboratory and steal narcotics therein, and that the theft had not been effected only because the perpetrators had failed to find the locksmith engaged for this purpose.

The Regional Court further held that the applicant's whereabouts on 11 March 1995 were irrelevant as it was beyond any doubt that on that day the theft had not been committed because of the applicant's failure to appear at the agreed place.

The applicant was sentenced to five and a half years' imprisonment.

The applicant appealed and alleged that the first instance court had not assessed the evidence in his case correctly and had decided erroneously. He requested that two witnesses should be heard with a view to confirming that on 11 March 1995 he had attended a discotheque and subsequently a party. In his view, this fact showed that he had not intended to join the other persons involved in the theft whereby he had prevented it from being committed.

On 31 January 1996, while the appeal proceedings were still pending, the applicant was released from custody.

On 23 May 1996 the Supreme Court (Najvyšší súd) upheld the first instance decision. Both the applicant and his lawyer attended the hearing. The written judgment of the Supreme Court has never been served on the applicant in person. The Supreme Court decided at last instance and Slovak law provided for no ordinary remedy against its judgment.

On 15 July 1996 the applicant lodged a request for pardon with the President of the Slovak Republic. In his request the applicant twice stated that the Supreme Court's judgment had become final. He further summed up the reasons for that judgment and challenged them in detail.

In particular, the applicant complained that in its judgment the Supreme Court had failed to address his arguments concerning the assessment of evidence at first instance. He also challenged the Supreme Court's conclusion according to which his acting constituted an offence because he had failed to ensure that the theft could not be committed in the future. Finally, the applicant complained that the Supreme Court had not considered it necessary to hear two witnesses with a view to establishing his whereabouts on 11 March 1995.

On 22 November 1996 the applicant was arrested pursuant to a warrant issued by the Bratislava Regional Court and started serving his prison term.

On 18 December 1996 the applicant complained to the Ministry of Justice that his conviction had been unlawful. On 7 December 1997 he was informed that his petition would be examined by the General Prosecutor's Office.

On 19 March 1997 a public prosecutor of the General Prosecutor's Office informed the applicant that he had examined both the Bratislava Regional Court's judgment of 10 November 1995 and the Supreme Court's judgment of 23 May 1996, and that he had found no reasons for lodging a complaint about breach of the law on his behalf.

In the public prosecutor's opinion, the proceedings leading to the applicant's conviction had conformed to the law, the courts had established all relevant facts of the case and had correctly qualified the applicant's actions from the legal point of view.

B. Relevant domestic law

The following provisions of the Code of Criminal Procedure are relevant in the applicant's case:

Section 62 governs serving of notices in the context of criminal proceedings. It provides that, normally, a notice shall be served on an accused by post at the address indicated by him or her for this purpose. When an addressee cannot be reached notwithstanding that he or she is staying at the address indicated on the notice, it is to be served on another grown-up person living at the same address or employed at the same place provided that he or she is willing to receive it and to hand it over to the addressee. If there is no such a person, the authority responsible for the service shall deposit the document in its own premises and inform the addressee by appropriate means where and when it can be withdrawn. In such a case a notice is considered as having been served on the day of its deposit with the authority responsible for its delivery even if the addressee did not learn about its deposit.

Section 63 specifies cases in which exclusively a personal service of a notice is permissible. These cases include the service of a decision on persons who are entitled to lodge a remedy against it, but not the service of a final decision.

Section 129 paras. 1 and 2 provide that every judgment shall be available in writing, as a rule not later than thirty days after its oral delivery.

Section 130 paras. 1 and 2 provide that a copy of a judgment shall be served, inter alia, on the accused even if he or she was present when it was delivered orally and also on his or her lawyer.

Pursuant to Section 139 para. 1 (a), a judgment is final and, unless the law provides otherwise, also enforceable if no appeal is available against it.

COMPLAINTS

The applicant complains that his detention following his arrest on 22 November 1996 has been unlawful since the Supreme Court's judgment of 23 May 1996 has not been served on him in person and, accordingly, could not have become final and enforceable. He alleges a violation of Article 5 para. 1 (a) and (b) of the Convention.

The applicant further complains under Article 6 para. 1 of the Convention that the proceedings leading to his conviction were unfair. In particular, he complains that the courts did not assess the evidence correctly and did not take into account that on 11 March 1995 he had prevented the theft in question from being committed in that he had deliberately refrained from meeting the other persons involved.

Finally, the applicant alleges a violation of Article 6 para. 3 (d) of the Convention in that the courts refused to hear witnesses who could confirm his whereabouts on 11 March 1995.

THE LAW

1. The applicant complains that his detention following his arrest on 22 November 1996 has been unlawful. He alleges a violation of Article 5 para. 1 (a) and (b) of the Convention which provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;"

...

The Commission does not consider it necessary to examine whether the applicant has complied with the requirement as to the exhaustion of domestic remedies since, in its view, this part of the application is any event inadmissible for the following reasons.

The Commission first notes that on 22 November 1996 the applicant was arrested pursuant to an arrest warrant issued by the Bratislava Regional Court, and that since that day he has been serving the prison term to which he had been sentenced in the criminal proceedings leading to the Supreme Court's judgment of 23 May 1996. Thus the deprivation of liberty the applicant complains of falls under Article 5 para. 1 (a) of the Convention.

The applicant considers his detention to be unlawful on the ground that, due to the failure to serve it on him personally, the Supreme Court's judgment of 23 May 1996 could not have become final and enforceable.

In the Commission's view, the applicant's above argument is based on a false premise since Section 139 para. 1 (a) of the Code of Criminal Procedure provides that a judgment is final and, unless the law otherwise provides, also enforceable if no appeal is available against it.

In the applicant's case the Supreme Court decided at second and last instance, and its judgment which was orally delivered on 23 May 1996 could not be challenged by means of an ordinary remedy. The Commission further notes that under Slovak law the service of a final judgment in writing on an accused is not a prerequisite condition for

such a judgment to become enforceable. Accordingly, the aforesaid Supreme Court's judgment was final and, pursuant to Section 139 para. 1 (a) of the Code of Criminal Procedure, also enforceable.

In these circumstances, the Commission considers that the failure to serve a written copy of the aforesaid Supreme Court's judgment on the applicant in person did not render his detention following his arrest on 22 November 1996 unlawful. Accordingly, there is no appearance of a violation of Article 5 para. 1 of the Convention in the present case.

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

2. The applicant further alleges a violation of Article 6 paras. 1 and 3 (d) of the Convention in the above proceedings.

The Commission recalls that pursuant to Article 26 of the Convention, it may only deal with the matter within a period of six months from the date on which the final decision was taken.

The aforesaid period has a double aim: to ensure legal certainty and to provide the persons concerned with sufficient time to evaluate the desirability of submitting an application to the Commission and to decide on the content thereof. The six months' time-limit is an autonomous rule which must be interpreted and applied in a given case in such a manner as to ensure to any applicant claiming to be a victim by one of the Contracting Parties of one of the rights set out in the Convention or its Protocols the effective exercise of the right of individual petition provided for by Article 25 of the Convention (see No. 29183/95, Dec. 26.5.97, D.R. 89-B, p. 111).

The Commission has held that, as a rule, when domestic law requires service of the written text of the final decision on the applicant or his lawyer, the six months' period is calculated from the date of such service, irrespective of whether the judgment concerned was previously delivered orally (see No. 32026/96, Dec. 10.9.97, D.R. 90-B, p. 141).

In the present case, the final decision was delivered orally at a hearing before the Supreme Court on 23 May 1996 in the presence of both the applicant and his lawyer. In accordance with Sections 129 and 130 of the Code of Criminal Procedure, the written judgment was to be prepared within thirty days after its oral delivery, and both the applicant and his lawyer were entitled to be served with it.

The applicant alleges that the judgment has not been served on him in person. He does not complain, however, that it has not been duly served on his lawyer. Furthermore, it does not appear from the applicant's submissions that he complained to the Slovak authorities about the failure to serve him duly with the Supreme Court's judgment.

In this respect, the Commission notes that under Slovak law there is no absolute requirement that a final judgment may only be served personally on an accused. In fact, in circumstances set out in Section 62 of the Code of Criminal Procedure the authority responsible for the service may deposit a document to be served in its own premises and inform the addressee by appropriate means where and when it can be withdrawn. In such a case the document is considered as having been served on the day of its deposit with the authority responsible for its delivery even if the addressee did not learn about its deposit.

In any event, the documents submitted indicate that the applicant had the Supreme Court's judgment at his disposal not later than on 15 July 1996 when he lodged a request for pardon with the President of the Slovak Republic. In this request the applicant expressly challenged the reasons for the Supreme Court's judgment, and the arguments raised by him form also the substance of his application to the Commission.

In these circumstances, the Commission finds no reason which would prevent the applicant from raising his complaints before the Commission not later than on 15 July 1996. Since he only introduced his application on 7 April 1997, he has not respected, as regards his complaints under Article 6 of the Convention, the six months' time-limit laid down in Article 26 of the Convention.

Finally, the Commission considers that the decisions on the applicant's request for pardon and on his petition that a complaint about breach of the law should be lodged on his behalf cannot be taken into consideration for the purposes of the six months' time-limit since the use of these extraordinary remedies was within the discretionary power of the President of the Slovak Republic and the Office of the General Prosecutor respectively (see No. 8395/78, Dec. 16.12.81, D.R. 27, p. 50; No. 9136/80, Dec. 10.7.81, D.R. 26, p. 242).

It follows that this part of the application must be rejected pursuant to Article 27 para. 3 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

J.-C. GEUS
President
of the Second Chamber