AS TO THE ADMISSIBILITY OF

Application No. 38855/97
by Alica MALFATTI
against the Slovak Republic

The European Commission of Human Rights (Second Chamber) sitting in private on 1 July 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. SVÁBY
P. LORENZEN
E. BIELIUNAS
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 15 September 1997 by Alica MALFATTI against the Slovak Republic and registered on 3 December 1997 under file No. 38855/97;

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 is an Austrian national. She was born in 1932 and resides in Rome. Before the Commission the applicant is represented by Mr S. Detvai, a lawyer practising in Bratislava.

The facts of the case, as submitted by the applicant, may be summarised as follows.

A. Particular circumstances of the case

On 27 June 1945 Slovak authorities handed the applicant's father, Ján Eszterházy, over to Soviet security forces at the latter's request. He was to be returned to Slovak authorities within ten days but was deported to the Soviet Union.

On 14 August 1946 criminal proceedings were brought against the applicant's father in Slovakia in accordance with the Slovak National Council's Order No. 33/1945 (see "The relevant domestic law" below).

On 10 June 1947 the National Court (Národny súd) issued an arrest warrant against the applicant. In the arrest warrant, the court noted

that the applicant's father was staying at an unknown place abroad.

On 17 August 1947 the public prosecutor indicted the applicant's father for treason and proposed that the proceedings be continued in his absence.

On 16 September 1947 the National Court refused to stay the proceedings until the whereabouts of the applicant's father became known as requested by the defence counsel. On the same day the National Court convicted the applicant's father of treason and sentenced him to the death penalty. The applicant's father was further deprived of civil rights and his property was confiscated.

In 1949 Soviet authorities extradited the applicant's father to Czechoslovakia. Following an individual pardon granted by the president of Czechoslovakia the death penalty imposed on the applicant's father was changed to a life sentence. The applicant's father died in prison in 1957.

On 8 May 1995 the applicant requested the General Prosecutor's Office to lodge a complaint about breach of the law (staznost pre porusenie zákona) in the proceedings leading to her father's conviction. The applicant alleged, inter alia, that the proceedings had been unlawful as her father could not defend himself before the National Court.

On 20 May 1996 a public prosecutor of the General Prosecutor's Office dismissed the applicant's request. He pointed out that the applicant's father had been convicted pursuant to a special law of retributive nature which had been temporarily enacted at the end of the World War II. The public prosecutor further recalled that this law had ceased to be effective on 31 December 1947 and concluded that the extraordinary remedy set out in Section 266 et seq. of the Code of Criminal Procedure could not be used in the case of the applicant's father.

On 3 April 1997 the General Prosecutor informed the applicant that Section 266 et seq. of the Code of Criminal Procedure could not be used in the case of her father as the latter had been convicted in the context of extraordinary proceedings under a special law which had ceased to be effective on 31 December 1947. The General Prosecutor expressed his opinion that a review of the judgment in question would only be possible if a law was enacted to this effect.

B. The relevant domestic law

The applicant's father was convicted of an offence under and in proceedings conducted pursuant to Order No. 33/1945 on Punishment of Fascist Criminals, Occupants, Traitors and Collaborators and on the Establishment of People's Judiciary (Nariadenie o potrestaní fasistickych zlocincov, okupantov, zradcov a kolaborantov a o zriadení ludového súdnictva) of 15 May 1945, as amended.

Under Order No. 33/1945 special people's courts (including the National Court) were established. People's courts ceased to exist and the relevant legal rules governing their functioning ceased to be effective on 31 December 1947.

Pursuant to Section 266 para. 1 of the Code of Criminal Procedure, the General Prosecutor may challenge before the Supreme Court (Najvyssí súd), by means of a complaint about breach of the law, a final decision of a court or other authority which was delivered as a result of miscarriage of justice.

Section 268 para. 2 of the Code of Criminal Procedure provides that when the Supreme Court establishes, upon a complaint lodged by the General Prosecutor, that there was a breach of the law as a result of

a decision or proceedings which preceded its delivery, it shall deliver a judgment to this effect.

Under Section 269 para. 2 of the Code of Criminal Procedure, if the Supreme Court finds that there was a breach of the law to the disadvantage of the accused person, it shall quash the decision in question or the relevant part thereof.

If a new decision on the issue in question is required, the Supreme Court shall, pursuant to Section 270 para. 1 of the Code of Criminal Procedure, order the authority in question to re-examine the case and to deliver a new decision.

COMPLAINTS

The applicant complains that the General Prosecutor refused to lodge a complaint about breach of the law in her father's case and thus deprived her of the possibility of having the charges against her father determined in proceedings that would conform to the law. She alleges a violation of Article 6 paras. 1 and 3 (a), (b), (c) and (d) of the Convention, and of Articles 2 para. 1 and 4 para. 2 of Protocol No. 7.

THE LAW

The applicant complains about the refusal, by the General Prosecutor, to lodge a complaint about breach of the law in her father's case. She alleges a violation of Article 6 (Art. 6) of the Convention and Articles 2 para. 1 and 4 para. 2 of Protocol No. 7 (Art. P7-2-1, P7-4-2) which provide, so far as relevant, as follows:

Article 6 (Art. 6) of the Convention

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public 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;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"
...

Protocol No. 7, Article 2 para. 1 (P7-2-1) of the Convention

"Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

Protocol No. 7, Article 4 (P7-4) of the Convention

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."

...

To the extent that the applicant complains that her father's right to have his conviction and sentence reviewed by a higher tribunal was not respected, the Commission recalls that the applicant's father was convicted and sentenced by a judgment delivered by the National Court on 16 September 1947. Since the Commission can only deal with applications against the Slovak Republic concerning matters which are subsequent to 18 March 1992 (see No. 23131/93, Dec. 4.3.96, D.R. 85-B, p. 65), the criminal proceedings leading to the conviction of the applicant's father fall outside the competence ratione temporis of the Commission.

As regards the applicant's complaints under Article 6 (Art. 6) of the Convention concerning the dismissal of her request for a complaint about breach of the law to be lodged in her father's case, the Commission notes that pursuant to Section 266 para. 1 of the Code of Criminal Procedure the use of this extraordinary remedy was within the discretionary power of the General Prosecutor, the relevant provisions imposing no formal obligations on him in this respect.

Accordingly, Section 266 para. 1 of the Code of Criminal Procedure cannot be held to have introduced a remedy directly available to the applicant in domestic law. In accordance with the Commission's case-law, the refusal by the General Prosecutor to lodge a complaint about breach of the law as requested by the applicant cannot affect the date of the final decision in the case of the applicant's father (see No. 9136/80, Dec. 10.7.81, D.R. 26, pp. 242, 244).

In the Commission's view, the General Prosecutor, when deciding on the applicant's request, did not determine or re-determine any "criminal charge" against the applicant's father (see, mutatis mutandis, No. 19155/92 and 21655/93, Dec. 16.5.95, D.R. 81-A, pp. 5, 13). Furthermore, the Convention does not guarantee, as such, a right to review of a trial (see No. 14739/89, Dec. 9.5.89, D.R. 60, pp. 296, 301). The proceedings before the General Prosecutor fall, therefore, outside the scope of Article 6 para. 1 (Art. 6-1) of the Convention.

To the extent that the applicant alleges a violation of Article 4 para. 2 of Protocol No. 7 (P7-4-2) the Commission considers that no right to a retrial can be deduced from this provision under which it is possible, in the context of protection of freedom from double jeopardy set out in para. 1 of the same Article, to re-open a case under certain circumstances. Accordingly, this complaint is also outside the scope of the Convention and the protocols thereto.

It follows that the application is incompatible with the Convention 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.-T. SCHOEPFER J.-C. GEUS

Secretary
to the Second Chamber

President
of the Second Chamber