CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 20723/02
by László OSVÁTH
against Hungary

The European Court of Human Rights (Second Section), sitting on 16 November 2004 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application lodged on 24 February 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr László Osváth, is a Hungarian national, who was born in 1949 and lives in Budapest. He is represented before the Court by Mr M. Róth, a lawyer practising in Budapest. The respondent Government are represented by Mr L. Höltzl, Deputy State-Secretary, Ministry of Justice.

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

A. Particular circumstances of the case

Criminal proceedings were instituted against the applicant on a charge of misappropriation. On 23 May 2001 the National Police Department ordered his 72-hour arrest. In the ensuing proceedings he was assisted by defence counsel of his choice.

On 24 May 2001 the Budapest Regional Public Prosecutor's Office dismissed the applicant's complaint concerning his arrest and lodged with the Pest Central District Court a motion for the applicant's detention on remand. On 25 May 2001 the District Court heard the applicant and, as confirmed by the Budapest Regional Court on 1 June 2001, ordered his detention on remand until 25 June 2001. The District Court held that there was a risk of collusion by the applicant.

On 19 June 2001 the District Court, as confirmed by the Regional Court on 3 July 2001, prolonged the applicant's detention until 25 August 2001. On 7 August and 16 October 2001 the Regional Court, as confirmed by an appeal panel of the same court on 27 August and 12 November 2001, prolonged his detention on remand until 25 October and 25 December 2001, respectively. In these proceedings the courts reached their decisions with reference to motions submitted by the Public Prosecutor's Office, all of which were based on the risk of collusion. Neither the applicant nor his defence counsel had been notified of these motions before the decisions were taken. In its decision of 12 November 2001 the Regional Court pointed out that notification was not prescribed by the Code of Criminal Procedure and was a matter for the public prosecutor in the exercise of his discretion. The Regional Court was satisfied that this practice was in accordance with the principle of 'equality of arms'.

On 27 November 2001 the applicant's lawyer filed a request for release. This motion did not reach the Supreme Court, which by that stage was responsible for deciding on the applicant's detention.

On 18 December 2001 the Supreme Court decided *in camera* to prolong the applicant's detention until 25 April 2002. The Supreme Court held that – given the seriousness of the charges against him – there was a risk that the applicant would abscond.

On 1 March 2002 the Public Prosecutor's Office ordered the applicant's release.

B. Relevant domestic law

Act no. 1 of 1973 on the Code of Criminal Procedure (as in force during the relevant period) provided:

Section 95

"(1) Detention on remand which has been ordered prior to the submission of the bill of indictment shall last until the first-instance court decides on it in the preparatory stage of the trial, but shall not exceed one month. The district court may prolong, once, the detention up to a maximum of two months. On the expiry of three months, detention on remand may be prolonged twice by a single judge of the regional court, up to a maximum of one year, beginning when the detention order is issued. Afterwards, detention on remand may only be prolonged by the Supreme Court.

(2) After the submission of the bill of indictment, detention on remand ordered by the first-instance court shall last until the delivery of the first-instance judgment. Detention on remand ordered or maintained subsequently shall last until the delivery of the final decision, but shall not exceed the duration of the sentence imposed on the defendant by the first-instance court.

(3) If the duration of detention on remand ordered or maintained after the submission of the bill of indictment:

(a) exceeds six months and no first-instance judgment has yet been taken, the first-instance court

(b) exceeds one year, the Supreme Court

shall review the justification for detention on remand.

(4) If a renewed request for the termination of detention on remand ... does not contain any new fact, the court or the public prosecutor may dispense with taking a formal decision on the request."

Section 96

"(1) The authorities shall make every effort in order to reduce the duration of detention on remand to the shortest period possible. If the defendant is detained on remand, the proceedings shall be conducted with special diligence.

(2) Detention on remand shall be terminated as soon as the cause underlying it has ceased to exist or its duration has expired and no prolongation has been ordered. Prior to the submission of the bill of indictment, the public prosecutor shall also be entitled to terminate detention on remand."

Section 379/A

"(1) The public prosecutor shall file a motion with the district court, within whose territorial competence the defendant's place of detention falls, with a view to the defendant's detention on remand ...; the public prosecutor shall, with the assistance of the investigation authority or otherwise, bring the defendant to court and notify his defence counsel of this fact.

...

(4) The public prosecutor shall file a motion with the court for the prolongation of detention on remand ... five days before the expiry of the duration of the measure. The defendant's or his counsel's request for the termination of detention ... shall be transmitted by the investigation authority to the court *via* the public prosecutor. The court shall hold a hearing if this is warranted by the occurrence of a new fact; otherwise it shall take a decision without holding a hearing."

COMPLAINT

The applicant complains under Article 5 § 4 of the Convention that neither he nor his defence counsel was notified of the motions submitted by the Public Prosecutor's Office for the prolongation of his detention. As a consequence, he did not have the opportunity to challenge effectively the statements or views expressed by the prosecutor or to influence the examination of the need to remand him in custody. Moreover, his motion for release of 27 November 2001 was not forwarded to the Supreme Court which, moreover, did not hold a hearing when deciding to prolong his detention, unexpectedly on a new ground, on 18 December 2001.

THE LAW

The applicant complains in essence that the principle of "equality of arms" was not respected in the proceedings for the prolongation of his pre-trial detention, in breach of Article 5 § 4 of the Convention, which provides as follows:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government point out that, when deciding to prolong pre-trial detention, the courts do not proceed solely on the basis of the contents of the public prosecutor's motion. Rather, they take account of all the relevant circumstances. Before taking a decision, the court holds a hearing if a new fact or circumstance has emerged, thereby enabling the defendant to put forward his views, to become familiar with the public prosecutor's views and statements contained in the latter's written and oral motions and to study them. Accordingly, the principle of equality of arms is respected whenever a decision is taken to prolong a defendant's detention on remand.

The Government admit that the law does not prescribe that, during the investigation, the public prosecutor's motion proposing the prolongation of a

defendant's detention on remand must be served on the defendant. At this stage, the judge decides on the basis of the available documents and communicates his decision to the defendant and his counsel. However, this decision is normally subject to an appeal. Furthermore, the defendant and his counsel are entitled at any stage of the proceedings to lodge with the court an unlimited number of requests for release. Prior to the submission of the bill of indictment, requests for release are decided by the public prosecutor; if the public prosecutor rejects the request, he must transmit it to the competent court. After the indictment has been filed, such requests are decided directly by the court.

Finally, the Government draw attention to the case of *Neumeister v. Austria* (judgment of 27 June 1968, Series A no. 8) in which the Court held that the principle of equality of arms need not be given full effect in the context of decisions relating to detention on remand. Since in the present case the essential procedural guarantees – including access to court, the adversarial nature of the proceedings and the impartiality of the court taking the decision – were ensured, one had to conclude that the applicant's rights under Article 5 § 4 of the Convention were not violated.

The applicant submits that the fact that the public prosecutor's motions had not been communicated beforehand (either to him or to his defence counsel) prevented him from influencing the courts' decisions to prolong his detention. Until 18 December 2001, his detention had been repeatedly ordered and prolonged on the sole ground that there was a risk of collusion by him. The Supreme Court's decision of that date did not give any reason for abandoning that ground and for deciding to prolong his detention on the ground that there was a risk that he would abscond. Since there must have been a new fact on which the Supreme Court based its conclusion that there was such a risk, it was obliged, pursuant to section 379/A § 4 of the Code of Criminal Procedure, to hold a hearing. However, no explanation was given for the court's decision to dispense with a hearing. Given the facts that the prosecution's motion, based on the risk of his absconding, was not served on the applicant, the Supreme Court did not hold a hearing, and the decision was not subject to an appeal, the applicant was deprived of any opportunity to challenge the ordering of his detention on an unexpected new ground. His defence counsel's motion for release of 27 November 2001 could not possibly remedy this situation, since it only concerned the issue of collusion – which was, to the defence's knowledge, the only ground of detention relied on by the prosecution – whereas the prosecution had meanwhile introduced a new ground for the proposed prolongation. In any event, the motion was never forwarded to the Supreme Court.

The Court finds that the applicant's complaint raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The application cannot, therefore, be regarded as manifestly ill-founded within the meaning of Article 35 § 3

of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

S. DOLLÉ
Registrar

J.-P. COSTA
President