AS TO THE ADMISSIBILITY OF

Application No. 32487/96
by Jirí SLEZÁK
against the Czech Republic

The European Commission of Human Rights (Second Chamber) sitting in private on 14 January 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 12 February 1996 by Jirí SLEZÁK against the Czech Republic and registered on 1 August 1996 under file No. 32487/96;

Having regard to :

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

- the information submitted by the respondent Government on 25 February 1997 and the reply received from the applicant on 20 March 1997;

- the applicant's further information of 10 November 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Czech citizen born in 1945. He is a lawyer. When he lodged the present application, he was being held in detention on remand in Prague Pankrác prison.

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

A. Particular circumstances of the case

On 5 September 1995 the applicant was arrested and charged with fraud under Section 250 (1) and (4) of the Criminal Code.

On 6 September 1995 a judge at the Prague 9 District Court

(Obvodní soud), having heard evidence from the applicant, ordered the applicant's detention on remand under Section 67(a)-(c) of the Code of Criminal Procedure. On 21 September 1995 the Prague Municipal Court (Mestsky soud) stated that the applicant's detention was legal and justified.

On 27 September and 4 October 1995, the judge at the Prague 9 District Court arrested further individuals, Mr. H., Mr. P. and Ms. P., and ordered their detention on remand under Section 67 of the Code of Criminal Procedure.

On 1 November 1995 the judge at the Prague 10 District Court dismissed the applicant's application for release pursuant to Section 67(a)-(c) of the Code of Criminal Procedure on the grounds that there was a risk that he would abscond, collude or repeat offences or influence witnesses. The judge stated, inter alia, that the applicant was likely to be sentenced to several years' imprisonment and that he had committed offences on more occasions which would have to be clarified, and that evidence would therefore have to be heard from all witnesses.

On 12 December 1995 the Prague Municipal Prosecutor (Mestsky státní zástupce) informed the applicant that his family visit of 27 December 1995 had not been approved because it was not possible to secure the presence of an officer.

On 28 December 1995 the Prague Municipal Court dismissed the applicant's representative's appeal against the decision of 1 November 1995, finding that since the beginning of the applicant's detention the nature of the examination had changed, particularly regarding the witnesses' evidence. The evidence did not, however, change the reasons for the applicant's detention. The Court also pointed out that "the applicant committed the offences and his argument about legal aid and his innocence could not be considered because it is not for a court in the pre-trial proceedings to examine the question of guilt or innocence of an accused".

On 22 January 1996 the applicant and his co-accused (Mr. H., Mr. P. and Ms. P.) were charged with fraud under Section 250 (1) and (4) of the Criminal Code and with falsification of public documents under Section 176 (1) and (2)(b) of the Criminal Code in conjunction with Section 9 (2) of the Criminal Code (complicity).

On 23 January 1996 the applicant introduced a constitutional appeal (ústavní stíznost) against the decision of 28 December 1995 alleging a violation of the principle of presumption of innocence guaranteed by Article 6 para. 2 of the Convention.

On 30 January 1996 the investigator ordered an expert report from a graphologist.

On 9 February 1996 the applicant was notified by the Constitutional Court (Ústavní soud) of certain shortcomings in his appeal and was allowed to rectify them by 13 March 1996. The applicant asked his lawyer to introduce a constitutional appeal on his behalf pursuant to Constitutional Court Act No. 182/1993 ("the Constitutional Court Act") (Zákon o Ústavním soudu). The lawyer refused as he did not consider the appeal to be an effective remedy.

In the meantime, on 4 February 1996, the applicant had introduced another constitutional appeal, this time against the Prague Investigation Office. On 19 February 1996 he was notified by the Constitutional Court about certain shortcomings in his appeal and allowed 15 days to rectify them.

On 19 February 1996 the Prague Municipal Prosecutor proposed extending the applicant's detention on remand and that of his co-

accused Mr. H. by four months because of the complexity of the investigation and the necessity to verify some evidence. On 28 February 1996 the judge at the Prague 10 District Court extended the applicant's detention on remand until 5 July 1996 at the latest and that of his co-accused Mr. H. until 26 July 1996 at the latest.

On 5 March 1996 the Prague 10 District Court rejected the applicant's request for release. The Court stated that there was still the risk of absconding, repetition of offences of the same nature and influencing witnesses.

On 20 March 1996 the applicant was removed from Ruzyne prison and escorted with handcuffs to Pankrác prison.

On 22 March 1996 a letter of the Secretariat of the European Commission of Human Rights posted on 11 March 1996 was opened and monitored by the Prague Investigation Office (Úrad vysetrování).

On 26 and 28 March 1996, the Constitutional Court dismissed the applicant's constitutional appeals for failure to comply with the formal requirements, in particular, the requirement to have legal representation.

On 26 March 1996 the Prague Municipal Court quashed the decision of the judge of the Prague 10 District Court by which the applicant's detention on remand had been extended by a maximum of four months and decided to extend it until 5 July 1996.

On 2 April 1996 the General Prosecutor (Vrchní státní zástupce) confirmed that there had been delay in the investigation of the case.

On 24 May 1996 the Prague Municipal Court upheld the decision of 5 March 1996 by which the judge at the Prague 10 District Court had dismissed the applicant's further request for release on the ground that the reasons for detention on remand within the meaning of Section 67(a)-(c) of the Code of Criminal Procedure continued to exist.

The same day the applicant introduced his third constitutional appeal complaining about the length of and the reasons for his detention on remand and the impossibility to effectively remedy the situation. He invoked Articles 2(2) and (3), 5 and 8(2) of the Charter of Fundamental Rights and Freedoms and Article 6 paras. 1, 2 and 3 and Article 13 of the Convention.

On 3 June 1996 the Czech Investigation Office (Úrad vysetrování) informed the applicant that his correspondence with the European Commission of Human Rights was subject to review by an investigating authority, and that this did not conflict with Ministry of Justice Decree No. 109/94. On 5 June 1996 the Czech Prison Service (Vezenská sluzba) confirmed this position and added that the applicant's escort with handcuffs was legal under Sections 41 (2) and 62 of the Criminal Code.

On 20 June 1996 the Prague Municipal Prosecutor proposed extending the applicant's detention on remand until 5 October 1996. He noted:

> "... during the extended period the investigator did not finish his examination as several witnesses still have to be heard and a report from the Prague 9 Financial Office (Financní úrad), requested at the very beginning of the investigation, has not been submitted. The expert's report concerning the examination of hand-written documents was submitted in May 1996. It can be assumed that after the applicant had, as required, acknowledged the facts the investigation could be concluded and the examination of the file could begin. This will take a certain time given the

extent of the offences."

On 21 June 1996 the Prague Municipal Prosecutor affirmed that there had been delay in the investigation. He also informed the applicant that a family visit scheduled for 20 June 1996 had not been approved because it was not possible to secure the presence of an officer. Alternative visits were scheduled for 11 and 18 July 1996.

On 26 June 1996 the Prague 10 District Court extended the detention on remand of the applicant until 5 October 1996. It also rejected the applicant's further application for release on the ground that the reasons for his detention within the meaning of Section 67(a)-(c) of the Code of Criminal Procedure continued to exist.

By letter of 29 July 1996 the Constitutional Court informed the applicant about shortcomings in his third constitutional appeal and allowed him 30 days for rectification. It also explained to the applicant the legal procedure for introducing such an appeal.

On 5 August 1996 the applicant was informed by the Inspector of the Ministry of the Interior (Inspektor Ministerstva vnitra) about misconduct on the part of the investigator of the Prague Investigation Office who was monitoring the applicant's correspondence with the European Commission of Human Rights as well as on the part of the Investigator of the Czech Investigation Office, who was examining the applicant's first complaint.

On 20 August 1996 the Czech Prison Service rejected the applicant's request for a typewriter. It gave as a reason that such a decision did not breach any legal act.

On 26 August 1996 the Czech Bar Association acknowledged receipt of the applicant's complaint against his representative.

On 27 September 1996 the Prague 10 District Court ordered the continued detention on remand of the applicant until 5 January 1997. The reasons given for the extension were analogous to those given for the previous extension.

On 30 September 1996 the applicant's third constitutional appeal was dismissed by the Constitutional Court for formal shortcomings. The Court made clear that the applicant had not introduced his appeal in a sufficient number of copies (Section 34 (2) of the Constitutional Court Act), that he had not presented a final decision by the ordinary courts against which he was making the appeal (Section 72 (4) of the Act), and that he had not been represented by a lawyer (Section 30 of the Act). The fact that he himself was a lawyer did not exempt him from this formal requirement.

On 1 October 1996 the Prague Municipal Court confirmed the extension of the detention on remand of all the accused until 5 October 1996. The Court considered, inter alia, that the applicant, given his legal qualification, was likely to be given a weighty prison sentence and that there were therefore reasons for the Court to assume that he would try to avoid being prosecuted if released in order to escape the imposition of a sentence if he was found guilty. The Court further stated that the examination of these criminal offences was very complicated because of the number of criminal acts, the number of firms which had incurred damage, and especially in view of the connections between the actions of the applicant and his co-accused and the differences in their respective evidence. All the accused had given conflicting evidence.

On 11 October 1996 the Czech Bar Association informed the applicant that his complaint against his representative had been transferred to the Monitoring Council of the Czech Bar Association (Kontrolní rada Ceské advokátní komory).

On 11 December 1996 the Prague Municipal Court dismissed the applicant's appeal against the decision of the Prague 10 District Court by which his detention on remand had been extended until 5 January 1997.

On 16 December 1996 the Prague Municipal Prosecutor proposed extending the detention on remand of the applicant by three months on the ground that it was necessary to examine further evidence. On 20 December 1996 the Prague 10 District Court ordered his detention on remand until 5 April 1997. The Court pointed out that the case-file showed that there were no delays in the investigation. The extension was justified and necessary in order to conclude the investigation.

The applicant's lawyer appealed against this decision, but it was confirmed by the Prague Municipal Court on 21 February 1997.

On 20 March 1997 the Prague Municipal Prosecutor proposed extending the detention on remand of the applicant by a further period of three months on the grounds that, before an indictment was brought, it was necessary to obtain witness evidence, to inform all the co-accused about the contents of the case-file, to specify the damage caused by all the acts and to prepare a proposal for bringing the indictment. The situation was further complicated by the fact that the Prague 9 Financial Office had lodged a complaint against the applicant's co-accused, Mr. P. It was therefore necessary either to establish evidence in that matter or to exclude the matter from the proceedings.

On 28 March 1997 the Prague 10 District Court extended the applicant's detention on remand until 5 July 1997 stating that the reasons for his detention continued to apply.

On 25 April 1997 the Prague Municipal Court dismissed the applicant's appeal against this extension.

On 3 June 1997 the applicant informed the Secretariat of the Commission that since March 1997 he had been represented by an ex officio lawyer, who had been appointed by the Prague 10 District Court.

From the applicant's most recent submissions it appears that he was released on 24 June 1997.

B. Relevant domestic law and practice

According to Section 71 (1) of the Code of Criminal Procedure, a judge may order detention on remand for a period not exceeding six months. According to sub-sections 2 and 3, when, in view of the particular circumstances of the case, the investigation cannot be terminated within the six-month period, the detention on remand may, if necessary, be prolonged by the court upon the prosecutor's request for a period not exceeding two years. When, in view of exceptional difficulties, the investigation cannot be terminated within the extended time and there is a risk that the accused will jeopardise the investigation, the Court of Cassation, upon the request of the General Prosecutor, may prolong the detention on remand for a period not exceeding three years.

According to Section 16 of Legal Profession Act No. 128/1990, everyone has the right to legal representation; those who have been refused legal representation may ask the Bar Association to appoint a barrister. This Act was amended by Legal Profession Act No. 85/1996 which came into force on 1 July 1996. Its Section 18 (2) provides guarantees similar to that in Section 16 (2) of Legal Profession Act No. 128/1990.

COMPLAINTS

1. The applicant complains under Article 5 paras. 1(c), 3 and 4 of the Convention about the length of and the reasons for his detention on remand. He submits that his detention on remand was unfounded and unacceptable as no evidence existed which could justify the charges against him. He also complains that the courts did not deal with his appeals speedily.

2. He complains under Article 6 paras. 1, 2, 3(b) and 3(d) of the Convention that his case was not dealt with fairly and within a reasonable time. He submits that the Prague Municipal Court breached the principle of presumption of innocence.

3. The applicant further claims that he had no effective domestic remedy when exercising his rights and freedoms guaranteed by the Convention. He submits that he was denied access to the Constitutional Court as his appeals were refused on the ground, inter alia, that they had not been introduced by a lawyer. Although he himself is a lawyer, he was required to have a legal representative to act on his behalf before the Constitutional Court. He invokes Article 13 of the Convention.

4. He complains under Article 3 of the Convention about inhuman and degrading treatment in the prison, namely about being detained in a cell of 7m² with two other persons, being able to change his underwear only once a week and bed linen once every other week and about being allowed to take a shower or a bath only once a week. He also complains about family visits which were thwarted and about having been escorted to Pankrác prison with handcuffs.

5. Finally, the applicant complains under Article 8 of the Convention about the refusal to allow him to have a typewriter at his disposal, the monitoring of his correspondence with the Commission and his family, and about the prison authority limitations on his family visits.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 February 1996 and registered on 1 August 1996.

On 20 January 1997 the member of the Commission appointed as Rapporteur, pursuant to Rule 47 para. 2 (a) of the Commission's Rules of Procedure, requested the Government of the Czech Republic to submit further information on the case.

The Government's written information was submitted on 25 February 1997. The applicant's written comments in reply were submitted on 20 March 1997.

The applicant submitted further information on 10 November 1997.

THE LAW

1. The applicant complains under Article 5 (Art. 5) of the Convention about the length of and the reasons for his detention on remand. He also complains under Article 3 (Art. 3) of the Convention about inhuman and degrading treatment in the prison, about family visits which were thwarted and about having been escorted with handcuffs. The applicant further complains under Article 6 para. 1 (Art. 6-1) of the Convention of the length of the criminal proceedings against him and under Article 6 para. 2 (Art. 6-2) of the Convention that the Prague Municipal Court breached the principle of presumption

of innocence.

The Commission first recalls that, under Article 26 (Art. 26) of the Convention, it may only deal with the matter after all domestic remedies have been exhausted, according to generally recognised rules of international law. It also recalls that according to its case-law, domestic remedies have not been exhausted where an appeal is not admitted because of a procedural mistake by the applicant (cf., for example, No. 23256/94, Dec. 29.6.94, D.R. 78, p. 139).

In the present case, the applicant's three constitutional appeals relating to the above matters were declared inadmissible for failure to comply with the formal requirements, in particular, the requirement of a legal representation, in application of the Constitutional Court Act. Moreover, the applicant's complaints under Article 3 (Art. 3) of the Convention have never been brought before the Constitutional Court. The applicant has therefore not exhausted the remedies available to him under Czech law.

The applicant submits that he was denied access to the Constitutional Court as his appeals were refused on the above-mentioned particular ground although he was himself a lawyer. The Commission notes that the applicant's chosen representatives refused to introduce constitutional appeals on his behalf. The question therefore arises whether in the particular circumstances the applicant is absolved from the obligation to exhaust this domestic remedy.

The Commission has already noted in its previous case-law that the requirement of representation before the Constitutional Court by a barrister, a commercial lawyer or a notary applies generally to appeals introduced before the Constitutional Court under Sections 29 and 30 of the Constitutional Court Act. The aim of that limitation is to prevent unqualified appeals being introduced by applicants before the Constitutional Court, which is the supreme judicial organ in the Czech judicial system. The Commission has concluded that this undoubtedly pursues the legitimate aim of ensuring a proper administration of justice (cf. No. 26345/95, Dec. 29.11.95, unpublished). The Commission has also held that a requirement of representation by a lawyer does not infringe the principles of the Convention even if the defendant is himself a lawyer (cf. No. 12350/86, Dec. 5.9.90, unpublished).

Also, the fact that the applicant's chosen legal representatives refused to file the constitutional appeals because they did not consider them to be effective, does not absolve the applicant from exhausting this remedy. It is true that the applicant was in a difficult situation as he was in custody. However, he could have asked the Czech Bar Association to appoint a lawyer for him under Section 16 (2) of Legal Profession Act No. 128/1990 (in force until 30 June 1996) and under Section 18 (2) of Legal Profession Act No. 85/1996 (in force from 1 July 1996).

It follows that this part of the application must be declared inadmissible in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

2. The applicant further complains under Article 8 (Art. 8) of the Convention about the refusal to allow him to have a typewriter at his disposal, about the monitoring of his correspondence with the Commission and his family and the prison authority limitations on his family visits.

The Commission has already mentioned that, under Article 26 (Art. 26) of the Convention, it may only deal with the matter after all domestic remedies have been exhausted, according to generally recognised rules of international law. In the present case the applicant failed to raise either in form or in substance in the

proceedings before the Constitutional Court the complaints which are now made under Article 8 (Art. 8) of the Convention. He has not, therefore, in accordance with Article 26 (Art. 26) of the Convention, complied with the condition as to the exhaustion of domestic remedies.

Furthermore, the Commission finds that the monitoring of the applicant's correspondence with the Commission by the prison authorities has not hindered the effective exercise of his right of petition under Article 25 (Art. 25) of the Convention (cf. Campbell v. the UnitedKingdom, Comm. Report 12.7.90, paras. 73-76, Eur. Court HR, Series A no. 233, p. 41; the Court, in its judgment, made no finding as to Article 25 (Art. 25) of the Convention; p. 23, para. 66).

It follows that this part of the application must be rejected under Article 27 paras. 2 and 3 (Art. 27-2, 27-3) of the Convention.

3. The applicant also complains under Article 13 (Art. 13) of the Convention that because of the Constitutional Court's refusal to accept his appeals he did not have an effective domestic remedy against the above violations of the Convention alleged by him. However, for the reasons just stated in the context of Article 26 (Art. 26) of the Convention, the Commission does not find any appearance of a violation of Article 13 (Art. 13) of the Convention.

As to the applicant's claim that he had no effective domestic remedy under Article 13 (Art. 13) of the Convention when exercising his rights and freedoms guaranteed by the Convention, the Commission recalls that the word "remedy", within the meaning of this provision, does not mean a remedy bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of a complaint (cf. No. 11468/85, Dec. 15.10.86, D.R. 50, p. 199). The Commission observes that all the petitions lodged by the applicant have been dealt with by appropriate national authorities.

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.

4. The applicant further complains under Article 6 paras. 1, 3(b) and 3(d) (Art. 6-1, 6-3-b, 6-3-d) of the Convention that his case was not dealt with fairly.

The primary purpose of Article 6 (Art. 6) of the Convention, as far as criminal matters are concerned, is to ensure as a whole a fair trial by a "tribunal" competent to determine "any criminal charge". Nevertheless, the requirements of paragraph 3 of Article 6 (Art. 6-3) could be relevant in pre-trial proceedings insofar as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them (cf. Eur. Court HR, Imbrioscia v. Switzerland judgment of 24 November 1993, Series A no. 275, p. 13, para. 36).

However, the applicant's complaints concern an early stage of the proceedings, namely the preliminary investigation, and not a "trial" before a "tribunal" within the meaning of Article 6 (Art. 6) of the Convention. The criminal proceedings against the applicant are still at the stage of investigation. The Commission cannot speculate whether the applicant will be put on trial, whether the evidence taken allegedly in breach of his rights will be used at this trial, whether the trial will be fair as a whole, or whether the applicant will be convicted.

The Commission therefore finds that the applicant's above complaints are premature and thus manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

J.-C. GEUS
President
of the Second Chamber