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. 30332/02
by Gábor TÁNCZOS
against Hungary

The European Court of Human Rights (Second Section), sitting on 26 April 2005 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr R. TÜRMEN,
Mr K. JUNGWIERT,
Mr M. UGREKHELIDZE,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges*
and Mr S. NAISMITH, *Deputy Section Registrar*,

Having regard to the above application lodged on 22 July 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:

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THE FACTS

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The applicant, Mr Gábor Tánczos, is a Hungarian national, who was born in 1979 and lives in Körmend, Hungary. He is currently serving a prison sentence in Budapest Prison. He is represented before the Court by Mr Z. Somos, 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

1. The first trial

On 7 April 1998 criminal proceedings were instituted against the applicant. He was charged with having murdered a 10-year-old girl by cutting her throat. In the ensuing proceedings he was assisted by a defence counsel of his choice.

On 15 October 1998 the Vas County Public Prosecutor's Office preferred a bill of indictment.

On 12 March 1999 the Vas County Regional Court convicted the applicant of murder and sentenced him to 14 years' imprisonment. The Regional Court relied on, *inter alia*, evidence given by the applicant at trial.

On appeal, on 17 November 1999 the Supreme Court held a hearing. It held that the first-instance judgment was ill-founded within the meaning of subparagraphs (a), (b) and (c) of section 239(2) of the Code of Criminal Procedure; consequently, it had to be quashed under sections 261(1) and 262(1) of that Code and remitted to the first-instance court. It ordered the Regional Court to analyse the contradictions contained in the various statements made by the applicant during the investigations and at trial.

2. The second trial

a. The first-instance proceedings

In the resumed proceedings, on 14 February 2001 the Regional Court convicted the applicant of murder and sentenced him to 13 years' imprisonment and barred him from participating in public affairs for 8 years. The Regional Court relied on the fact that, during the investigations, the applicant had admitted the murder, on the testimonies of some 110 witnesses, the opinion of some 25 experts, documentary evidence, the inspection of the crime scene and forensic analyses. The defendant did not wish to testify; instead, he maintained the statements he had made during the investigations along with those which he had made before the Regional Court during the first trial. His previous statements were read out in court.

b. The appellate proceedings

i. Preliminary proceedings before the Supreme Court

In the appeal proceedings, on 11 July 2001 the Supreme Court refused the request of the applicant's lawyer to obtain copies of the video recordings made during the investigation. The Supreme Court pointed out that he was entitled to obtain copies of any written minutes prepared on the basis of the recordings.

On 15 October 2001 the Supreme Court, pursuant to section 248(2) of the Code of Criminal Procedure and in response to the submission by the defence of the opinion of a private expert, instructed the expert chemist who had given an opinion during the first-instance trial to complete his report concerning the alleged mishandling of the material evidence in the case. The expert submitted his supplementary opinion on 30 October 2001.

ii. Hearings before the Supreme Court

On 6 November 2001 the Supreme Court held a hearing. The court heard the expert chemist and both the defence and prosecution put questions to him. The court refused to appoint an additional expert in physics, as was proposed by the defence, and declared the taking of evidence closed.

A further hearing took place on 13 November 2001. The Supreme Court rejected the defence's further proposals to obtain the opinions of an expert physicist and an expert in graphological lie-detection, as well as to hear the applicant.

At the hearing of 20 November 2001, the Supreme Court again refused to hear the applicant, despite insistence by the defence. It was pointed out that during the first-instance proceedings the defendant could have, at any time, pleaded his case, but he had deliberately chosen not to. At the appeal stage, the hearing of the applicant's testimony would only be permitted if necessary to complete the findings of fact. In any event, he had the right to address the court last.

At the hearings of 29 and 30 January 2002 the applicant addressed the court last.

iii. The Supreme Court's order

On 5 February 2002 the Supreme Court adjudicated on the applicant's appeal. It made a preliminary review of the judgment which it found well-founded as a whole. It made several corrections to the text and then considered that it was of a sufficient standard to be considered on the merits rather than quashed (*érdemi felülbírálatra alkalmas*). In the light of the evidence which it had completed itself, it was able to make a rectification to the relevant part of the first-instance decision by way of an order (*végzés*) rather than a judgment. Thereafter it upheld the conviction and sentence.

In particular, the Supreme Court noted that the Regional Court had respected its instructions on to how to repeat the first-instance proceedings. It observed that, since the applicant had refused to give evidence in the resumed proceedings before the Regional Court, all his utterances previously made in the case had been read out before the Regional Court and the applicant had been free to comment on them. Moreover, the video tapes available to the Regional Court were played at the hearings and all the persons involved in the case were heard. Furthermore, additional expert opinion was obtained.

The Supreme Court emphasised that, the taking of evidence having been closed in the first-instance proceedings, the provisions of the Code of Criminal Procedure did not allow for a repetition of that evidence before the second-instance court, which was only called on to review, under section 236 (1), the disputed judgment and the earlier proceedings. Insofar as the opinion of the defence's private expert was concerned, the Supreme Court specified that it was admitted to the file as documentary evidence, although largely irrelevant.

B. Relevant domestic law

Act no. 1 of 1973 on the [Old] Code of Criminal Procedure (as in force at the material time) provided as follows:

Section 61

"(1) Evidence is constituted in particular by ... the testimony given by the accused."

Section 87

"(1) The authority is obliged to interrogate the accused in detail. ...

(2) At the beginning of the interrogation, the accused shall be warned that he is under no obligation to give evidence, that at any time during the interrogation he is free to refuse to give evidence and that what he says may be used as evidence. ..."

Section 214

"(1) The court shall determine the case by a judgment (*ítélet*) if it convicts or acquits the defendant."

Section 236

(1) Unless the law provides otherwise, the appellate court shall review the judgment, together with the entirety of the preceding court proceedings, irrespective of who has appealed and for what reason.

Section 238

The second-instance court shall ... uphold, modify or quash the first-instance court's judgment, or dismiss the appeal.

Section 239

"(1) The appellate court shall base its decision on the facts as established by the first instance court unless the first instance judgment is ill-founded.

(2) The first instance judgment is ill-founded if:

a) the facts have not been explored;

b) the court has failed to establish the facts or the findings of fact are deficient;

c) the findings of fact are in contradiction with the contents of the documents;

d) the court has drawn incorrect conclusions from the findings of fact in regard to a further fact."

Section 240

"Evidence may be taken in order to remedy the ill-foundedness of the first instance judgment if the facts are deficient or have been partially unexplored. Evidence shall be taken at hearings."

Section 248

"(2) Prior to the hearing, the appellate court may, at its preliminary deliberations *in camera*, order the taking of evidence, if necessary."

Section 257

"(1) If the appellate court modifies the first instance judgment, it shall determine the case by a judgment (*ítélet*); otherwise, it shall do so by an order (*végzés*)."

Section 258

"(1) In the event of ill-foundedness (section 239(2)), the appellate court:

a) shall complete or correct the facts if the facts can be established fully and properly from the documents, or through induction, or from the evidence taken; and shall review the first instance judgment on the basis of the facts thus established;

b) may establish the facts differently from those established by the first instance court if, on the basis of the evidence taken, the defendant may be acquitted or the proceedings discontinued.

(2) The appellate court's assessment, under (1) above, of the evidence may be different from that of the first instance court only in respect of those facts in relation to which the appellate court has taken evidence."

Section 259

"(1) The appellate court shall uphold the first-instance court's judgment, if the appeal is ill-founded, the judgment need not be quashed or modified, or because it is not entitled to increase the penalty."

Section 260

"If the first-instance court applied the law erroneously and its judgment need not be quashed, the second-instance court shall modify the judgment and decide according to the law."

Section 261

(1) The second-instance court shall quash the first-instance judgment and remit the case to the first-instance court, if such a violation, other than those listed in section 250(II), of the procedural rules took place, so that the judgment was substantially affected... [in particular, if] the first-instance court did not meet the requirement of reasoning.

Section 262

"(1) The second-instance court shall quash the first-instance judgment and remit the case to the first-instance court, if the ill-foundedness, which would be impossible to remedy under section 258, substantially affected the finding of guilt or the imposition of the sentence."

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention that the proceedings were not fair, in particular in that the Supreme Court did not hear him. Moreover, he submits, under Article 6 § 3 (b), that he did not obtain copies of the video recordings made during the investigation and, under Article 6 § 3 (d), that his request to have a further expert heard was refused by the Supreme Court.

THE LAW

1. The applicant complains that the fact that the Supreme Court refused to hear him during the appellate proceedings rendered the criminal proceedings against him unfair, in breach of Article 6 § 1 of the Convention, which, in its relevant part, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ..."

A. The Government's arguments

The Government submit that both the principle of adversarial procedure and that of 'equality of arms' were observed in the case, since the applicant and his defence counsel had the opportunity to study the statements and evidence submitted by the public prosecutor and to address the witnesses and the experts. Although at one stage of the proceedings the applicant did not wish to give evidence in a comprehensive way and the appellate court rejected defence counsel's motion to hear him in person, altogether he was not deprived of the procedural means which were also available to the prosecution.

Referring in particular to the *Constantinescu v. Romania* judgment (no. 28871/95, § 55, ECHR 2000-VIII), the Government emphasise that the first issue to be addressed is whether the Supreme Court was to try questions of law or fact, i.e. whether it reviewed the case against the applicant in its entirety. In this connection, it is to be noted that the appellate court's reformatory powers are very limited in that it decides on the basis of the facts as established by the first instance court and does not take evidence, unless the first instance judgment is ill-founded and its factual shortcomings can be remedied without extensive evidence being taken. If, however, the latter is necessary, the appellate court quashes the first instance judgment and instructs the lower court to resume the proceedings and complete the findings of fact, or take evidence anew.

In the present case, the Supreme Court neither considered the first instance judgment ill-founded nor found it necessary to take evidence or to hear the applicant. It is true that on 6 November 2001 it heard an expert; however, the evidence given by the latter did not concern the actual facts of the case but only the handling of certain exhibits. In the case of *Kremzow v. Austria* (judgment of 21 September 1993, Series A no. 268-B, p. 44, § 63), a similar question on the conduct of the proceedings was considered by the Court to be a question of law; in this event the appellate court's failure to hear the applicant did not amount to a violation of the right to a fair trial.

Moreover, the applicant's case did not present special circumstances requiring the defendant to be heard by the appellate court, unlike other cases with which the Court has dealt (cf. *Constantinescu v. Romania*, *op. cit.*, § 58; *Botten v. Norway*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 145, § 50; *Ekbatani v. Sweden*, judgment of 26 May 1988, Series A no. 134, p. 14, §§ 32-33). Neither the character of the offence nor the nature of the evidence imperatively required the applicant to be heard by the appellate court: his credibility was not decisive in assessing the evidence and, in addition to the witness testimonies, several exhibits and expert opinion supported the first instance court's finding of the applicant guilty. In any event, he was assisted by defence counsel of his choice throughout the proceedings, with whose conduct he was satisfied. He was present in the courtroom at all stages of the proceedings, made observations on the evidence given by some witnesses, and his counsel cross-examined the witnesses and put questions to the expert.

Furthermore, by wishing to give evidence in the proceedings before the Supreme Court, the applicant only intended to elaborate "his remarks on the judgment" – to quote his counsel in this connection. However, he had already done so in writing and he reiterated his position subsequently in his lengthy (several hours) last address to the court. Although not equivalent to giving evidence, in practice a last address is an effective tool for the defence and an integral part of the case file.

Lastly, in so far as the applicant's right to silence is concerned, the courts did not draw any conclusions from the applicant's refusal to give evidence in a comprehensive way in part of the earlier proceedings, or evaluate this refusal as evidence against him. In fact, the applicant had made several, often contradictory statements, both oral and written, during the investigation and first trial. However, in the resumed proceedings, he did not give fresh evidence, referring to his earlier statements which he maintained. The latter were read out in court and considered as part of the evidence. In sum, the applicant did not exercise his right to silence. However, even if he could be regarded as having done so, the Government maintain that the court's ruling on the applicant's guilt was primarily based on the material and expert evidence, and he did not suffer any prejudice on account of his refusal to give evidence at the resumed first instance trial.

B. The applicant's arguments

The applicant submits that the Supreme Court, acting as the second instance court, was called on to examine both facts and law, since in his appeal the applicant also challenged the findings of fact as established by the Regional Court. Obviously, the Supreme Court assumed the task of taking evidence when it heard a forensic expert concerning the

transportation and the alleged mishandling of material evidence, whilst refusing the defence's repeated requests to hear another expert who could prove the unprofessional handling of exhibits.

The applicant draws attention to the fact that the Supreme Court, in its order to quash the first instance judgment, expressly instructed the Regional Court to hear the applicant with a view to reconciling the contradictory statements he had made earlier in the proceedings. Given that his conviction at first instance was primarily based on some contested microscopic evidence and that neither the motivation for the murder nor the weapon was identified, the applicant argues that his evidence was crucial and could not be replaced by the actions of his lawyer. In reply to the Government's reference to the *Kremzow* case, he maintains that the taking of evidence effected by the Supreme Court concerned more than a mere question of law, since both the opinions of the expert who was heard and the one who was not, dealt with factual issues decisive for the applicant's guilt.

Although in the resumed first instance proceedings the applicant had exercised his right to silence, in the appellate proceedings nothing prevented the Supreme Court from ensuring compliance with its own instructions to eliminate the contradictions in the applicant's earlier statements. This could have been done by the Supreme Court itself if it had granted his repeated requests and heard him in order to complete the findings of fact. The mere fact that he was requested to state whether or not he adhered to the testimony he had made during the investigation cannot be regarded as giving evidence.

Moreover, the defendant's right to address the court last is no substitute for the right to be heard, given that the last address is not a means of taking evidence, susceptible to questions or comments, or a basis for the arguments of the defence.

Finally, the applicant insists that he suffered prejudice for having used his right to silence in the first instance proceedings, as the Supreme Court refused to hear him for precisely that reason. The fact that the very court instance which gave the final judgment in his case refused to take evidence from him rendered the proceedings unfair, as in the aforementioned *Constantinescu* and *Botten* cases.

C. The Court's assessment

The Court reiterates that the manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein. The Court has held that where an appellate court is called upon to examine the facts and law, and to make a full assessment of the question of the applicant's guilt or innocence, it cannot, as a matter of fair trial, properly

determine those issues without a direct assessment of the evidence given by an accused who claims that he has not committed the act alleged to constitute a criminal offence. Accordingly, in order to determine the well-foundedness of the applicant's complaint, an examination must be made of the role of the Supreme Court and the nature of the issues which it was called upon to determine (see, among other authorities, *Constantinescu v. Romania*, *op.cit.*, §§ 53 to 56).

The Court observes that in the instant case the scope of the Supreme Court's powers, sitting as an appellate court, was essentially set out in sections 238 to 240 and 257 to 262 of the Code of Criminal Procedure. In particular, it could uphold the first-instance judgment, or quash it for irremediable shortcomings, or modify it in a judgment (see sections 238 and 257 of the Code of Criminal Procedure).

In the first round of the present case, the Supreme Court quashed the first-instance proceedings. In the second round, it upheld the first-instance judgment by way of an order, whilst completing and rectifying certain limited findings of fact in accordance with subparagraph (a) of section 258(2) of the Code of Criminal Procedure. Following the defence's submission of a private expert, it ordered the taking of evidence under sections 240 and 248(2) of the Code of Criminal Procedure on the sole question of the handling of material evidence. The applicant was able to contest the ensuing opinion of the expert chemist at a hearing on 15 October 2001. This closed the taking of evidence. The Court does not consider that this limited completion of the evidence by the Supreme Court constituted a full re-hearing of the case which would also have required hearing the applicant.

It is also to be noted that, unlike in the cases of *Constantinescu* and *Botten* where the appellate courts were the first courts to convict the applicants after overturning their acquittals, in the instant case the Supreme Court simply reviewed and confirmed the applicant's conviction by the lower court.

In these circumstances, the Court does not find that the proceedings before the Supreme Court were a full review governed by the same rules as a trial on the merits. Consequently, the Court is satisfied that, unlike in the above-mentioned *Constantinescu* case, the Supreme Court was not called on to make a full assessment of the applicant's guilt. Its scrutiny having been restricted primarily to questions of law, it was in essence the Regional Court which had established the factual elements underlying the determination of the criminal charge against the applicant.

In this connection, as regards the second proceedings before the Regional Court, they were clearly of an adversarial nature, in which the applicant, assisted by defence counsel, and the prosecution enjoyed equal rights of access to the material evidence and in the questioning of the witnesses and experts. It was the applicant's own decision not to give evidence before the

Regional Court, which took note of his position and arranged for the oral reproduction in court of all the previous statements he had made throughout the proceedings. The applicant and his lawyer were at all times in a position to make comments on those statements. In the absence of any negative inferences being drawn from the applicant's conduct before the Regional Court, the Court is satisfied that his defence rights, in particular the right to silence, was not infringed.

In the light of the foregoing, the Court concludes that the Supreme Court's refusal to hear evidence directly from the applicant did not impair the essence of his right to a fair hearing. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant also complains that the Supreme Court did not place at his lawyer's disposal copies of the video recordings made during the investigation, and that it refused to hear a further expert proposed by the defence. He relies on Article 6 § 3 (b) and (d) of the Convention, which provides as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> (b) to have adequate time and facilities for the preparation of his defence; ...
>
> (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; ..."

Concerning the complaint about the video recordings, the Court considers that the Supreme Court's position – according to which the defence was entitled to obtain copies of any written minutes prepared on the basis of the recordings – does not as such disclose any arbitrariness prejudicing the applicant's defence rights. In any event, the Court is satisfied that the recordings were played during the Regional Court's resumed proceedings and were thus available to both the prosecution and the applicant, who was not thereby deprived of any facilities for the preparation of his defence.

As to the refusal to hear a private expert, the Court reiterates that, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. More specifically, Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses; it does not require the attendance and examination of every witness on the accused's behalf (cf. *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X); this principle holds true also for experts (see *Baragiola v. Switzerland*, no. 17265/90, Commission decision of 21 October 1993, Decisions and Reports 75, p. 76). The Court notes that this expert's written

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opinion was nevertheless admitted to the case file. It finds, therefore, that the applicant's defence rights were not impaired in this respect.

It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

S. NAISMITH
Deputy Registrar

J.-P. COSTA
President