CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 34941/97
by Silvio UNTERGUGGENBERGER
against Austria

The European Court of Human Rights, sitting on 25 September 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 30 December 1996 and registered on 17 February 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Silvio Unterguggenberger, is an Austrian national, born in 1935 and living in Vienna. He is represented before the Court by Mr M. Graff, a lawyer practising in Vienna. The respondent Government are represented by Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

A. The circumstances of the case

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

The applicant was a member of the executive board of the V. Company and was responsible for the management of the company's finances.

On 7 March 1990 this company laid an information against the applicant *inter alia* on the suspicion that the applicant had caused financial damage by abusing his position as financial manager of the company. Point a) of the information concerns transactions with the K. Bank. It alleges that the K. Bank, chosen by the applicant to carry out the management of the V. Company's investment portfolio, had charged the latter excessive fees. It alleges further that the applicant had requested a refund of about 12 million Austrian schillings (ATS) for entrusting the K. Bank with these financial transactions.

On 2 April 1990 preliminary investigations were opened against the applicant.

On 19 April 1990 the Economic Police (*Wirtschaftspolizei*) carried out searches at the applicant's premises and at the premises of M.W., the former director of the K. Bank, who was at the same time a witness against the applicant. Three diaries and about a hundred pages of other documentary evidence (the so-called "green folder") were seized at M.W.'s home. The documents which were considered relevant to the investigation were listed in a report of 21 May 1990.

On 20 April 1990 the investigating judge at the Vienna Regional Criminal Court heard the applicant. According to the minutes, the questioning started at 9 a.m. The applicant was informed that preliminary investigations on the suspicion of a breach of trust (*Untreue*) under section 153 of the Criminal Code (*Strafgesetzbuch*) and on the suspicion of offences under the Company Act (*Aktiengesetz*) were pending against him. He was first heard as regards the alleged breach of the Company Act and then about the transactions with the K. Bank. In this respect, he was told that he was suspected of having received a refund from M.W. and indications as to the amount at issue and the date of receipt were also given. The applicant stated that he was aware of the allegations and handed over a written statement outlining his position. The questioning on the transactions with the K. Bank

ended at about 10 a.m. whereas the further questioning, which lasted until 12 a.m., concerned facts which are not relevant in the present context.

On 8 May 1990 the investigating judge decided that the defence was not entitled to inspect certain specified parts of the file. On 29 May 1990 the applicant lodged a complaint against this decision with the Review Chamber (*Ratskammer*) of the Regional Court which was unsuccessful.

On 22 June 1990 the Economic Police submitted a report on the result of their investigations to the Regional Court. The latter confirmed in writing the receipt of the green folder, which was subsequently transmitted to an expert.

On 24 April 1991 the V. Company filed a supplementary information against the applicant concerning transactions with the K. Bank.

On 6 June 1991 the V. Company filed another supplementary information against the applicant concerning new facts. It alleged that he had introduced L. as a fictitious intermediary in order to carry out certain financial transactions of the I. Company, a subsidiary of the V. Company, and that the commission paid had caused financial damage to the V. Company.

On 13 and 16 December 1991 the V. Company filed further documentary evidence and information.

On 6 August 1993 the Regional Court received the applicant's request to obtain the green folder from the expert in order to enable him to inspect it. He submitted that, according to the report of 21 May 1990 by the Economic Police, documents which were relevant to the proceedings had been seized at M.W.'s premises and had apparently been handed over to the expert who referred in his written opinion to one of those documents. The investigating judge at the Regional Court did not take any decision on this request.

On 1 March 1994 the Public Prosecutor's Office preferred the thirty-page indictment against the applicant and his co-accused, L., concerning charges of breach of trust under section 153 of the Criminal Code. The applicant was accused, *inter alia*, of having in 1985 and 1986 demanded and received a "refund" of about ATS 12 million for financial transactions carried out by the K. Bank, and for having introduced, between 1985 and mid-1987, L. as a fictitious intermediary in order to carry out certain financial transactions of the I. Company, thus, creating a fictitious claim for commission, causing damage of about ATS 9 million. Detailed information as to the underlying facts was given with regard to both charges. The indictment was served on the applicant on 22 March 1994.

On 7 March 1994 the investigating judge, upon the request of the Public Prosecutor's Office on 23 February 1994, discontinued the criminal proceedings against the applicant *inter alia* as regards point a) of the information concerning "excessive fees for transactions with the K. Bank" (see above, the information of 7 March 1990).

On 12 April 1995 the applicant repeated his request that the green folder be made available to him. Again the Regional Court took no decision.

On 27 April 1995 the applicant filed a motion for the hearing of two witnesses and for access to four related criminal court files.

On 8 May 1995 the trial started before the Vienna Regional Criminal Court sitting as a court with lay assessors (*Schöffengericht*). When the co-accused, L., was heard, the presiding judge ruled that the applicant was not allowed to be present. Neither the applicant nor his counsel contested this measure. Defence counsel was present during the interrogation. The applicant was re-admitted to the court room as soon as the questioning of L. was finished and the presiding judge gave him a summary of L.'s statements. At that stage, neither the applicant nor his counsel asked for further information or complained that the summary of L.'s statements was insufficient. The former director of the K. Bank, M.W., was heard as a witness in the presence of the applicant and the defence questioned him in some detail.

On 9, 10, 15, 16 and 17 May 1995 further hearings were held and numerous witnesses were heard.

It is in dispute between the parties when the green folder was made available to the defence. The Government submit that it was available as of the first day of the trial, whereas the applicant submits that he only received copies of parts of it on 15 May 1995, i.e. on the fourth day of the trial.

On 17 May 1995, the last hearing day, the applicant's counsel filed a further application for the hearing of witnesses. According to the minutes, he also requested that documents from the green folder be read out and - in case it was disputed that M.W. was the author of those documents - to hear M.W. and to appoint a handwriting expert. At the close of the hearing the presiding judge dismissed all outstanding requests for the taking of further evidence.

On 17 May 1995 the court gave judgment, convicting the applicant of a breach of trust within the meaning of section 153 of the Criminal Code, and sentencing him to six years' imprisonment for having demanded and received a "refund" of about ATS 12 million for financial transactions carried out by the K. Bank. He was also convicted of having introduced L. as a fictitious intermediary in order to carry out certain financial transactions of the I. Company, thus creating a fictitious claim for commission and causing damage of about ATS 9 million. It found that, in both cases, he had not transferred the commission to the V. Company and that he had abused his position as the financial director of the V. Company, causing it financial damage. The court recalled that the case-law on the question of whether the acceptance of commission by trustees fell within the scope of section 153 of the Criminal Code had been contradictory for some time, but had been settled by the Supreme Court's judgment of

17 May 1983 in another case. According to that judgment, section 153 was applicable to the applicant's case.

On 11 December 1995 the applicant filed a plea of nullity and an appeal (*Nichtigkeitsbeschwerde und Berufung*). He complained about the refusal to hear several witnesses he had called for, and the fact that he had not had access to the green folder before the trial hearings. Thus he had not been able to prepare his defence properly. He further noted that he had not been present when his co-accused had been heard. He alleged that he had been insufficiently informed about the statements made by the co-accused afterwards. Furthermore, he criticised the evaluation of evidence. As to the facts concerning the K. Bank, he alleged that his conviction violated the principle of *ne bis in idem* because the investigating judge had ordered the criminal proceedings to be discontinued in this respect on 7 March 1994. Finally, he complained that the court had erred in law when applying section 153 of the Criminal Code to his case. He argued that it was section 153a of the Criminal Code which was pertinent to the offence concerning the acceptance of advantages by trustees (*Geschenkannahme durch Machthaber*). As this section had entered into force after he had committed the acts in issue, he could not be punished at all.

On 4 April 1996 the Attorney-General (*Generalprokurator*) filed thirty pages of observations (*Croquis*) on the applicant's plea of nullity and his appeal.

On 12 April 1996 the applicant was notified that the hearing before the Supreme Court would take place on 25 April 1996.

On 15 April 1996 the applicant, who was at that stage still represented by the lawyer who had filed his plea of nullity and appeal, received the Attorney-General's observations and was informed that he could comment on them within a delay of eight days. He sent his twelve-page reply by mail on 23 April 1996, which reached the Supreme Court the next day. He did not request an adjournment of the hearing.

On 25 April 1996 the hearing took place and the Supreme Court confirmed the Regional Court's judgment.

As to the applicant's complaint that he had not been adequately informed about the statement of his co-accused L., who had been heard in his absence, the Supreme Court noted that the presiding judge had given the necessary information by way of a summary of the statements. It would have been open to defence counsel to challenge the applicant's exclusion from L.'s hearing and to complain about the alleged insufficiency of the summary of L's evidence, in order to obtain an interim decision from the court in this respect.

Further, the Supreme Court found that the court of first instance had justifiably refused to hear certain witnesses as it had in any case considered that the facts to be proved by those witnesses had already been established. Thus, the refusal did not cause any prejudice to the applicant.

As to the green folder, it noted that the applicant could have applied for the further questioning of M.W. after having obtained the folder, but that he failed to make such an application and had therefore not fulfilled the conditions for a plea of nullity in this respect.

The Supreme Court found that the applicant's further submissions constituted an inadmissible attempt to challenge the Regional Court's assessment of the evidence, which was duly reasoned and free from contradiction.

As to section 153 of the Criminal Code, the Supreme Court confirmed that it was applicable to the applicant's case. Finally, it found that the facts described in the investigating judge's order of 7 March 1994, namely "excessive fees for transactions with the K. Bank" were not identical to those facts underlying the conviction, namely the receipt of refunds by the applicant. Therefore, the conviction did not violate the principle of *ne bis in idem*.

B. Relevant domestic law and practice

Criminal Code

According to section 153 § 1 whoever knowingly abuses the power, conferred on him by law, decree or contract, to dispose of another person's property or to enter into an obligation on his behalf, and thereby causes pecuniary damage, is liable to punishment by up to six months' imprisonment or a fine of up to 360 day rates. According to the second paragraph of that provision, the punishment may be between one and ten years' imprisonment where the damage exceeds ATS 500,000.

The question of whether the acceptance of a commission by a trustee falls within the scope of section 153 had been unclear in the case-law until the Supreme Court, in a leading case, ruled on 17 May 1983 that section 153 applied to such matters. The judgment was published in the Supreme Court's official collection in criminal matters (SSt no. 54/42) and in the leading legal journals, namely the Austrian Lawyer's Journal (*Österreichische Juristenzeitung,* 1983, p. 404) and the Legal Journal (*Juristische Blätter,* 1983, p. 545).

Code of Criminal Procedure

Pursuant to section 113 anyone who alleges in the course of preliminary proceedings, or in the proceedings after the indictment has been preferred, that his rights have been violated by a decision or omission of the investigating judge, may lodge a complaint with the Review Chamber.

COMPLAINTS

1. The applicant raises a number of complaints about the alleged unfairness of the criminal proceedings against him. He invokes Article 6 §§ 1 and 3 (a), (b), (c) and (d) of the Convention.

a. The applicant complains that he was not informed promptly and in sufficient detail of the nature and cause of the accusations against him and was therefore hampered in the preparation of his defence. He submits in particular that he had only been heard once, on 20 April 1990, i.e. at the very beginning of the preliminary investigations in a summary manner as regards the transactions with the K. Bank, and that he had not been heard at all during the preliminary investigations as regards the supplementary information laid on 6 June 1991 concerning the transactions with the I. Company.

b. The applicant next complains that he did not have adequate time and facilities for the preparation of his defence, in particular as he only had access to parts of the green folder during the fourth day of the trial. He submits that the green folder contained *inter alia* a document in which the main witness against him, M.W., had outlined alternative versions of presenting the case. As M.W. had already been heard before the applicant had access to parts of the folder, the applicant had no opportunity to question him regarding that evidence.

c. The applicant also complains that he was not allowed to be present when his co-accused, L., was heard by the trial court and that the presiding judge's summary of L.'s statement was insufficient.

d. The applicant further complains that the trial court refused his requests for the hearing of a number of witnesses on his behalf, and that it wrongly evaluated the evidence before it.

e. Lastly, the applicant complains under Article 6 of the Convention that the proceedings before the Supreme Court were unfair as he was only given an eight-day delay for commenting on the voluminous observations of the Attorney-General, and that only one day was left to the Supreme Court itself to study his counter-arguments, which was insufficient for it to prepare the hearing of his case carefully.

2. The applicant complains under Article 7 of the Convention that he was convicted under section 153 of the Criminal Code for having received a refund for transactions carried out with the K. Bank, although the introduction of section 153a of the Criminal Code concerning the acceptance of advantages by trustees, which entered into force after the relevant facts, showed clearly that such conduct had not been covered by the first-mentioned provision.

3. The applicant complains under Article 4 of Protocol No. 7 that he was tried twice as regards the transactions with the K. Bank. He submits in particular that, on 7 March 1994, the investigating judge discontinued the

proceedings *inter alia* in this respect. According to the Code of Criminal Procedure, discontinuance has the same effect as an acquittal, namely that the proceedings may only be continued if there are reasons for re-opening them, whereas he was convicted without a re-opening of the proceedings.

THE LAW

1. The applicant raises a number of complaints about the alleged unfairness of the criminal proceedings against him. He invokes Article 6 §§ 1 and 3 (a), (b), (c) and (d) of the Convention, which read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... 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; ..."

Preliminary issues

The Government assert that the applicant failed to exhaust domestic remedies as regards the following complaints:

The applicant failed to complain at the trial that he was not allowed to be present when his co-accused L. was heard and that he was not adequately informed about the latter's statement. He should have obtained an interim decision from the trial court in this respect. Further, he failed to challenge the decision not to hear M.W. again on the contents of the green folder and to obtain an interim decision from the trial court. As regards his complaint that, in the proceedings before the Supreme Court, he did not have sufficient time to submit his observations in reply to the Attorney General's, he neither requested an extension of the time-limit nor a postponement of the hearing. According to the Government such requests are granted in practice.

The applicant contests the Government's view. He contends that he only became aware that his co-accused L. had incriminated him when the Regional Court's judgment was served on him. He could, therefore, not be expected to complain during the trial. As regards access to the green folder, he submits that defence counsel complained on 29 May 1990 about the refusal of access to parts of the file, including the green folder. As regards the hearing before the Supreme Court, the applicant argues that the Code of Criminal Procedure does not envisage requests for postponement of hearings. Filing such a request therefore offered no prospects of success.

The Court recalls that, pursuant to Article 35 § 1 of the Convention, it may only deal with the matter after all domestic remedies have been exhausted. The purpose the rule is to enable the State to have the opportunity to redress the alleged breach by domestic means within the framework of its own legal system before proceedings are brought in an international court (Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 65).

As regards the applicant's complaint about allegedly insufficient information on the statements of his co-accused L., the Court notes, firstly, that the applicant did not contest the presiding judge's decision to exclude him from L.'s hearing. Secondly, the Court observes that defence counsel was present during the hearing of L. and was therefore in a position to assess whether the presiding judge gave a sufficiently detailed summary of L.'s statement to the applicant after his return to the courtroom. However, counsel did not raise the matter. Accordingly, the Supreme Court dismissed the complaint on the ground that it had not been duly raised before the trial court. In these circumstances, the Court finds that the applicant failed to raise the issue in accordance with the formal requirements of domestic law and has therefore failed to exhaust domestic remedies (*ibid*., § 66).

It follows that this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

The applicant further complains that his defence was hampered in that he only had access to the green folder on the fourth day of the trial and could therefore not question M.W. as regards the evidence contained therein. The Court will examine whether the applicant made use of the remedies which were at his disposal during the pre-trial and the trial stage in order to obtain access to the file and to question M.W. about its contents.

The Court notes that the applicant's complaint to the Review Chamber of 29 May 1990 against the refusal of access to parts of the file would not have included a complaint about the refusal of access to the green folder as it is undisputed that the latter was only transmitted to the Regional Court on 22 June 1990. It is true that, during the pre-trial stage on 6 August 1993, the applicant requested that the green folder be made available to him for inspection. As the investigating judge failed to decide, the applicant could

and should have lodged a complaint with the Review Chamber pursuant to section 113 of the Code of Criminal Procedure (see above - relevant domestic law) which may be directed against any act or omission of the investigating judge. However, he failed to do so. As regards the trial stage, the Court, having regard to the minutes of the trial, notes that the applicant did not request a re-hearing of M.W. on the contents of the green folder. He only requested that M.W. be heard if it were contested that M.W. was the author of certain documents in the folder. Accordingly, the Supreme Court found that the applicant had not complied with the conditions for filing a plea of nullity. The Court, in turn, finds that the applicant failed to exhaust remedies as regards his belated access to the green folder.

It follows that this part of the application must also be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

As to the applicant's complaint that he did not have sufficient time to comment on the Attorney-General's observations in the proceedings before the Supreme Court, the Court notes that it is in dispute between the parties whether or not a request for an extension of the time-limit or a postponement of the hearing would have offered prospects of success. However, the Court is not called upon to resolve this question as it considers that the complaint is anyway inadmissible for the reasons set out below.

The merits

As to the merits, the Government contend that there is no indication of a violation of Article 6 §§ 1 and (a) and (b). The applicant was informed promptly about the suspicion against him as he was heard on 20 April 1990, i.e. shortly after the preliminary investigations were opened, on the facts that were known to the authorities at that time. More importantly, the indictment was served on him on 22 March 1994 and the trial started more than a year later on 8 May 1995. The applicant therefore knew the factual basis as well as the legal qualification of the charges against him and had enough time to prepare his defence.

As to the hearing before the Supreme Court, the Government submit that the applicant had a period of eight days to reply to the Attorney General's observations. They contend that, at the appeal stage, where the defence is already familiar with the file and the legal issues of the case, such a period is adequate.

The applicant maintains that he was not informed promptly and in sufficient detail of the nature and cause of the accusations against him and was therefore hampered in the preparation of his defence. He was heard only once on 20 April 1990, i.e. at the very beginning of the preliminary investigation in a summary manner as regards the transactions with the K. Bank, and that he was not heard at all during the preliminary investigations

as regards the supplementary information laid on 6 June 1991 concerning the transactions with the I. company.

As to the hearing before the Supreme Court, the applicant maintains that the time-limit for filing his comments on the Attorney General's observations was unduly short and that only one day was left to the Supreme Court itself to study his counter-arguments, which was insufficient for it to prepare the hearing of his case carefully.

The Court recalls firstly that the requirements of paragraph 3 of Article 6 represent particular aspects of the right to a fair trial guaranteed by paragraph 1. It will therefore examine the present case from the point of view of these two provisions taken together (see, as a recent authority, *Mattoccia v. Italy*, no. 23969/94, § 58, ECHR 2000-IX).

The Court further recalls that paragraph 3 (a) of Article 6 requires that the accused must be made aware "promptly" and "in detail" of the cause of the accusation, i.e. the material facts alleged against him which are at the basis of the accusation, and of the nature of the accusation, i.e. the legal qualification of these material facts. The adequacy of the information must be assessed in relation to sub-paragraph (b) of paragraph 3 of Article 6, which confers on everyone the right to have adequate time and facilities for the preparation of their defence and in the light of the more general right to a fair hearing embodied in paragraph 1 of Article 6 of the Convention (*ibid*., §§ 59-60).

In the present case, the applicant was informed at an early stage of the pre-trial proceedings on 20 April 1990 of the suspicion against him concerning the transactions with the K. Bank. Although the applicant's questioning on this issue lasted no more than half an hour, the information given to him comprised both the essential facts and their legal qualification as a breach of trust. It is true that he was not informed of the suspicions against him concerning the transactions with the I. Company during the preliminary investigations. However, he was fully informed of all the charges against him by the thirty-page indictment which was served on him on 22 March 1994 more than a year before the trial started. Thus, it cannot be said that he was not duly informed of the nature and cause of the accusation against him or that his right to have adequate time and facilities to prepare his defence was adversely affected.

As regards the proceedings before the Supreme Court, the Court notes that on 15 April 1996 the Attorney General's observations were served on the applicant, who was given eight days to comment. This period may appear short in criminal proceedings bearing on complicated factual and legal issues, but it should be borne in mind that the scope of the Attorney General's observations was delimited by the issues raised in the plea of nullity. Moreover, the applicant was represented by counsel who had already filed the plea of nullity and the appeal on his behalf and was familiar with the issues to be addressed. Thus, the Court finds that the

applicant had "adequate time" to prepare his defence. In fact, counsel filed a thirteen-page counter-statement on the applicant's behalf. The Court also considers that, in the circumstances of the present case, it cannot be said that the fact that the Supreme Court only had a day to study that counter-statement rendered the proceedings unfair.

In conclusion, the Court finds that there is no indication of a violation of Article 6 §§ 1 and 3 (a) and (b) and that this aspect of the case is to be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

As to the applicant's complaint about the trial court's refusal to hear a number of witnesses on his behalf, the Court recalls that the taking and assessment of evidence is primarily a matter for the domestic courts, whilst the Court's task is to assess whether the proceedings considered as a whole were fair (*Garcia Ruiz v. Spain* [GC], 30544/96, § 28, ECHR 1999-I). In the present case, the trial court heard numerous witnesses but refused to hear others requested by the applicant as it considered that their proposed testimony concerned facts which had already been established. Its decision was confirmed by the Supreme Court. The Court finds nothing in the case-file to indicate any arbitrariness in this assessment by the domestic courts. There is, thus, no indication of a violation of the applicant's rights under Article 6 §§ 1 and 3 (d) and this aspect of the case is also to be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant next complains that his conviction under section 153 of the Criminal Code violated Article 7 of the Convention which, so far as relevant, reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. ..."

The Government concede that the question whether or not the acceptance of a commission by a trustee falls within the scope of section 153 of the Criminal Code had been disputed in the criminal courts' case-law as well as in legal writing for some time. However, the question was settled by the Supreme Court's leading case of 17 May 1983. According to this judgment a trustee committed a breach of trust if he made an arrangement for receiving a commission, gift or bribe in connection with a financial transaction conducted for the principal. This has not been altered by the introduction of section 153a in 1987 relating specifically to the acceptance of advantages by trustees. Thus, the applicant was in a position in the present case concerning acts committed between 1985 and 1987 to know - if need be with legal advice - that his conduct constituted a breach of trust.

For his part, the applicant argues that the introduction of the offence of acceptance of advantages by trustees under section 153a of the Criminal Code in 1987 shows that such conduct was not covered previously by

section 153. He also points out that the Supreme Court's decision of 17 May 1983 has been widely criticised in academic writing.

The Court recalls that Article 7 requires that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The concept of "law" as used in Article 7 implies qualitative requirements, notably those of accessibility and foreseeability. Article 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, to be published in ECHR 2001).

The Court notes that the Supreme Court's judgment of 17 May 1983 which made it clear that the offence envisaged by section 153 of the Criminal Code included the acceptance of commissions by trustees, was published in the Supreme Court's official collection as well as in legal journals and was, thus, sufficiently accessible. It is true that it concerns a rather complex interpretation of the offence of breach of trust. However, a law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see the Cantoni v. France judgment of 15 November 1996, *Reports* 1996-V, p. 1629, § 35).

In the present case, the Court is satisfied that the applicant could have foreseen at the material time that he would be liable to criminal prosecution for the financial transactions at issue, had he sought appropriate legal advice. He could have been expected to do so, all the more so as he was acting in his professional capacity as a member of the executive board of a company (*ibid*.). This assessment is not invalidated by the fact that the legislator subsequently created a specific provision relating to the acceptance of commissions by trustees. In these circumstances, there is no indication of a violation of Article 7 of the Convention.

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

3. Finally, the applicant alleges that he was tried twice as regards the transactions with the K. Bank. He relies on Article 4 of Protocol No. 7, which, so far as relevant, reads as follows:

> "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."

The Government assert that the proceedings against the applicant were partly discontinued by the investigating judge on 7 March 1994 and that some of the facts concerned by the discontinuance indeed related to the K. Bank. However, the refund received from the K. Bank was the subject matter of the indictment preferred at the same time.

The applicant maintains that the decision of 7 March 1994 discontinued the proceedings in respect of "excessive fees for transactions with the K. Bank" which, according to him, encompassed the receipt of refunds. He argues that, pursuant to the Code of Criminal Procedure, discontinuance has the same effect as an acquittal, namely that the proceedings may only be continued if there are reasons for re-opening them.

The Court is not called upon to decide whether or not Article 4 of Protocol No. 7 applies where the person concerned has not been acquitted but rather the proceedings against him have been discontinued with final effect, as the complaint is inadmissible for the following reasons:

The Court notes, on the basis of the documents in the file, that point a) of the criminal information laid on 7 March 1990 by the V. Company against the applicant contains two distinct points, namely excessive fees for transactions with the K. Bank and refunds paid by the K. Bank to the applicant. On 1 March 1994 the Public Prosecutor preferred the indictment charging the applicant with a breach of trust under section 153 of the Criminal Code only as regards the receipt of refunds. On 7 March 1994 the proceedings against the applicant were partially discontinued, *inter alia* as regards the excessive fees for transaction with the K. Bank. The Court further observes that the Supreme Court in its judgment of 25 April 1996 also held that the facts underlying the applicant's conviction and the facts covered by the decision of 7 March 1994 were not identical.

In these circumstances, the Court is satisfied that the facts on which the applicant's conviction was based differed from those in respect of which the proceedings had been discontinued. There is, thus, no indication of a violation of Article 4 of Protocol No.7.

It follows that this part of the application must also be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

S. DOLLÉ
Registrar

J.-P. COSTA
President