FIFTH SECTION

DECISION[1]

AS TO THE ADMISSIBILITY OF

Application no. 2615/10
by Ludmila POLEDNOVÁ
against the Czech Republic

The European Court of Human Rights (Fifth Section), sitting on 21 June 2011 as a Chamber composed of:

Dean Spielmann, *President,*
Elisabet Fura,
Karel Jungwiert,
Mark Villiger,
Isabelle Berro-Lefèvre,
Ann Power,
Ganna Yudkivska, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 29 December 2009,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

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, Ms Ludmila Polednová, is a Czech national who was born in 1921 and lives in Plzeň. She was represented before the Court by Mr V. Kovář, of the Czech Bar. The respondent Government were represented by their Agent, Mr V. A. Schorm.

A. The circumstances of the case

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

1. The context of the case

After the communist coup in February 1948, a number of political trials were conducted in former Czechoslovakia in order to consolidate the power of the Communist party and eliminate opponents of the new totalitarian regime. The State Court *(Státní soud)* and State Prosecutor's Office were created for this purpose by a special law and subject to direct political control by the party. The most important trial was the 1950 trial of Ms Milada Horáková and other opponents of the communist regime for high treason and espionage, and the applicant was appointed to act as a member of the prosecutorial steering group. It was later established that the trial had been manipulated in that the issues of guilt and sentencing had been decided on by the political authorities well in advance of the trial and that the defendants had been compelled, by means of inhuman investigation techniques, to admit to offences they had not committed. The trial culminated in a State Court judgment of 8 June 1950 by which four of the defendants were sentenced to death and the others received lengthy prison sentences. After having their appeal dismissed on 24 June 1950 by the Supreme Court *(Nejvyšší soud)*, the four persons sentenced to death were executed on 27 June 1950.

On 30 June 1968, in a climate of political détente, the Presidium of the Supreme Court quashed the convictions of 8 and 24 June 1950 following an appeal in the interests of the law lodged on behalf of those convicted. On this occasion it was found that the investigation had been carried out, using illegal methods, by investigators of the Ministry of the Interior and not by the investigating judge. It was also found that many legal provisions (in particular those of the 1983 Code of Criminal Procedure (Law no. 119/1873)) had been infringed during the trial, that the facts had not been sufficiently established, that numerous pieces of evidence had been omitted, that the defendants' actions had been partly incited by the State Security Service and that all the relevant authorities had single-mindedly focused on fabricated charges aimed at eliminating the so-called "class enemies". The Supreme Court therefore ordered the competent prosecutor to re-examine the case; consequently, evidence was heard from several persons who had participated

in the trial with Milada Horáková. It appears from a statement made in April 1969 by one of the defendants sentenced to life imprisonment that the accused had been forced, through physical and psychological coercion, to learn their statements of evidence, which had been written beforehand, off by heart; that the confrontations at the hearing had been previously prepared in minute detail and that the minutes of the hearing had in fact been a script which determined the exact questions to be asked by the prosecutors and the answers that the defendants were expected to provide. This witness also reported that the applicant had displayed a hard and pitiless attitude.

Renewed consolidation of the communist regime in the 1970s meant that there was no further interest in investigating the case and it was discontinued in 1975 because the criminal prosecution was time-barred.

The case was not definitively settled until after the collapse of the communist regime in November 1989. On 29 June 1990 the Prosecutor General ruled that there was no case to answer in respect of all those charged. Referring to the judgment of 30 June 1968, he found that they had been wrongfully convicted of actions which were in accordance with the principles of a democratic society and that the criminal proceedings had been designed, for political ends, to arbitrarily eliminate opponents of the totalitarian dictatorship under the communist regime.

2. The criminal proceedings against the applicant

On 8 September 2005 the police questioned the applicant about her participation in the trial of Milada Horáková and others. She claimed to be unable to remember certain facts and stated that at the time she had been convinced, having trusted the judgment of the other, more experienced prosecutors and judges, that the activity concerned was designed to undermine the Republic.

On 6 October 2005 criminal proceedings were instituted against the applicant for acting as an accessory to murder *(účastenství na vraždě)*. She was accused of having acted as a prosecutor in the political trial of Milada Horáková and others in 1950.

On 13 October 2005 the applicant appealed against this decision, arguing that the authorities had not specified which of her acts or omissions constituted the offence in question, for which *mens rea* was required. She emphasised that the situation of that time should not be viewed emotionally merely because mindsets had changed since then, and that it would have to be proved that she had committed a criminal offence under the law applicable at the material time.

According to the applicant, the decision to open the above-mentioned proceedings was set aside following her complaint, and the police were ordered to reinvestigate the case. She submitted that as soon as the police knew that a prosecution for acting as accessory to murder would be time-barred, new criminal proceedings were brought against her in January 2007 for the offence of murder.

It is clear from the case file, however, that the new decision to bring criminal proceedings, taken by the police on 8 January 2007, still concerned the offence of acting as an accessory to murder under the 1961 Criminal Code (Law no. 140/1961). The applicant appealed against this decision, claiming that at the time of the trial she had been a mere student, answering to a higher-ranking

prosecutor, and that she had not been able to work independently. She claimed that the charge she was facing was imprecise and did not specify either her intention to commit the offence or in what way she had broken the laws of the time. She also maintained that she had not participated in the investigation and that the investigation file had convinced her of the guilt of the defendants, who had spontaneously confessed during the hearing. She felt it normal to have been present at preparatory meetings, as they were preparing for a public trial, and stated that she had followed the instructions of her supervisors. During her questioning by the police on 1 March 2007 the applicant exercised her right to silence.

On 19 April 2007 the applicant's lawyer inspected the file, added some press cuttings from the time of the events and requested that the case be discontinued on the grounds of lack of evidence indicating that her client was guilty. She subsequently asked that the evidence be supplemented by any that might prove the applicant's intention to commit the crime in question and expressed surprise at the fact that proceedings had been brought only in 2005, when all of the other participants were deceased.

On 12 July 2007 the prosecutor allegedly informed the applicant, before formally charging her and without further explanation, that her acts were henceforth to be classified as murder committed as a joint principal (*trestný čin vraždy ve spolupachatelství*).

In September 2007 the applicant submitted documents to the court attesting to the fact that, having been in her first year of legal studies at university at the time of the trial, she had been under the instructions of her supervisors and could in no way influence the course of events. She also argued that the provisions of the 1873 Code of Criminal Procedure that she was accused of having infringed were very general and concerned only the due diligence of the proceedings, and that the charge against her was not founded on any actual responsibility on her part.

On 10 October 2007 the applicant requested that the hearing be held without her attendance, for health reasons, and exercised her right to silence on the ground that she had already communicated her comments to the authorities.

Between 16 and 18 October 2007 the Prague Municipal Court *(Městský soud)* held the hearing in the absence of the applicant, who was represented by a lawyer. Her deposition was read out, along with many other written documents, and audio and visual recordings of the trial were projected. In response to counsel for the applicant's objection that the defence had not yet had the possibility of giving their views on the charge and the evidence read out in court, the court observed that, according to Article 214 of the Code of Criminal Procedure, that right was reserved solely for the defendant herself. At the end of the hearing the applicant's lawyer did not file a motion to submit additional evidence and delivered a closing address, noting that the criminal proceedings could have been instituted at the time of the judgment of 30 July 1968 and that the proceedings brought against the applicant, as the sole survivor, were possible at present only because the limitation period had been changed after 1989. The lawyer admitted that her client had, in participating in the trial, shown her loyalty to the communist regime, but emphasised that at the material time the Communist Party, together with the KGB, had run everything, and that the psychosis in society had turned into a general acceptance of breaking the law. However, the prosecution had not presented any real evidence proving the criminal

responsibility of the applicant. Indeed, having had no legal training at the time, she had not been in a position to understand the shortcomings of the trial, particularly since the State Prosecutor's Office had been directly run by the Ministry of Justice, and had been in no position to influence or change the course of the trial. By taking part in the drafting of the charges and the assessment of the trial the applicant had merely been following the orders of her more experienced supervisors and she had not proposed a sentence in her written submissions. Moreover, no minutes existed from any political meeting bearing the applicant's signature as a sign of her attendance.

On 1 November 2007 Prague Municipal Court found the applicant guilty of murder under Article 219 of the 1961 Criminal Code (in force at the time of the judgment), committed jointly with the other prosecutors and judges involved in the aforementioned trial and since deceased, and sentenced her to eight years' imprisonment. The court considered it to be proven that, having participated in the trial in 1950 of Milada Horáková and others as a member of the prosecution, the applicant had acted in breach of the 1873 Code of Criminal Procedure in force at the time, as she had been aware of the fact that the questions of guilt and sentencing had been decided on by the political authorities well in advance of the trial, which she knew had been designed only to confer an appearance of legality on the physical elimination of the defendants. The court held that the applicant's defence, submitted by her lawyer in court, had been refuted by the evidence taken. Among this evidence, in particular, were written documents bearing witness to the fact that the trial had been prepared by the Ministries of Justice and the Interior with the help of the State Security Service and a group of prosecutors within which the applicant, having already proven herself during other political trials, had acted as a "people's prosecutor". They showed that the scripted trial and the minutes had been prepared in advance by the Ministry of the Interior, that the case file of the prosecution had been subject to political approval, that counsel for the defence, the prosecutors and the judges had been instructed by the Ministry of Justice as to how the trial should unfold and that political meetings at which the applicant had been present had taken place every day after the hearing. The file also contained a written assessment of the trial, signed by the applicant, which emphasised the importance of the political investigations and commended the very good cooperation with the State Security Service. The Municipal Court also had at its disposal an appeal in the interests of the law lodged on behalf of the defendants in July 1968, which had led to a Supreme Court judgment on 30 July 1968. The court considered that this evidence proved that the 1950 trial had been manipulated to the point where it amounted in fact to a quadruple murder carried out through the justice system and that the applicant had made a significant contribution to it by failing to comply with, among other provisions, Articles 3, 30 and 34 of the Code of Criminal Procedure of the time relating to the authorities' obligation to look for incriminating and exonerating evidence, to protect the interests of the State and to establish the truth by all available methods. The Municipal Court held that, at the time, the applicant should have known that the death sentences imposed had not been a legal measure and that, jointly with others, she had contributed to conferring an appearance of legality on the political trial in question, and consequently to the murder of four people on the basis of their political beliefs. Given that under the 1852 Criminal Code, which had been in force at the time of the offence, murder was punishable by the death penalty, the court held that the charges against the applicant should be classified as murder under Article 219 of the 1961 Criminal Code, which was more favourable to her. Although the Code provided for a twenty-year limitation period, it was also necessary to take into account section 5 of Law no. 198/1993 on the Illegality of the

Communist Regime, which suspended the limitation period between 25 February 1948 and 29 December 1989 when political motives incompatible with the fundamental principles of a democratic legal system had thwarted a conviction or acquittal. In the present case, therefore, the offences with which the applicant was charged were not time-barred. Taking into account the extenuating circumstances (the applicant's subordinate status and her law-abiding life), the amount of time that had passed since the offence had been committed and since she could have first been prosecuted, her age, the state of her health and her degree of involvement in the offence (less than that of the renowned judges and prosecutors), the court imposed a lesser sentence on the applicant than the normal minimum.

The applicant lodged an appeal, arguing that under the original legislation, which was more favourable to her, the offence was time-barred (as in a similar case concerning the prosecutor K.V. which ended with the charges being dropped). She also complained that the rights of the defence had not been respected, alleging that the court had not taken into account the closing address of her lawyer, who, moreover had not been given the opportunity to comment on the criminal charge or the evidence, and that the court had not responded to the submissions of the defence in any way. Furthermore, she deemed evidence consisting of an anonymous letter from a former prison guard, which had prejudiced her in the eyes of the court and the public, to be illegal. In her opinion, there was no evidence to prove that she had intentionally participated in the murder of four people based on their political beliefs, that she had knowingly been part of a plan designed to eliminate enemies of the regime regardless of the established facts, that she should have known that the judges had been influenced or that she had taken part in meetings with the political authorities. The applicant criticised the court for not taking into account the fact that, at the time of the events, she had only completed one year of preparatory legal studies and had been a first-year law student, which did not enable her to understand all of the circumstances surrounding the trial, let alone any potential political manipulations.

In a judgment of 4 February 2008 delivered in closed court, the Prague High Court *(Vrchní soud)* quashed the Municipal Court's judgment on appeal and discontinued the proceedings on the ground that the limitation period had expired. The court observed firstly that no significant procedural defects had occurred in the proceedings before the Municipal Court, that all the evidence necessary in order to elucidate the facts had been properly taken and decided on by the judges and that the court had explained its reasoning as well as the elements supporting its findings. The High Court did not therefore agree with the applicant's opinion that her guilt had not been proven and found it established that the questions of guilt and sentencing had been decided on before the trial had even begun, that the applicant had taken part in it as a "people's prosecutor" even though she had not yet finished her studies at university and that she must have been aware, at least broadly, that the provisions of the Code of Criminal Procedure of the time were being breached. The court also rejected her submission that the rights of the defence had not been respected. In this regard it noted that when defendants waived their right to appear before the court, they also waived the right to comment on the evidence taken. Furthermore, when a defendant was not present at the hearing but his or her lawyer was, the right to comment on the evidence and the charges was exercised through the closing address, which was what had happened in this case.

The High Court nonetheless held that the Municipal Court had not given the aforementioned correctly established facts the appropriate legal classification. It did not accept the Municipal Court's opinion that the 1961 Criminal Code was more lenient than the 1852 Code, applicable at the material time. Taking into account, in the light of the principle of individual criminal responsibility, the ancillary and limited role of the applicant, the court held that she could not be considered as having committed murder as a joint principal. The court remarked in this regard that the political system of the time had created a mechanism which fabricated political trials and was operated by political leaders (in particular the secretariat of the Communist Party), the security services (the State Security Service and Soviet advisers) and the judicial service; judgments were therefore predetermined. Thus, in the chain of command of those who had participated in the trial of Milada Horáková and others, the prosecutors had played a part which was key to the trial but not decisive for its outcome, and the applicant had been at the end of this chain. An objective assessment of her role therefore led to classifying her actions not as murder committed as a joint principal but rather as acting as an accessory to judicial murder, as in the preliminary proceedings. Under Article 137 of the 1852 Code, such acts could be classified only as indirect participation in ordinary murder, carrying a sentence of five to ten years in prison and with a five-year limitation period. In these circumstances, even having regard to section 5 of Law no. 198/1993, the limitation period had expired on 30 December 1994, and since the proceedings in question had been brought after that date there was no case to answer.

An appeal on points of law against the High Court's ruling was lodged by the Supreme Prosecutor, who argued that the present case did not concern indirect participation in murder, but murder committed jointly, an offence which, under the 1852 Code, was punishable by the death penalty and not subject to a limitation period. In the prosecutor's opinion it was therefore necessary to apply the 1961 Criminal Code, which was more lenient as it did not provide for the death penalty and fixed the limitation period at twenty years. Under section 5 of Law no. 198/1993, the limitation period therefore ran from 30 December 1989 to 30 December 2009.

The applicant objected to the grounds of the appeal and consented to it being heard in camera.

Nonetheless, on 4 June 2008 a public hearing took place before the Supreme Court, in the absence of the applicant, who was represented by her lawyer. The latter commented on the appeal, without requesting leave to add to the evidence, and asked the court to uphold the finding that there was no case to answer for lack of evidence proving that his client had been aware of the manipulation and that she had intended to infringe the procedural provisions.

After this hearing, the Supreme Court quashed the judgment of 4 February 2008 and ordered the High Court to give a new decision, respecting its binding legal opinion. In the Supreme Court's opinion, to find the correct legal classification in this case, it was necessary to compare the applicant's involvement in the trial with the immutable ethical standards required of a prosecutor. In this regard, the court referred to its decision no. 7 Tz 179/99 of 7 December 1999 which defined the conditions in which a judge could be held criminally responsible for the murder of innocent people sentenced to death. In view of these principles, applicable *mutatis mutandis* to prosecutors, the actions of the applicant, who had taken part in the fraudulent manipulation of legal proceedings designed to eliminate opponents of the communist regime, had been completely unethical. As the Municipal Court had established, the case was about a political trial

the outcome of which had been decided in advance by the political organ of the Communist Party together with the State Security Service. All those who had agreed to take part as judges and prosecutors were in a similar position, that of key enforcers of the will of a political organ, and there was no convincing reason for differentiating between them in terms of criminal responsibility. The fact that the applicant had been chosen after having proved herself in other political trials, had been a member of the main group of prosecutors which had prepared the prosecution, had taken part in the political meetings and delivered the prosecutor's closing address, had signed the assessment of the trial and had taken part in the execution of those convicted showed to what extent she had identified with the aim of the trial, namely the physical elimination of innocent victims. Given that the trial, ending in the sentencing to death and execution of the defendants, had constituted the murder mechanism, it was correct to conclude that the applicant, as a prosecutor, had actively participated in the joint commission of the murder and had thus committed a crime which, according to Article 136 of the 1852 Criminal Code, was punishable by death and hence had no limitation period. It was the Supreme Court's opinion that the High Court's decision was therefore founded on an erroneous legal assessment of the facts and that the conditions for finding that there was no case to answer had not been met. Given that the 1961 Criminal Code, which was more favourable to the applicant, provided for a limitation period of twenty years (suspended between 25 February 1948 and 29 December 1989), the proceedings in the instant case were not time-barred.

Having agreed to the applicant's request that the hearing, planned for 29 July 2008, be postponed, the Prague High Court held a public hearing on 9 September 2008 in the courtroom of the Regional Court of Plzeň, the city where the applicant resided. The latter attended the hearing with her lawyer and commented on her case by describing her childhood and her experience of the war and by maintaining that her participation in the trial of Milada Horáková had been presented to her as an opportunity to work with and learn from some excellent lawyers. She had not been aware of any manipulation having occurred, had never spoken to the defendants and had trusted the judgment of those more experienced than herself.

At the end of the hearing, the Prague High Court quashed the Municipal Court's judgment of 1 November 2007 and found the applicant guilty of ordinary murder as a direct participant within the meaning of Article 136 (a) of the 1852 Code of Criminal Procedure, for which she was sentenced to six years' imprisonment. After reiterating its previous findings on the absence of irregularities in the proceedings before the Municipal Court, the High Court, bound by the legal opinion of the Supreme Court and its reasoning regarding the responsibility of the applicant, concluded that the latter had been directly involved in the murder by having participated in a trial breaching Articles 3, 30, 34 and others of the 1873 Code of Criminal Procedure, breaches of which she must at least have been broadly aware. Under the 1852 Criminal Code the offence had no limitation period, whilst the 1961 Criminal Code provided for a limitation period of twenty years (suspended between 25 February 1948 and 29 December 1989, by virtue of section 5 of Law no. 198/1993). The criminal proceedings were therefore not time-barred in either case at the time of their instigation in 2005. Given that under the 1852 Code the above-mentioned offence carried a maximum sentence of twenty years' imprisonment when at least twenty years had passed since the events, whereas the 1961 Criminal Code provided for a life sentence, it made sense to sentence the applicant under the 1852 Code. In doing so the High Court took into account the extenuating circumstances (the applicant's law-abiding life, the fact that she had

committed the offence *de facto* by obeying orders, the amount of time that had passed since the offence had been committed, the age and health of the applicant and the part she had played in the trial), and determined that the sentence should be shorter than the normal minimum.

On 14 October 2008 the applicant lodged an appeal on points of law with the Supreme Court, complaining of the media uproar, the defence's inability to comment on the evidence taken, the court's reading of an anonymous letter from a former prison guard supposedly describing her behaviour during the execution of those convicted, and the application of the principle of collective guilt (without distinguishing between people according to their function and their ranking in the hierarchy). She submitted that the guilty verdict against her was contrary to Article 4 § 3 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter "the Charter") since an analogous case against K.V., a former military prosecutor, had been discontinued on 15 January 2002 because it was time-barred, a decision upheld by the Supreme Court on 12 June 2002. She also argued that the verdict had relied on a mere moral conviction, as a substitute for the lack of evidence refuting her defence; however the case had to be approached not solely from a moral and ethical perspective, but also from a legal one. Finally, the applicant submitted that it was unacceptable and against the principle of independence of the courts that the High Court, bound by the Supreme Court's legal opinion, should have been influenced, in this regard, in establishing the facts and examining the evidence.

After a request by the applicant that her appeal be considered by a different panel to the one having already ruled on the appeal lodged by the Supreme Public Prosecutor, it was decided on 5 March 2009 that the panel would not withdraw from examining the case.

On 19 March 2009, after a session held in camera (to which the applicant had consented), the Supreme Court dismissed the appeal for lack of grounds. It noted firstly that in its judgment of 4 June 2008 it had given the High Court no instructions as to the establishment of the facts or the assessment of the evidence, having limited itself to commenting on the legal assessment of the established facts and the application of the 1852 Criminal Code. This assessment had in no way been influenced by the media coverage of the criminal proceedings or by the reading of the anonymous letter, on which the Municipal Court had in any case not relied in its findings. The Supreme Court also rejected the argument relating to collective guilt, finding that it was only in cases where justice functioned normally that there was cause to distinguish between judges and prosecutors. However, given that in the trial of Milada Horáková and others the judges and prosecutors had all contributed to the pursuit of a political objective, which was to physically eliminate the victims, by conferring an appearance of legality on it, the responsibility borne by the applicant, although less than that of the judges, was not so different that it was incomparable. The court went on to find that the objection that the applicant's criminal responsibility was based solely on ethical or moral failings was unfounded, stating that the applicant had been responsible for illegal conduct which infringed the provisions of the 1873 Code of Criminal Procedure. Concerning the violation of Article 4 § 3 of the Charter alleged by the applicant with reference to the K.V. case, the Supreme Court stated that it was not its place to assess the judgment in a case concerning a different defendant, different facts and different criminal legislation, when the binding nature of the judgment referred to was limited to the case in question. The fact that the Supreme Court had not taken this decision into account in the applicant's case could not amount

to a breach of Article 4 § 3 of the Charter, which in any case was not applicable to specific judicial decisions.

In March 2009 the applicant began to serve her prison sentence.

On 27 April 2009 the applicant challenged the Supreme Court's decisions of 4 June 2008 and 19 March 2009, as well as the High Court's judgment of 9 September 2008, in a constitutional appeal in which she relied on Articles 4 § 3, 10 and 36-40 of the Charter. She complained of the application of the principle of collective guilt and the admission into evidence of the defamatory anonymous letter. She also argued that the contested judgments had not specified which evidence was meant to have proved that she had been aware that the trial had been manipulated, and that it was not possible to commit murder either through ethical or moral failings or by infringing the provisions of the Code of Criminal Procedure. She further complained of the fact that the Supreme Court, in its decision of 4 June 2008, had given instructions to the High Court regarding the assessment of evidence and of the High Court's subsequent failure to further investigate the case or hear evidence from the applicant, allowing her only a closing address. Referring once again to the K.V. case, the applicant objected to the courts' findings as to which legislation was more favourable to her. Finally, she questioned the reasons for not having initiated proceedings earlier, when other participants in the trial would still have been alive and when she could have more actively defended herself. She believed that the courts had been influenced in the instant case by the objective of convicting her, as she was the last survivor of the trial in question.

On 16 July 2009 the Constitutional Court *(Ústavní soud)* dismissed the appeal as manifestly ill-founded in that the applicant had failed to prove that there had been a violation of her fundamental rights. It found firstly that the applicant's claims before the court were identical to those which had been put forward in her appeal on points of law, on which the Supreme Court had duly ruled; the applicant was therefore just pursuing the same claim and was treating the Constitutional Court as a court of fourth instance. Agreeing with the other courts' view that there was no need to differentiate, for the purposes of criminal responsibility, between the different persons who had taken part in the trial, the Court noted that the other courts had nonetheless considered the applicant's individual conduct. The decisive legal findings had been reached on the basis of facts which had been established by the Municipal Court with the help of numerous items of written evidence, as stated in its judgment. These documents, the authenticity of which had not been challenged by the applicant, named the applicant as having taken part in the political meetings and included an assessment of the trial signed by her. In response to the applicant's claim that the High Court had not accepted her deposition, the Constitutional Court referred to the courts' reasoning regarding the consequences of the applicant's request that the hearing in the court of first instance take place without her. It also noted that the High Court had adequately considered the closing address made for the applicant and that therefore her right to address the court had not been infringed. Moreover, the Municipal Court had no obligation to approve every motion to take evidence. Concerning the anonymous letter, the Constitutional Court found that it was unnecessary evidence as the courts had not based their decisions on it and thus had not had to assess it. The applicant's allegations about the influence of the media on the outcome of the proceedings were described as vague and hypothetical. The Constitutional Court also upheld the Supreme Court's decision of 4 June 2008, in which the latter had merely expressed its opinion on the correct legal classification of the facts which had been established

up until that time. The decision had therefore not bound the High Court in any way in terms of the facts. Concerning the applicant's claims that she could not have committed murder, the court referred to the findings of the lower courts according to which the applicant had misused her role as a prosecutor and had not fulfilled it in accordance with the legal provisions, and had thus actively participated in the murder as a joint principal. The Constitutional Court also considered it impossible to interpret Article 136 of the 1852 Criminal Code as not applying to certain methods of committing murder, such as a manipulated trial infringing the procedural provisions; such an interpretation would guarantee impunity for murders committed through manipulated trials, which would be tantamount to the State renouncing the protection of life. In the Constitutional Court's opinion, the courts had, moreover, sufficiently explained why they had considered the 1852 Criminal Code to be more favourable to the applicant, even with regard to limitation periods. From a constitutional perspective it was irrelevant that the criminal proceedings against K.V. had led to a different result; as the Supreme Court had already stated, Article 4 § 3 of the Charter could not be relied on in that context. Finally, the question of why the criminal proceedings had not been brought earlier was considered to be speculative and abstract. The Constitutional Court therefore held that the interpretation and application of the law by the courts and their conduct of the proceedings had not exceeded the limits of constitutionality.

On 24 February 2010 the Hradec Králové Regional Court *(Krajský soud)* decided of its own motion that three presidential amnesties, from 1953, 1955 and 1990, were applicable to the applicant, each of which took two years off her prison sentence. However, this decision was set aside on 24 March 2010 by the Prague High Court, which ruled that only the 1953 and 1990 amnesties were applicable to the applicant and that it was appropriate to grant her a pardon in respect of three years of her sentence in total. In this decision, the High Court referred to other criminal cases where it had been established that the 1955 amnesty did not apply to persons convicted of murder.

On 2 March 2010 the applicant's lawyer was informed that the Supreme Public Prosecutor had not agreed to her request that an appeal in the interests of the law be lodged on her behalf.

On 21 December 2010 the President of the Czech Republic pardoned the applicant in respect of the rest of her sentence. She was released the same day.

B. Relevant domestic law and practice

1. Law in force at the time of the trial of Milada Horáková and others

(a) Constitution of the Czechoslovak Republic (Law no. 150/1948)

Article 2 guaranteed the right to individual liberty and no one was to be deprived of that liberty except by law.

Article 3 § 1 provided that no one could have proceedings brought against him or her except in cases provided for by the law, and only by a court or authority competent under the law and in accordance with a procedure prescribed by law.

Under Article 36, all holders of public authority had to conform to the laws and regulations of the people's democratic regime during the exercise of their functions and powers; any agent of the public authorities failing to fulfil this obligation was to be punished by law.

(b) 1852 Criminal Code (Law no. 117/1852)

Under Article 134, any person who acted against another with the intention of causing his or her death and in a way which led to his or her death was guilty of murder.

According to Article 136 (a), the death penalty was to be imposed not only on the person who carried out the murder, but also on any person who had ordered it, had laid hands on the victim during the murder or had acted as a joint principal during it.

Article 137 provided for sentences for accomplices to and indirect participants in the murder.

Under Article 231, offences punishable by the death penalty were not subject to limitation. However, where the offence had been committed twenty years before the criminal proceedings were brought, this provision stipulated that the accused could only receive a sentence of between ten and twenty years' imprisonment.

(c) 1873 Code of Criminal Procedure (Law no. 119/1873)

Article 3 required the competent criminal authorities to duly consider all the circumstances which might incriminate the accused as well as those relevant to his or her defence, and to inform the accused of his or her rights.

Pursuant to Article 30, members of the prosecution were required, within their areas of competence, to defend the well-being of the State and act independently of the courts.

Under Article 34, prosecutors were required to prosecute of their own motion all offences brought to their attention and to ensure that the investigation was carried out before the competent court and that the persons responsible were punished. They also had to ensure that all methods capable of leading to the discovery of the truth were correctly employed. They had the right to consult files, obtain information about the progress of investigations and formulate appropriate proposals. If they noticed any irregularities or delays they were required to take measures provided by law to remedy them.

2. Domestic law and practice after 1989

(a) Charter of Fundamental Rights and Basic Freedoms

Article 4 § 3 provides that any statutory restriction of the fundamental rights and freedoms must apply equally to all cases meeting the conditions laid down.

Under Article 10 § 1, everybody is entitled to respect for his or her human dignity, personal integrity and good reputation, and to the protection of his or her name.

Articles 36 to 40 guarantee the right to an independent and impartial court, a fair and public trial held without unnecessary delay, the rights of the defence and the principles of the presumption of innocence and of penalties being strictly defined by law.

(b) 1961 Code of Criminal Procedure (Law no. 141/1961)

Article 214 provides that, after taking each item of evidence, the judge must ask the defendant if he or she wishes to comment on it. The defendant's comments must appear in the minutes of the proceedings.

(c) Law no. 198/1993 on the Illegality of the Communist Regime and Resistance to It (entry into force on 1 August 1993)

Under section 5, the limitation period for prosecuting offences is suspended between 25 February 1948 and 29 December 1989 if a legally effective conviction or acquittal did not take place owing to political motives incompatible with the fundamental principles of a democratic legal system.

(d) Supreme Court decision no. 7 Tz 179/99 of 7 December 1999

In this decision, the Supreme Court considered the possibility of prosecuting a State Court judge, who had sentenced innocent people to death in another political trial in the 1950s, for murder. Noting that, at the time of the trial, the Constitution and laws in force had established rules aimed at ensuring that judges could decide in an independent, impartial and fair manner, the Supreme Court held:

"Even if we must take into account the departure, in reality, of judicial practice from these principles due to the external influence of the executive bodies and the prosecution, it is unacceptable to conclude that judges did not bear responsibility for their decisions. Being in the role of a judge is never purely a matter of applying the law ... but is based first and foremost on ethics. This ethical basis is characterised by certain immutable ethical standards ... even though they are not codified. In order for a judgment to be fair ... and constitute an act of justice, certain principles, which must be respected regardless of the external political situation, must incontestably form part of these unwritten rules. Whilst recognising that the notion of justice is always, in some way, dependent on the conditions of the historical context or the time, the Supreme Court remains nonetheless convinced that, at the very least, certain fundamental ethical requirements can be formulated, applicable to the notions of justice and fair judgment that are not subject to such temporal conditions.

To be considered fair, a sentence must at the very least fulfil the requirement of punishing the convicted person for an offence actually carried out by them. The judgment must truly be the result of the trial preceding it. The proceedings leading up to the judgment must not be mere formal, insignificant precursors to a predetermined decision. The judgment must genuinely result from the court's work and not be imposed from the outside, in other words by institutions outside the judicial system such as political bodies, the executive, etc. The court's decision-making process must involve distancing itself from any vested interests in the outcome of the

proceedings, including political interests. The judgment must not have the sole objective of becoming a tool in the political struggle conducted by one part of society against the other. It must not be a simple act of elimination of individuals or groups of individuals in the context of such a struggle.

The value of these rules lies in the fact that if judges do not abide by them, they deeply betray the fundamental ethical principles of their vocation, regardless of the reason, even if for example they have succumbed to political influence. If, when making their decision, judges are exposed to influences that are contextual or specific to the time, they must not forget that this decision must stand even after those influences are gone. Judges must be aware that, even later, their decisions must fulfil the fundamental requirements of justice.

If a person's life is taken as a result of a decision sentencing him or her to death, the question is: when does that judgment constitute a criminal offence, when is it an abuse of power by the judge, and when is it what is known as judicial murder? Although this question is very difficult to answer, it is not impossible. We must first identify a certain hierarchy of the unlawful elements in the judgment.

There can be times when a judgment is the result of proceedings which have been duly conducted and are based on the assessment of concrete evidence, the issue of guilt or innocence having simply been the subject of differing opinions throughout the various judicial proceedings.

At other times, a judgment may be the result of irregular proceedings where there was insufficient evidence. However these are irregularities which, in substance, testify only to poor decision-making, with no actual intent on the part of the judge to harm the accused. A judgment of this kind is still the result of justice that functions normally.

There can also be cases where a judgment is vitiated because the judge intended to harm the accused or favour someone, but where the judgment was delivered following a trial conducted according to the requirements of proper legal proceedings. Here, the irregular judgment constitutes a substantive breach of the principles of impartiality and objectivity required for exercising the duties of a judge.

The most serious case is that of a judgment given in circumstances devoid of those immutable ethical attributes inherent in the duties of a judge, in particular because

(a) there was premeditated intent to physically eliminate a person;

(b) the judgment was chosen as the tool with which to physically eliminate that person;

(c) the judge identified with that aim of the judgment, regardless of the reason;

(d) the judge subordinated the way in which he or she conducted the proceedings or participated in the decisions to the objective of delivering, as planned, a judgment amounting to murder;

(e) the judge sentenced or participated in the sentencing of the accused with no heed to the course or outcome of the trial; in reality, the results of the proceedings were not a criterion in determining the judgment – on the contrary, the proceedings were adapted to the objective of securing a conviction which amounted to murder; and

(f) the accused had no real chance of reversing the premeditated intention to eliminate him, even if, to an outside observer, the proceedings might have given the impression that their content had led to the judgment (for example if the accused had been coerced into confessing).

In these circumstances, the decision to sentence someone can be regarded as a necessary and irreplaceable part of a lethal mechanism. The issue here is not one of a mere abuse of power on the judges part, but of murder. That is what is meant in legal terms by judicial murder. The sentencing here is an act that is totally estranged from the ethical foundations on which the duties of a judge rest.

It is thus apparent that in order to decide whether, in the case of a judge, there has been an abuse of power or judicial murder, it is not sufficient to examine the sentence solely in the light of whether or not it is in accordance with the law as a normative act of public authority. The issue can be properly and convincingly resolved only if the sentence is scrutinised in the light of the criteria stemming from the ethical foundations of the office of a judge. ...

It is clear from the circumstances surrounding the adoption of the judgment in case no. 1 Ts II 57/51 of the former State Court that in determining the case, the accused had betrayed the ethics of the judicial decision-making process in an extremely serious way. The judgment had not been an act of justice but an act of elimination of the persons convicted by it. That act of elimination had only the appearance of a judgment; in terms of its content and values, it had nothing to do with justice. It was a case of the person adopting the judgment not being, in reality, the judge in the case but an assistant to or joint principal with those who, at the time, determined that the objective of the trial would be the physical elimination of the accused. Thus, it would not do to exclude one of the forms of criminal responsibility of a person accused of murder. The accused cannot exonerate him or herself from that responsibility by referring to the responsibility of others who may have also participated in the physical elimination of those convicted. ..."

(e) Supreme Court decision no. 6 Tdo 115/2002 of 12 June 2002

In this decision, the Supreme Court dismissed an appeal on points of law lodged by the Supreme Public Prosecutor to the detriment of the person concerned, K.V. In a judgment of the Prague Municipal Court, K.V. had been found guilty of murder under Article 219 § 1 of the 1961 Criminal Code for having contributed, as a military prosecutor and subsequently an investigating judge, to the unjust conviction in 1949 of General H.P., who received the death sentence. K.V. had been accused of, among other things, forging parts of the case file, distorting the minutes of the proceedings, leading the investigation in a way that was not objective and was influenced by Soviet advisers, and proposing the death penalty. Following K.V.'s appeal, the High Court had nonetheless classified the same facts as participation in ordinary murder within the meaning of Article 414 § 4 of the Military Criminal Code in force at the material time, an offence for which that law provided a limitation period of five years. The High Court had therefore concluded that,

even taking section 5 of Law no. 198/1993 into account, the limitation period had expired before criminal proceedings had been instituted against K.V. on 9 March 1998.

The Supreme Court noted that the Municipal Court and the High Court had relied on the same facts and that the significant difference in their legal assessment of those facts was due to the importance and gravity attached to the forging of parts of the case file. Therefore, after having freely assessed the evidence before them, the two courts had come to different legal conclusions based on the same description of the facts. In examining the lawfulness of the legal classification decided on by the High Court, from the point of view of the legal assessment of the facts, and noting that it was not its place to interfere in the appellate court's procedural assessment of the evidence, the Supreme Court found that the said classification corresponded to the facts described. Consequently, the Supreme Public Prosecutor's appeal on points of law was dismissed as manifestly ill-founded.

COMPLAINTS

1. Relying on Article 7 of the Convention, the applicant argued that the trial of Milada Horáková and others had taken place in conformity with the law in force at the time and that the courts which had dealt with her case had failed to specify which legal provisions she had allegedly breached in order to have committed murder. She argued that it went against the laws of humanity to wait until all the witnesses to the events had died before prosecuting an old and frail person incapable of defending herself.

2. Relying on the right to a fair trial within the meaning of Article 6 of the Convention, the applicant complained that the High Court had not granted her request to comment at the hearing and that the Constitutional Court had not agreed to hear her either. In this regard she emphasised that since the courts had relied solely on written sources dating back sixty years, they had been unable to establish with certainty that she had been aware that the trial of Milada Horáková and others had been manipulated. She argued that the courts had not been guided by the will to establish the truth because the present case was a political trial which needed to result in a conviction, in this case of the applicant, who was the last survivor of those involved in the original trial.

3. Lastly, complaining of (political) discrimination, the applicant alleged on the one hand that, had the trial taken place when other witnesses to it had been alive and she had been younger, she would have been better able to defend herself. She then referred to the similar case of K.V., who had not been convicted even though he had acted as the sole prosecutor in another trial. In his case, the High Court had discontinued the proceedings on the ground that they were time-barred, a decision which the Supreme Court had upheld. Finally, the applicant complained about the media campaign which, in her view, had branded her a murderer from the beginning of the proceedings.

4. In a supplement to her application, dated 26 May 2010 and following the decisions on the effect of the previous amnesties, the applicant submitted that the High Court had been mistaken in excluding her from the 1955 amnesty. The applicant complained, under Article 6, about the failure to comply with the 1993 amnesty decision (no. 56/1993). This decision, taken by the

President of the Czech Republic, ordered the Prosecutor General and the Ministers of Justice and Defence to submit proposals for granting discharges and pardons in cases that were not covered by the decision but concerned, among others, women over 55 years of age. In the instant case, the applicant's case had apparently never been transmitted to the President, who had therefore been prevented from making a decision about it.

THE LAW

A. Alleged violation of Article 7 of the Convention

Relying on Article 7, the applicant complained mainly that the courts having heard her criminal case had not specified which legal provisions she had allegedly breached during the trial of Milada Horáková and others so as to have committed murder. She submitted that the said trial had been conducted in accordance with the law in force at the time and that it went against the laws of humanity to prosecute, so long after the events, an old and frail person incapable of defending herself.

The Court considers that what must be examined in the present case is whether the applicant's conduct was criminal under the domestic law in force at the time of the trial of Milada Horáková and others, and whether she must therefore have been aware of it, as required by Article 7 of the Convention, which provides that:

"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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

1. Submissions of the parties

(a) The Government pleaded, at the outset, failure to exhaust domestic remedies, submitting that the applicant had not explicitly asserted, either before the domestic courts or the Court, that she had been punished for conduct that had not been criminal at the material time. The Government maintained that she had essentially only challenged the conclusions on the facts and law that the domestic courts had reached. That was moreover the reason for which the Constitutional Court, in its decision of 16 July 2009, had stayed silent on the subject of respect for the principle *nullum crimen sine lege*. The Government therefore believed that the applicant had not given the national authorities sufficient opportunity to assess whether there had been a violation of Article 7.

The applicant countered this objection, alleging that her lawyer had, from the beginning of the criminal proceedings, emphasised that the charge could only concern acts which were constitutive of a criminal offence at the time they were committed, but that he had never received

a satisfactory response. She referred in this respect to her complaint of 13 October 2005, as well as to her many appeals and requests aimed at getting the courts to state which legal provisions she had allegedly breached and supplement the evidence that she had intended to commit the murder or that she had known that the trial had been manipulated. In any case, she argued that it fell to the criminal authorities to investigate, of their own motion, whether the acts which had given rise to the proceedings had constituted an offence at the time they were committed.

In the present case, the Court does not consider it necessary to determine the issue of whether the applicant duly complied with the condition of exhausting domestic remedies, as the complaint in question is inadmissible in any case, for the reasons set out below.

(b) Regarding the substance of the complaint, the Government observed at the outset that the applicant had been convicted of ordinary murder as a direct participant within the meaning of the 1852 Criminal Code, that is to say under a law that was in force at the material time. Emphasising that the trial of Milada Horáková and others, in which the applicant had taken part as a prosecutor, had been a mere formality designed to confer an appearance of legality and legitimacy on the physical elimination of the opponents of the communist regime established in 1948, the Government referred to the legal classification of the applicant's actions as established by the domestic courts which had decided on the merits of the case. In particular they referred to the Supreme Court's decision of 4 June 2008, in itself mainly inspired by the one delivered by that same court on 7 December 1999. The Government argued that, in the aforementioned decision, the Supreme Court had convincingly established that the conviction in the case of Milada Horáková and others could not be considered to be an act which was part of the course of public justice, that there had been no difference in guilt between the prosecutors and the judges taking part in the trial that had led to this conviction, and that the applicant's actions should be classified as murder as a direct participant under section 136 (a) of Law no. 117/1852. According to the Government, these decisions had refuted the applicant's claim that the courts had not specified which legal provisions she had allegedly breached in order for her actions to amount to murder. Indeed, the Municipal Court's judgment of 1 November 2007, as well as the High Court's judgment of 9 September 2008 referred to, among other things, Articles 3, 30 and 34 of the 1873 Code of Criminal Procedure; in addition, the applicant's total lack of ethics in a profession which had ethics as its foundation was emphasised by the Supreme Court in its decision of 4 June 2008, hence making it clear that the case did not concern an ordinary breach of procedural rules.

The Government subsequently noted that the accused did not explicitly question whether there it had, at the time, been possible for a judge or prosecutor to be punished for committing murder by having participated in a show trial resulting in the execution of innocent persons. Rather, she merely disputed the facts established by the courts and the assessment of the evidence taken, and minimised her part in the trial of Milada Horáková and others, points which fell outside the competence of the Court. In their opinion, the question for examination here was whether the applicant's conduct, as established by the domestic courts, had constituted an offence at the material time, to which the Government answered affirmatively.

On this point, the Government acknowledged that not all conduct amounting to the elements constitutive of an offence was always considered criminal, as criminal laws generally provided

for mitigating circumstances such as self-defence or the exercise by criminal authorities of their official functions. Therefore, when these authorities exercised their statutory duties in accordance with the relevant limits, the imposition of a penalty in a criminal procedure and the enforcement of it did not constitute the offence of murder, as there was no illegality, but an act of justice. In the present case, however, the Supreme Court had found that the sentencing of Milada Horáková and three other people could not be considered an act of justice since it had been imposed at the end of a trial that did not satisfy the fundamental and immutable requirements of the exercise of judicial power; there were therefore no circumstances precluding the illegality of the applicant's conduct as a prosecutor in that case.

The Government argued, moreover, that the applicant's conduct was criminal according to the general principles of law recognised by civilised nations, principles which they claimed included the fundamental ethics required for dispensing criminal justice. Furthermore, the trial of Milada Horáková and others had been conducted after the Universal Declaration of Human Rights had been published, and as the drafting of the European Convention was being finalised – both documents reflecting the aforementioned principles. The Government noted in this respect that in the case of *Öcalan v. Turkey* [GC] (no. 46221/99, § 166, ECHR 2005-IV), the Court had considered that Article 2 of the Convention, which enshrined the right to life as one of the fundamental values of democratic societies, prohibited the execution of a death sentence imposed following proceedings which did not satisfy the requirements of a fair trial.

As to the question of whether the applicant should have known, at the material time, that her conduct was criminal according to domestic law or, at the very least, according to the general principles of law recognised by civilised nations, the Government submitted that the fact that the applicant had not completed her legal training at the time in no way invalidated the rule of *ignoratio juris non excusat*. On the contrary, the fact that she had had some legal training and practical experience, unlike the majority of those to whom the criminal law was applied, showed that she should have been aware of the criminal nature of her actions. The evidence collected by the domestic authorities, including the audiovisual recordings, incontestably proved that the applicant had actively and deliberately taken part, as a prosecutor, in the preparation and conduct of the trial of Milada Horáková and others. As was clear from the judgment of 1 November 2007, among others, the courts had also been at pains to prove that she must have been aware of the fact that the trial had been manipulated in order to eliminate the opponents of the totalitarian regime. It had thus been proved that the applicant had been part of a prosecutorial steering group having cooperated with the Ministry of the Interior to prepare the trial, that she had participated in a meeting culminating in a decision to instruct the lawyers for the defence not to endanger the political objective of the trial, as well as another investigative meeting held at the Ministry of Justice; that she and other prosecutors had consulted the State prosecutor about the sentences to be imposed on the soon-to-be convicted persons; that she had drawn up an assessment of the trial, in which she had praised the cooperation with the State Security Service; and that she had been present at the execution of the convicted persons. The fact that the applicant, aged 28 at the time, had completely trusted her more experienced colleagues did not relieve her of her criminal responsibility according to the Government. Furthermore, other evidence had proved with certainty that the trial had been planned in detail and manipulated with a specific aim, that it had been conducted by the Deputy Minister of Justice through daily meetings, that the prosecutors had participated in the drafting of the criminal complaint lodged by the State Security Service

and that they had personally attended the hearings of the different defendants and witnesses. The Government also emphasised that the trial of Milada Horáková and others had violated a number of provisions of the Czechoslovak Constitution in force at the time and that the sentence had been set aside on grounds of irregularity in 1968, that is to say still during the communist regime. On this point, the Government referred to the principle laid down in *Streletz, Kessler and Krenz v. Germany* [GC] (nos. 34044/96, 35532/97 and 44801/98, § 81, ECHR 2001-II), according to which it was legitimate for a State governed by the rule of law to bring criminal proceedings against persons who had committed crimes under a former regime, and to apply and interpret the legal provisions in force at the time in the light of the principles governing a State subject to the rule of law.

The applicant submitted that the events, which had taken place in the post-war period at a time when people were constantly confronted with death, could not be understood in the same way today. She claimed to have been convinced, at the time, of the guilt of Milada Horáková and others, who had even confessed. She also pointed out that Milada Horáková had been a lawyer and had been aware of the law and judicial system of the time; she had therefore known that high treason was punishable by death and could decide to act accordingly.

The applicant then claimed that instead of trying to discover the reasons for the past events, the authorities had seized upon her, fifty-five years later, making her a symbol of the former system and prosecuting her simply because she had been a prosecutor in a communist country which had nonetheless been recognised by other States at the time.

With regard to the trial of Milada Horáková and others, the applicant emphasised that, unlike the court, which was supposed to be independent, the prosecutors had been subject to the supervision of their superiors and the Ministry of Justice and that she herself, as a student, had been unable to do anything without the approval of her direct superiors. She could therefore in no way have influenced the events, unlike in the case of *Streletz, Kessler and Krenz*, cited by the Government. She also submitted that the Supreme Court's decision of 30 June 1968 quashing the convictions had not mentioned poor-quality work, let alone criminal activity, on the part of the prosecutors. She maintained that, despite her many requests, the courts had not been able to produce a single piece of evidence proving that she had, during the trial, breached the law in force in a way that amounted to murder.

2. The Court's assessment

The Court reiterates firstly that while it is its duty, according to Article 19 of the Convention, to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed the rights and freedoms protected by the Convention. It is primarily for the domestic courts to interpret and apply domestic law.

Furthermore, it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime, just as it is legitimate for the courts of such a State, having succeeded those formerly in place, to apply and interpret the legal provisions in force at the time in the light of the principles governing a State subject to the rule

of law (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 81, ECHR 2001-II).

As to Article 7 of the Convention in particular, it is not confined to prohibiting the retroactive application of criminal law to the accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law. Nonetheless, however clearly drafted a legal provision may be in any system of law including criminal law, there is an inevitable element of judicial interpretation and there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Admittedly, that concept applies in principle to the gradual development of case-law in a given State subject to the rule of law and under a democratic regime, but it remains wholly valid where, as in the present case, one State has succeeded another (see *Streletz, Kessler and Krenz,* cited above, §§ 49 and 81-82, and *K.-H.W. v. Germany* [GC], no. 37201/97, §§ 44 and 84-85, ECHR 2001-II (extracts)).

In the light of the above principles, the Court observes that it is not its task to determine whether the applicant as an individual was guilty, that being primarily a matter for the assessment of the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether her act, at the time it was committed, constituted an offence defined with sufficient accessibility and foreseeability by the law of the former Czechoslovakia.

It must be noted at the outset that the Czech courts convicted the applicant of murder under the 1852 Criminal Code, in force at the material time. The applicant was accused of having participated, as a prosecutor, in the trial of Milada Horáková and others which had been conducted in 1950 under the direct control of the political authorities of the time, and which had culminated in the sentencing to death of several innocent persons. Using numerous pieces of written evidence, the courts found that the trial had been a mere formality designed to confer an appearance of legality on the physical elimination of opponents of the communist regime, and that the course of the proceedings and their outcome had been decided on in advance by the political organ of the Communist Party in cooperation with the State Security Service. The courts found that the fundamental principles of fairness of the proceedings and the immutable ethical requirements of judicial power had therefore been flouted during the trial; hence, the resulting judgment could not be considered an act of justice and the participants in the trial, of which the applicant was the only survivor, could not avoid this criminal liability by claiming to have merely been fulfilling their duties.

Throughout the proceedings, the courts also analysed the applicant's role and considered that, through her active and deliberate participation in the above-mentioned trial, she had significantly contributed to giving it an appearance of legality and to fulfilling its political aim. Seeing as the trial, culminating in the sentencing to death and execution of the convicted persons, had been the murder mechanism, the courts concluded that the applicant, as a prosecutor in the legal system, had committed this quadruple murder as a joint principal. In this respect, the Constitutional Court had considered it impossible to interpret section 136 of Law no. 117/1852 as not applying to certain murder mechanisms, such as a manipulated trial in breach of certain procedural

provisions. In particular, the applicant was accused of having misused her role as a prosecutor and of not having fulfilled it in accordance with the legal provisions, among others Articles 3, 30 and 24 of the Code of Criminal Procedure applicable at the material time, relating to the obligation of the authorities to look for incriminating and exonerating evidence, to protect the interests of the State and to establish the truth by all available methods. The courts found that the evidence taken also rebutted the applicant's defence that she had allegedly been unaware of any manipulation of the trial, and proved that she had taken part in preparatory political meetings, that she had helped to prepare the preliminary minutes of the proceedings, which were tantamount to a script of the trial, and that she must have known that the death sentences had been decided on in advance by the political authorities.

With regard to these elements, the Court considers that the domestic courts' application and interpretation of the provisions of criminal law in force at the material time was not arbitrary in any way and that this strict interpretation of the relevant Czechoslovakian legislation was compatible with Article 7 § 1 of the Convention. It considers that the practice of eliminating opponents to a political regime through the death penalty, imposed at the end of trials which flagrantly infringed the right to a fair trial and, in particular, the right to life, can not be described as "law" within the meaning of Article 7 of the Convention (see, *mutatis mutandis, Streletz, Kessler and Krenz,* cited above, §§ 85 and 87, and *K.-H.W. v. Germany* [GC], no. 37201/97, §§ 88 and 90, ECHR 2001-II (extracts)).

The Court also cannot accept the applicant's argument that she had simply been obeying the instructions of her more experienced superiors whom she had trusted completely. It notes firstly that the applicant did not claim that she had not had access to the texts of the Constitution and relevant laws; the maxim "ignorance of the law is no excuse" therefore applied to her. Furthermore, having already held that even a private soldier should not show total, blind obedience to orders which so flagrantly infringed the principles of national legislation but also internationally recognised human rights, in particular the right to life (see *K.-H.W.,* cited above, § 75), the Court considers this observation to be wholly applicable to the case of the applicant, who had acted as a prosecutor after having completed preparatory law studies and acquired some practical experience of trials. Moreover, the national courts found, relying on evidence, that the applicant must have been aware of the fact that the questions of guilt and sentencing had been determined by the political authorities well in advance of the trial and that the fundamental principles of justice had been completely flouted. That being said, in its judgment of 9 September 2008 the High Court held that the fact that the applicant had committed the offence *de facto* through obedience was an extenuating circumstance, justifying a reduction of the sentence imposed.

In these circumstances the Court considers that the applicant, who, in her role as a prosecutor, had helped to confer the appearance of legality on the political trial of Milada Horáková and others and had identified herself with that unacceptable practice, cannot rely on the protection afforded by Article 7. To reason otherwise would run counter to the object and purpose of that provision, namely to ensure that no one is subjected to arbitrary prosecution, conviction or punishment. Moreover, the fact that the applicant had not been prosecuted in the former communist Czechoslovakia and was prosecuted and convicted by the Czech courts only after the restoration of the democratic regime does not in any way mean that her acts did not constituted

an offence according to the Czechoslovak law in force at the material time (see, *mutatis mutandis, Streletz, Kessler and KrenzI*, cited above, §§ 79 and 88).

The Court refers to its previous ruling, in the context of the succession of two States ruled by different legal systems, that the conviction of an applicant (for aiding and abetting a deliberate perversion of the course of justice and deprivation of liberty) who had taken part as a prosecutor in a trial in the German Democratic Republic (GDR) against a dissident who received a prison sentence amounting to a violation of the principle of proportionality and the rules on sentencing laid down by the law of the GDR, was not contrary to Article 7 § 1 of the Convention (see *Glässner v. Germany* (dec.), no. 46362/99, ECHR 2001-VII).

Although the applicant did not argue that the proceedings against her were time-barred, the Court finds it relevant to note that proceedings were initiated against her as late as in 2005, fifty-five years after the events, because section 5 of Law no. 198/1993 on the Illegality of the Communist Regime provides for the suspension of the limitation period between 25 February 1948 and 29 December 1989 where political motives incompatible with the fundamental principles of a democratic legal system had thwarted a conviction or acquittal. Similar legislation was also enacted in Poland in respect of "communist crimes" involving human rights violations between 1939 and 1989 and in reunified Germany in respect of "acts committed under the unjust regime of the Socialist Unity Party" (see *K.-H.W.*, cited above, § 111). The Court accepts that, with the above-mentioned provision, the Czech State was trying to remedy a problem which it considered prejudicial to its democratic regime, and distance itself from an unacceptable practice of the totalitarian regime which allowed serious violations of its own legislation to go unpunished; thus, such an approach by the Czech legislature does not seem prima facie incompatible with the values protected by the Convention. The Court further notes that, even at the time of the events, Article 231 of the 1852 Criminal Code already provided for no limitation period in the case of the offence of murder, of which the applicant was found guilty under Article 136 (a). Therefore, even if the applicant had argued that the limitation period had expired, her submission would not have been accepted.

Having regard to all the above considerations, the Court considers that the applicant's act, at the time it was committed, constituted an offence defined with sufficient accessibility and foreseeability by Czechoslovakian law. The Court considers that this conclusion makes it unnecessary for it to examine the present case in the light of the principles of international law or the general principles of law recognised by civilised nations, especially as the domestic courts did not use arguments based on those principles.

In the Court's opinion, the principle enshrined in Article 7 § 1 whereby only law can define a crime and prescribe a penalty has thus been observed. Accordingly, the complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

B. Alleged violation of Article 6 of the Convention

The applicant complained secondly that, after she had voluntarily waived her right to appear before the first-instance court, the appellate court had not granted her request to give evidence, and nor had the Constitutional Court. In this regard she emphasised that since the courts had

relied solely on written sources dating back sixty years, they had been unable to establish with certainty that she had been aware that the trial of Milada Horáková and others had been manipulated, and they had not been guided by the will to establish the truth.

The applicant relied here on the right to a fair trial as guaranteed by Article 6 § 1 of the Convention, which provides that:

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

The Government submitted that the applicant had been duly represented by a lawyer throughout the proceedings. In October 2007, the latter had taken part in the hearing before the Municipal Court without the applicant, who had voluntarily waived her right to appear before the court. At the end of the hearing, counsel for the applicant had not filed a motion to submit additional evidence and had delivered a closing address. The High Court had heard the appeal in camera, which could not have affected the rights of the defence as it had decided that there was no case to answer. A public hearing had subsequently been held before the Supreme Court on 4 June 2008 and before the High Court on 9 September 2008. The Government noted that the time and place of the last-mentioned hearing had been changed to take into account the availability of the applicant, who on that occasion had been free to address the court. The Government also pointed out that the applicant had had many opportunities, of which she had taken advantage, to submit her comments in writing. Moreover, at the end of the preliminary phase she had had the possibility of examining the investigation file, which her lawyer had done in her stead on 19 April 2007 without requesting any further investigation.

In the Government's opinion, the fact that counsel for the applicant had not had the possibility of commenting on the various pieces of evidence as they were taken during the hearing before the Municipal Court was not in breach of the Convention, as such a right belonged solely to the defendant according to Article 214 of the Code of Criminal Procedure; in the present case, however, the applicant had waived that right by not being present at the hearing. Moreover, the present case was particular in that the courts had not heard any witnesses and had taken written and documentary evidence only, all of which had been included in the file that the applicant could have inspected. Furthermore, counsel for the applicant had had the opportunity to comment on the evidence in the closing address, which can be considered sufficient in view of the specific circumstances of the case. Besides, had the Municipal Court decided, in the light of the closing address, that it was necessary to further elucidate certain facts, it would have decided to continue the hearing and add to the evidence, which had not in fact been the case. The Government also emphasised that, additionally, the defence had had the opportunity to comment during the hearings before the higher courts; the applicant herself had thus been able to comment in her pleadings during the hearing of 9 September 2008, comments which had equal value to anything that might have been given in oral evidence.

Finally, the Government noted that holding a public hearing before the Constitutional Court was not essential, considering the particular nature of the procedure before that court, and that criminal proceedings being initiated a relatively long time after the events did not violate the right to a fair trial.

Referring to the Government's submission that Milada Horáková and others had been denied the rights enshrined in the Universal Declaration of Human Rights and the European Convention, the applicant submitted that it was she who had been the one deprived of the rights guaranteed by those texts as she had not been heard in court, despite her requests, and she had only been allowed to comment during the appeal once the evidence had been taken. She claimed to have been unaware that her absence from the first-instance hearing would result in the dual consequence of her being unable to comment throughout the rest of the proceedings, as well as her lawyer being unable to comment on the evidence taken. She believed that such an interpretation of the Code of Criminal Procedure was manifestly erroneous and deprived the accused of the right to conduct his or her defence in an appropriate manner. Moreover, the tendentious way in which the trial had been conducted was also illustrated by the reading aloud of the anonymous, defamatory letter before the Municipal Court. The letter had, she alleged, come to light after the defence had consulted the file and they had therefore not been made aware of it.

The Court reiterates its case-law to the effect that, in order to have a fair trial, each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage *vis-à-vis* his opponent and to have knowledge of, and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment on them (see *Öcalan v. Turkey* [GC], no. 46221/99, §§ 140 and 146, ECHR 2005-IV). In determining whether the proceedings as a whole were fair, regard must also be had as to whether the rights of the defence were respected. In particular, the Court must examine whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must also be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (See *Bykov v. Russia* [GC], no. 4378/02, § 90, ECHR 2009-..., and Gäfgen v. Germany [GC], no. 22978/05, § 164, ECHR 2010-...).

The Court notes at the outset that it is not required to examine the relevant legislation *in abstracto*, namely Article 214 of the Code of Criminal Procedure enabling only the accused to comment on evidence as it is being taken before a court; the Court must confine its attention to the facts of the case.

In the present case, the national courts based themselves on evidence collected during the preliminary phase and taken at the hearing before the Prague Municipal Court in October 2007. The defence, having had access to the investigation file, had been able to apprise themselves of this evidence before the case went to court. It should be noted that the applicant never objected to the evidence being used, nor did she allege – with the exception of the anonymous letter which the courts ultimately did not consider – that it had been acquired in breach of her rights guaranteed under the Convention. During the hearing, neither party proposed to add to the evidence nor were any witnesses heard. Although the applicant, of her own volition, had declined to be present at the hearing, her lawyer had been able to follow it in full; at the end the latter had been able to give a closing address. In the Court's opinion, nothing prevented the applicant's lawyer at this point from commenting on the various pieces of evidence that had just

been read out or projected. In this regard the Court considers that when domestic law provides for a limitation such as the one resulting from Article 214 of the Czech Code of Criminal Procedure, the rights of the defence will be protected (for example in a situation where the accused or counsel for the defence have limited access to the case file) if the evidence was made available to the accused before the trial and the accused was given the opportunity to comment on it through his or her lawyer in oral submissions (see, *mutatis mutandis*, *Öcalan*, cited above, § 140). In the present case, the Court considers these conditions to have been fulfilled.

It must also be noted that the applicant appeared in person before the High Court at the hearing of 9 September 2008, during which she presented her oral submissions and was able to put forward all her arguments, objections and comments. She cannot therefore maintain that the appellate court did not grant her request for a hearing.

With reference to the fact that no hearing was held before the Constitutional Court, the Court notes that public hearings were held by the first instance and appellate courts, as well as the Supreme Court, at which questions of fact and law were examined. However, since proceedings in the Constitutional Court were limited to the examination of questions of constitutionality, they did not involve a direct and full determination of the criminal charge. The Court considers that the lack of a hearing in the Constitutional Court was therefore sufficiently remedied by the public hearings held at earlier stages of the proceedings.

In the Court's view, in the particular circumstances of the present case it cannot be contended that the defence was not given a real opportunity to comment on the observations and evidence having served as the basis of the decisions of the national courts. It is moreover not the role of the Court to take the place of the national courts in assessing the elements which had been brought to their attention.

It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

C. Other alleged violations

Relying on Article 14 of the Convention, the applicant alleged firstly that, had the proceedings taken place while other witnesses to the events were still alive and she were younger, she could have defended herself better. She referred secondly to the analogous case of K.V., who had not been convicted even though he had acted as the sole prosecutor in a different trial; in his case, the High Court had discontinued the proceedings because they were time-barred, a decision upheld by the Supreme Court. The applicant also complained of the media campaign which had allegedly branded her a murderer from the beginning of the proceedings. Finally, under Article 6 of the Convention, she contested the way in which the various presidential amnesties had been applied to her.

Having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention. It considers that the fact that the national courts came to a different conclusion in a different criminal case based on different facts and a different legal

characterisation cannot be qualified as discriminatory. The Court also notes that the applicant's trial had its roots in events which had long been a matter of heated debate in society, and it could not be expected that the trial itself would be conducted in a dispassionate atmosphere. However, the applicant has not shown that a media campaign of such virulence as to sway or be likely to sway the opinion of the judges in her case was waged against her (see, *mutatis mutandis, Papon v. France (no. 2)* (dec.), no. 54210/00, ECHR 2001-XII (extracts)). The Court considers finally that the complaints concerning the amnesty decisions and pardons fall outside the scope of Article 6 of the Convention.

It follows that these complaints must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek Dean Spielmann
Registrar President

[1] Non official translation prepared by the Registry of the Court.

POLEDNOVÁ v. THE CZECH REPUBLIC DECISION