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

FIFTH SECTION

CASE OF BOCHEV v. BULGARIA

(Application no. 73481/01)

JUDGMENT

STRASBOURG

13 November 2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bochev v. Bulgaria,

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

Rait Maruste, *President,*
Karel Jungwiert,
Volodymyr Butkevych,
Renate Jaeger,
Mark Villiger,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges,*
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 14 October 2008,

Delivers the following judgment, which was adopted on the latter date:

PROCEDURE

1. The case originated in an application (no. 73481/01) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Konstantin Bochev Bochev, born in 1964 and presently serving a sentence in Sofia Prison ("the applicant"), on 24 February 2001.

2. The applicant was represented by Ms S. Stefanova and Mr M. Ekimdzhiev, lawyers practising in Plovdiv. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Dimova, of the Ministry of Justice.

3. The applicant alleged, in particular, that his pre-trial detention had been unwarranted and excessively lengthy, that the proceedings whereby he had tried to obtain his release had been defective, and that he had not had an effective right to compensation in respect of these matters. He also alleged that the criminal proceedings against him had lasted too long and that his correspondence in detention had been unlawfully and unnecessarily intercepted by the authorities.

4. On 20 March 2007 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the length of the applicant's pre-trial detention, the scope and the fairness of its judicial review, the availability of an enforceable right to compensation in respect of these matters, the length of the criminal proceedings against the applicant and the monitoring of his correspondence. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. At about 5 a.m. on 9 May 1998 the applicant and an accomplice were surprised by police while in the process of trying to enter a computer equipment shop through a hole in the wall of the basement of a neighbouring building. They had previously drilled the hole over the course of several nights, and in this way had attracted the attention of the building's inhabitants.

6. On the morning of 9 May 1998 the applicant and his accomplice were heavily armed. The applicant opened fire and shot a police officer dead. Later he detonated a hand grenade. In the ensuing exchange of gunfire his accomplice was injured and died. The special anti-terrorism squad intervened later in the morning. The applicant gave himself up and was arrested at about 8.30 a.m., after negotiations with the police, a psychologist and a public prosecutor.

A. The criminal proceedings against the applicant

7. On the same day, 9 May 1998, the applicant was charged with attempted robbery committed in conspiracy with others and accompanied by murder, and placed in pre-trial detention.

8. The charges against him were later amended to include the unlawful possession of firearms, ammunition and explosives in large quantities, the murder of a police officer, and attempted murder of six police officers committed in a manner and by means which endangered several lives and by a person who had already committed murder. The maximum penalty on conviction for those offences was life imprisonment, with or without parole.

9. After the Sofia City Prosecutor's Office referred the case back to the investigator on three occasions for additional investigation, on 13 August 1999 the investigator finished his work on the case, recommending that the applicant be committed for trial.

10. On 29 December 1999 the Sofia City Prosecutor's Office filed an indictment against the applicant with the Sofia City Court.

11. On 21 February 2000 the judge-rapporteur to whom the case was assigned set it down for hearing on 8 and 9 June 2000. As required by Article 241 § 2 (4) of the 1974 Code of Criminal Procedure, as in force at that time, he examined of his own motion whether the applicant's pre-trial detention should be replaced with a more lenient measure, and confirmed it without giving reasons.

12. The trial against the applicant began in June 2000, but had to re-start in October 2001, as in May 2001 the judge-rapporteur was appointed as the

Minister of Justice and the formation examining the case did not include a reserve judge.

13. Over the course of the next few years numerous hearings were adjourned for various reasons. On some occasions the adjournments were made necessary by the fact that the applicant had dismissed his counsel and instructed new ones, who needed time to acquaint themselves with the case file.

14. In a judgment of 14 October 2005 the Sofia City Court found the applicant guilty of murdering a police officer, attempting to murder another police officer and unlawfully possessing firearms and explosives. Although under the relevant provisions of the 1968 Criminal Code it could have imposed a sentence of life imprisonment, it opted for a lesser penalty and sentenced the applicant to thirty years' imprisonment, citing his clean criminal record, and the facts that he had a family and had not been fully discredited morally and socially.

15. Both the applicant and the prosecution appealed. The prosecution requested that the applicant's sentence be increased to life imprisonment.

16. On 2 October 2007 the Sofia Court of Appeal upheld the Sofia City Court's judgment. When considering the appropriateness of the applicant's sentence, it found that the mitigating circumstances relied on by the lower court were not sufficient to warrant a sentence less than the maximum penalty. It also found that the Sofia City Court had failed to take into account certain aggravating circumstances, such as the victim's good moral character. In its judgment, the murder committed by the applicant was considerably graver than other offences of that type and the aggravating circumstances were, overall, of such weight and intensity as to rule out a penalty showing any degree of lenience. However, it went on to say, by express reference to Article 6 § 1 of the Convention, that the criminal charges against the applicant had not been determined within a reasonable time, with all the negative repercussions which this had had on him. It found that the excessive length of the proceedings was not attributable to the applicant's conduct, although he had at times failed to organise his defence efficiently. In the court's view, the undue delay amounted in itself to a mitigating circumstance, which obviated the need to imprison the applicant for life, in line with the former Commission's and the Court's case-law that the excessive length of criminal proceedings could be remedied by a reduction in sentence.

17. The applicant and the prosecution appealed on points of law. The prosecution again argued that the penalty was far too lenient and should be increased to life imprisonment.

18. In a judgment of 5 March 2008 the Supreme Court of Cassation upheld the Sofia Court of Appeal's judgment, endorsing its reasoning.

B. The applicant's pre-trial detention and his requests for release

19. The applicant was arrested on 9 May 1998 and detained by an investigator's order of the same day. The reasons given by the investigator were that the applicant had committed a serious wilful offence and that there existed a genuine risk that he might abscond. On the same day the investigator's order was approved by a prosecutor.

20. The applicant made his first request for release on 2 October 1998, when the proceedings against him were at the preliminary investigation stage. The request was dismissed by the Sofia City Court at a public hearing held on 13 October 1998. The court observed that the applicant had committed a serious wilful offence carrying a very severe penalty, and that no special circumstances warranting his release existed. This decision was not subject to appeal. Nevertheless, on 13 December 2000, when the proceedings against him had already progressed to the trial stage, the applicant appealed against it to the Sofia Court of Appeal. In a decision made in private on 15 January 2001 the Sofia Court of Appeal, finding that the applicant's legal challenge was actually not an appeal but a fresh request for release, sent it to the Sofia City Court for a ruling. On 1 February 2001 the applicant appealed against this decision to the Supreme Court of Cassation. On 21 February 2001 the Sofia Court of Appeal returned the appeal, informing the applicant that its decision was not subject to appeal on points of law. It seems that the Sofia City Court did not examine the request.

21. On 26 February 2001 the applicant appealed against the decision of the judge-rapporteur to confirm his detention of his own motion following receipt of the indictment (see paragraph 11 above). On 9 March 2001 the Sofia Court of Appeal, sitting in private, declared the appeal inadmissible.

22. The applicant made further requests for release at several trial hearings, held on 9 April and 29 November 2001, and 18 March and 9 May 2002. They were all turned down by the Sofia City Court at the respective hearings. The applicant's ensuing appeals were dismissed by the Sofia Court of Appeal by decisions made in private on 4 May 2001, 7 January, 15 April and an unknown later date in 2002.

23. In their reasoning the Sofia City Court and the Sofia Court of Appeal stressed, with various degrees of detail, the following points: (i) the applicant stood accused of several very serious offences, which in itself justified the conclusion that he was a dangerous individual who could abscond or re-offend, (ii) there were no fresh circumstances warranting his release, and (iii) no unwarranted delays had taken place in the criminal proceedings, as the case was factually and legally complex.

24. In its decision of 4 May 2001 the Sofia Court of Appeal stated that the presumption under Article 152 § 2 (3) of the 1974 Code of Criminal Procedure, in the 1 January 2000 version, about the existence of a risk that

the detainee might abscond or re-offend (see paragraph 32 below) applied to the applicant's case. In two other decisions – those of 7 January and 15 April 2001 – that court expressed the view that the applicant's lack of a criminal record, known identity and permanent place of abode were not enough to rebut this presumption.

25. On at least two occasions, in April and May 2002, the applicant's appeals against the decisions of the Sofia City Court were sent to the competent public prosecutors, who commented on them in writing. These comments were not communicated to the applicant and later the Sofia Court of Appeal ruled on the appeals in private, without holding a hearing, with the result that the applicant did not have the opportunity of replying to these comments.

26. In October 2002 and April and December 2003 the applicant made three further requests for release in writing. They were turned down by the Sofia City Court in decisions made in private on 18 October 2002 and 14 April and 29 December 2003. On appeal, these decisions were upheld by the Sofia Court of Appeal in decisions also made in private on 11 November 2002, 23 May 2003 and 12 January 2004.

27. The applicant later lodged four more requests for release. They were all rejected by the Sofia City Court at public hearings held on 27 January, 4 May, 8 September and 23 November 2004. The applicant's ensuing appeals were dismissed by the Sofia Court of Appeal by decisions made in private on 19 February, 7 June, 21 September and 20 December 2004. The Sofia City Court declined to examine a further request for release made by the applicant during the trial hearing on 13 January 2005, on the grounds that his counsel was absent and it could not proceed with the case.

28. In turning down the requests for release made between October 2002 and November 2004 the courts relied on the seriousness of the charges against the applicant, the lack of change in the circumstances save for the passage of time, the complexity of the case and the diligent conduct of the proceedings. In their decisions of 4 May 2004 and 8 September and 23 November 2004 the Sofia Court of Appeal and the Sofia City Court expressed the view that the length of the proceedings was due to the numerous adjournments caused by the applicant.

29. In its decisions of 4 May, 8 September and 23 November 2004 the Sofia City Court stated that under the newly added Article 268a of the 1974 Code of Criminal Procedure (see paragraph 36 below), when ruling on requests for release made during the trial, it was barred from examining the existence or otherwise of a reasonable suspicion against the applicant. In its view, to do so would mean to prejudge the merits of the criminal case against the applicant. It was true that under Article 5 § 1 (c) of the Convention the court had to examine whether a reasonable suspicion existed, but that applied only to rulings made at the pre-trial stage. This view was endorsed by the Sofia Court of Appeal in its decision of

21 September 2004. For this reason, the courts declined to delve into the applicant's arguments concerning this point.

30. On 14 October 2005 the Sofia City Court convicted the applicant (see paragraph 14 above). In a separate decision it confirmed his detention.

C. The legal challenge to Regulation no. 2 governing the legal regime of pre-trial detainees

31. On 17 June 2002 the applicant asked the Supreme Administrative Court to annul certain provisions of Regulation no. 2 governing the legal regime of pre-trial detainees (see paragraph 42 below), which, in his view, violated, *inter alia*, his freedom of correspondence. In a final judgment of 19 July 2002 the Supreme Administrative Court rejected his application.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Pre-trial detention

1. Grounds for detention

32. The relevant provisions of the 1974 Code of Criminal Procedure and the Bulgarian courts' practice before 1 January 2000 are summarised in the Court's judgments in several similar cases (see, among others, *Nikolova v. Bulgaria* [GC], no. 31195/96, §§ 25-36, ECHR 1999-II; *Ilijkov v. Bulgaria*, no. 33977/96, §§ 55-59, 26 July 2001; and *Yankov v. Bulgaria*, no. 39084/97, §§ 79-88, ECHR 2003-XII (extracts)). On 1 January 2000 the legal framework of pre-trial detention was amended with the aim of ensuring the compliance of Bulgarian law with the Convention (тълк. реш. № 1 от 25 юни 2002 г. по н.д. № 1/2002 г., ОСНК на ВКС). The amendments and the resulting practice of the Bulgarian courts are summarised in the Court's judgments in the cases of *Dobrev v. Bulgaria* (no. 55389/00, §§ 32-35, 10 August 2006), and *Yordanov v. Bulgaria* (no. 56856/00, §§ 21-24, 10 August 2006).

33. On 29 April 2006 the 1974 Code was superseded by the 2005 Code of Criminal Procedure, which reproduced all the provisions brought in with the January 2000 reform.

2. Requests for release during the trial

34. By Article 304 § 1 of the 1974 Code, during the trial the detainees' requests for release were examined by the trial court (the same is currently provided for by Article 270 of the 2005 Code). It followed from Article 304 §§ 1 and 2 of the 1974 Code that these requests could be examined in

private or at an oral hearing (under Article 270 § 2 of the 2005 Code, these requests must be examined at an oral hearing). The law did not – and still does not – require the court to decide within a particular time-limit.

35. The trial court's decision was subject to appeal to the higher court (Article 344 § 3 of the 1974 Code; superseded by Article 270 § 4 of the 2005 Code). The higher court could examine the appeal in private or, if it considered it necessary, at an oral hearing (Article 348 § 1 of the 1974 Code, reproduced in Article 354 § 1 of the 2005 Code).

36. A new Article 268a was added to the 1974 Code in May 2003. By paragraph 1 of that Article (presently reproduced in Article 270 § 1 of the 2005 Code), a fresh request for release at the same level of court could be made only if there had been a change in circumstances. Paragraph 2 *in fine* of this Article (presently reproduced in Article 270 § 2 *in fine* of the 2005 Code) provided that the trial court had to refrain from examining the existence or otherwise of a reasonable suspicion against the detainee.

3. Compensation for unlawful detention

37. Section 2 of the 1988 State Responsibility for Damage Caused to Citizens Act ("the SRDA" – *Закон за отговорността на държавата за вреди, причинени на граждани* – this was the original title; on 12 July 2006 it was changed to the State and Municipalities Responsibility for Damage Act, *Закон за отговорността на държавата и общините за вреди*), provides as follows:

> "The State shall be liable for damage caused to [private persons] by the organs of ... the investigation, the prosecution, the courts ... for unlawful:
>
> 1. pre-trial detention, including when imposed as a preventive measure, when it has been set aside for lack of lawful grounds;
>
> 2. criminal charges, if the person concerned has been acquitted, or if the criminal proceedings have been discontinued because the act has not been committed by the person concerned or did not constitute a criminal offence..."

38. In a binding interpretative decision (тълк. реш. № 3 от 22 април 2004 г. на ВКС по тълк.д. № 3/2004 г., ОСГК) made on 22 April 2004 the Plenary Meeting of the Civil Chambers of the Supreme Court of Cassation resolved a number of contentious issues relating to the construction of various provisions of the SRDA. In line with the courts' earlier case-law, in point 13 of the decision it held that pre-trial detention was unlawful when it did not comply with the requirements of the Code of Criminal Procedure and that the State was liable under section 2(1) of the SRDA when such detention had already been set aside as unlawful.

39. Individuals seeking redress for damage resulting from decisions of the investigating and prosecuting authorities or the courts in circumstances falling within the scope of the SRDA have no claim under general tort law

as the Act is a *lex specialis* and excludes the application of the general regime (section 8(1) of the Act; реш. № 1370/1992 г. от 16 декември 1992 г., по г.д. № 1181/1992 г. на ВС, IV г.о.).

B. Correspondence of the pre-trial detainees

1. Relevant constitutional provisions

40. Articles 30, 32 § 1 and 34 of the 1991 Constitution read, as relevant:

Article 30 § 5

"Everyone has the right to meet in confidence with the person who defends him. The confidentiality of their communication shall be inviolable."

Article 32 § 1

"The private life of citizens shall be inviolable. Everyone has the right to protection against unlawful interference in his private or family life and against encroachment on his honour, dignity and reputation."

Article 34

"1. The freedom and secrecy of correspondence and other communications shall be inviolable.

2. This rule may be subject to exceptions only with the permission of the judicial authorities when necessary for uncovering or preventing serious offences."

2. Relevant statutes and statutory instruments

41. Section 18(2) of the 1991 Bar Act (*Закон за адвокатурата*), presently superseded by section 33(2) of the 2004 Bar Act, provided that the correspondence between lawyers and their clients was inviolable, could not be subject to interception and could not be used as evidence in court.

42. Between 1993 and 2000 the legal regime of pre-trial detainees, including their correspondence, was the subject of two successive regulations issued by the Minister of Justice: Regulation no. 12 of 15 April 1993, superseded by Regulation no. 2 of 19 April 1999.

43. Under section 18(5) of Regulation no. 12, detainees had the right to send and receive an unlimited number of letters. Section 19(2) of the Regulation provided that letters (except those to and from the detainees' counsel), which contained advice about the criminal proceedings against them, were not allowed to be passed on, but instead had to be made available to the competent prosecutor or court.

44. Section 25(1) of Regulation no. 2 provided that "the correspondence of the accused and of the indicted [was] subject to inspection by the [detention facilities] administration".

45. In a decision of 22 December 2000 (реш. № 7982 от 22 декември 2000 г. по адм.д. № 3351/2000 г., ВАС, петчленен състав, обн., ДВ, бр. 4 от 12 януари 2001 г.) the Supreme Administrative Court annulled this provision, holding that it was contrary to Articles 30 § 5, 32 and 34 of the 1991 Constitution (see paragraph 40 above), Article 8 of the Convention and section 18(2) of the 1991 Bar Act (see paragraph 41 above), as it provided for systematic monitoring of the entirety of the detainees' correspondence.

46. In June 2002 the 1969 Execution of Punishments Act (*Закон за изпълнение на наказанията*), which is the statute regulating, along with other matters, the manner of serving custodial sentences, was amended and now incorporates, in the newly added sections 128-132h, special rules relating to pre-trial detainees. As a result, Regulation no. 2 ceased to apply; it was however expressly repealed only on 1 September 2006, when the Minister of Justice amended the Regulations relating to the application of the Act (see paragraph 49 below).

47. The new section 132d(3) of the 1969 Act provided that "[t]he correspondence of the accused and of the indicted [was] subject to inspection by the [prison] administration".

48. In a decision of 18 April 2006 (реш. № 4 от 18 април 2006 г. по к.д. № 11 от 2005 г., обн., ДВ, бр. 36 от 2 май 2006 г.) the Constitutional Court, acting pursuant to a request by the Chief Prosecutor, declared this provision unconstitutional. After analysing in detail the relevant constitutional and Convention provisions and making reference to, among others, the cases of *Campbell v. the United Kingdom* (judgment of 25 March 1992, Series A no. 233), *Calogero Diana v. Italy* (judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V) and *Petra v. Romania* (judgment of 23 September 1998, *Reports* 1998-VII), it held that a blanket authorisation to inspect the correspondence of all detainees without regard to their particular circumstances and the threat which they allegedly posed to society through such correspondence was contrary to Articles 30 § 5 and 34 of the 1991 Constitution (see paragraph 40 above).

49. Following the Constitutional Court's decision, on 1 September 2006 the Regulations for application of the 1969 Execution of Punishments Act were amended. Under the new section 178(1), pre-trial detainees are entitled to unlimited correspondence which is not subject to monitoring. Envelopes have to be sealed and opened in the presence of members of staff, in a manner allowing those members to make sure that they do not contain money or other prohibited items (section 178(2) of the Regulations).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

50. The applicant alleged that his pre-trial detention had been unwarranted and excessively lengthy. He relied on Article 5 § 3 of the Convention, which, in so far as relevant, provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. The parties' submissions

51. The Government argued that the authorities had been justified in placing the applicant in pre-trial detention. Their decisions had been based on a reasonable suspicion of his having committed a very serious offence and the existence of the other prerequisites for remanding him in custody. In all their decisions rejecting his requests for release they had had regard to the continuing risk that he would flee, hinder the investigation or commit an offence. They had also acted with the utmost speed possible under the circumstances.

52. The applicant described in detail the reasons given by the national courts for rejecting his requests for release between 1998 and 2005. In his view, these reasons had been very laconic and formal, and had been neither pertinent nor sufficient to warrant his remaining in custody. On most occasions the courts had been content to cite the gravity of the charges and to repeat that no fresh developments had taken place. Moreover, the authorities had not acted diligently in the criminal proceedings against him. There had been substantial intervals between the hearings and the trial had had to start afresh after the judge-rapporteur had been appointed as Minister of Justice in 2001, as no arrangements had been made to prevent such an eventuality.

B. The Court's assessment

53. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

54. Turning to the merits of the complaint, the Court observes that the period to be taken into consideration started on 9 May 1998, when the applicant was taken into custody (see paragraph 19 above), and ended on

14 October 2005, when the Sofia City Court convicted him (see paragraph 30 above). It therefore lasted seven years, five months and five days.

55. According to the Court's settled case-law, the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the authorities continued to justify the deprivation of liberty. Where such grounds were relevant and sufficient, the Court must also ascertain whether the competent authorities displayed special diligence in the conduct of the proceedings (see, among many other authorities, *Ilijkov*, § 77, and *Yankov*, § 169, both cited above).

56. In the present case, the applicant was arrested at the scene of a crime, after considerable efforts by the police (see paragraphs 5 and 6 above). There is therefore little doubt that his arrest and subsequent detention were based on a reasonable suspicion of his having committed an offence.

57. However, the reasons given by the domestic courts for prolonging the applicant's detention for almost seven and a half years do not appear to be relevant and sufficient. In spite of the legislative reform of 1 January 2000, which was intended to bring the 1974 Code of Criminal Procedure in line with the requirements of the Convention (see paragraph 32 above), the Sofia City Court and the Sofia Court of Appeals continued to rely, throughout the entire period under consideration, chiefly on the gravity of the charges against the applicant, on the presumption that due to the seriousness of the offences of which he stood accused he automatically presented a risk of absconding and would commit offences if released, and on the lack of any change in the relevant circumstances (see paragraphs 23 and 28 above and *Petar Vasilev v. Bulgaria*, no. 62544/00, § 37, 21 December 2006). This approach was due to these courts' expansive interpretation of the shift of the burden of proof under Article 152 § 2 (3) of the 1974 Code in its version after 1 January 2000 (see paragraphs 24 and 32 above). On this point, the Court reiterates that the gravity of the charges cannot by itself serve to justify long periods of pre-trial detention and that continued detention can be justified only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of concrete facts outweighing the rule of respect for individual liberty must nevertheless be convincingly demonstrated (see *Ilijkov*, cited above, §§ 81 and 84, with further references). Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively

enumerated and strictly defined cases (ibid., § 85). It can hardly be presumed, without more information, that the risk presented by the applicant did not recede over a period of almost seven and a half years. However, no concrete facts and arguments were invoked by the national courts to convincingly demonstrate the need for his remand in custody for such a long time.

58. There has therefore been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

59. The applicant alleged that the scope of the courts' review of his requests for release from pre-trial detention had been too narrow, that the proceedings had not been adversarial, as he had not had the opportunity of replying to the public prosecutors' comments, and that the courts had failed to rule on some of his requests. He relied on Article 5 § 4 of the Convention, which provides:

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

A. The parties' submissions

60. In the Government's submission, the courts had considered all issues relevant to the lawfulness of the applicant's deprivation of liberty. They had examined his requests for release speedily and had given full reasons for their decisions. The reform of the CCP of 1 January 2000 had introduced significant safeguards to ensure both equality of arms between the parties and the adversarial character of the proceedings.

61. The applicant submitted that a number of decisions given pursuant to his requests for release and his ensuing appeals had been made by the courts in private, without hearing the parties or allowing them to adduce evidence and raise additional arguments. Moreover, his appeals had been sent for comment to the competent public prosecutors and their comments had not been communicated to him, in breach of the principle of equality of arms. Another problematic aspect of the proceedings had been the limited scope of review. The courts had focused on the gravity of the charges against him, had expected him to shoulder the burden of proving the existence of facts militating for his release, and had treated important factors as irrelevant. Furthermore, some of his requests for release had not been examined speedily. Finally, the applicant found fault with the Sofia Court of Appeals' refusal to examine his appeal against the decision of the judge-rapporteur to confirm his detention and the Sofia City Court's failure to rule on his request

for release of December 2000, as well as with several other instances on which the courts had failed to rule on his requests for release.

B. The Court's assessment

62. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

1. Scope of the complaint

63. The Court observes at the outset that it is competent to examine only the proceedings instituted pursuant to the applicant's requests for release after August 2000. His complaints in respect of earlier requests were declared inadmissible in the partial decision in the present case (see *Bochev v. Bulgaria* (dec.), no. 73481/01, 20 March 2007). The grievance relating to the Sofia Court of Appeal's refusal to examine the appeal against the decision of the judge-rapporteur to confirm the applicant's detention was likewise declared inadmissible (ibid.).

2. Scope of the judicial review of the applicant's detention

64. According to the Court's settled case-law, arrested or detained persons are entitled to a review relating to the procedural and substantive conditions which are essential for the lawfulness, in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine not only compliance with the procedural requirements set out in domestic law, but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention (see, as a recent authority, *Petar Vasilev*, cited above, § 33, with further references). While Article 5 § 4 does not enjoin a court examining a request for release to address every argument contained in detainees' submissions, its guarantees would be deprived of their substance if that court could treat as irrelevant, or disregard, particular facts invoked by detainees which could cast doubt on the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty (see, among many other authorities, *Nikolova*, § 61; and *Ilijkov*, § 94, both cited above; as well as *I.I. v. Bulgaria*, no. 44082/98, § 103, 9 June 2005).

65. Turning to the present case, the Court observes that despite the legislative reform of 1 January 2000 (see paragraph 32 above), the Sofia City Court and the Sofia Court of Appeal continued to rely chiefly on the gravity of the charges against the applicant to justify his pre-trial detention and were content to repeat, for a considerable period of time, that, since he stood accused of several very serious offences of violence, he automatically

presented a risk of absconding and would commit further offences if released. They also consistently invoked the lack of any change in the relevant circumstances (see paragraphs 23 and 28 above). This approach was due to the expansive manner in which they construed the shift of the burden of proof under Article 152 § 2 (3) of the 1974 Code of Criminal Procedure in its version after 1 January 2000 (see paragraph 32 above). However, by relying on this presumption the courts disregarded as irrelevant or plainly insufficient a number of concrete facts and arguments adduced by the applicant. As noted in paragraph 57 above, where the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of concrete facts outweighing the rule of respect for individual liberty must nevertheless be convincingly demonstrated. The persistent application of this presumption in the instant case was particularly disquieting, considering the fact that the applicant's detention lasted almost seven and a half years. The time elapsed and the stage of the proceedings are in themselves factors which reflect upon and might negate the need for the continued detention of an accused (see *Petar Vasilev*, cited above, § 36).

66. The Court also observes that following the introduction in May 2003 of the new Article 268a § 2 *in fine* of the 1974 Code of Criminal Procedure, presently reproduced in Article 270 § 2 *in fine* of the 2005 Code of Criminal Procedure, trial courts, which were the ones competent to examine requests for release made during the trial, were barred from inquiring into the existence or otherwise of a reasonable suspicion against the accused (see paragraph 36 above). The rationale for this proscription was that if they did so, they would be impermissibly prejudging the merits of the criminal case (see paragraphs 29 above). The Court has already had occasion to criticise such circumscription of the scope of judicial review of pre-trial detention. In *Ilijkov* it found, after examining the matter in considerable detail, that the Bulgarian authorities' concern to provide effective protection for the principle of impartiality was based on a misconception and could not justify the limitation imposed on the Article 5 § 4 rights of pre-trial detainees (see *Ilijkov*, cited above, §§ 94-100, with further references). It reaffirmed this ruling in several later cases (see, for example, *Hristov v. Bulgaria*, no. 35436/97, § 117, 31 July 2003; and *I.I.*, cited above, §§ 104 and 105). In any event, is incumbent on the respondent State to devise appropriate procedural means to secure the enjoyment of all Convention rights, including that under Article 5 § 4 to judicial review of all aspects of the lawfulness of detention (see *Ilijkov*, cited above, § 96).

3. The guarantees of adversarial procedure

67. According to the Court's settled case-law, a court examining a request for release must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure “equality of arms”

between the parties, the prosecutor and the detained person. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among many other authorities, *Petar Vasilev*, cited above, § 33, with further references). The same guarantees must be provided on appeal (see *Ilijkov*, cited above, § 103).

68. By contrast, on some occasions the Sofia City Court examined the applicant's requests for release in private and the Sofia Court of Appeal invariably examined the appeals against the lower court's decisions in private (see paragraphs 22, 22, 26 and 27 above).

69. The applicant's grievance about the lack of equality of arms in the proceedings before the Sofia Court of Appeal is the same as those in several cases against Bulgaria in which the Court found breaches of Article 5 § 4 (see *Nikolova*, cited above, §§ 54, 58, 62 and 63; *Ilijkov*, cited above, §§ 101-04; *Mihov v. Bulgaria*, no. 35519/97, §§ 99-104, 31 July 2003; *Hristov*, cited above, § 118; *Kuibishev v. Bulgaria*, no. 39271/98, § 76, 30 September 2004; *E.M.K.*, cited above, § 132; and *Kolev v. Bulgaria*, no. 50326/99, § 79, 28 April 2005). The situation in the present case was identical. On at least two occasions, in April and May 2002, the applicant's appeals against the refusals of the Sofia City Court to release him were communicated to the competent public prosecutors, who were able to comment on them in writing. These comments were not made available to the applicant and the Sofia Court of Appeal later examined the appeals without holding oral hearings, although it had discretion as to whether or not to do so (see paragraphs 25 and 35 above). As a result, the prosecution authorities had the privilege of addressing the judges with arguments which could not be countered by the applicant. The proceedings were therefore not truly adversarial and did not ensure equality of arms between the parties.

4. Failure to rule on certain requests for release

70. According to the Court's case-law, Article 5 § 4 enshrines, as does Article 6 § 1, a right of access to a court, which can only be subject to reasonable limitations that do not impair its very essence (see *Shishkov v. Bulgaria*, no. 38822/97, §§ 82-90, ECHR 2003-I (extracts)). However, when on 15 January 2001 the Sofia Court of Appeal sent the applicant's request for release of December 2000 to the Sofia City Court with instructions to examine it, the latter failed to do so (see paragraph 20 above and *Radoslav Popov v. Bulgaria*, no. 58971/00, § 49, 2 November 2006). Also, at the hearing held on 13 January 2005 the Sofia City Court declined to consider the applicant's request for release on the grounds that his counsel was absent (see paragraph 27 above), which can hardly be seen as a valid ground for this refusal. Even if in the absence of counsel the court was unable to proceed with the trial, there was nothing to prevent it from ruling on the applicant's request.

5. The Court's conclusion

71. The foregoing considerations are sufficient to enable the Court to conclude that the applicant did not benefit from the guarantees enshrined in Article 5 § 4 of the Convention. It does not therefore find it necessary to additionally enquire whether or not the applicant's requests for release were examined speedily (see *Ilijkov*, cited above, § 106).

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

72. The applicant complained that Bulgarian law did not guarantee a right to compensation for the breaches of Article 5 §§ 3 and 4 of the Convention found in his case. He relied on Article 5 § 5, which provides:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

73. The Government made no submissions in relation to this complaint.

74. The applicant argued that Bulgarian law did not ensure effective compensation for detention effected in breach of Article 5 of the Convention. Section 2 of the SRDA gave a right to compensation only to persons who had been acquitted, which was not his case.

75. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

76. Turning to the merits of the complaint, the Court observes that, according to its case-law, Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (see, among many other authorities, *Vachev v. Bulgaria*, no. 42987/98, § 78, ECHR 2004-VIII (extracts)). The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the preceding paragraphs of Article 5 has been established, either by a domestic authority or by the Court. In the present case, the Court found that the applicant's pre-trial detention infringed his rights under paragraphs 3 and 4 of Article 5 (see paragraphs 58 and 71 above). He was therefore entitled to compensation under this provision.

77. An individual remanded in custody may claim damages under section 2(1) of the SRDA only if his detention "has been set aside for lack of lawful grounds". This expression apparently refers to unlawfulness under domestic law (see paragraphs 37 and 38 above). However, in the instant case the applicant's detention was considered by the courts as being in full compliance with the requirements of Bulgarian law (see paragraphs 20-29 above). It thus seems that he had no right to compensation under section 2(1) of the SRDA. Nor does section 2(2) of the SRDA apply, as the

proceedings against the applicant resulted in his conviction (see paragraphs 14 and 37 above). It follows that in the applicant's case the SRDA does not provide for an enforceable right to compensation. Nor does it appear that such a right is secured under any other provision of Bulgarian law (see paragraph 39 above).

78. There has therefore been a violation Article 5 § 5 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

79. The applicant alleged that the criminal proceedings against him had been excessively lengthy. He relied on Article 6 § 1 of the Convention, which provides, in so far as relevant:

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

80. The Court observes at the outset that in its judgment of 2 October 2007 the Sofia Court of Appeal turned down the prosecution's request to increase the applicant's penalty to life imprisonment, citing the unreasonable length of the criminal proceedings against him (see paragraph 16 above). The question thus arises whether he may still claim to be a victim of a violation of his right to a trial within a reasonable time.

81. According to the Court's case-law, the reduction of a sentence on the grounds of the excessive length of proceedings does not in principle deprive the individual concerned of his status as a victim. However, this rule is subject to an exception when the national authorities have acknowledged in a sufficiently clear way the failure to observe the reasonable-time requirement of Article 6 § 1 and have afforded redress by reducing the sentence in an express and measurable manner (see, as recent authorities, *Morby v. Luxembourg* (dec.), no. 27156/02, ECHR 2003-XI; *Mladenov v. Bulgaria*, no. 58775/00, § 31, 12 October 2006; *Sheremetov v. Bulgaria*, no. 16880/02, § 33, 22 May 2008; and *Menelaou v. Cyprus* (dec.), no. 32071/04, 12 June 2008).

82. In the instant case, the Court is satisfied that the ruling of the Sofia Court of Appeal did amount to such an acknowledgement (see *Beck v. Norway*, no. 26390/95, § 28, 26 June 2001; and *Kovács v. Hungary* (dec.), no. 22661/02, 24 January 2006). That court analysed the matter in some detail and found, by express reference to Article 6 § 1, that the charges against the applicant had not been determined within a reasonable time and that this failure was not attributable to his conduct (see paragraph 16 above and, by contrast, *Mladenov*, § 32, and *Sheremetov*, § 34, both cited above). It thus remains to be determined whether the court's refusal to increase the applicant's sentence amounted to sufficient redress therefor.

83. On this point, the Court observes that the offences committed by the applicant carried a maximum sentence of life imprisonment, with or without parole (see paragraphs 7 and 14 above). The Sofia Court of Appeal found that the mitigating circumstances relied on by the Sofia City Court were not of themselves significant enough to warrant the lesser penalty – thirty years' imprisonment – for which that court had opted. It was therefore inclined to allow the prosecution's request to increase the sentence to life imprisonment. The crucial factor for its eventual decision not to do so was its understanding that the unreasonable length of the criminal proceedings in itself amounted to a mitigating circumstance warranting a lesser sentence than the maximum penalty. In these circumstances, the Court is satisfied that the Sofia Court of Appeal's finding concerning the effect of the excessive length of the proceedings had a decisive and measurable impact on the applicant's sentence (see, *mutatis mutandis*, *Beck*, cited above, § 28 *in fine*). It therefore amounted to sufficient redress for the excessive length of the criminal proceedings against him.

84. In view of the foregoing, the Court considers that the applicant can no longer claim to be a victim within the meaning of Article 34 of the Convention.

85. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

86. The applicant complained that his correspondence in custody, including that with his legal counsel, had been monitored by the prison administration. He relied on Article 8 of the Convention, which provides, in so far as relevant:

> "1. Everyone has the right to respect for his private ... life ... and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

87. The Government made no submissions in relation to this complaint.

88. The applicant described in detail the relevant legal framework and on this basis alleged that the entirety of his mail whilst in detention, including that with his lawyers, had been monitored, not only before December 2000 and April 2006, but also after that. The legal basis for the

interference until April 2006 had been defective and had been set aside by the national courts. The ensuing legal framework had remained unclear and was thus insufficient for the purposes of the Convention. Furthermore, the interference had not been necessary in a democratic society, as correspondence with lawyers was as a rule privileged.

B. The Court's assessment

1. Admissibility

89. The Court must first determine whether the fact that the provisions which served as a basis for the interception of the applicant's correspondence were set aside by the Bulgarian courts (see paragraphs 45 and 48 above) deprived him of the status of victim within the meaning of Article 34 of the Convention.

90. As already noted (see paragraph 81 above), decisions or measures favourable to applicants are not in principle sufficient to deprive them of their status as victims unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see also *Lebedev v. Russia*, no. 4493/04, § 44, 25 October 2007).

91. In the instant case, it is open to doubt whether the Supreme Administrative Court's and the Constitutional Court's decisions can be regarded as an acknowledgment of a violation of the applicant's rights. These courts did not examine his individual situation as such but gave an interpretation of the law (ibid., § 45) and changed it for the future. Furthermore, the decisions by themselves, while apparently putting an end to the interference with the applicant's rights, did not provide him any relief in respect of the monitoring of his correspondence up until that point. In this connection, the Court also observes that the applicant's legal challenge to Regulation no. 2 governing the legal regime of pre-trial detainees was rejected by the Supreme Administrative Court (see paragraphs 31 and 42 above).

92. The Court thus concludes that the applicant may still claim to be a victim within the meaning of Article 34 of the Convention.

93. The Court further considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

94. The Court observes that the applicant has not produced evidence that his letters in custody were being opened and inspected. However, it also notes that it is clear from the terms of section 19(2) of Regulation no. 12 of

1993, which applied between the moment when the applicant was taken into custody and April 1999, that all of the pre-trial detainees' letters, except for those to and from their lawyers, were subject to opening and inspection (see paragraph 43 above). Later, between April 1999 and December 2000, and between June 2002 and April 2006, the entirety of the applicant's incoming and outgoing correspondence, including the letters to and from his lawyers, was subject to inspection under the express terms of section 25(1) of Regulation no. 2 of 1999 and section 132d(3) of the 1969 Execution of Punishments Act (see paragraphs 44 and 47 above). In these circumstances, the Court concludes that there has been an interference with the applicant's right to respect for correspondence (see *Campbell*, cited above, p. 16, § 33; and *Petrov v. Bulgaria*, no. 15197/02, § 39, 22 May 2008), at least between the time when he was taken into custody and December 2000, as well as between June 2002 and April 2006. However, in the present case the Court finds no basis to assume that such interference existed following the adoption in September 2006 of the new section 178 of the Regulations for application of the 1969 Execution of Punishments Act (see paragraph 49 above).

95. An interference gives rise to a breach of Article 8 unless it can be shown that it was "in accordance with the law", pursued one or more legitimate aim or aims as defined in paragraph 2 and was "necessary in a democratic society" to achieve those aims.

96. Concerning the first of these requirements, the Court observes that both section 25(1) of Regulation no. 2 of 1999 and section 132d(3) of the 1969 Execution of Punishments Act were set aside by the Bulgarian courts as being contrary to the 1991 Constitution. The former was also found to run counter to section 18(2) of the 1991 Bar Act (see paragraphs 40, 41, 45 and 48 above). The Court also notes that the monitoring envisaged by these provisions was not based on a judicial decision, as expressly required under Article 34 § 2 of the Constitution (see paragraph 40 above). Against this background, it finds that between April 1999 and December 2000 and between June 2002 and April 2006 the interference with the exercise of the applicant's right to freedom of correspondence was not "in accordance with the law", in breach of paragraph 2 of Article 8 of the Convention.

97. As regards the period before April 1999, when the interference was based on section 19(2) of Regulation no. 12 (see paragraph 43 above), the Court first observes that it is questionable whether this provision was compatible with Article 34 § 2 of the Constitution, which subjects the interception of correspondence to judicial authorisation (see paragraph 40 above). Furthermore, while agreeing that some measure of control over the correspondence of those in custody is called for and is not of itself incompatible with the Convention, the Court notes that the Government have not explained what was the legitimate aim pursued by the systematic interception of the entirety of the pre-trial detainees' non-legal

correspondence. Nor have they sought to adduce any arguments showing why it was to be considered "necessary in a democratic society" for its attainment (see *Petrov*, cited above, §§ 43 and 44, with further references). On the contrary, the Supreme Administrative Court and the Constitutional Court both voiced their concerns in this regard (see paragraphs 45 and 48 above).

98. There has therefore been a violation of Article 8 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

100. The applicant claimed 50,000 euros (EUR) in respect of the non-pecuniary damage suffered as a result of the breach of Article 5 § 3. He submitted that the extraordinary amount of time which he had spent in pre-trial detention, often in appalling conditions, and the national courts' formalistic approach to this matter caused him to feel desperate and helpless. He further claimed EUR 30,000 in respect of the non-pecuniary damage flowing from the breach of Article 5 § 4. He said that the formalistic and unfair manner in which the courts reviewed his numerous requests for release had caused him despair and distress. He also claimed EUR 10,000 in respect of the damage engendered by the breach of Article 5 § 5 and EUR 10,000 for the breach of Article 6 § 1. Finally, he claimed EUR 10,000 in respect of the breach of Article 8, saying that the systematic interception of his letters, which had been his principal means of communication with the outside world and his lawyers, had caused him emotional trauma.

101. The Government did not comment on the applicant's claims.

102. The Court considers that the violations of the Convention found in the present case have undoubtedly caused the applicant non-pecuniary damage in the form of stress, despair and frustration arising from the lack of sufficient justification for his pre-trial detention, the deficient examination of his requests for release, and the monitoring of his correspondence. Ruling on an equitable basis, as required under Article 41 of the Convention, it awards him EUR 6,000, plus any tax that may be chargeable.

B. Costs and expenses

103. The applicant sought the reimbursement of EUR 5,040 incurred in lawyers' fees for the proceedings before the Court. He further claimed EUR 130 for postage and copying expenses and EUR 200 for translation expenses. He requested that any award made by the Court under this head be made payable to his lawyers, Ms S. Stefanova and Mr M. Ekimdzhiev.

104. The Government did not comment on the applicant's claims.

105. According to the Court's case-law, applicants are entitled to the reimbursement of their costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, having regard to the information in its possession and the above criteria, and noting that part of the application was declared inadmissible, the Court considers it reasonable to award the sum of EUR 1,500, plus any tax that may be chargeable to the applicant. This sum is to be paid into the bank account of the applicant's representatives, Ms S. Stefanova and Mr M. Ekimdzhiev.

C. Default interest

106. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning (a) the justification for the applicant's pre-trial detention, (b) the judicial review of this detention, (c) the alleged lack of an enforceable right to compensation in respect of these matters, and (d) the interception of the applicant's correspondence in custody admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds* that there has been a violation of Article 5 § 5 of the Convention;

5. *Holds* that there has been a violation of Article 8 of the Convention;

6. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:

(i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be into the bank account of the applicant's representatives, Ms S. Stefanova and Mr M. Ekimdzhiev;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Rait Maruste
Registrar	President