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

FIRST SECTION

CASE OF E.M.K. v. BULGARIA

(Application no. 43231/98)

JUDGMENT

STRASBOURG

18 January 2005

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 E.M.K. v. Bulgaria,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr P. LORENZEN,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr D. SPIELMANN, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 14 December 2004,

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

PROCEDURE

1. The case originated in an application (no. 43231/98) against the Republic of Bulgaria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr E.M.K., a Bulgarian national born in 1973 and living in Sofia ("the applicant"), on 17 October 1997.

2. The applicant was represented by Mr Y. Grozev and Ms K. Yaneva, lawyers practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agents, Ms M. Pasheva and Ms M. Dimova, of the Ministry of Justice.

3. The applicant alleged, in particular, that after his arrest he had not been brought before a judge or a judicial officer, that his detention had been unjustified and excessively lengthy, that the judicial review of his detention had been flawed and that the criminal proceedings against him had lasted unreasonably long.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3).

6. By a decision of 13 November 2003 the Court (First Section) declared the application partly admissible.

7. The applicant, but not the Government, filed observations on the merits (Rule 59 § 1).

8. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1973 and lives in Sofia.

10. During the period September 1995 – May 1996 the applicant was a university student in finance in the town of Svishtov, at the Danube river. He was also the manager of a sport-shoes shop in the town of Novi Pazar, in north-eastern Bulgaria (situated at approximately 415 kilometres from Sofia), owned by his girlfriend.

A. The criminal proceedings against the applicant

1. The offences with which the applicant was charged

(a) First offence

11. On 12 April 1995 Mr E.S.A., a Greek citizen living in Germany, drove through Bulgaria in a jeep with a trailer to transfer a corpse from Germany to Greece. At about 11.00 p.m. he stopped on the ring-road of Sofia. A car stopped in front of the jeep, three men came out of it and approached the vehicle. One of them tried to hit Mr E.S.A. with a hammer through the jeep's window. Another got into the jeep and attacked him with a knife. Mr E.S.A. managed to knock off the knife, but in the meantime the man with the hammer hit him in the face. Then the three men threw Mr E.S.A. out of the vehicle, kicked him several times while he was lying on the ground, and drove away with the jeep.

(b) Second offence

12. At about 10.30 p.m. on 9 March 1996 Ms M.V. stopped her car in front of the house of a friend of her mother's and stepped out to wipe the ice from the windscreen. A man wearing a wool hat approached her, threatened her, sat in the driver's seat of her car and drove away.

2. The preliminary investigation

13. An investigation into the first incident was opened on 13 April 1995. Mr E.S.A. was presented with photographs of several persons, including the applicant, and later was questioned. He identified the applicant as one of the assailants and described the assailant as having a dark complexion and short brown hair. Apparently the identification procedure was tainted as the investigator did not, as provided by the Code of Criminal Procedure ("the CCP"), question Mr E.S.A. about the distinctive features of the person to be identified prior to presenting him with the photographs. It also seems that the record was not signed by one of the certifying witnesses, as required by the CCP.

14. Following the identification, the investigator drew up a ruling to summon the applicant. On 11 and 12 July 1995 a process server visited the applicant's home to deliver the summons but was informed by a neighbour that the applicant was absent.

15. On 23 August 1995 the investigator charged the applicant *in absentia* with aggravated robbery and ordered his detention.

16. On 5 September 1995 a prosecutor of the Sofia City Prosecutor's Office confirmed the investigator's order for the applicant's detention.

17. On 22 September 1995 the applicant was listed in a police posting as a wanted criminal suspect.

18. On 5 October 1995 several police officers went to the home of the applicant to arrest him. They informed his parents that he was wanted. The applicant's mother told the officers that she had spoken with the applicant the previous day and that he was in Svishtov taking his university examinations.

19. The next day, 6 October 1995, the applicant's mother went to the Investigation Service and, being a practising lawyer, requested permission to represent the applicant together with another lawyer. She requested the investigator to allow her to get acquainted with the charges and informed him that the applicant would appear for questioning in a week's time. The investigator refused to acquaint her with the charges.

20. The applicant refused to appear for questioning. According to him, this was due to his believing that the accusation was "false and absurd" and to his fear of being ill-treated in custody.

21. On 10 October 1995 the police issued a nation-wide search warrant for the applicant. According to the applicant, in practice no steps were undertaken in that respect and he was not hiding, but staying in hotels in Svishtov and taking his examinations.

22. On 17 October 1995 a prosecutor from the Sofia City Prosecution Office ordered the investigator to allow the applicant's mother to participate in the proceedings.

23. On 23 October 1995 the applicant's lawyers requested the examination of several witnesses who, it was asserted, could establish his

alibi. They argued that at the time of the alleged offence the applicant had been in Novi Pazar in connection with the investigation of the robbery of the shop he was managing there. On unspecified dates later in the autumn of 1995 five witnesses testified that the applicant had been in Novi Pazar prior to and at the time of the attack on Mr E.S.A. in Sofia.

24. On 26 October 1995 the investigator proposed that the investigation be stayed on the ground that the applicant was missing and sent the case file to the Sofia City Prosecutor's Office.

25. On 8 November 1995 a prosecutor from that office refused to stay the investigation and ordered the carrying out of further investigative steps. She found, *inter alia*, that the photographs pursuant to which the applicant had been identified and the report from the examination of the crime scene were missing from the case file and that Mr E.S.A. had not been properly questioned.

26. In the beginning of December 1995 the applicant's lawyers requested that the order for his detention be rescinded. They relied on the fact that the identification procedure with the participation of Mr E.S.A. was flawed and on the testimony that the applicant had been in Novi Pazar at the time of Mr E.S.A.'s robbing.

27. The Sofia City Prosecutor's Office rejected the request by an order of 15 December 1995, reasoning that the proceedings were at a too early stage, that the applicant had been charged with a serious intentional offence and that there was no indication that he would not abscond, obstruct the investigation or commit another offence. In particular, the applicant was in hiding.

28. On the same date the investigator again proposed that the proceedings be stayed on the ground that neither the applicant, nor Mr E.S.A. could be located.

29. On 20 December 1995 the applicant's lawyers unsuccessfully requested from the Sofia City Prosecutor's Office to replace the investigator.

30. On 8 January 1996 the Sofia City Prosecutor's Office stayed the proceedings because Mr E.S.A. had to be summoned from Germany, where he was living, for questioning.

31. On 22 January 1996 the applicant's lawyers requested from the Chief Prosecutor's Office to rescind the order for the applicant's detention. The Chief Prosecutor's Office refused. It reasoned that there was no indication that if not in custody, the applicant would not abscond, obstruct the investigation or commit another offence. In particular, he was in hiding.

32. On 29 January 1996 the proceedings were resumed because Mr E.S.A. had arrived in Bulgaria and could be questioned. During questioning he stated that the person who had assaulted him with a hammer had been a man of medium height, aged between thirty and thirty-five years, with short hair and brown eyes. In contrast to his earlier statement, he testified that the attacker had been light-skinned.

33. On 30 January 1996 Mr E.S.A. was questioned again and said that during the 13 April 1995 identification he had been presented with five or six pictures, not nine as had been stated in the record.

34. On 28 February 1996 the applicant's lawyers again requested from the Chief Prosecutor's Office to rescind the order for the applicant's detention. They argued that the evidence thus far adduced convincingly demonstrated that the applicant was not Mr E.S.A.'s attacker. The Chief Prosecutor's Office replied that it could not rule on the request.

35. A renewed request dated 4 March 1996 remained unanswered.

36. On 29 March 1996 the investigator proposed that the proceedings be stayed because the applicant was missing.

37. By an order of 8 April 1996 the Sofia City Prosecutor's Office refused to stay the proceedings and sent the case back to the investigator, reasoning that its earlier instructions for additional investigative steps had not been complied with and that key pieces of evidence had not been gathered. It also noted that no effective actions had been undertaken to locate and apprehend the applicant.

38. In the meantime, on or about 10 March 1996, an investigation relating to the robbery of Ms M.V.'s car (see paragraph 12 above) was opened by the Sofia District Prosecutor's Office.

39. On 9 April 1996 the picture of the applicant appeared in the daily newspapers. When Ms M.V. saw the pictures, she went to the police and stated that it was the applicant who had robbed her car.

40. On 8 May 1996 the applicant, after consulting with his lawyers, turned himself in. He was then formally presented with the charges against him.

41. On 16 May 1996 Ms M.V. was questioned. She described the offender as a twenty-five year old man with a large mouth and big eyes.

42. On 17 May 1996 the applicant was charged with robbing Ms M.V.'s car.

43. On 11 June 1996 the investigator in the proceedings relating to Mr E.S.A.'s robbery recommended that the charges against the applicant be dropped, as it appeared that he was not the offender. By an order of 21 June 1996 the Sofia City Prosecutor's Office refused and returned the case for further investigation.

44. On 18 June 1996 the Sofia City Prosecutor's Office, which was supervising the proceedings relating to Mr E.S.A.'s robbery, took charge of the investigation relating to Ms M.V.'s robbery as well. It ordered an additional questioning of Ms M.V. with a view to establishing, *inter alia*, on what basis she was able to identify the applicant and whether she was categorical about that.

45. On 24 July 1996 the two investigations were merged.

46. On 19 November 1996 the investigator proposed that the applicant be committed for trial for the alleged robbery of Ms M.V.'s car but that the charges in respect of the robbery of Mr E.S.A. be dropped.

47. On 4 January 1997 the Sofia City Prosecutor's Office refused to drop the charges, ordered additional investigative actions, and decided that the applicant was to be indicted for both offences.

48. On 23 January 1997 the investigator presented the applicant with the amended charges, proposed that he be committed for trial and transmitted the case file to the Sofia City Prosecutor's Office.

3. The trial

49. On 5 March 1997 the Sofia City Prosecutor's Office submitted to the Sofia City Court a two-count indictment against the applicant.

50. On 10 March 1997 the reporting judge set the case down for hearing on 3-5 February 1998 and ordered that Mr E.S.A. be summoned from Germany, where he resided, by letter rogatory.

51. The summons was served on Mr E.S.A. not later than 28 August 1997.

52. The first hearing was held on 3-5 February 1998, at which another judge was presiding. The court heard testimony from at least fourteen witnesses. A second hearing was scheduled for 30 June 1998 because Ms M.V. and two other witnesses failed to show up.

53. During the hearing on 30 June 1998 the Sofia City Court questioned Ms M.V. and the other witnesses. Mr E.S.A.'s testimony from the preliminary investigation was read out before the court because he was absent from the hearing.

54. On 1 July 1998 the Sofia City Court gave judgment, acquitting the applicant of all charges against him. However, the court did not announce the reasons for its judgment until 8 December 1998. It held that Ms M.V.'s and Mr E.S.A.'s testimony regarding the physical features of the offender was very unreliable. The court also refused to take into account the results of the photograph identification made on 13 April 1995 by Mr E.S.A. (see paragraph 13 above), holding that it had been effected in breach of the relevant rules of evidence and was thus inadmissible. Finally, the court found it established that the applicant had an alibi in respect of both alleged offences. As regards the first alleged offence, it found that at the time of the robbery of Mr E.S.A. the applicant had been in Novi Pazar because the shop he had been managing there had been robbed several days before that. As regards the second alleged offence, the court held that at the time of the robbery the applicant had been visiting a friend together with his girlfriend.

4. The appeal proceedings

55. On 13 July 1998 the Sofia City Prosecutor's Office appealed against the judgment to the Sofia Court of Appeals, stating that the Sofia City Court had not properly established the facts. The appeal did not mention further particulars in support of this position and stated that additional arguments would be provided after the announcement of the reasons for the judgment by the Sofia City Court.

56. On 17 July 1998 the applicant's lawyer requested the Sofia Court of Appeals to declare the prosecution's appeal inadmissible for failure to specifically describe the non-elucidated facts.

57. On 29 December 1998, after having received on 8 December the reasons for the Sofia City Court's judgment (see paragraph 54 above), the Sofia City Prosecutor's Office filed an "additional submission" which contained detailed arguments in support of its appeal. It submitted that the Sofia City Court had erroneously assessed certain witness testimony and that its findings of fact had not reflect correctly the evidence presented.

58. On 13 January 1998 the applicant's lawyer made an objection, arguing that the prosecution's appeal should be declared inadmissible as the first filing had been defective and the "additional submission" – allegedly the valid appeal – had been lodged out of time.

59. The Sofia Court of Appeals accepted the appeal for consideration, briefly noting that the detailed argumentation had been filed later because of the late announcement of the reasons for the Sofia City Court's judgment and that there was no indication that the appeal was out of time.

60. A hearing was held on 11 March 1999 at which oral argument was heard but no new evidence presented.

61. On the same date the Sofia Court of Appeals quashed the acquittal and remitted the case to the Sofia City Prosecutor's Office on the ground that on 23 January 1997 the applicant had been charged in violation of the procedural requirements, his signature being missing from the minutes of the charging. Thus, it was unclear whether he had understood the nature and the cause of the accusation against him. That amounted to a serious violation of the applicant's defence rights, despite the fact that his lawyers had been present at the charging.

62. The court's judgment was not subject to appeal, as it did not put an end to the criminal proceedings.

5. The proceedings after the remittal and the second appeal

63. On 12 May 1999 the Sofia City Prosecutor's Office returned the case to the investigator, instructing him to carry out certain investigative actions.

64. The applicant was charged anew on 14 July 1999. The investigator recommended his committal for trial.

65. On 2 November 1999 the Sofia City Prosecutor's Office submitted to the Sofia City Court an indictment against the applicant.

66. On 5 November 1999 the reporting judge set the case down for hearing on 1, 2 and 5 June 2000.

67. The Sofia City Court held several hearings on 1, 2 and 5 June, 10 October and 2 November 2000 and 2 February and 8 March 2001.

68. In a judgment of 8 March 2001 the Sofia City Court again acquitted the applicant of all charges against him. The court held that Mr E.S.A.'s testimony about the physical features of the offenders was controversial and unreliable. It also held that the photograph identification was inadmissible because effected in breach of the relevant rules of evidence (see paragraph 13 above). The court went on to hold that Ms M.V.'s testimony about the physical features of the person who had robbed her was likewise unreliable. The court further held that the applicant had an alibi for both offences. As regards the first alleged offence, from 10 till 12 April 1995 the applicant had been in Novi Pazar, because the shop he had been managing there had been robbed on 9 April 1995. He had stayed at a friend's house and had met officers from the local police station and several other persons. He had taken a train in the evening of 12 April, at 11.55 p.m., and had arrived back in Sofia in the morning of 13 April 1995. As regards the second alleged offence, the court held that at the time of the robbery the applicant had been visiting a friend together with his girlfriend.

69. On 3 April 2001 the Sofia City Prosecutor's Office appealed against the judgment to the Sofia Court of Appeals.

70. The Sofia Court of Appeals held a hearing on 5 October 2001.

71. In a judgment of 23 January 2002 the Sofia Court of Appeals upheld the acquittal.

72. No appeal was lodged against the judgment and it entered into force on 11 February 2002.

B. The applicant's detention

1. The detention during the preliminary investigation

73. On 8 May 1996 the applicant turned himself in and was detained pursuant to the investigator's order of 5 September 1995 (see paragraph 15 above).

74. On 17 May 1996, when the applicant was also charged with robbing Ms M.V.'s car, his detention was confirmed by the investigator on the ground that another investigation was pending against him.

75. On 24 June 1996 the Sofia City Prosecutor's Office held, in response to an application for bail, that the applicant had been charged with a serious intentional offence, that there was a risk that he would flee, jeopardise the investigation, or re-offend. In particular, prior to his arrest he had been

hiding. Also, another investigation was pending against him, which, according to Article 152 § 3 of the CCP, made detention mandatory. It therefore refused bail.

76. On 11 September 1996 the applicant again applied for bail.

77. On 24 September 1996 a prosecutor from the Sofia City Prosecutor's Office granted bail, but apparently his order was not found in the case file and was never put into effect.

78. On 26 September 1996 the deputy-head of the Sofia City Prosecutor's Office reversed the bail order, holding that under Article 152 § 2 of the CCP a detainee charged with a serious intentional offence could only be released if there existed serious indications that he or she would not abscond, obstruct the investigation or commit an offence. In the case at hand this prerequisite was missing. On the contrary, the available information indicated that there was a serious risk of the applicant fleeing or committing an offence, because he had been hiding for ten months prior to his arrest. Moreover, another investigation was pending against him, which excluded release on bail.

79. The applicant's lawyer appealed against this order to the Chief Prosecutor's Office. By an order of 14 October 1996 the Chief Prosecutor's Office dismissed the appeal. It held that the applicant had been charged with two serious intentional offences and that sufficient evidence pertaining to his guilt had been collected. Furthermore, in view of the nature of the alleged offences, the applicant's release could seriously obstruct the investigation. There was also a danger that the applicant could flee.

2. The detention pending and during the trial

80. On 10 March 1997 the reporting judge at the Sofia City Court held of her own motion that there were no grounds for granting bail at that point and decided to continue the applicant's detention.

81. On 7 May 1997 the applicant's lawyer requested the applicant's release. It was argued that the investigation had already been completed and that there was hence no risk of the applicant jeopardising it, and that there was no indication that if released the applicant, who was a student and wished to continue his education, would commit an offence. Moreover, the applicant had not tried to hide because he had never been properly summoned.

82. In a decision of 8 May 1997 made in private the reporting judge refused bail. She held that the applicant had been charged with serious intentional offences, which meant that release was only possible if the exception of Article 152 § 2 of the CCP was applicable. However, prior to his arrest the applicant had been hiding for approximately ten months, thus demonstrating his intention to jeopardise the investigation. On the other hand, another investigation was pending against him, which, under Article 152 § 3 of the CCP, excluded the possibility for release.

83. The applicant did not appeal against the decision.

84. On an unspecified date in August or September 1997 the applicant's lawyer again requested the applicant's release, arguing that he had a permanent address and was enrolled in university and that his girlfriend had given birth to his baby on 9 October 1996.

85. The reporting judge at the Sofia City Court rejected the applicant's request in a decision of 8 September 1997 made in private. She held, *inter alia*, that the applicant's lengthy hiding had hindered the investigation and that another investigation was pending against him for a robbery allegedly committed in Novi Pazar. It appears that the judge was referring to the investigation into the robbery of the applicant's girlfriend's shop, in which the applicant was not the suspect, but the victim (see paragraph 23 above).

86. On 18 September 1997 the applicant's lawyer appealed against the decision to the Supreme Court of Cassation. She lodged the appeal with the Sofia City Court, but on 22 September 1997 the court rejected it as inadmissible, holding that, being his mother and having been questioned as a witness, the applicant's lawyer could not also act as his defence counsel. Following this, the same day the applicant lodged an appeal in person. He argued that he had not been hiding: he had been taking his university examinations and staying in hotels; the authorities had never made an effective effort to find him. He further explained the misunderstanding concerning the investigation in Novi Pazar. In addition, he complained that the Sofia City Court had failed to address the question of the reliability of the evidence on which the charges had been based or to consider the factors militating against his continued detention.

The reporting judge examined the appeal, and having found no grounds to vary its decision, sent it together with the case-file to the Supreme Court of Cassation.

87. On 7 October 1997 the Supreme Court of Cassation, sitting in private and in the presence of a prosecutor who argued that the appeal was ill-founded, dismissed the appeal. It noted that the applicant had been charged with two serious intentional offences, that he had been hiding and that there had been no change in circumstances warranting his release. Despite the applicant's explanation concerning the misunderstanding in respect of the Novi Pazar investigation, the Supreme Court of Cassation repeated the reference to an investigation pending against him there.

88. On 5 February 1998, the third day of the trial, the Sofia City Court granted bail, setting the amount at five million old Bulgarian levs. The court held that prior to his arrest the applicant had been in Svishtov taking his university examinations, that there was no indication that he would abscond, that his clean criminal record suggested that there was little danger of him committing an offence, and that there was no risk that he would obstruct the investigation. The applicant posted bail the same day and was released on 6 February 1998.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The offences with which the applicant was charged

89. Article 199 § 1 (1) of the Criminal Code ("the CC"), read in conjunction with Article 198 § 1 thereof, provides that robbery of chattels in large amounts is punishable by five to fifteen years' imprisonment.

B. Provisions relating to detention in the context of criminal proceedings

1. Power to order detention

90. At the relevant time and until the reform of the CCP of 1 January 2000 the accused could be detained by decision of an investigator or a prosecutor. In cases where the decision to detain had been taken by an investigator without the prior consent of a prosecutor, it had to be approved by a prosecutor within twenty-four hours (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 28, ECHR 1999-II).

91. The role of investigators and prosecutors under Bulgarian law has been summarised in paragraphs 25-27 and 29 of the Court's judgment in the case of *Nikolova v. Bulgaria* (cited above).

2. Legal criteria and practice regarding the requirements and justification for detention in the context of criminal proceedings

92. Article 152 §§ 1 and 2 of the CCP, as in force at the relevant time, provided as follows:

> "1. Pre-trial detention shall be ordered [in cases where the charges concern] a serious intentional offence.
>
> 2. In the cases falling under paragraph 1 [pre-trial detention] may be dispensed with if there is no risk of the accused obstructing the course of justice, absconding or committing further offences."

93. Article 93 § 7 of the CC defines a "serious" offence as one punishable by more than five years' imprisonment.

94. The Supreme Court's practice at the relevant time (it has now become at least partly obsolete as a result of amendments to the CCP in force since 1 January 2000) was that Article 152 § 1 required that a person charged with a serious intentional offence be detained. An exception was only possible, in accordance with Article 152 § 2, where it was clear beyond doubt that any risk of absconding or re-offending was objectively excluded as, for example, in the case of a detainee who was seriously ill, elderly, or

already in custody on other grounds, such as serving a sentence (опред. № 1 от 4 май 1992 г. по н.д. № 1/92 г. на ВС I н.о.; опред. № 48 от 2 октомври 1995 г. по н.д. № 583/95 г. на ВС I н.о.; опред. № 78 от 6 ноември 1995 г. по н.д. 768/95 г.).

95. Paragraph 3 of Article 152, as in force until 11 August 1997, provided that remand in custody was mandatory without exception where other criminal proceedings for a publicly prosecutable offence were pending against the accused, or where he or she was a repeat offender.

96. On 21 March 1997 the Supreme Court of Cassation examined a request by the Chief Prosecutor for an interpretative decision on Article 152 of the CCP. The court considered that Article 152 § 3 of the CCP was incompatible with the Constitution, the Convention and the International Covenant on Civil and Political Rights. It therefore decided to submit the matter to the Constitutional Court which is competent to rule on the compatibility of legislation with the Constitution and international treaties. Ultimately, the Constitutional Court did not decide the point, as the impugned provision was repealed with effect from 11 August 1997.

3. Judicial review of detention during the preliminary investigation

97. Article 152 § 5 of the CCP, as in force until August 1997, provided as follows:

> "The detained person shall be provided immediately with a possibility of filing an appeal with the competent court against the [imposition of detention]. The court shall rule within a time-limit of three days from the filing of the appeal by means of a final decision."

98. The Supreme Court has held that, in deciding on appeals against pre-trial detention, it is not open to the court to inquire whether there exists sufficient evidence supporting the charges against the detainee, but only to examine the lawfulness of the detention order (опред. № 24 от 23 май 1995 г. по н.д. 268/1995 г. на ВС I н.о.).

99. In a decision of 17 September 1992 the Supreme Court found that the imposition of pre-trial detention could be contested before a court only once (опред. № 94 по н.ч.х.д. 754/1992 г. на ВС I н.о.). Thus, until the amendment of the CCP in August 1997, periodic judicial review of the lawfulness of detention was only possible when the criminal case was already pending before a court.

4. Judicial review of detention before and during the trial

100. After the prosecution has filed an indictment against the accused with the court and the case is being prepared for trial, it is the reporting judge from the trial court who rules on all requests relating to the accused's detention (Article 255 of the CCP). In May 2003 that provision was amended, providing that the reporting judge has to hold a public hearing in

the presence of the detainee and his counsel. Before that it was silent on the issue. The reporting judge's decision is subject to appeal to the higher court (Article 344 § 3). The appeal must be lodged within seven days (Article 345) with the trial court (Article 348 § 4 in conjunction with Article 317 § 2 until February 1998 and Article 318 § 2 after that), which verifies whether there exist grounds for it to vary its decision (Article 347). If it finds no such grounds, it sends the appeal together with the case-file to the higher court. Article 348 § 1 provides that the higher court may examine the appeal in private or, if it considers it necessary, at a public hearing.

101. It follows from Article 304 § 1 of the CCP that the detainee's requests for release during the trial are examined by the trial court.

THE LAW

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

A. Alleged violation of the right to be brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention

102. The applicant complained under Article 5 § 3 of the Convention that upon his arrest he had not been brought promptly before a judge or other officer authorised by law to exercise judicial power.

103. Article 5 § 3 provides, as relevant:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power..."

104. The Government submitted that the applicant had had the possibility to appeal against his detention, which he had used. He had, personally or through his lawyers, filed appeals with the prosecution authorities during the preliminary investigation and subsequently with the courts.

105. The applicant submitted that the right guaranteed by Article 5 § 3 was for the detainee to be brought before a judge or other judicial officer automatically, on the motion of the authorities, without filing an appeal against detention. However, the applicant had not been so brought, and had only had the possibility to request release from the prosecution authorities. The prosecutors deciding on his detention had not been independent and impartial, because they could act as parties in the criminal proceedings

against him. Likewise, the investigator who had ordered the detention could not be considered as corresponding to the requirements of Article 5 § 3. Moreover, neither the investigator, nor the prosecutor had seen the applicant in person.

106. The Court recalls that in previous judgments which concerned the system of detention pending trial as it existed in Bulgaria until 1 January 2000, it found that neither investigators before whom accused persons were brought, nor prosecutors who approved detention orders could be considered as "officer[s] authorised by law to exercise judicial power" within the meaning of Article 5 § 3 (see *Assenov and Others v. Bulgaria,* judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, pp. 2298-99, §§ 144-50, *Nikolova*, cited above, §§ 49-53, and *Shishkov v. Bulgaria*, no. 38822/97, §§ 52-54, 9 January 2003).

107. The present case also concerns detention pending trial before 1 January 2000. The applicant's detention was ordered by an investigator and confirmed by a prosecutor without any of them having seen the applicant (see paragraphs 15 and 16 above). It is unclear whether after his actual arrest on 8 May 1996 the applicant was brought before an investigator or a prosecutor (see paragraph 73 above). In any event, neither the investigator, nor the prosecutor were sufficiently independent and impartial for the purposes of Article 5 § 3, in view of the practical role they played in the investigation and the prosecution and the prosecutor's potential participation as a party to the criminal proceedings (see paragraphs 90 and 91 above). The Court refers to the analysis of the relevant domestic law contained in its *Nikolova* judgment (see paragraphs 28, 29 and 49-53 of that judgment).

108. It follows that there has been a violation of the applicant's right to be brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention.

B. Alleged violation of the right to trial within a reasonable time or to release pending trial

109. The applicant complained under Article 5 § 3 of the Convention that his detention had been unjustified and unreasonably lengthy.

110. Article 5 § 3 provides, as relevant:

> "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. ..."

111. The Government maintained that the length of the applicant's detention was due to his complicated criminal activities, the joinder of several investigations against him and the need to send letters rogatory to Germany. In their view, the fact that the court, which had twice rejected the

applicant's requests for release, did eventually grant bail in view of the diminished risk of the applicant jeopardising the investigation showed that it had assessed the need for detention with objectivity.

112. The applicant submitted that he had not been engaged in any criminal activities with other persons. Moreover, the letter rogatory to Germany had not been executed for more than four months. The applicant also submitted that he had been released because the judge in charge of his case had been replaced and the new judge had based his decision on an analysis of the truly relevant facts militating in favour of or against the applicant's detention.

113. The applicant argued that his detention had not been based on relevant and sufficient reasons. He had no reason to abscond, as he had a young child. There was furthermore no indication that he would commit an offence, tamper with evidence or try to suborn witnesses.

114. The applicant further argued that during his detention the authorities had not conducted the proceedings with the requisite diligence. The case had not been factually complex. The preliminary investigation had not proceeded at a good pace. There had also been a lengthy interval between the submission of the indictment to the Sofia City Court and the first hearing.

115. The Court notes that the applicant was arrested on 8 May 1996 and released on bail on 6 February 1998 (see paragraphs 73 and 88 above). The period to be examined is therefore approximately one year and nine months.

116. 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 *Labita v. Italy* [GC], no. 26772/95, §§ 152-53, ECHR 2000-IV).

117. In its admissibility decision of 13 November 2003 in the present case the Court rejected as manifestly ill-founded the applicant's complaint that there had been no reasonable suspicion of his having committed an offence (see *E.M.K. v. Bulgaria* (dec.), no. 43231/98, 13 November 2003). The applicant was held in custody on the basis of a suspicion that he had committed two robberies. Admittedly, it seems that with the progress of the investigation the evidence against the applicant grew weaker (see paragraph 46 above) and that eventually he was acquitted because the accusation against him had not been proven beyond a reasonable doubt (see paragraphs 54 and 68 above). However, noting that facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge (ibid.) and having regard to its conclusions below,

the Court does not consider it necessary to determine whether the reasonable suspicion against the applicant persisted throughout the entire period of his remand in custody and will proceed on the assumption that that condition was present until the end of the applicant's detention on 6 February 1998.

118. As to the grounds for the continued detention, the Court notes that in the case of *Ilijkov v. Bulgaria* (no. 33977/97, 26 July 2001), it observed that during the period in question the authorities had applied law and practice establishing a presumption that detention pending trial was always necessary in cases where the sentence faced went beyond a certain threshold of severity. The presumption was only rebuttable in very exceptional circumstances where even a hypothetical possibility of absconding, re-offending or collusion was excluded, due to serious illness or other exceptional factors. It was moreover incumbent on the detained person to prove the existence of such exceptional circumstances, failing which he was bound to remain in detention throughout the proceedings. The above principles were based on Article 152 §§ 1 and 2 of the CCP, as worded at the material time, and the Supreme Court's practice at that stage.

119. At the time of the applicant's detention those provisions were still in force and the same practice prevailed.

120. The Court must nevertheless examine whether those provisions and practice, which were clearly incompatible with Article 5 § 3 of the Convention (see *Ilijkov*, cited above, §§ 84-87), were actually applied in the instant case.

121. It notes that when rejecting the applicant's request for release the Sofia City Prosecutor's Office mentioned that presumption in its reasons (see paragraph 78 above). The Chief Prosecutor's Office, the reporting judge at the Sofia City Court and the Supreme Court of Cassation also relied on the presumption (see paragraphs 79, 82 and 87 above). It is true that in order to exclude the application of the exception of paragraph 2 of Article 152 of the CCP the authorities stated that there was a likelihood that the applicant would try to abscond. However, the only reasoning they provided in support of this conclusion was the fact that the applicant had allegedly gone into hiding prior to his arrest, which is quite dubious (see paragraphs 14, 18, 21, 81 and 88 above). Also, they disregarded other relevant arguments presented by the applicant in support of his requests for release, such as the fact that he had a family, was studying in university and had a newborn baby (see paragraphs 81, 84 and 86 above). The Court considers that while succinct reasoning may be inevitable in practice, it is difficult to accept that a detention was based on sufficient reasons if, in disregard of repeated arguable submissions, no reasons were given in respect of several of the relevant criteria.

122. Moreover, after the applicant was charged with robbing Ms M.V.'s car, the investigator applied another provision of the CCP, paragraph 3 of

Article 152, which excluded any possibility of the release of a person against whom more than one investigation was pending (see paragraph 74 above). The Sofia City Prosecutor's Office also relied on that provision in its decisions to refuse bail of 24 June and 26 September 1996 (see paragraphs 75 and 78 above). So did the reporting judge at the Sofia City Court and the Supreme Court of Cassation (see paragraphs 82, 85 and 87 above). That approach was clearly incompatible with Article 5 § 3 of the Convention (see *Yankov v. Bulgaria*, no. 39084/97, § 173, 11 December 2003, *Belchev v. Bulgaria*, no. 39270/98, § 80, 8 April 2004, *Kuibishev v. Bulgaria*, no. 39271/98, § 64, 30 September 2004, and, *mutatis mutandis*, *Nankov v. Bulgaria*, no. 28882/95, §§ 83 and 84, Commission report of 25 May 1998, unpublished).

123. In view of the foregoing considerations, the Court finds that the authorities failed to convincingly demonstrate the need for the applicant's remand in custody for a period of one year and nine months.

124. Moreover, it seems that the authorities did not act with the diligence required of them in such circumstances: there was a lengthy period between the setting of the case down for hearing on 10 March 1997 and the beginning of the trial on 3 February 1998 (see paragraphs 50 and 52 above). Only part of that period was warranted by the need to serve the summons on the victim of the alleged offence abroad (see paragraphs 50 and 51 above), whereas the remainder of the delay was apparently due to the busy schedule of the Sofia City Court. The authorities thus apparently did not take account of the fact that an accused person in detention is entitled to have his case given priority and conducted with particular expedition (see *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, p. 26, § 17).

125. It follows that there has been a breach of the applicant's right to trial within a reasonable time or release pending trial, guaranteed by Article 5 § 3 of the Convention.

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

126. The applicant complained under Article 5 § 4 of the Convention that his requests for release had been examined by the Sofia City Court in private and by the Supreme Court of Cassation in private and in the presence of a prosecutor, in breach of the principle of equality of arms, and that he was not allowed a continuing review of his detention at reasonable intervals. He also submitted that the proceedings in which he sought to challenge his detention were inadequate in other respects as well.

127. Article 5 § 4 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."

128. The Government submitted that the applicant's detention was thrice reviewed by the Sofia City Court. On each occasion the applicant had the possibility to appeal to the Supreme Court of Cassation. However, he had used this opportunity only the third time. Then his appeal was examined by the Supreme Court of Cassation, which had, however, not dealt with the sufficiency of the evidence against the applicant, because this was an issue going to the merits of the criminal case against him.

129. The applicant submitted that the reporting judge at the Sofia City Court had examined his requests for release in private, without hearing him in person. Likewise, the Supreme Court of Cassation had examined the applicant's appeal of 22 September 1997 in private and in the presence of a prosecutor, to whose submissions the applicant had not had the opportunity to reply. It had not been until the hearing on 5 February 1998 that the applicant's request for release had been examined in his presence.

130. The Court reiterates that a court examining an appeal against detention must provide guarantees of a judicial procedure. Thus, the proceedings must be adversarial and must adequately ensure "equality of arms" between the parties, the prosecutor and the detained (see *Ilijkov*, cited above, § 103). In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see *Assenov and Others*, p. 3302, § 162, and *Nikolova*, § 58, both cited above).

131. The Court notes that on 8 May and 8 September 1997 the Sofia City Court decided to refuse bail in private, without hearing the applicant (see paragraphs 82 and 85 above).

132. The Court further observes that on 7 October 1997 the Supreme Court of Cassation examined the applicant's appeal in private and in the presence of a prosecutor who had the possibility to make submissions to the court without the applicant having the opportunity to reply to them (see paragraph 87 above). The proceedings were therefore not adversarial (see *Ilijkov*, cited above, § 104).

133. There has therefore been a violation of Article 5 § 4 of the Convention.

134. In view of the conclusion that the procedure for judicial review of the applicant's detention did not satisfy the requirements of "equality of arms" and of a hearing in the presence of the applicant, there is no need for the Court to inquire whether it was provided at reasonable intervals and was otherwise compatible with Article 5 § 4 (see, *mutatis mutandis*, *Nikolova*, § 65, and *Ilijkov*, § 106, both cited above).

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

135. The applicant complained under Article 6 § 1 of the Convention about the length of the criminal proceedings against him.

136. Article 6 § 1 of the Convention provides, as relevant:

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

137. The Government submitted that although at first sight the overall length of the proceedings appeared excessive, the delay was not entirely without justification. In particular, this time included a period of ten months during which the applicant had been hiding and thus hindering the investigation. Later the case had moved through several levels of court and letters rogatory had had to be sent to Germany.

138. The applicant submitted that he had not even once requested an adjournment. On the other hand, the authorities had been responsible for most of the delays. In particular, there had been a long period of inactivity between the submitting of the indictment to the Sofia City Court in March 1997 and the first hearing on 3-5 February 1998. Also, and more importantly, the applicant's acquittal by the Sofia City Court had been quashed by the Sofia Court of Appeals in March 1999 on the sole ground that the applicant's defence rights had been breached during the preliminary investigation. In the applicant's view, this had been arbitrary and the proceedings after that quashing had been completely unnecessary and merely adding a further three years to the overall length of the criminal case.

139. The Court notes that the period to be taken into consideration started to run either in April 1995, when the proceedings were instituted (see paragraph 13 above), in July 1995, when an attempt was made to summon the applicant (see paragraph 14 above), in October 1995, when an attempt was made to arrest the applicant and his mother was notified of the proceedings against him (see paragraphs 18 and 19 above), or on 8 May 1996, when the applicant turned himself in (see paragraph 40 above). Having regard to its findings below, the Court considers that it is not necessary to determine this point (see *Ilijkov*, cited above, § 111) and will proceed on the assumption that the relevant date is 8 May 1996. The period ended on 11 February 2002, when the Sofia Court of Appeals' judgment became final (see paragraph 72 above). Its length was thus at least five years and nine months.

140. The Court will assess the reasonableness of the length of the proceedings in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. What was at stake for the applicant has also to be taken into account (see *Portington v. Greece*, judgment of 23 September 1998, *Reports* 1998-VI, p. 2630, § 21, and *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI).

141. As regards the complexity of the case, it does not appear that the proceedings were characterised by any extreme factual or legal difficulty. It

is true that the case involved two serious offences, but it does not seem that it was especially complex – the Sofia City Court was able to dispose of it in two hearings during the original trial.

142. Concerning the applicant's conduct, the Court notes that the applicant's initial refusal to turn himself in and appear for questioning partially accounted for ten months of delay. However, since the Court decided to proceed on the assumption that the starting point of the period to be taken into consideration is the date of the applicant's arrest on 8 May 1996 (see paragraph 139 above), that delay cannot be taken into consideration. It does not seem that any other delays were attributable to the applicant.

143. Regarding the conduct of the authorities, the Court notes that prolonged periods of inactivity elapsed between the setting of the case down for hearing on 10 March 1997 and the first hearing before the Sofia City Court on 3-5 February 1998 and between the first and the second hearings: eleven months and five months, respectively (see paragraphs 50, 52 and 53 above).

144. The Court further notes that on 11 March 1999 the Sofia Court of Appeals quashed the applicant's acquittal on the sole ground that in the proceedings preceding that acquittal the applicant had not been properly charged and it was thus unclear whether he had understood the nature and the cause of the accusation against him (see paragraph 61 above). That ruling appears arbitrary, because in issuing it the Sofia Court of Appeals disregarded the fact that the acquittal had effectively rectified all prior infringements of the applicant's defence rights. The resulting continuation of the proceedings for three more years, until the applicant was again acquitted (see paragraphs 63-72 above), thus appears wholly unnecessary.

145. Having regard to the criteria established in its case-law, the Court finds that the length of the criminal proceedings against the applicant failed to satisfy the reasonable time requirement of Article 6 § 1 of the Convention.

It follows that there has been a violation of that provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

146. 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

147. The applicant claimed 1,000 euros (EUR) as compensation for pecuniary damage. He submitted that as a result of his detention he had lost his student's rights and after his release had to enrol anew and pay the requisite fees. The applicant also claimed EUR 14,000 as compensation for non-pecuniary damage. He emphasised the length of his detention, during which he had been separated from his family and in particular from his newborn child. The applicant also stated that during the proceedings against him there had been numerous false publications in the newspapers which had impinged on his reputation.

148. The Government submitted that the claim for compensation for non-pecuniary damage was excessive. In their view, the amount awarded under this head should be in line with the Court's case-law and should take into account the living standards in Bulgaria. Concerning the claim for compensation for pecuniary damage, the Government stated that it was unrelated to the subject-matter of the case and was not supported by any evidence.

149. The Court notes that the applicant's claim for compensation for pecuniary damage is not supported by any proof. No award is accordingly made under that head. As regards the claim for compensation for non-pecuniary damage, the Court considers that it is reasonable to assume that the applicant has suffered distress and frustration on account of the unreasonable length of his detention and the length of the criminal proceedings against him. Taking into account the various relevant considerations and making its assessment on an equitable basis, the Court awards the applicant EUR 3,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

150. The applicant claimed EUR 8,100 for 324 hours of work on the domestic proceedings, at the hourly rate of EUR 25. He further claimed EUR 14,400 for 360 hours of work on the Strasbourg proceedings, at the hourly rate of EUR 40. The applicant submitted a fees agreement between him and his lawyer relating to the proceedings before the Court and a time-sheet. Finally, the applicant claimed EUR 875 for expenses.

151. The Government submitted that the number of hours claimed was grossly excessive. In their view, the actual number of hours spent in work on the proceedings before the Court was not more than 50. Also, the hourly rate was disproportionately high. The expenses incurred in the context of the domestic proceedings could not be allowed, because they were out of the scope of the case. Moreover, there were no documents proving that the lawyers' fees had in fact been paid. Also, under Bulgarian law lawyers had

to provide their services free of charge to close relatives. Finally, the fees claimed for travel to and from the applicant's place of detention could not be allowed; neither could the claim for translation expenses, which was not supported by documents.

152. The Court reiterates that in order for costs to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and reasonable as to quantum (see *Nikolova*, cited above, § 79).

153. The Court notes that part of the lawyer's fees claimed concerned the applicant's defence against the criminal charges in the domestic proceedings. These fees do not constitute expenses necessarily incurred in seeking redress for the violations of the Convention found in the present case (ibid.). On the other hand, the Court considers that the expenses incurred by the applicant in an effort to put an end to his detention, which was unjustifiably lengthy, were relevant to the complaints under the Convention. However, the Court notes that the fees agreement between the applicant and his lawyer relates only to the proceedings before the Court, whereas no documents have been provided proving that any fees have been paid by the applicant to his lawyer for her participation in the domestic proceedings.

154. Concerning the claim for fees in the Strasbourg proceedings, the Court is of the view that the number of hours claimed to have been spent by the lawyer on the case appears excessive. It also considers that a reduction should be applied on account of the fact that some of the applicant's complaints were declared inadmissible (see paragraph 6 above).

155. Having regard to all relevant factors and deducting EUR 660 received in legal aid from the Council of Europe, the Court awards EUR 1,500 in respect of costs and expenses, plus any tax that may be chargeable on that amount.

C. Default interest

156. 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. *Holds* that there has been a violation of Article 5 § 3 of the Convention in that upon his arrest the applicant was not brought promptly before a judge or other officer authorised by law to exercise judicial power;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention in that the applicant's detention was not justified and was excessively lengthy;

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 6 § 1 of the Convention;

5. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to 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 3,000 (three thousand euros) in respect of non-pecuniary damage;
(ii) EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses;
(iii) any tax that may be chargeable on the above amounts;
(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;

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

Done in English, and notified in writing on 18 January 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President