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

FIFTH SECTION

CASE OF GULUB ATANASOV v. BULGARIA

(Application no. 73281/01)

JUDGMENT

STRASBOURG

6 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 Gulub Atanasov v. Bulgaria,

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

Rait Maruste, *President,*
Karel Jungwiert,
Renate Jaeger,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 7 October 2008,

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

PROCEDURE

1. The case originated in an application (no. 73281/01) 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 Gulub Atanasov Atanasov ("the applicant"), on 5 January 2001. He passed away on 31 January 2006. His two sons, Mr A. Atanasov and Mr S. Atanasov, stated that they wished to pursue the application.

2. The applicant and his heirs were represented by Ms E. Nedeva, a lawyer practising in Plovdiv. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Kotzeva, of the Ministry of Justice.

3. The applicant alleged, in particular, that his pre-trial detention and house arrest had been unjustified and excessively lengthy, that his confinement in a psychiatric clinic in August and September 2000 had been unlawful, that he had not been able to appeal to a court and that he did not have a right to compensation in this connection.

4. On 7 April 2006 the President of the Fifth Section decided to give notice of the above complaints to the Government. It has also been decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The criminal proceedings against the applicant

5. Prior to the events at issue, in the 1980s, the applicant was convicted of theft and served a prison term. Several other sets of criminal proceedings were opened against him, some of which were terminated on the basis that the applicant, who suffered from schizophrenia, was found to be of unsound mind and therefore not criminally liable.

6. After 1990 the applicant spent several years in Germany until his expulsion on an unspecified date.

7. On 27 June 1999 two persons were robbed and murdered in their home in Plovdiv.

8. On 2 July 1999 the applicant was arrested, remanded in custody and charged with two counts of murder. The charges were later amended to robbery aggravated by murder.

9. In the course of the investigation approximately twenty witnesses were examined, some of them repeatedly. The investigator ordered numerous expert reports, including autopsies, analyses of blood stains and tissue, ballistic reports and reports by psychiatrists on the applicant's mental health. Several witness confrontations and identity parades were organised and other evidence was collected.

10. For several months in 2000 the case was dealt with by prosecution authorities at a number of levels in relation to the applicant's request for a third psychiatric examination (see paragraphs 29-31 below) and, additionally, on account of divergent views expressed by the investigator and prosecutors as regards the precise legal characterisation of the charges. On 27 December 2000 the Plovdiv Regional Prosecutor's Office submitted to the Regional Court an indictment against the applicant.

11. The trial started in January 2001. During the period when the applicant was deprived of his liberty three hearings were held. The hearing held on 19 February 2001 was adjourned as some of the psychiatric experts who had examined the applicant were absent. The next hearing took place on 8 and 9 May 2001, when the court examined twelve witnesses and twenty experts. Another hearing was held on 3 July 2001.

12. In a judgment of 4 June 2003 the Plovdiv Regional Court acquitted the applicant, holding that the charges against him had not been proven.

13. This judgment was quashed on 29 December 2003 by the Plovdiv Appeals Court, acting on an appeal by the prosecutor, on the basis that, *inter*

alia, the lower court had failed to examine all relevant facts. The case was remitted to the Plovdiv Regional Court for a fresh examination.

14. The proceedings were terminated on an unspecified date following the applicant's death on 31 January 2006.

B. The applicant's deprivation of liberty and the surgery he underwent during that period

15. Following the applicant's arrest on 2 July 1999, he was remanded in custody by decision of an investigator and a prosecutor who found on the basis of witness testimony and other evidence that there was a reasonable suspicion as to the applicant's having been involved in the murders committed on 27 June 1999.

16. The applicant spent an unspecified period in the detention facility of the Plovdiv Investigative Service. Between 17 August and 28 September 1999 he was at the Psychiatric Department of Sofia Medical University for a psychiatric examination (see paragraphs 27 and 28 below).

17. On an unspecified date prior to March 2000 he was transferred to Plovdiv prison.

18. On an unspecified date in March 2000, while detained in Plovdiv prison, the applicant underwent a medical examination which detected the presence of a lump in his salivary gland. On 22 June 2000 he was transferred to Sofia and admitted to the Sofia prison hospital for the purpose of surgically removing the lump and analysing it with a view to establishing whether it was cancerous or benign. The applicant refused to undergo surgery and on 24 June 2000 was transferred back to Plovdiv prison.

19. On an unspecified date in June 2000 the applicant appealed against his detention, arguing that he had been unlawfully detained, that he was ill and needed immediate surgery and that there was no longer any risk of his absconding, re-offending or hindering the investigation.

20. On 30 June 2000 the Plovdiv Regional Court examined the applicant and his lawyer in person and dismissed the appeal on the basis that as the applicant had had a previous conviction for a serious wilful offence (theft) and had been charged with murder, there was a risk of his absconding or re-offending. As regards the applicant's health condition, the court noted the medical experts' opinion that the applicant could undergo surgery and receive adequate treatment in the Sofia prison hospital.

21. The applicant appealed stating, among other things, that he did not want to undergo surgery in the Sofia prison hospital because it did not offer appropriate conditions.

22. On 6 July 2000 the Plovdiv Appeals Court decided to release the applicant from custody and place him under house arrest. It held that there was sufficient evidence supporting a reasonable suspicion that the applicant had committed an offence and considered that, as correctly assessed by the

Regional Court, there was a real risk of his absconding or re-offending. However, the court took into account the applicant's health. It noted the medical experts' opinion that the applicant might have developed a tumour of the salivary gland and decided that he would have greater freedom to choose the medical treatment he wished to have if placed under house arrest.

23. Following his release from custody the applicant sought and obtained, on 13 July 2000, permission to undergo surgery in a Plovdiv hospital. That was performed on an unspecified date before 26 July 2000, when he was discharged from hospital.

24. In July 2001 the applicant sought his release from house arrest. That was granted by a decision of 23 July 2001 of the Plovdiv Appeals Court on the basis that the proceedings against him risked exceeding a reasonable time. The applicant was released on bail on an unspecified date.

C. The applicant's placement in a psychiatric hospital for the purpose of conducting psychiatric examinations

25. In the course of the criminal proceedings it was established that the applicant had been suffering from paranoid schizophrenia since 1984 and had been treated in psychiatric hospitals in 1985, 1986, 1988 and 1989.

26. The investigator in charge of the case ordered an expert report on the applicant's mental health. He was examined on 22 July 1999. The experts, relying mainly on the history of his illness, concluded that the applicant was of unsound mind.

27. The investigator ordered a second, more detailed examination by a larger group of experts, and, for that purpose, the applicant's placement at the Psychiatric Department of Sofia Medical University.

28. The applicant stayed at the psychiatric hospital between 17 August and 28 September 1999, when he was remanded in custody. In their ensuing report submitted on 19 October 1999 the medical experts considered that the applicant suffered from a form of schizophrenia but was not of unsound mind within the meaning of the Penal Code. The report mentioned that the applicant's stay in hospital had been effected “under the conditions of pre-trial detention”.

29. In January 2000, and again at a later date, the applicant and his lawyer insisted on a third detailed psychiatric examination in view of the divergent conclusions of the first two examinations. The investigator initially refused and the applicant appealed. By decisions of 15 and 20 March 2000 of the prosecuting authorities, the applicant's request was granted.

30. On 13 July 2000 the prosecutor in charge of the case wrote to the investigator stating that he did not object to a third examination and that the

applicant could be placed in a psychiatric hospital for a period of up to thirty days.

31. On 3 August 2000 the investigator in charge of the case ordered a third psychiatric report to be prepared by a commission of eleven experts and, accordingly, the applicant's placement at the Psychiatric Department of Sofia Medical University. The investigator considered that the length of the applicant's stay was to be decided by the experts. The order referred to Article 117 of the Code of Criminal Procedure, which concerned the commissioning of expert reports. No reference was made to Article 155 of that Code (see paragraphs 34-37 below).

32. The applicant, who was under house arrest at that time, spent twenty-six days (from 8 August to 4 September 2000) at the Psychiatric Department of Sofia Medical University. In their ensuing report, eight of the experts came to the conclusion that despite his mental illness the applicant had been of sound mind at all relevant times and the remaining three experts considered that he was of unsound mind within the meaning of the Penal Code.

33. The experts also stated that the applicant had been placed at the Psychiatric Department "under conditions of house arrest" and had complied "relatively strictly" with the ensuing restrictions. They stated that towards the end of his stay in the hospital he had occasionally been tense and had made statements that he had been "fed up" and would commit suicide or "blow up the hospital".

II. RELEVANT DOMESTIC LAW

A. Confinement in a psychiatric institution for the purpose of effecting a psychiatric examination

34. The relevant legislation at the time of the events in the present case was the Code of Criminal Procedure ("CCP") of 1974 (abrogated with effect from April 2006).

35. Until 1 January 2000, Article 155 of the CCP provided that confinement in a psychiatric institution for the purpose of effecting a psychiatric examination of a person charged in criminal proceedings could be ordered by a prosecutor or a court. In practice, such measures were ordered by prosecutors where the case was pending at the investigation stage and by judges where the case was pending before a court.

36. This provision was amended with effect from 1 January 2000. The amended text required a judicial decision in all cases and also introduced a thirty-day maximum period of confinement (subject to not more than one extension) and other procedural guarantees.

37. Article 155 was in a chapter of the CCP entitled "Measures of procedural compulsion". This chapter contained separate provisions for various such measures – pre-trial detention, house arrest, bail, undertaking not to leave the place of residence, suspension from office, confinement to a psychiatric hospital and several others. The provisions concerning each measure were phrased and structured as separate rules governing separate measures. The same structure was reproduced in the new CCP in force since April 2006.

38. At all relevant times, paragraph 6 of Article 155 provided that the period spent in psychiatric hospital for examination should count as a period of pre-trial detention. The effect of this provision was that persons sentenced to imprisonment could deduct from their prison term the time spent in a psychiatric hospital.

39. The Ministry of Health has issued an instruction for the guidance of health care personnel dealing with persons confined to psychiatric institutions (Инструкция No. 1 за дейността на здравните органи при настаняване на лица в психиатрични стационари по принудителен ред, ДВ бр.бр. 58/1981, 44/1991 и 48/2004). It clarifies, in its sections 4 and 5, that persons in pre-trial detention or serving a prison term are to be placed in facilities for detained persons and held under conditions of detention. The instruction does not mention persons under house arrest.

B. Appeals against decisions of investigators and prosecutors

40. Under Article 181 of the CCP of 1974, decisions of an investigator could be appealed against to a prosecutor and prosecutors' decisions to a higher prosecutor.

C. The State (and Municipal) Responsibility for Damage Act ("the SMRDA")

41. Under section 2(4) of the Act, the State is liable for damage caused by forced medical treatment ordered by a court if its decision has been set aside for lack of lawful grounds. Under section 2(1) of the Act compensation is available for pre-trial detention set aside for lack of lawful grounds (construed in judicial practice as compensation in cases of acquittal or discontinuation of criminal proceedings). Persons seeking redress for damage occasioned by decisions of the investigating and prosecuting authorities or the courts in circumstances falling within the scope of the SMRDA 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.).

THE LAW

I. PRELIMINARY ISSUE

42. The Court notes at the outset that the applicant died after lodging the present application and that his two sons have expressed their wish to continue the proceedings before the Court (see paragraph 1 above). It has not been disputed that the applicant's sons are entitled to pursue the application on his behalf and the Court sees no reason to hold otherwise (see *Kozimor v. Poland*, no. 10816/02, §§ 25-29, 12 April 2007 and *Lukanov v. Bulgaria*, judgment of 20 March 1997, *Reports* 1997-II, § 35). For reasons of convenience, the text of this judgment will continue to refer to Mr Gulub Atanasov as "the applicant", although his sons are today to be regarded as having this status.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 (TRIAL WITHIN A REASONABLE TIME OR RELEASE PENDING TRIAL)

43. The applicant complained that his pre-trial detention and house arrest had been unjustified and excessively lengthy, in breach of Article 5 § 3 of the Convention. This provision reads as follows:

> "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."

44. The Government contested that argument.

A. Admissibility

45. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

46. The applicant stated that the authorities had not explained in detail the reasons for their decision to detain him in 1999. Furthermore, they had presumed the need for such detention solely on the basis of the gravity of the charges. The applicant also argued that the length of his deprivation of liberty had been excessive and that there had been a period of inactivity

between July and December 1999 when he had not been questioned or otherwise involved in the case.

47. The Government stated that the applicant's deprivation of liberty had been justified and reasonable in length. The authorities had taken into consideration the applicant's health and had released him from custody and placed him under house arrest as early as July 2000. The Government drew attention to the fact that the applicant had not sought release from house arrest for a whole year after that and had obtained such release when he had eventually asked for it in July 2001. In the Government's view, another important factor was the complexity of the case and the fact that during the relevant period the authorities had worked actively on it.

2. The Court's assessment

48. The Court notes that the applicant was remanded in custody between 2 July 1999 and 6 July 2000. Thereafter, he was under house arrest until 23 July 2001 (see paragraphs 15-24 above). Accordingly, in such cases (see *Danov v. Bulgaria*, no. 56796/00, § 80, 26 October 2006), the period of the applicant's deprivation of liberty to be examined for compliance with Article 5 § 3 of the Convention was two years and twenty-one days.

49. The persistence of a reasonable suspicion that the person deprived of his liberty under Article 5 § 1(c) of the Convention has committed an offence is a condition *sine qua non* for the lawfulness of the continued deprivation of liberty, 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 judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Labita v. Italy* [GC], no. 26772/95, §§ 152-53, ECHR 2000-IV).

50. In the Court's view, the authorities' finding that there was a reasonable suspicion that the applicant might have murdered two persons was based on relevant evidence (see paragraphs 9, 15, 20 and 22 above) and the applicant has not substantiated his allegation that their assessment was erroneous.

51. The Court also observes that the authorities' finding that there was a real risk that the applicant might abscond and commit an offence was not unjustified, having regard to the information about his past and the violent nature of the crime with which he had been charged (see paragraphs 5-8, 20, 22 and 24 above). The succinct reasoning of their decisions is not decisive in these circumstances (compare *Kehayov v. Bulgaria* (dec.), no. 41035/98, 13 March 2003, and *D.E. and Others v. Bulgaria* (dec.), no. 44625/98, 14 November 2002).

52. The Court must next establish whether the proceedings were conducted with the requisite diligence. It notes at the outset that the

applicant has not adduced any concrete arguments about material delays being imputable to the authorities and that his complaint is based above all on the length of his deprivation of liberty as such.

53. The Court observes, however, that, the authorities were careful to adjust the measure of judicial supervision imposed on the applicant to his individual circumstances and that as a result he spent half of the relevant period under house arrest, not in custody (see paragraphs 15-24 above). Upon his request, in July 2001 he was released from house arrest (see paragraph 24 above). The Court further notes that the investigation in the case involved numerous witnesses and experts. Moreover, in 2000 the proceedings were delayed for several months in relation to the applicant's requests for a third psychiatric examination. While there was, apparently, a short delay in 2000, only partly imputable to the authorities, the Court also notes that the trial commenced soon thereafter and that during the remaining part of the relevant period the trial proceeded swiftly with the hearing of witnesses, experts and the collection of other evidence (see paragraphs 5-11 and 29-31 above).

54. The foregoing considerations are sufficient to enable the Court to conclude that there has not been a violation of the applicant's right under Article 5 § 3 of the Convention to a trial within a reasonable time or release pending trial.

III. ALLEGED VIOLATIONS OF THE CONVENTION IN RELATION TO THE APPLICANT'S PLACEMENT IN A PSYCHIATRIC HOSPITAL

55. The applicant complained, relying on Article 5 §§ 1, 4 and 5 and Article 13 of the Convention, that his placement for examination in a psychiatric hospital in August and September 2000 had been unlawful and unnecessary and that he had not had effective remedies in this respect.

56. The Government contested that argument.

57. The Court considers that the above complaints fall to be examined under Article 5 §§ 1, 4 and 5 of the Convention. Those provisions read, in so far as relevant, as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...
>
> (e) the lawful detention ... of persons of unsound mind ...

4. 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.

5. 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."

A. The parties' submissions

58. The Government argued that the complaints were inadmissible for failure to exhaust the relevant domestic remedies and in any event unfounded. In particular, the applicant had not appealed to the relevant prosecutor against the order for his placement in a psychiatric hospital and, moreover, had himself requested an examination. Furthermore, he had not brought an action for damages.

59. The Government also stated that the applicant had been deprived of his liberty on the strength of the decision to detain him and place him under house arrest, not by way of the impugned order for his psychiatric examination. In the Government's view, the CCP required a judicial decision for confinement to psychiatric hospital only in cases of accused persons who were not already deprived of their liberty on other grounds. Persons under house arrest or in custody could be placed in a psychiatric hospital for examination by decision of an investigator or a prosecutor. In such cases, as in the applicant's case, the length of the placement was determined by the medical experts conducting the examination.

60. The applicant replied that an action for damages was not an appropriate remedy and that in any event the pertinent provisions of Bulgarian law only concerned damages for placement in a psychiatric hospital ordered by a court. While it was true that he could have appealed to a prosecutor against the placement order, this was not an appropriate remedy either, since the Convention required a remedy before a court in respect of unlawful deprivation of liberty.

61. The applicant disagreed with the Government on the interpretation of the relevant domestic law. In his view, the order of the investigator who had placed him in a psychiatric hospital had been the legal basis for his deprivation of liberty during the impugned period (from 8 August to 4 September 2000). The applicant averred that under Article 155 of the CCP such placement could only be ordered by a judge irrespective of the previous situation of the accused person. In the applicant's view the order for his house arrest had not been a valid legal basis for his detention in a psychiatric hospital as it had not authorised his relocation to a hospital.

B. The Court's assessment

1. Admissibility

62. The Court notes that the parties are in disagreement on a number of points whose determination, while relating to the merits of the above complaints, may also have an incidence on their admissibility. In particular, the Court cannot assess whether or not the applicant has exhausted the relevant domestic remedies without clarifying whether during the impugned period he was deprived of his liberty on the basis of the investigator's order of 3 August 2000, as he has alleged, or on the strength of the judicial order for his house arrest, as alleged by the Government (see paragraphs 58 and 60 above). In addition, if it is true that the applicant's stay in a psychiatric hospital had been voluntary, as the Government may be understood to have argued, that may have repercussions on the admissibility of his complaint under Article 5.

63. Accordingly, the Court holds that the questions raised in the Government's objections to admissibility should be joined to the merits of the applicant's complaints under Article 5 §§ 1, 4 and 5 of the Convention concerning his confinement in a psychiatric hospital in August and September 2000.

64. The Court further considers, in the light of the parties' submissions, that those complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. They must therefore be declared admissible.

2. Merits

(a) Alleged violation of Article 5 § 1

65. In so far as the Government argued that the applicant had been placed for examination at his own request, the Court notes that he had only asked to be examined by psychiatrists (see paragraph 29 above). In any event, the Court does not consider that such a request alone, taken in isolation, is sufficient to conclude that throughout the period spent in the psychiatric hospital the applicant was a voluntary patient and not a person deprived of his liberty (see, *mutatis mutandis*, *Storck v. Germany*, no. 61603/00, § 71-78, ECHR 2005-V). Such an interpretation of the applicant's situation is not supported by the facts – the hospital staff treated the applicant as a person deprived of his liberty and the applicant was not free to go home when he so wished (see paragraphs 31 and 33 above). The Court considers, therefore, that the applicant was deprived of his liberty.

66. The applicant's complaint is based, in essence, on the alleged unlawfulness of the investigator's order of 3 August 2000 for his transfer

from his home, where he was under house arrest, to a psychiatric hospital, where he was detained for twenty-six days for examinations.

67. The Court must determine at the outset whether the alleged unlawfulness of the order of 3 August 2000 is solely relevant with regard to the location, regime or conditions of the applicant's deprivation of liberty – issues not regulated by Article 5 and possibly falling under Articles 3 and 8 of the Convention (see *Laventis v. Latvia*, no. 58442/00, §§ 63 and 64, 28 November 2002, and *Bollan v. the United Kingdom (dec.)*, no. 42117/98, 4 May 2000) – or whether it must be seen as having repercussions on the conformity of the applicant's deprivation of liberty with the requirements of Article 5.

68. The Court observes that the impugned order of 3 August 2000 did not purport to modify the legal ground for the applicant's deprivation of liberty or the attendant legal restrictions. It is also noteworthy that the hospital staff expressly recognised that the applicant's legal status remained that of a person under house arrest (see paragraphs 31 and 33 above).

69. The Court reiterates, however, that in keeping with the prohibition of arbitrariness inherent in all Convention provisions, for a deprivation of liberty to be lawful in the sense of the Convention there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see, *mutatis mutandis*, *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, § 44). Deprivation of liberty must also be consistent with the general aim of Article 5, namely to protect the individual against arbitrariness (see, *mutatis mutandis*, *Anguelova v. Bulgaria*, no. 38361/97, § 154, ECHR 2002-IV).

70. In its judgment in the case of *Mancini v. Italy* (no. 44955/98, ECHR 2001-IX) the Court found a violation of Article 5 in a situation where two accused persons were unlawfully held in custody for six days at a time when a lawful order for their house arrest was in force. In *Mancini*, the Court did not accept the respondent Government's position that there was no issue under Article 5 and observed that there was an important difference in the nature of the place of detention in a private home and a public institution. Unlike the former, the latter required integration of the individual into an overall organisation and strict supervision by the authorities of the main aspects of his day-to-day life (ibid, §§ 13-26).

71. In the applicant's case, it is evident that despite the fact that his situation in law remained unchanged, in practice the nature and degree of the restrictions on his liberty while in the hospital must have been very different from those associated with house arrest. Furthermore, having regard to its specific nature and potential effect on the physical and psychological well-being of the individual concerned, confinement in a psychiatric clinic must be accompanied by specific procedural and substantive guarantees tailored for this type of deprivation of liberty. In

cases involving such confinement, the Court has consistently interpreted the Convention in that sense (see *Storck v. Germany*, cited above, and *Varbano v. Bulgaria*, no. 31365/96, ECHR 2000-X; see also *R.L. and M.-J.D. v. France*, no. 44568/98, 19 May 2004, where the Court accepted implicitly that separate issues of lawfulness arise under paragraphs 1 (c) and 1(e) of Article 5 of the Convention in the case of a person arrested in the context of an alleged offence and placed in a psychiatric hospital).

72. On the foregoing basis, taking into consideration that replacing house arrest with confinement in a psychiatric hospital entails a significant change in the nature of the detention, and having regard to the situation of the applicant during the relevant period, the Court is of the view that although he was lawfully under house arrest, the question whether or not his transfer to and detention in a psychiatric hospital was ordered in conformity with domestic law and the Convention is not merely an issue of conditions of detention but is relevant with regard to the lawfulness, in the sense of Article 5 § 1, of his deprivation of liberty. The Court must therefore examine that question.

73. Lawfulness, within the meaning of Article 5 § 1, of a deprivation of liberty presupposes conformity both with domestic law and with the purpose of the restrictions permitted by the applicable subparagraphs of that provision (see *Storck v. Germany*, cited above, § 111, and *Raf v. Spain*, no. 53652/00, § 53, 17 June 2003).

74. The applicant's house arrest fell under Article 5 § 1(c) of the Convention, being deprivation of liberty for the purpose of bringing him before the competent court on suspicion of having committed an offence. During the same period, in view of his mental illness, it was essential to conduct an assessment of his mental health (see paragraphs 8, 15 and 25-33 above). In the Court's view, remand in custody or house arrest under Article 5 § 1(c) of the Convention may be perfectly compatible with lawful confinement to a psychiatric hospital effected for the purpose of establishing whether or not the accused person's mental health has a bearing on his criminal liability for the offences with which he has been charged: deprivation of liberty may be justified on more than one ground listed in Article 5 § 1 (see, *mutatis mutandis*, *X v. the United Kingdom*, judgment of 5 November 1981, Series A no. 46, pp. 17-18, §§ 36-39).

75. As regards conformity with domestic law, the salient issue is whether the Bulgarian Code of Criminal Procedure required a court order for the applicant's placement in psychiatric hospital.

76. On the basis of the material before it, the Court finds unconvincing the Government's position that it did not. In particular, such interpretation does not follow from the text and structure of the CCP (see paragraphs 34-38 above). Furthermore, the Government have not produced a single decision or other material in support of their position that, despite

its wording, Article 155 of the CCP did not apply in respect of accused persons deprived of their liberty.

77. In these circumstances the Court finds that the applicant's removal from his home to a psychiatric hospital was unlawful under domestic law as it was not based on a valid decision issued by the competent authority.

78. The Court thus finds that the applicant was placed for twenty-six days in a psychiatric hospital in violation of Article 5 § 1 of the Convention.

(b) Alleged violation of Article 5 § 4

79. Since Bulgarian law does not provide for a general *habeas corpus* procedure and owing to the fact that the impugned decision to place the applicant in a psychiatric hospital for examination was taken by an investigator, the applicant could only appeal against it to the prosecution authorities (see paragraph 40 above). Article 5 § 4 of the Convention, however, guarantees to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention before a court (see *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, § 60). The same applies in respect of persons under house arrest (see *Vachev v. Bulgaria*, no. 42987/98, § 70, ECHR 2004-VIII (extracts)).

80. It is true that during the period which he spent in the psychiatric hospital, the applicant was free to appeal to a court against the Appeal Court's decision of 6 July 2000 ordering his placement under house arrest, as he later did successfully (see paragraph 24 above). On the material before it, the Court is unable to speculate whether the applicant would have been released from the psychiatric hospital, where he was held "in conditions of house arrest" (see paragraphs 31-33 above), if, during the period of his confinement, a court had put an end to his house arrest and had ordered his release on bail.

81. In any event, as the Court has found, the Court of Appeal's decision of 6 July 2000 ordering the applicant's house arrest was an insufficient legal basis for his subsequent confinement in the clinic (see paragraphs 65-71 above). Therefore, the availability of judicial review of its lawfulness did not secure the applicant's right to scrutiny of lawfulness of the type and scope required by Article 5 § 4 of the Convention. That provision guarantees a review bearing upon all procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II). In the applicant's case, even if he had appealed against his house arrest during the period of his confinement in the psychiatric hospital, the courts examining such an appeal would have had no power to review the lawfulness of the investigator's order of 3 August 2000 and, consequently, of his confinement in the clinic.

82. It follows that there has been a violation of Article 5 § 4.

(c) Alleged violation of Article 5 § 5

83. Noting that the applicant's confinement to a psychiatric clinic involved breaches of Article 5 §§ 1 and 4 of the Convention (see paragraphs 77 and 81 above), the Court finds that paragraph 5 of that provision was applicable and required the availability in Bulgarian law of an enforceable right to compensation in the applicant's case.

84. The Court observes that the applicable legislation, the SMRDA, provides for compensation in certain cases of deprivation of liberty, where the relevant decision or order has been set aside "for lack of lawful grounds" under domestic law (see paragraph 41 above). Had the applicant appealed to a prosecutor against the investigator's decision of 3 August 2000 on his confinement, that decision could have been quashed as being contrary to Article 155 of the CCP. It is unclear, however, whether that would have been relevant under the SMRDA, since during the period spent in a psychiatric hospital, the applicant was considered lawfully under house arrest (see paragraphs 22-24 and 31-33 above). In any event, the right to compensation under section 2(4) of the SMRDA is limited to cases of forced medical treatment ordered by a court, not by an investigator, and the Government have not shown that it would apply to the applicant's case (see paragraphs 41 and 57 above). Neither have the Government argued that an action for damages under general tort law was possible in the applicant's circumstances.

85. Reiterating that the effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty (see *N.C. v. Italy* [GC], no. 24952/94, §§ 49 and 52, ECHR 2002-X), the Court finds that that right was not secured to the applicant under Bulgarian law.

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

3. The Government's objections joined to the merits

87. In view of the foregoing conclusions, the Court must dismiss the Government's objections to admissibility. In particular, having regard to the unavailability of a judicial appeal against the applicant's confinement in the psychiatric hospital, the Court finds that the applicant's failure to appeal to a prosecutor against the investigator's order of 3 August 2000 cannot, in the specific circumstances, lead to the conclusion that he had failed to exhaust the relevant domestic remedies (see paragraphs 62 and 63 above).

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

88. The applicant complained under Article 3 that he had not been provided with adequate medical care in relation to the cyst found in his salivary gland. He alleged, under Article 5 § 1, that no written order had

been issued for his arrest on 2 July 1999 and that his arrest had not been justified by well-reasoned decisions establishing a reasonable suspicion against him. Relying on Article 5 § 3 he complained that upon his arrest he had not been brought promptly before a judge.

Admissibility

89. In the light of all the material in its possession, and in so far as the above matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

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

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

91. 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

92. The applicant claimed 8,000 euros (EUR) in respect of non-pecuniary damage caused by his unlawful confinement for examinations in a psychiatric hospital and the unavailability in domestic law of an enforceable right to compensation.

93. The Government did not comment.

94. The Court considers that the applicant must have suffered distress as a result of the violations of Article 5 §§ 1, 4 and 5 of the Convention found in his case. Having regard to all relevant circumstances and, in particular, the procedural nature of the defect that led to those violations, the Court considers that the sum of EUR 2,000 is sufficient just satisfaction in respect of the non-pecuniary damage sustained.

B. Costs and expenses

95. The applicant also claimed EUR 1,800 for legal fees in respect of legal representation before the Court, EUR 45 for translation costs and EUR 15 for postage (EUR 1,860 in total). He submitted copies of a legal fees agreement between him and his legal representative, a receipt for the

payment of those fees and receipts concerning the expenses incurred for translation and postage.

96. The Government did not comment.

97. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the claim in full.

C. Default interest

98. 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. *Joins to the merits* the Government's objections to the admissibility of the applicant's complaints concerning his confinement in a psychiatric hospital in August and September 2000 and dismisses them after considering the merits;

2. *Declares* admissible the following complaints: (i) under Article 5 § 3 the complaint concerning the applicant's right to a trial within a reasonable time or release pending trial; and (ii) under Article 5 §§ 1, 4 and 5, the complaints concerning the applicant's confinement in a psychiatric hospital in August and September 2000;

3. *Declares* the remainder of the application inadmissible;

4. *Holds* that there has been no violation of Article 5 § 3 of the Convention;

5. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

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

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

8. *Holds*
   (a) that the respondent State is to pay jointly to the applicant's two sons, within three months from the date on which the judgment becomes final

in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 1,860 (one thousand eight hundred and sixty euros) plus any tax that may be chargeable to the applicant's two sons, in respect of costs and expenses, to be converted into Bulgarian levs at the rate applicable at the date of settlement;

(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;

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

Done in English and French, and notified in writing on 6 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Registrar	Rait Maruste President