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

FIFTH SECTION

CASE OF GAVRIL YOSIFOV v. BULGARIA

(Application no. 74012/01)

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 Gavril Yosifov v. Bulgaria,

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

Rait Maruste, *President,*
Karel Jungwiert,
Volodymyr Butkevych,
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. 74012/01) 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 Mr Gavril Yordanov Yosifov ("the applicant"), a Bulgarian national born in 1975 and living in Sofia, on 16 January 2001.

2. The applicant was represented by Ms B. Buneva, Ms E. Stoyanova and Mr B. Boev, lawyers practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Kotseva, of the Ministry of Justice.

3. The applicant alleged, in particular, that his deprivation of liberty between 17 July and 26 October 2000 had not been lawful and that he had been unable to obtain a speedy and binding judicial ruling on that question.

4. On 4 May 2006 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. On 19 November 1996 the applicant was arrested and detained on suspicion of committing an offence. On 22 November 1996 he was charged with seven counts of theft, one count of attempted theft and one count of robbery. Most of the charges concerned offences committed jointly with

others. He remained in custody until 30 September 1997, when he was released on bail.

6. In June 1998 the Sofia District Prosecutor's Office indicted the applicant, Mr V.S. and Mr D.D. in relation to four thefts and one robbery. On an unspecified date one of the victims of the offences joined the proceedings as a civil claimant.

7. After a trial, in a judgment of 7 December 1998 the Sofia District Court found the applicant guilty as charged, sentenced him to three years' imprisonment, and ordered him to pay damages to the civil claimant. The court did not make an order for the applicant's detention pending appeal. It did not immediately give the reasons for its judgment; they were made available in October 1999.

8. On 5 January 1999 the applicant's counsel appealed to the Sofia City Court. Since at that point she did not yet have the reasons for the Sofia District Court's judgment, she submitted in general that the applicant's conviction was unlawful and unfounded and asked it to be quashed. She also argued that his sentence was excessive and requested that it be revoked or suspended. She said that she would provide further particulars and indicate the evidence to be gathered as soon as the reasons for the Sofia District Court's judgment became available. As required under Article 318 § 2 of the 1974 Code of Criminal Procedure, the appeal was lodged through the Sofia District Court.

9. On 17 February 1999 the Sofia District Court briefly noted that the appeal did not meet the requirements of Article 319 of the Code and, without indicating the specific deficiencies, directed the applicant to submit a rectified appeal within seven days. The applicant was notified of the court's ruling on 20 April 1999, but did not react. Accordingly, in a decision of 10 May 1999 the Sofia District Court dismissed the appeal. Neither the applicant, nor his counsel was notified of this and did not seek to appeal against this decision.

10. In line with Article 371 §§ 1 and 2 (3) of the Code (see paragraph 24 below), upon the expiry of the fifteen-day time-limit for appealing against the decision of 10 May 1999 the applicant's conviction and sentence were considered final and therefore enforceable. On 30 November 1999 he was detained in Sofia Prison for the purpose of serving his sentence.

11. On 20 December 1999 the applicant's counsel appealed to the Sofia City Court against the Sofia District Court's decision of 10 May 1999. She argued that the appeal against the applicant's conviction and sentence had been in line with all legal requirements. She stressed that the applicant had not been required to give detailed grounds of appeal, as the Sofia District Court had not made available the reasons for its judgment within the time-limit for lodging an appeal. Finally, she asked the court to rule rapidly, as the applicant was in custody serving his sentence.

12. On 2 February 2000 the Sofia District Court sent this appeal to the Sofia City Court.

13. Two hearings listed by the Sofia City Court on 20 March and 22 May 2000 respectively were adjourned: the first because the applicant had not been properly summoned and, although legally represented, did not appear in person, and the second because his co-accused and the civil claimant, despite being duly summoned, failed to attend.

14. At a hearing which took place on 17 July 2000 the Sofia City Court found that there was no need to involve the applicant's co-accused and the civil claimant in the proceedings relating to the propriety of the Sofia District Court's decision to dismiss his appeal against conviction and sentence. It further held that this appeal had been in line with legal requirements and that the Sofia District Court had erred by dismissing it. Moreover, its decision to do so did not indicate in what respects the appeal had been deficient. The court therefore quashed this decision and referred the case back to the Sofia District Court for further consideration of the appeal against the conviction and sentence. With that the criminal proceedings against the applicant were restored and his conviction and sentence were no longer considered final.

15. According to the applicant, at the same hearing his counsel asked the Sofia City Court to consider whether he should remain in custody or be released. The court declined to do so, saying that it was for the Sofia District Court to decide on this matter.

16. After 17 July 2000 the applicant's counsel filed with the Sofia District Court and the Sofia District Prosecutor's Office several requests for release, none of which was examined.

17. The applicant's counsel also met three times with the president of the Sofia District Court, who explained that the judge to whom the case had been assigned was absent. On 5 October 2000 the applicant's counsel filed a complaint with the Supreme Judicial Council, but received no reply.

18. On 3 October 2000 the Sofia District Court sent the case file to the Sofia City Court.

19. On 24 October 2000 the Sofia City Court set the applicant's appeal down for examination. Apparently, at this point the president of the panel to which the case had been assigned noticed that the applicant was still in custody. For this reason, on the next day, 25 October 2000, she alerted the Sofia District Prosecutor's Office that, following the decision of 17 July 2000 (see paragraph 14 above), the applicant's conviction and sentence were no longer considered final, and that he could not be kept in custody pursuant to them. On the same day the Sofia District Prosecutor's Office ordered the applicant's release, citing the same reasons.

20. On 26 October 2000 this order was received by the Sofia Prison and the applicant was set free. It appears that until the end of the criminal proceedings against him the applicant was not further remanded in custody.

21. In a judgment of 27 March 2001 the Sofia City Court acquitted the applicant of the charges concerning two of the thefts and upheld the remainder of the Sofia District Court's judgment. It imposed a global sentence of one and a half years' imprisonment. In determining the length of the applicant's period of imprisonment in pursuance of this sentence it deducted, by reference to Article 59 of the 1968 Criminal Code (see paragraph 30 below), the time he had already spent in custody between 30 November 1999 and 26 October 2000, saying that during this period the applicant had been serving a sentence which had not yet been made final.

22. The applicant lodged an appeal on points of law.

23. After holding a hearing on 19 November 2001, in a final judgment of 26 November 2001 the Supreme Court of Cassation upheld the Sofia City Court's judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Execution of sentences

24. Article 371 § 1 of the 1974 Code of Criminal Procedure (presently superseded by Article 412 § 1 of the 2005 Code of Criminal Procedure), as in force at the material time, provided that criminal convictions and sentences became enforceable after they had been made final. This occurred when, *inter alia*, no (valid) appeal had been lodged against them (Article 371 § 2 (3), read in conjunction with Article 322 §§ 1 (1) and 2 of the 1974 Code, presently superseded by Article 412 § 2 (3), read in conjunction with Article 323 § 1 of the 2005 Code).

25. The authorities supervising the lawful execution of criminal sentences are the competent public prosecutors (Article 375 § 2 of the 1974 Code (presently superseded by Article 416 § 2 of the 2005 Code), section 118(2) (between 2006 and 2007 section 118(4)) of the 1994 Judicial Power Act (presently superseded by section 146(1) of the 2007 Judicial Power Act) and section 4(1) of the 1969 Execution of Sentences Act). They are under a duty to order the release of any detainee who has been unlawfully deprived of his or her liberty (section 119(7)(1) of the 1994 Judicial Power Act, presently superseded by section 146(2)(1) of the 2007 Judicial Power Act).

B. The 1988 State Responsibility for Damage Act

26. Section 2 of the Act originally called the 1988 State Responsibility for Damage Caused to Citizens Act (*Закон за отговорността на държавата за вреди, причинени на граждани* – "the SRDA"), renamed on 12 July 2006 the 1988 State and Municipalities Responsibility for

Damage Act (*Закон за отговорността на държавата и общините за вреди*), as in force at the material time, read, in so far as relevant:

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

27. According to the Bulgarian courts' case-law, the State is liable for all damage caused by pre-trial detention where the accused has been acquitted (реш. № 978/2001 г. от 10 юли 2001 г. по г.д. № 1036/2001 г. на ВКС) or the criminal proceedings discontinued on grounds that the charges have not been proven, or where the perpetrated act is not an offence (реш. № 859/ 2001 г. от 10 септември 2001 г. г.д. № 2017/2000 г. на ВКС).

28. In a binding interpretative decision (тълк. реш. № 3 от 22 април 2004 г. на ВКС по тълк.д. № 3/2004 г., ОСГК), made on 22 April 2004 pursuant to the proposal of the President of the Supreme Court of Cassation, the Plenary Meeting of the Civil Chambers of that court resolved a number of contentious issues relating to the construction of various provisions of the SRDA. In point 13 of the decision it held that the compensation awarded in respect of the non-pecuniary damage arising under section 2(1) or (2) of the Act should cover also the non-pecuniary damage stemming from unlawful pre-trial detention imposed during the proceedings, whereas compensation for the pecuniary damage flowing from such detention should be awarded separately. The reasons it gave for this decision were as follows:

> "Pre-trial detention is unlawful when it does not comply with the requirements of [the CCP].
>
> The State is liable under section 2(1) [of the] SRDA when the pre-trial detention has been set aside as unlawful, irrespective of how [the criminal] proceedings unfold later. In such cases compensation is determined separately.
>
> If the person has been acquitted or the criminal proceedings have been discontinued, the State is liable under section 2(2) [of the] SRDA. In that case, the compensation for non-pecuniary damage has to cover the damage flowing from the unlawful pre-trial detention. If pecuniary damage has arisen, compensation for it is not included but has to be awarded separately, taking into account the particular circumstances of each case."

29. In point 11 of its decision the court dealt with the question whether the accused should be entitled to compensation under section 2(2) of the SRDA when they have been convicted of some charges and acquitted of others. It held that compensation was due even in cases of partial acquittals, provided there was a proven causal link between the unlawful bringing of

charges and the damage suffered. Non-pecuniary damages were to be assessed globally and in equity, taking into account the number of acts in respect of which an accused has been found not guilty and the respective gravity of the offences of which they have been convicted and those of which they have been acquitted. Pecuniary damages were to be awarded by taking into consideration the particular circumstances of each case and whether or not they flowed from the unlawful acts of the law enforcement authorities.

C. Other relevant law

30. Under Article 59 § 1 of the 1968 Criminal Code, the sentencing court has to deduct from any sentence of imprisonment the time already spent by the offender pending the final outcome of the case.

31. Section 37(1) of the 1969 Execution of Punishments Act provides that inmates have the right to file applications and complaints, and to appear in person before the prison governor. By section 37(2) of the Act, these applications and complaints have to be sent immediately to the competent authorities.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

32. The applicant complained that his detention between 17 July and 26 October 2000 did not have any basis in domestic law, as it was not in pursuance of a final and enforceable conviction and sentence of imprisonment. He relied on Article 5 § 1 of the Convention, which reads, in so far as relevant:

> "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:
>
> (a) the lawful detention of a person after conviction by a competent court; ..."

33. The Government firstly submitted that the applicant had not exhausted domestic remedies. In their view, the grievance which he raised before the Court fell within the ambit of section 2 of the SRDA. At the relevant time the domestic courts' case-law on the application of this provision had been sufficiently established, making it an adequate and effective avenue of redress. In support of their assertion the Government pointed to a number of domestic judgments under section 2 of the SRDA

and drew attention to the fact that in 2004 the Supreme Court of Cassation had adopted a binding interpretative decision on its application.

34. The Government also argued that the applicant could no longer be considered as a victim of a violation, as in determining his sentence the Sofia City Court had taken into account the amount of time when he had been deprived of his liberty in pursuance of a sentence which was not yet final.

35. The applicant replied that the SRDA did not provide an effective remedy for the complaints which he had raised before the Court. In his view, a distinction had to be made between the right to seek release from detention and the right to claim compensation for unlawful deprivation of liberty. A claim under the SRDA would not have led to his release, nor would it have led to the speeding up of the examination of his application for release.

36. The applicant also pointed out that the Sofia City Court had taken into account the period of his detention between 30 November 1999 and 26 October 2000 because it was bound by law so do to, rather than because it had found that this deprivation of liberty had been unlawful. In so doing it had not acknowledged expressly or in substance the breach of Article 5 § 1 of the Convention.

37. Article 35 § 1 of the Convention provides, in so far as relevant:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law..."

38. According to the Court's and the former Commission's settled case-law, the rule of exhaustion of domestic remedies laid down in this provision is intended to give the Contracting States the opportunity of preventing or putting right the violations alleged against them. When the national authorities acknowledge either expressly or in substance, and then afford redress for, the breach of the Convention, to duplicate the domestic process with proceedings before the Court would appear hardly compatible with the subsidiary character of the machinery of protection established by the Convention. The Convention leaves it in the first place to each Contracting State to secure the enjoyment of the rights and freedoms it enshrines (see, among other authorities, *Kokavecz v. Hungary* (dec.), no. 27312/95, 20 April 1999, with further references).

39. The rule of exhaustion of domestic remedies requires applicants to use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. However, they are only required to avail themselves of remedies which are accessible, capable of providing redress in respect of their complaints and offer reasonable prospects of success (see, as a recent relevant authority, *Kolev v. Bulgaria*, no. 50326/99, §§ 70 and 72, 28 April 2005). In determining whether any particular remedy meets these criteria, regard must

be had to the particular circumstances of the case and the nature of the breaches alleged (see, among other authorities, *Caprino v. the United Kingdom*, no. 6871/75, Commission decision of 3 March 1978, Decisions and Reports (DR) 12, p. 14, at p. 16 *in fine*).

40. In some cases the Court and the former Commission have found that an action for damages cannot be seen as an effective remedy in respect of complaints under Article 5 § 3 about the excessive length of time spent on remand (see *Woukam Moudefo v. France*, no. 10868/84, Commission decision of 21 January 1987, DR 51, p. 73; *Egue v. France*, no. 11256/84, Commission decision of 5 September 1988, DR 57, p. 60; *Tomasi v. France*, judgment of 27 August 1992, § 79, Series A no. 241-A; *Yağcı and Sargın v. Turkey*, nos. 16419/90 and 16426/90, Commission decision of 10 July 1991, DR 71, p. 253, and judgment of 8 June 1995, § 44, Series A no. 319-A; and, more recently, *Haris v. Slovakia*, no. 14893/02, § 38, 6 September 2007), under Article 5 § 4 about the failure of a national court to determine speedily an application for release (see *Navarra v. France*, no. 13190/87, Commission decision of 1 March 1991, DR 69, p. 168, and judgment of 23 November 1993, § 24, Series A no. 273-B), and under Article 5 § 1 about detention effected in violation of some of its requirements, such as to be ordered by a "competent court" or to be based on a "reasonable suspicion" (see *Drozd and Janousek v. France and Spain*, no. 12747/87, Commission decision of 12 December 1989, DR 64, p. 113; and *Włoch v. Poland* (dec.), no. 27785/95, decision of 30 March 2000 and § 90 of the judgment, ECHR 2000-XI). In all these cases the main basis for such a decision was that the right to obtain release and the right to obtain compensation for a deprivation of liberty in breach of Article 5 are two separate rights, enshrined respectively in paragraphs 4 and 5 of that Article, and this distinction is also relevant for the purposes of Article 35 § 1. This line of reasoning is of particular importance where the person concerned is still in custody. In such circumstances, the only remedy which may be considered sufficient and adequate is one which is capable of leading to a binding decision for his or her release.

41. However, in a number of other cases the Court has accepted that, if the impugned detention has come to an end, an action for damages, which is capable of leading to a declaration that this detention was unlawful or in breach of Article 5 § 1 and to a consequent award of compensation, may be an effective remedy in respect of complaints under this provision (see *De Jong, Baljet and Van den Brink v. the Netherlands*, judgment of 22 May 1984, § 39, Series A no. 77; *Amuur v. France*, judgment of 25 June 1996, § 36 *in fine*, *Reports of Judgments and Decisions* 1996-III; *Steel and Others v. the United Kingdom*, judgment of 23 September 1998, § 63, *Reports* 1998-VII; *Kokavecz*, cited above; *Anderson v. the United Kingdom* (dec.), no. 44958/98, 5 October 1999; *Tám v. Slovakia*, no. 50213/99, §§ 44-53, 22 June 2004; *Andrei Georgiev v. Bulgaria*, no. 61507/00, §§ 73-79, 26 July

2007; *Kolevi v. Bulgaria* (dec.), no. 1108/02, 4 December 2007; and *Ladent v. Poland*, no. 11036/03, § 39, ECHR 2008-... (extracts)).

42. In the Court's view, where the applicant's complaint of a violation of Article 5 § 1 of the Convention is mainly based on the alleged unlawfulness of his or her detention under domestic law, and where this detention has come to an end, an action capable of leading to a declaration that it was unlawful and to a consequent award of compensation is an effective remedy which needs to be exhausted, if its practicability has been convincingly established (see *Kolevi*, cited above). To hold otherwise would mean to duplicate the domestic process with proceedings before the Court, which would be hardly compatible with its subsidiary character.

43. In the present case, the Court observes that on 25 October 2000 the Sofia District Prosecutor's Office, having been alerted by the Sofia City Court that the applicant's conviction and sentence were not final and enforceable and that he could not be kept in custody pursuant to them, ordered his immediate release. On the next day, 26 October 2000, the applicant was set free (see paragraphs 19 and 20 above). Later he was acquitted of some of the charges against him, which means that he fell within the ambit of point 11 of the 2004 interpretative decision of the Supreme Court of Cassation (see paragraphs 21, 23 and 29 above). The Court further observes that the gravamen of the applicant's complaint under Article 5 § 1 was that his detention between 17 July and 26 October 2000 had no legal basis in Bulgarian law (see paragraph 32 above). It finally notes that a claim under section 2(1) or (2) of the SRDA would have required the national courts to review the legality of the applicant's detention and to award compensation for any damage suffered, in case they found that this detention had not been lawful (see paragraphs 26, 27 and 28 above). In the Court's view, these elements are sufficient to show that a claim under section 2 of the SRDA would have, in all probability, been an effective remedy in respect of the applicant's grievance under Article 5 § 1. However, although in his initial application to the Court he said that he contemplated bringing such a claim, there is no information in the case file that he actually did so.

44. It follows that the applicant's complaint under Article 5 § 1 must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

45. In view of this conclusion, the Court does not consider it necessary to deal with the Government's second objection.

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

46. The applicant complained of two matters under this provision. He firstly found fault with the amount of time taken by the Sofia City Court to rule on his appeal of 20 December 1999. Secondly, he criticised that court

for having declined to make an order for his release on 17 July 2000 despite finding that the appeal against his conviction and sentence had been validly lodged, with the result that the same conviction and sentence had not become final and enforceable.

47. Article 5 § 4 of the Convention provides as follows:

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

A. Admissibility

48. The Government firstly maintained that the complaint was inadmissible for failure to exhaust domestic remedies. In their submission, the applicant's grievance fell within the ambit of section 2 of the SRDA, which provided a reliable and effective remedy in respect of it. There existed ample case-law on the application of this provision and in 2004 it had been authoritatively construed by the Supreme Court of Cassation. However, the applicant had not shown that he had brought a claim under this provision.

49. The Government secondly argued that the applicant had lost his victim status, because the Sofia City Court had deducted the period of time he had been deprived of his liberty between 30 November 1999 and 25 October 2000 from his sentence.

50. The applicant replied that a claim under section 2 of the SRDA could not have led to the speeding up of the examination of his requests for release. Concerning the alleged loss of victim status, he reiterated his arguments relating to the admissibility of his complaint under Article 5 § 1 (a) of the Convention.

51. Concerning the first objection of the Government, the Court, leaving open the question whether a claim for damages may amount to an effective remedy in respect of an alleged breach of Article 5 § 4 of the Convention (see *Kolev v. Bulgaria*, no. 50326/99, § 71, 28 April 2005), observes that it has previously found that section 2 of the SRDA does not create a cause of action in respect of complaints under this provision (see *Andrei Georgiev*, cited above, § 80). It has also found that the case-law of the Bulgarian courts in relation to claims for damages under section 2 of the SRDA premised on breaches of Article 5 § 4 of the Convention was not clear and settled (see *Kolev*, § 73; and *Kolevi*, both cited above). The Court is not aware of – and the Government have not pointed to – any fresh developments which may alter these findings. The 2004 interpretative decision relied on by the Government (see paragraphs 28 and 29 above) is silent on this issue and cannot be seen as a relevant precedent (see, *mutatis mutandis*, *Vachev v. Bulgaria*, no. 42987/98, § 73, ECHR 2004-VIII

(extracts)). This lack of clear case-law shows the present uncertainty of this remedy in practical terms, in so far as complaints under Article 5 § 4 of the Convention are concerned. The Government's objection must therefore be dismissed.

52. As regards the Government's second objection, the Court considers that, unlike the situation with regard to the complaint under Article 5 § 1, the reduction of the applicant's sentence was neither intended to remedy his grievances under Article 5 § 4, nor capable of doing so. While the Sofia City Court said that the applicant's deprivation of liberty had been in pursuance of a non-final and non-enforceable sentence of imprisonment, it did not mention the problems encountered by him in obtaining a judicial pronouncement on the lawfulness of his detention. He may therefore still claim to be a victim in this respect.

53. Finally, the Court considers that the applicant's complaint under Article 5 § 4 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3, nor inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

54. The Government argued that the applicant had not tried all avenues capable of leading to his release. Under section 37(1) of the 1969 Execution of Punishments Act, he was entitled to file requests and appeals with the prison governor and appear in person before him. The governor would have been under the duty to transmit these requests or appeals to the competent authorities. There was no indication that the applicant had tried doing so.

55. The applicant reiterated his complaints.

56. According to the Court's settled case-law, the remedy required by Article 5 § 4 must be of a judicial nature, which implies that the person concerned should have access to a "court", within the meaning of this provision, and the opportunity to be heard either in person or, where necessary, through some form of representation (see, among many other authorities, *Vachev*, cited above, § 71, citing *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 24, § 60). This "court", does not necessarily have to be a court of law of the classic kind, integrated within the standard judicial machinery of the country. However, it must be independent of the executive and of the parties to the case, provide guarantees of a judicial procedure, and be competent to make a legally binding decision leading to the person's release (see, among others, *X v. the United Kingdom*, judgment of 5 November 1981, §§ 53 and 61 *in fine*, Series A no. 46).

57. The Court observes at the outset that the applicant's detention after 30 November 1999 was carried out in pursuance of his conviction and sentence, which were considered to have become final and enforceable (see

paragraph 10 above). His deprivation of liberty is therefore to be considered as detention "after conviction" within the meaning of Article 5 § 1 (a) of the Convention, regardless of the position under domestic law (see *Wemhoff v. Germany*, judgment of 27 June 1968, § 9, Series A no. 7; and *B. v. Austria*, judgment of 28 March 1990, §§ 35-40, Series A no. 175). The Court must therefore determine as a threshold matter whether Article 5 § 4 was applicable. This provision would in principle be redundant with respect to detention under Article 5 § 1 (a), since judicial control of the deprivation of liberty has already been incorporated into the initial conviction and sentence (see, as a recent authority, *Stoichkov v. Bulgaria*, no. 9808/02, § 64, 24 March 2005, citing *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971 (merits), § 76, Series A no. 12). However, whenever fresh issues affecting the lawfulness of such detention arise, Article 5 § 4 comes back into play (ibid., § 65, with further references, as well as, more recently, *Svetoslav Dimitrov v. Bulgaria*, no. 55861/00, § 67, 7 February 2008).

58. It follows that the Court must examine whether any fresh issues of lawfulness were capable of arising in relation to the applicant's deprivation of liberty between 30 November 1999 and 26 October 2000 and, if so, whether the applicant was able to have them resolved in proceedings complying with the various requirements of Article 5 § 4.

59. The Court observes that, having initially been placed in pre-trial detention, the applicant was released on bail before his trial (see paragraph 5 above). At the close of the trial the Sofia District Court did not make an order for him to be further detained, pending the outcome of an appeal against his conviction and sentence (see paragraph 7 above). He could therefore only have been lawfully deprived of his liberty in pursuance of his conviction and sentence of imprisonment. By Article 371 § 1 of the 1974 Code of Criminal Procedure, a sentence may be executed only if it has been made final (see paragraph 24 above). Indeed, the applicant was further taken into custody only after the competent authorities had formed the view that his conviction and sentence had become final (see paragraph 10 above). The question whether they were actually so was therefore determinative of the legality of his detention. This question was, moreover, independent of and distinct from the issues resolved by the Sofia District Court during the applicant's trial. It follows that the applicant was entitled to apply to a "court" having jurisdiction to decide speedily whether or not his deprivation of liberty was unlawful in this sense (see, *mutatis mutandis*, *Stoichkov*, § 66; and *Svetoslav Dimitrov*, § 69, both cited above).

60. The Court observes that on 20 December 1999 the applicant challenged the dismissal of his appeal against conviction and sentence (see paragraph 11 above). The consideration of this legal challenge was significantly delayed, first in the Sofia District Court and then by reason of two wholly unwarranted adjournments in the Sofia City Court (see

paragraphs 12 and 13 above). More significantly, although on 17 July 2000 the Sofia City Court found that the appeal against the applicant's conviction and sentence had been valid, with the result that neither conviction nor sentence was final or enforceable, it declined to make an order for his release, saying that this was a matter for the Sofia District Court (see paragraphs 14 and 15 above). However, later the Sofia District Court, despite several requests, did not examine whether the applicant was to remain in custody or be released (see paragraphs 16 and 17 above). The applicant was thus unable to obtain a speedy judicial ruling as to the lawfulness of his detention, as required by Article 5 § 4. This situation was not made good by the fact that more than three months later, on 24 October 2000, the Sofia City Court informally alerted the Sofia District Prosecutor's Office to the matter, which in turn made an order for the applicant's release (see paragraphs 16-19 above). The Sofia City Court did not make a binding order for the applicant's release, because it apparently did not consider itself competent to do so, whereas the Sofia District Prosecutor's Office was not a "court" within the meaning of Article 5 § 4 and the procedure followed by it did not have any judicial features (see, *mutatis mutandis*, *Svetoslav Dimitrov*, cited above, § 71). The prison governor, to whom the Government alluded in their observations, was not a "court" either and did not have the power to release the applicant, but merely to transmit his complaints and applications to the competent authorities (see paragraph 31 above).

61. This state of affairs seems to have been the result of the unclear regulation of the courts' competence in this domain, the fact that Bulgarian law entrusts all issues affecting the legality of the execution of sentences of imprisonment solely to the competent prosecutors and not to a judge (see paragraph 25 above) and the lack in Bulgarian law of a general habeas corpus procedure whereby any individual deprived of his or her liberty, regardless of the grounds therefor, is entitled to request a court to review the lawfulness of his or her detention and order his or her release if this detention is not lawful (see *Stoichkov*, § 66; and *Svetoslav Dimitrov*, § 71, both cited above; and *Sadaykov v. Bulgaria*, no. 75157/01, § 35 *in fine*, 22 May 2008). As matters stand, Bulgarian law envisages distinct procedures for challenging specific types of deprivation of liberty, such as pre-trial detention (see, for instance, *Ivanov v. Bulgaria* (dec.), no. 22434/02, 25 September 2007), confinement to a mental institution (see *Kayadjieva v. Bulgaria*, no. 56272/00, §§ 22 and 23, 28 September 2006), or detention pending deportation (see *Sadaykov*, cited above, §§ 11 and 13). The result of this approach is that individuals whose deprivation of liberty does not fall within a well-defined category are likely to face serious or even insuperable difficulties in challenging it (see *Stoichkov* and *Sadaykov*, both cited above).

62. It is not within the province of the Court to inquire into what would be the best or most appropriate system of judicial review in the sphere under examination, for the Contracting States are free to choose different methods of performing their obligations. However, it observes that during the period of his detention between 30 November 1999 and 26 October 2000 the applicant did not have the opportunity to take proceedings providing the guarantees required by Article 5 § 4 of the Convention. There has therefore been a violation of this provision.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Alleged violation of Article 6 § 1 of the Convention

63. The applicant complained that the criminal proceedings against him had lasted an unreasonably long time, in breach of Article 6 § 1 of the Convention, which provides, in so far as relevant:

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

64. The Court observes that the criminal proceedings against the applicant lasted approximately five years, starting on 19 November 1996 and ending on 26 November 2001 (see paragraphs 5 and 23 above). During this time there was a pre-trial investigation and examination by three levels of court. Their length in itself does not appear excessive, especially if account is taken of the fact that the case involved three co-defendants charged with several offences, as well as a civil claimant. It is true that certain unjustified delays occurred during the processing of the applicant's appeal against the judgment of the Sofia District Court (see paragraphs 8-19 above). However, the Sofia City Court and the Supreme Court of Cassation subsequently disposed of the case in a speedy manner, taking about eight months each (see paragraphs 18, 21 and 23 above). The overall length of the proceedings cannot therefore be said to have exceeded a "reasonable time".

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

B. Alleged violation of Article 13 of the Convention

66. The applicant complained that he had not had effective remedies in respect of his complaint under Article 6 § 1, in breach of Article 13 of the Convention which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

67. According to the Court's settled case-law, Article 13 requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, *Hadjikostova v. Bulgaria (no. 2)*, no. 44987/98, § 49, 22 July 2004). Having regard to its findings under Article 6 § 1, the Court considers that the applicant had no "arguable complaint" under that provision in respect of the length of proceedings.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

71. The Government did not comment on the applicant's claim.

72. The Court observes that the only violation found in the present case was that of Article 5 § 4 of the Convention. On the evidence, the possibility cannot be excluded that the applicant might have been released earlier if he had been able to benefit from the guarantees contained in this provision. On the other hand, any prejudice suffered on that account must have been greatly tempered by the deduction of the relevant period of detention from the sentence of imprisonment ultimately imposed (see paragraph 21 above). Nonetheless, the applicant did forfeit the opportunity of a speedy and effective judicial control of his detention. In addition, he must have suffered, by reason of the absence of the relevant guarantees, feelings of frustration, uncertainty and anxiety not wholly compensated by the finding of violation or by the deduction of the relevant period of detention from his sentence (see, *mutatis mutandis*, *De Jong, Baljet and Van den Brink*, cited above, § 65; and *Kolanis v. the United Kingdom*, no. 517/02, § 92, ECHR 2005-V). Ruling on an equitable basis, as required under Article 41, the Court awards him EUR 1,500, plus any tax that may be chargeable.

B. Costs and expenses

73. The applicant sought the reimbursement of EUR 1,750 incurred in lawyers' fees for the proceedings before the Court. He submitted a fee agreement between himself and his lawyer and a time sheet.

74. The Government did not comment on the applicant's claim.

75. According to the Court's settled case-law, only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention. In the present case, having regard to the information in its possession and the above criteria, and noting that part of the application was declared inadmissible, the Court considers it reasonable to award the sum of EUR 1,000, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint that the applicant was not able to take proceedings in which to have determined in a speedy manner the lawfulness of his deprivation of liberty between 30 November 1999 and 26 October 2000 admissible and the remainder of the application inadmissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
      (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (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;

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

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

Claudia Westerdiek	Rait Maruste
Registrar	President