FIFTH SECTION

CASE OF GANCHEV v. BULGARIA

(Application no. 57855/00)

JUDGMENT

STRASBOURG

12 April 2007

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 Ganchev v. Bulgaria,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 20 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 57855/00) 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 Velko Stoyanov Ganchev ("the applicant"), on 30 December 1999.

2. The applicant was represented initially by Mrs V. Kelcheva and subsequently by Mr V.S. Stoyanov, lawyers practising in Pazardzhik. The Bulgarian Government ("the Government") were represented by their Agent, Mrs M. Kotzeva, of the Ministry of Justice.

3. On 30 June 2005 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the alleged failure to bring the applicant before a judge and the length of the criminal proceedings against him. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1940 and lives in Velingrad.

5. On 11 November 1999 the applicant was arrested and brought before an investigator who decided to remand him in custody on charges of sexual assault allegedly committed against a minor on 20 October 1999, an offence punishable with up to five years' imprisonment under Article 149 § 1 of the Criminal Code. The investigator's decision was confirmed by a prosecutor.

6. On 18 November 1999 the investigator conducted searches in the applicant's home.

7. On 29 March 2000 the applicant was released.

8. In the course of the investigation a number of witnesses, the alleged victim and the applicant were heard and several forensic and medical reports were drawn up.

9. On 5 February 2001 the investigator submitted his conclusions to the prosecutor, proposing that the applicant should be indicted for sexual assault.

10. On 10 April 2001 the District Prosecutor's Office referred the case back to the investigator instructing him to undertake further investigation as to whether the applicant had raped the same girl on 9 November 1999, as alleged by her.

11. Since the alleged victim had changed her address and could not be located, the investigation could not proceed and was suspended on 1 October 2003.

12. In October 2003 the case file was transmitted to the district police in Velingrad with instruction to continue seeking the alleged victim's address. It appears that as of September 2006, the date of the latest communication received from the parties, the investigation remained suspended.

B. Relevant domestic law and practice

13. The relevant provisions of the Code of Criminal Procedure ("CCP") concerning decisions on pre-trial detention and the Bulgarian authorities' practice at the relevant time are summarised in the Court's judgments in several similar cases (see, among others, the *Nikolova v. Bulgaria* [GC], no. 31195/96, §§ 25-36, ECHR 1999-II; *Ilijkov v. Bulgaria*, no. 33977/96, §§ 55-62, 26 July 2001; and *Yankov v. Bulgaria*, no. 39084/97, §§ 79-88, ECHR 2003-XII (extracts)).

14. A legislative amendment that entered into force on 2 June 2003 introduced a possibility for an accused person to request that his case be brought for trial if the investigation has not been completed within two years in cases concerning serious offences and one year in all other cases (Article 239a CCP as in force until April 2006). In accordance with section 140 of the transitory provisions to the 2003 amendment, that possibility applies with immediate effect in respect of investigations opened before June 2003. In April 2006, Article 239a was superseded by Articles 368 and 369 of the new CCP, which have the same wording.

15. The procedure under those provisions is as follows. The accused person must submit a request to the relevant court which has seven days to examine the file. It may refer the case back to the prosecuting authorities or terminate the criminal proceedings. If the case is referred to the prosecutors, they have two months to file an indictment with the trial court or to terminate the proceedings failing which the court is under a duty to terminate the proceedings against the accused person who had filed the request.

16. The 2003 amendment was introduced in Parliament with the reasoning that it was necessary to secure observance of the right to trial within a reasonable time as guaranteed by the Convention.

THE LAW

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

17. The applicant complained that upon his arrest on 11 November 1999 he had not been brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention. The Government did not comment.

18. The relevant part of Article 5 § 3 reads:

> "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 ..."

A. Admissibility

19. The Court notes that this 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

20. 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).

21. 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. 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. The Court refers to the analysis of the relevant domestic law contained in its *Nikolova* judgment, cited above (see paragraphs 28, 29 and 49-53 of that judgment).

22. 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.

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

23. The applicant complained that the criminal proceedings against him were excessively lengthy and thus in violation of Article 6 § 1 of the Convention, which in its relevant part reads as follows:

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

A. The parties' submissions on the admissibility of the complaint

24. The Government stated that the applicant had not exhausted all domestic remedies as he had failed to avail himself of the procedure under Article 239a CCP and had not appealed to the District Court against the suspension order of 1 October 2003.

25. The applicant replied that the remedies referred to by the Government were not effective as they could not secure compensation and acknowledgment of the violation complained of.

B. The Court's assessment

26. It is undisputed that the applicant never filed a request under Article 239a CCP. The Court must examine, therefore, whether this was an effective remedy which had to be exhausted in accordance with Article 35 § 1 of the Convention.

27. The Court has stated that remedies in respect of excessive length of proceedings may be considered effective if they have either a preventive or a compensatory effect. The best solution in absolute terms is prevention. A

remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach a posteriori, as does a compensatory remedy (*Sürmeli v. Germany* [GC], no. 75529/01, §§ 99 and 100, ECHR 2006-).

28. The remedy in question in the present case, a request under Article 239a CCP, became directly accessible in June 2003 to any accused person the criminal proceedings against whom had been pending at the investigation stage longer than a statutory period (one or two years, depending on the gravity of the charges). Such was the case of the applicant. As of June 2003, the proceedings against him had been pending at the investigation stage for approximately three years and seven months (see paragraphs 5-11 above).

29. The Court further notes that where a request under Article 239a is filed, it is examined within seven days by a court and, thereafter, the authorities must either draw up an indictment within two months and bring the case for trial or terminate the proceedings (see paragraphs 14-16 above). In either case, by availing himself of the remedy under Article 239a, the accused person effectively brings about the end of the preliminary investigation and, in some cases, of the criminal proceedings. There is no doubt, therefore, that in respect of cases delayed at the preliminary investigation stage – as the applicant's – , the remedy in question may serve to prevent a possible violation of the accused person's right to a trial within a reasonable time.

30. It is true that the remedy under Article 239a CCP could not secure compensation. Therefore, in cases where significant delays exceeding a reasonable time accumulated before the introduction of that remedy in June 2003, the question whether it was effective in principle is irrelevant under Article 13 (see *Karov v. Bulgaria*, no. 45964/99, § 74, 16 November 2006 and, *mutatis mutandis, Rachevi v. Bulgaria*, no. 47877/99, § 67, 23 September 2004). Accordingly, in such cases the applicant's failure to submit a request under Article 239a CCP cannot affect the admissibility of the complaint under Article 6 § 1 of the Convention.

31. The Court considers, however, that the applicant's case was different. Without prejudging the merits of the applicant's complaint, it notes that between November 1999, when the criminal proceedings were opened against the applicant and April 2001, when the prosecutor ordered additional investigation, the authorities worked actively on the case and that at least a part of the delay that occurred after 2001 was due to large extent to objective difficulties (see paragraphs 5-11 above). It cannot be said with any certainty, therefore, that the “reasonable time” had already been exceeded

before June 2003, when the possibility arose for the applicant to seek acceleration of the proceedings.

32. The Court has considered in previous cases that remedies such as complaints to a relevant authority with power to accelerate criminal or civil proceedings are effective within the meaning of Article 13 in conjunction with Article 6 § 1 of the Convention and that, therefore, they must be exhausted before setting in motion the international machinery of human rights' protection (see, *Charzyński v. Poland* (dec.), no. 15212/03, ECHR 2005 and *Slavicek v. Croatia* (dec.), no. 20862/02, ECHR 2002-VII).

33. In the applicant's case it is clear that had he filed a request under Article 239a CCP, the proceedings would have moved to the trial stage or would have been terminated not later than in September or October 2003. The applicant is not entitled to allege a violation of his right to a trial within a reasonable time on account, *inter alia*, of the continued pendency of the proceedings after 2003, without having made use of the domestic remedy which could have effectively and quickly moved the proceedings. In the particular circumstances, therefore, the applicant cannot be deemed to have exhausted all domestic remedies, as required by Article 35 § 1 of the Convention. In these circumstances it is not necessary to examine whether the other possibility relied upon by the Government – an appeal to the relevant District Court against the suspension of the criminal proceedings –- was a remedy to be exhausted.

34. It follows that the complaint under Article 6 § 1 of the length of the proceedings must be declared inadmissible in accordance with Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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

36. The applicant claimed 7,000 euros (EUR) in respect of non-pecuniary damage.

37. The Government did not comment.

38. Having regard to the nature of the violation of Article 5 § 3 found in the present case, the Court considers – as it did in other similar cases (see the above cited *Nikolova* judgment, § 76) – that the finding of a violation constitutes sufficient just satisfaction in the circumstances.

B. Costs and expenses

39. The applicant also claimed EUR 5,000 for the costs and expenses before the Court. He submitted an undated document setting out fees agreed between the applicant and two lawyers and the number of hours of work done at the hourly rate of EUR 100. The hours claimed include, *inter alia*, seven hours allegedly necessary for studying the Court's partial decision in the case and the Registry's letter to the applicant. The applicant requested that the sums in respect of costs and expenses be paid directly to his two lawyers.

40. The Government did not comment.

41. According to the Court's case-law, an applicant is entitled to reimbursement of his 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 sum of EUR 300, to be paid to the applicant's current legal representative directly. In determining the amount the Court notes that most of the applicant's complaints were declared inadmissible and that the sole complaint in which a violation of the Convention was found is identical to complaints examined in a number of other cases against Bulgaria, including cases brought by the applicant's legal representative (see *Georgiev v. Bulgaria*, no. 47823/99, 15 December 2005, *Dobrev v. Bulgaria*, no. 55389/00, 10 August 2006, *Yordanov v. Bulgaria*, no. 56856/00, 10 August 2006 and the cases cited in paragraphs 13 and 20 above).

C. Default interest

42. 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 under Article 5 § 3 admissible and the complaint under Article 6 § 1 inadmissible;

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

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds*

(a) that the respondent State is to pay the applicant, directly into the bank account of his current legal representative, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 300 (three hundred euros) in respect of costs and expenses, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 12 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President