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

FIFTH SECTION

CASE OF KANDZHOV v. BULGARIA

(Application no. 68294/01)

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 Kandzhov 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. 68294/01) 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 Aleksandar Bogdanov Kandzhov, a Bulgarian national born in 1971 and living in the village of Pobeda, the Pleven region ("the applicant"), on 5 January 2001.

2. The applicant was represented by Mr Y. Grozev, a lawyer 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 that his arrest and detention for displaying a banner allegedly insulting the Minister of Justice and gathering signatures calling for the Minister's resignation had been unlawful and in breach of his right to freedom of expression. He also alleged that after his arrest he had not been brought promptly before a judge.

4. On 14 November 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

1. Background to the case

5. The applicant has been involved in politics since the beginning of the democratic changes in Bulgaria in 1990 and was an activist of one of the major political parties in the 1990s, the Union of Democratic Forces ("UDF"). He played an active role in the UDF's campaign during the parliamentary elections in April 1997. After the elections, he grew gradually disenchanted with the UDF's policies and some of its leaders. He was particularly disappointed by Mr Teodosiy Simeonov, a UDF Member of Parliament from the Pleven constituency and head of the UDF branch in Pleven. On 4 February 1999 the applicant, together with a few other members of the UDF, formed the "Committee against corruption in the UDF – Pleven". In his capacity as chairman of the committee, the applicant wrote to the Prime Minister, who was also leader of the UDF, alleging that Mr Simeonov had been heavily involved in political intrigue and corruption.

6. On 18 December 1999 Mr Simeonov was re-elected as head of the Pleven branch of the UDF and on 21 December 2000 appointed as Minister of Justice.

7. On 1 June 2000, in an interview discussing the widely publicised trial of five Bulgarian nurses facing the death penalty in Libya, Mr Simeonov expressed the opinion that Libya was not a "white" country. This statement was severely criticised by the press and sparked a protest from the Libyan ambassador to Bulgaria. On 14 June 2000 the daily newspaper *Monitor* ran an editorial expressing the opinion that with his statement Mr Simeonov was "on his way to being ranked 'top idiot' of the year".

8. In the beginning of July 2000 the applicant, together with some friends and political supporters, founded an initiative committee to campaign for Mr Simeonov's resignation. On 7 July 2000 he notified the mayor of Pleven that on 10, 11 and 12 July 2000 in the centre of Pleven UDF supporters would gather signatures calling for the resignation of "the top idiot of the Bulgarian Government – Teodosiy Simeonov". The organisers planned to gather signatures between 9 a.m. and 5 p.m. on the above-mentioned days at four stands placed in front of the town hall, the district police station, the theatre and the Monument to the Unknown Soldier – all in the centre of Pleven.

9. On 7 July 2000 the deputy mayor, who at the time was acting as mayor, refused to give permission for the gathering of signatures. His refusal was based on a lack of evidence that the applicant had been authorised to represent the initiative committee. The mayor further reasoned

that coordination was necessary in order to ensure "the safety of citizens and buildings pursuant to Regulation no. 1 on the maintenance and protection of public order and public property in the municipality of Pleven" and invited the applicant, if he insisted on carrying out the action, to discuss where exactly the tables could be placed. On 9 July 2000 the police tried to apprise the applicant of this refusal but could not find him at his address.

2. The events of 10-14 July 2000 and the criminal proceedings against the applicant

10. At about 9 a.m. on 10 July 2000, while on his way to one of the signature-gathering stands, the applicant was stopped in front of the district police station by the head of the police department, who informed him about the deputy mayor's refusal. The applicant, who was determined to go ahead with his plan, went to the town hall and met with the deputy mayor, but did not reach an agreement with him.

11. The applicant decided to complete the planned action. He put in the centre of Pleven two stands and two posters reading "We, the supporters of the UDF, call for the resignation of the top idiot of the Government Teodosiy Simeonov". A number of people, including some police officers, gathered around the stands.

12. At 11.35 a.m. the same day a police officer warned the applicant in writing that he should remove the stands, pending approval of their locations by the deputy mayor. The applicant refused to take them away, as he considered that the placing of stands on public ground did not amount to a breach of public order and that the law did not require him to seek permission from the mayor for that.

13. At 12.30 p.m. another police officer ordered the applicant's arrest. The order was based on section 70(1) of the 1997 Ministry of Internal Affairs Act and Articles 148 § 1 (1) and (3) and 325 § 2 of the 1968 Criminal Code (see paragraphs 27 and 30 below). It did not set out the specific acts alleged against the applicant. Immediately after that the police arrested the applicant and seized the two posters.

14. Later in the day the police officer who had ordered the applicant's arrest instituted a criminal investigation against him for publicly insulting the Minister of Justice in his official capacity, contrary to Article 148 § 1 (1) and (3) of the 1968 Criminal Code, and for performing indecent actions, grossly violating public order, and demonstrating overt disrespect for society, characterised by exceptional cynicism and arrogance, contrary to Article 325 § 2 of the Code (see paragraphs 27 and 30 below). He did not specify exactly what acts the applicant had carried out.

15. The applicant was questioned at 6.30 p.m. He pleaded not guilty and refused to make any statements until the arrival of his counsel.

16. On 11 July 2000 the Pleven District Prosecutor's Office received a complaint by Mr Simeonov who requested that criminal proceedings for

insult under Article 148 and for hooliganism under Article 325 of the 1968 Criminal Code be instituted against the applicant.

17. The same day a prosecutor of the Pleven District Prosecutor's Office, acting on the proposal of the police and pursuant to his powers under Article 152a § 3 of the 1974 Code of Criminal Procedure (see paragraph 34 below), ordered that the applicant be detained for seventy-two hours, starting at 12.30 p.m. that day, pending a ruling by the Pleven District Court on whether he should be placed in "pre-trial detention". He noted that proceedings had been instituted against the applicant on charges of insult and hooliganism and stated, *inter alia*, that there was a real risk that he would flee or re-offend. The applicant's counsel immediately appealed against the order to the Pleven Regional Prosecutor's Office. She did not receive a reply.

18. On the same day the investigator in charge of the case interviewed Mr Simeonov. He said that he had felt very insulted and humiliated by the campaign for his resignation and by the description of him as a "top idiot". He had learned about the events from his son and had immediately telephoned the deputy mayor, the vice-chairman of the UDF in Pleven and the head of the district police department, insisting that they "ensure public order". The investigator also interviewed two police officers who had eye-witnessed the events of 10 July 2000.

19. On 12 July 2000 the investigator interviewed the deputy mayor, the vice-president of the UDF in Pleven and the applicant's father. The interviews finished at 4.45 p.m.

20. At 11 a.m. on 14 July 2000 the Pleven District Court examined the request for placing the applicant in "pre-trial detention" at a public hearing. It heard submissions from the prosecutor and the applicant's counsel. It held that, while there were indications that the applicant had committed the offence alleged against him, it was not necessary to place him in "pre-trial detention", because there was no risk that he would abscond or re-offend. The court also noted certain health problems experienced by the applicant. It decided to release him on bail. The applicant apparently paid the bail immediately after the hearing, which finished at 11.30 a.m., and was released.

21. The investigation against the applicant was completed on 24 July 2000 and the case file was sent to the Pleven District Prosecutor's Office. On 25 July 2000 it indicted the applicant, accusing him of aggravated hooliganism. The insult charges had apparently been dropped earlier.

22. After holding a trial, in a judgment of 23 April 2001 the Pleven District Court found the applicant guilty of aggravated hooliganism, contrary to Article 325 § 2 of the 1968 Criminal Code (see paragraph 27 below) and sentenced him to four months' imprisonment, suspended for three years.

23. Upon an appeal by the applicant, on 25 September 2001 the Pleven Regional Court quashed the lower court's judgment and acquitted him.

24. The Pleven Regional Prosecutor's Office appealed on points of law. The appeal was examined by the Supreme Court of Cassation at a public hearing which took place on 15 January 2002. The prosecution, which was represented by a prosecutor of the Supreme Cassation Prosecutor's Office, expressed the opinion that the acquittal was correct and should be upheld.

25. In a final judgment of 11 February 2002 the Supreme Court of Cassation upheld the applicant's acquittal in the following terms:

> "... The court of first instance failed to give any arguments, but merely declared that [the applicant's] acts amounted to 'a brutal demonstration against the established order' and had caused 'considerable harm' to this order. ...the testimony of the persons authorised to preserve public order – the [police officers] questioned as witnesses, and in particular, [one of them], who was specifically asked about this – shows that no 'disarray, commotion or breach of public order' had occurred at the place where [the applicant] and the other UDF supporters had organised the gathering of signatures in support of the removal from office of the then Minister of Justice T. Simeonov. The only thing which could be characterised as scandalous is the label 'top idiot' accompanying the name of the witness Simeonov on the two posters explaining the aim of the event. However, there is no evidence whatsoever that the use of these words was intended to discredit T. Simeonov by lowering his prestige and dignity."

26. The court went on to say that it was public knowledge that a month before the events of 10 July 2000 Mr Simeonov had made an unacceptable statement in respect of Libya, which, in view of its potentially damaging repercussions for relations between the two countries, had been assessed very negatively by the press and had eventually led to the loss of his post. It was the press that had first called Mr Simeonov a "top idiot" and there was no indication that any newspaper had been called upon to answer for this phrase. It was thus completely natural for the applicant, when calling for the Minister's resignation, to use the same phrase, thus expressing the public – and not merely his own – attitude towards Mr Simeonov's activities. On this basis, the court concluded that:

> "It is clear from the above, that, as regards the subjective element, no offence under Article 325 §§ 1 or 2 [of the 1968 Criminal Code] has been committed, because there were no acts which meant to breach public order or demonstrate overt disrespect for society. The offence alleged against [the applicant] was not objectively committed either: there was no public disorder and the presence of police officers at the site was due to the need to prevent possible incidents. The expression of indignation by [some of the persons who were present there], which was an act of political support for T. Simeonov, cannot be seen as a consequence of hooliganism either."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Hooliganism

27. Article 325 §§ 1 and 2 of the 1968 Criminal Code, as in force at the relevant time, provided:

> "1. Whoever carries out indecent actions which grossly violate public order and show overt disrespect for society shall be punished for hooliganism by up to two years' imprisonment or by corrective labour, as well as by public reprimand.
>
> 2. If the actions are accompanied by resistance against [a law enforcement officer], or are characterised by exceptional cynicism or arrogance, the penalty shall be up to five years' imprisonment."

28. In a binding interpretative decision made in 1974 (Постановление № 2 от 29 ноември 1974 г. по н.д. № 4/1974 г., Пленум на ВС), the Supreme Court defined the elements of hooliganism. The first element is the perpetration of indecent actions, which are described as actions which are "improper or impudent, expressed through curses, raving, bad manners or other actions scandalising society". Indecent actions must both grossly violate public order and demonstrate overt disrespect for society. Gross violation of public order occurs when "through his actions the perpetrator makes a brutal demonstration against the established order". These actions violate "important State, public or personal interests or substantially affect morality". "Overt disrespect for society" is present when through his actions the perpetrator "openly demonstrates a high level of disrespect for the individuals and the rules of society".

29. According to the decision, "exceptional cynicism" within the meaning of paragraph 2 of Article 325 is present when "the acts of hooliganism are particularly impudent, grossly violate moral values and affect citizens' feelings". Obscene actions which are performed in public and cause indignation in society are also "exceptionally cynical". "Exceptional arrogance" is present when "the actions gravely and persistently affect public and personal interests and express a disparaging attitude towards public order or other public or personal interests". These actions "scandalize society and demonstrate rude impudence or cause grave insult".

B. Insult

30. Insult is a criminal offence under Article 146 of the 1968 Criminal Code. It is aggravated if committed in public and/or in respect of public officials carrying out their duties (Article 148 § 1 (1) and (3) of the Code). Prior to March 2000 it was privately prosecutable save in cases where the

victim was a public official (Article 161 of the Code, as in force before March 2000). After an amendment to the Code of March 2000 insult became privately prosecutable in all cases and was no longer punishable with a term of imprisonment. This means that there is no pre-trial investigation (Articles 171 and 240 of the 1974 Code of Criminal Procedure and Articles 191 and 247 § 1 of the 2005 Code of Criminal Procedure) and that no preventive measures, such as pre-trial detention or bail, may be imposed on the accused, as they are possible solely in respect of publicly prosecutable offences (Article 146 of the 1974 Code and Article 56 § 1 of the 2005 Code). Pre-trial detention is not permissible either, as it can only be imposed when the charges concern an offence punishable with a term of imprisonment or a harsher penalty (Article 152 § 1 of the 1974 Code and Article 63 § 1 of the 2005 Code).

C. Provisions concerning police detention and detention by order of a prosecutor

31. Under the 1997 Ministry of Internal Affairs Act, as in force at the relevant time, the police could, on the basis of a written order to that effect (section 72(1)), arrest an individual who had committed a criminal offence (section 70(1)(1)). An individual taken in police custody was entitled to be assisted by counsel and seek judicial review of his detention (section 70(3) and (4)). The application had to be examined immediately (section 70(3) *in fine*). Police detention under section 70(1)(1) and (1)(2) could not exceed twenty-four hours (section 71 *in fine*).

32. Police detention under section 70(1)(1) was lawful only if it immediately preceded the opening of a preliminary investigation against the arrestee (реш. № 9779 от 24 ноември 2004 г. по адм. д. № 4925/2004 г., ВАС, V отд.). It was imposed with a view to instituting such a preliminary investigation (реш. № 3996 от 13 април 2006 г. по адм. д. № 9362/2005 г., ВАС, V отд.). The power to detain was given to the police to assist them in the investigation of crime (реш. № 1812 от 27 февруари 2003 г. по адм. д. № 10831/2002 г., ВАС, V отд.; реш. № 810 от 27 януари 2005 г. по адм. д. № 6185/2004 г., ВАС, V отд.; реш. № 2550 от 21 март 2005 г. по адм. д. № 7391/2004 г., ВАС, V отд.). All reported cases under section 70(1)(1) concern publicly prosecutable offences.

33. Arrest orders under section 70 were administrative decisions. According to the case-law of the Supreme Administrative Court (опр. № 1793 от 17 февруари 2006 г. по адм. д. № 1390/2006, ВАС, V отд.; реш. № 894 от 31 януари 2005 г. по адм. д. № 5783/2004 г., ВАС, V отд.), the persons affected by them could challenge their lawfulness before a court and, if they were set aside, they could seek damages under section 1 of the 1988 State Responsibility for Damage Act (see paragraph 35 below).

34. Article 152a of the 1974 Code of Criminal Procedure, which governs the procedure for imposing "pre-trial detention" ("задържане под стража") under Article 152 of the Code, was changed in its entirety with effect from 1 January 2000, in a bid to bring Bulgarian law in line with Article 5 the Convention (тълк. реш. № 1 от 25 юни 2002 г. по н.д. № 1/2002 г., ОСНК на ВКС). The amended paragraph 3 of Article 152a provided that the investigation and the prosecution authorities had to ensure the immediate appearance of the accused before the competent first-instance court and, if necessary, detain them until that moment. Such detention could not exceed twenty-four hours if ordered by an investigator and seventy-two hours if ordered by a prosecutor. This distinction was apparently intended to ensure compliance with Article 30 § 3 *in fine* of the 1991 Constitution, which provides that any deprivation of liberty has to be reviewed by an "organ of the judicial power" within twenty-four hours.

D. The 1988 State Responsibility for Damage Act

35. Section 1 of the 1988 State Responsibility for Damage Caused to Citizens Act ("the SRDA" – „Закон за отговорността на държавата за вреди, причинени на граждани" – this was the original title; on 12 July 2006 it was changed to the State and Municipalities Responsibility for Damage Act, „Закон за отговорността на държавата и общините за вреди"), provided that the State was liable for damage suffered by private persons as a result of unlawful decisions, actions or omissions by civil servants, committed in the course of or in connection with the performance of their duties. Section 1(2), as in force at the material time, provided that compensation for damage arising from unlawful decisions could be claimed after the decisions concerned had been annulled in prior proceedings.

36. Section 2 of the SRDA reads, 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..."

37. According to the 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, the perpetrated act is not an offence, or the criminal proceedings were unlawful from the outset because they were opened after

the expiry of the relevant limitation period or an amnesty (реш. № 859/ 2001 г. от 10 септември 2001 г. г.д. № 2017/2000 г. на ВКС).

38. In a binding interpretative decision (тълк. реш. № 3 от 22 април 2004 г. на ВКС по тълк.д. № 3/2004 г., ОСГК), made on 22 April 2004 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 compensation awarded in respect of the non-pecuniary damage arising under section 2(1) or (2) of the SRDA should also cover non-pecuniary damage stemming from unlawful pre-trial detention imposed during the proceedings, whereas compensation for pecuniary damage resulting from such detention should be awarded separately. The reasons it gave for this conclusion were as follows:

> "Pre-trial detention is unlawful when it does not comply with the requirements of [the Code of Criminal Procedure].
>
> 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 resulting 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."

39. Persons seeking redress for damage resulting from decisions of the investigating and prosecuting authorities or the courts in circumstances falling within the scope of the SRDA have no claim under general tort law as the Act is a *lex specialis* and excludes the application of the general regime (section 8(1) of the Act; реш. № 1370/1992 г. от 16 декември 1992 г., по г.д. № 1181/1992 г. на ВС, IV г.о.).

THE LAW

I. ADMISSIBILITY OF THE APPLICATION

40. The Government submitted that the application was inadmissible because the applicant had failed to exhaust domestic remedies in respect of his complaints. They pointed out that the criminal proceedings against him had resulted in an acquittal and that the grievances which he raised before the Court thus fell within the ambit of section 2(2) of the SRDA. He

therefore could have claimed compensation for the damage sustained as a consequence of the criminal proceedings against him. 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(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.

41. The applicant conceded that, despite some practical difficulties, he could have brought a claim under section 2(2) of the SRDA. However, for him, such a claim would not have provided redress in respect of the complaints which he had raised before the Court. These complaints were all founded on his unlawful and unjustified detention between 10 and 14 July 2000, whereas a claim under section 2(2) of the SRDA would have been based exclusively on his eventual acquittal. In such proceedings the national courts would not have addressed the issues brought before the Court because they would have considered them irrelevant. Moreover, such a claim would have only been capable of providing compensation, not securing his release. Only remedies which could result in release could be considered effective with regard to deprivation of liberty. Similarly, a claim under section 2(2) could not have provided genuine redress for the breach of his freedom of expression.

42. 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..."

43. The Court has often stated that the rule of exhaustion of domestic remedies referred to in this provision requires applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. However, it is incumbent on a Government claiming non-exhaustion to indicate with sufficient clarity the remedies to which an applicant has not had recourse and to satisfy the Court that they were effective and available in theory and in practice at the relevant time, that is to say that they were accessible, were capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, as a recent relevant authority, *Kolev v. Bulgaria*, no. 50326/99, §§ 70 and 72, 28 April 2005).

44. The Court does not need to resolve the question whether a claim for compensation may be considered as an effective remedy in respect of a deprivation of liberty carried out in breach of Article 5 of the Convention (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; *Tám v. Slovakia*, no. 50213/99, §§ 44-53, 22 June 2004; *Andrei Georgiev v. Bulgaria*, no. 61507/00, §§ 73-79, 26 July 2007; and *Ladent v. Poland*, no. 11036/03, § 39, ECHR 2008-... (extracts), which imply that it may be; *Kokavecz v. Hungary* (dec.), no. 27312/95, 20 April 1999, which says that it is, after the impugned detention has ended; and *Tomasi v. France*, judgment of 27 August 1992, § 79, Series A no. 241-A; *Navarra v. France*, judgment of 23 November 1993, § 24, Series A no. 273-B; *Yağcı and Sargın v. Turkey*, judgment of 8 June 1995, § 44, Series A no. 319-A; *Włoch v. Poland*, no. 27785/95, § 90, ECHR 2000-XI; and *Haris v. Slovakia*, no. 14893/02, § 38, 6 September 2007, which say that it is not, even after the individual concerned has been released). Even if it were to be assumed that in certain situations it may be deemed such a remedy, the Court does not, for the reasons which follow, consider that it was available to the applicant in the instant case.

45. The Court notes at the outset that the Government pointed solely to section 2(2) of the SRDA and did not invoke any other provision of domestic law in support of their contention that the applicant had failed to exhaust domestic remedies. It is therefore not necessary for the Court to consider of its own motion whether some of the complaints should have been declared inadmissible in part on account of the applicant's failure to seek judicial review of his police detention under section 70(3) of the 1997 Ministry of Internal Affairs Act and then claim damages under section 1 of the SRDA (see paragraphs 31 and 33 above and, *mutatis mutandis*, *Steel and Others*, cited above, p. 2737, § 63, with further references).

46. Turning to the provision relied on by the Government, section 2(2) of the SRDA, the Court must firstly determine whether it was capable of remedying the applicant's grievance under Article 5 § 1 (c) of the Convention. On this point, it notes that the Supreme Court of Cassation's 2004 binding interpretative decision, which clarifies in respect of what facts compensation is due under this provision, refers to “pre-trial detention”, a term taken from the 1974 Code of Criminal Procedure and referring exclusively to one form of deprivation of liberty imposed in the course of criminal proceedings (see paragraph 36 above). However, in the case at hand the applicant was never placed in “pre-trial detention”. He was first in police detention under section 70(1) of the 1997 Ministry of Internal Affairs Act (see paragraphs 13 and 31 above) and then in detention ordered by a prosecutor under Article 152a § 3 of the 1974 Code of Criminal Procedure, pending a judicial determination of whether or not he should be placed in “pre-trial detention” (see paragraphs 17 and 34 above). When brought before a judge, he was released on bail (see paragraph 20 above). It thus seems unlikely that the domestic courts would have found that his deprivation of liberty fell within the ambit of section 2(2) of the SRDA and that he was entitled to compensation for it, despite his acquittal. The Government – who are under the burden of proving the effectiveness of the

remedies which they invoke – have not pointed to any domestic court judgment under section 2(2) of the SRDA in which compensation has been awarded in such circumstances. The Court is therefore not persuaded that a claim under this provision can be seen as an effective remedy in respect of the applicant's complaint under Article 5 § 1 (c) of the Convention.

47. The Court secondly finds that a claim under section 2(2) of the SRDA cannot be considered as capable of providing redress in respect of the applicant's complaint under Article 5 § 3 of the Convention that he was not brought promptly before a judge. It is clear from the domestic courts' case-law and from the 2004 interpretative decision of the Supreme Court of Cassation that in examining claims under this provision these courts confine their attention to whether the persons concerned have been acquitted and prior to such acquittal placed in "pre-trial detention", and do not review whether they have been brought promptly before a judge who would rule on the initial need for their detention (see paragraphs 37 and 38 above). It thus seems that section 2(2) of the SRDA does not create a cause of action in respect of the applicant's grievance under Article 5 § 3 of the Convention (see *Kolevi v. Bulgaria* (dec.), no. 1108/02, 4 December 2007; and, *mutatis mutandis*, *Pavletić v. Slovakia*, no. 39359/98, § 71, 22 June 2004). The Government have not identified any domestic court judgment in which compensation has been awarded on the basis of such facts.

48. Finally, the Court must examine whether a claim under section 2(2) of the SRDA can be said to constitute an effective remedy in respect of the alleged violation of Article 10 of the Convention. On this point, it notes that the applicant's allegation that his freedom of expression had been violated was based on his arrest and subsequent detention, not on the opening of criminal proceedings against him (see paragraphs 3 above and 68 below). The Court already found that such an action would not have been likely to result in an award of compensation for the arrest and detention. It could not therefore have remedied the applicant's Article 10 grievance in respect of these matters.

49. Furthermore, the Court notes that the subject matter of such a claim would have been confined to establishing whether the criminal proceedings against the applicant had resulted in an acquittal and whether in the course of these proceedings he had been kept in "pre-trial detention" (see paragraphs 37 and 38 above). There is no indication – and it has not been suggested by the Government – that in examining the claim the courts would have touched upon the substance of the applicant's freedom-of-expression grievance, as it is not part of the cause of action. The Court does not therefore consider that an action under section 2(2) of the SRDA would have amounted to an avenue whereby the applicant could have vindicated his freedom of expression as such (see, *mutatis mutandis*, *Peev v. Bulgaria*, no. 64209/01, §§ 72 and 73, 26 July 2007).

50. The Government's objection under Article 35 § 1 of the Convention must therefore be rejected.

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

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

52. The applicant alleged that his arrest and detention had been unlawful and arbitrary. He relied on Article 5 § 1 (c) of the Convention, which provides:

> "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."

53. Neither the Government nor the applicant made submissions in respect of the merits of the complaint.

54. The Court observes that in the present case the applicant was arrested and detained as the alleged perpetrator of two criminal offences: hooliganism and insult (see paragraphs 13 and 17 above). His deprivation of liberty was therefore an "arrest or detention" effected "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence" within the meaning of sub-paragraph (c) of Article 5 § 1.

55. For the Court, the main issue to be determined in the present case is whether this deprivation of liberty was "lawful" within the meaning of Article 5 § 1 (see *Lukanov v. Bulgaria*, judgment of 20 March 1997, § 41, *Reports* 1997-II). According to its settled case-law, this expression stipulates not only full compliance with the procedural and substantive rules of national law, but also requires that any deprivation of liberty be consistent with the purpose of Article 5 – to prevent persons from being deprived of their liberty in an arbitrary fashion (see, among many other authorities, *Steel and Others*, cited above, § 54). Seeing that paragraph 1 of this provision contains an exhaustive list of permissible grounds for deprivation of liberty, it must be interpreted strictly (see *Lukanov*, cited above, § 41).

56. Since under Article 5 § 1 compliance with domestic law is an integral part of the obligations of the Contracting States under the Convention, the Court, subject to the limits inherent in the logic of the

European system of protection, can and should exercise a certain power of review in this respect (ibid.; and *Tsirlis and Kouloumpas v. Greece*, judgment of 29 May 1997, § 57, *Reports* 1997-III).

57. The Court has often stated that a person may be detained under Article 5 § 1 (c) only on "reasonable suspicion" of his "having committed an offence". Apart from its factual side, which is most often in issue, the existence of such suspicion additionally requires that the facts relied on can be reasonably considered as behaviour criminalised under domestic law. Thus, there could clearly not be a "reasonable suspicion" if the acts held against a detained person did not constitute an offence at the time when they were committed (see *Włoch*, cited above, §§ 108 and 109).

58. The Court must therefore examine whether the applicant's arrest and detention on charges of hooliganism and insult were "lawful" within the meaning of Article 5 § 1 and whether his deprivation of liberty was based on a "reasonable suspicion" of his having committed an offence.

59. In so far as insult is concerned, the Court observes that, following the March 2000 amendments to the 1968 Criminal Code, at the relevant time it was a privately prosecutable offence and could not attract a sentence of imprisonment (see paragraph 30 above). The levelling of charges of insult could not therefore have served as a basis for the applicant's detention between 11 and 14 July 2000 under Article 152a § 3 of the 1974 Code of Criminal Procedure (see, as an example to the contrary, *Douiyeb v. the Netherlands* [GC], no. 31464/96, § 46, 4 August 1999). By making an order to this effect the Pleven District Prosecutor's Office blatantly ignored the clear and unambiguous provisions of domestic law. It is not for the Court to speculate whether this happened because that Office was not aware of the March 2000 amendments to the 1968 Criminal Code or for other reasons. As regards the immediately preceding period, when the applicant was in police detention, the Court notes that section 70(1)(1) of the 1997 Ministry of Internal Affairs Act does not distinguish between privately and publicly prosecutable offences (see paragraph 31 above). However, it is apparent from the interpretation given to this provision by the Supreme Administrative Court that the powers which it bestows upon the police are ancillary to their duty to investigate crime (see paragraph 32 above). It is clear that the police have no power to conduct preliminary investigations in respect of privately prosecutable offences such as insult. The applicant's police detention on this basis was therefore also unlawful.

60. As regards hooliganism, the Court observes that the applicant's actions consisted of the gathering of signatures calling for the resignation of the Minister of Justice and displaying two posters calling him a "top idiot". When examining the criminal charges against the applicant the Supreme Court of Cassation specifically found that these actions had been entirely peaceful, had not obstructed any passers-by and had been hardly likely to provoke others to violence. On this basis, it concluded that they did not

amount to the constituent elements of the offence of hooliganism and that in convicting the applicant the Pleven District Court had "failed to give any arguments" but had merely made blanket statements in this respect (see paragraphs 25 and 26 above). Nor did the orders for the applicant's arrest under section 70(1) of the 1997 Ministry of Internal Affairs Act and for his detention under Article 152a § 3 of the 1974 Code of Criminal Procedure – which were not reviewed by a court – contain anything which may be taken to suggest that the authorities could reasonably believe that the conduct in which he had engaged constituted hooliganism, whose elements were comprehensively laid down in the Supreme Court's binding interpretative decision of 1974 (see paragraphs 28 and 29 above, as well as *Lukanov*, §§ 43 and 44; *mutatis mutandis*, *Steel and Others*, § 64, and, as an example to the contrary, *Włoch*, §§ 111 and 112, all cited above).

61. On the basis of the foregoing, the Court concludes that the applicant's deprivation of liberty between 10 and 14 July 2000 did not constitute a "lawful detention" effected "on reasonable suspicion" of his having committed an offence.

62. There has therefore been a violation of Article 5 § 1 of the Convention.

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

63. The applicant complained that after his arrest he had not been brought promptly before a judge. He relied on Article 5 § 3 of the Convention, which provides, in so far as relevant:

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

64. Neither the Government nor the applicant made submissions in respect of the merits of the complaint.

65. The Court observes that Article 5 § 3 requires that an arrested individual be brought promptly before a judge or judicial officer, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. While promptness has to be assessed in each case according to its special features (see, among others, *Aquilina v. Malta*, [GC], no. 25642/94, § 48, ECHR 1999-III), the strict time constraint imposed by this requirement of Article 5 § 3 leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (see, recently, *McKay v. the United Kingdom* [GC], no. 543/03, § 33, ECHR 2006-X).

66. In the present case the applicant was brought before a judge three days and twenty-three hours after his arrest (see paragraphs 13 and 20 above). In the circumstances, this does not appear prompt. He was arrested on charges of a minor and non-violent offence. He had already spent twenty-four hours in custody when the police proposed to the prosecutor in charge of the case to request the competent court to place the applicant in pre-trial detention. Exercising his powers under Article 152a § 3 of the 1974 Code of Criminal Procedure (see paragraph 34 above), the prosecutor ordered that he the applicant be detained for a further seventy-two hours, without giving any reasons why he considered it necessary, save for a stereotyped formula saying that there was a risk that he might flee or re-offend. It does not seem that when thus prolonging the applicant's detention the prosecutor took appropriate steps to ensure his immediate appearance before a judge, as mandated by the provision cited above (see paragraph 17 above). Instead, the matter was brought before the Pleven District Court at the last possible moment, when the seventy-two hours were about to expire (see paragraph 20 above). The Court sees no special difficulties or exceptional circumstances which would have prevented the authorities from bringing the applicant before a judge much sooner (see, *mutatis mutandis*, *Koster v. the Netherlands*, judgment of 28 November 1991, § 25, Series A no. 221; and *Rigopoulos v. Spain* (dec.), no. 37388/97, ECHR 1999-II). This was particularly important in view of the dubious legal grounds for his deprivation of liberty.

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

IV. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

68. The applicant complained that he had been arrested and detained for organising a public collection of signatures. In his view, these measures had amounted to an unjustified interference with his freedom of expression and had had a chilling effect on its future exercise. He relied on Article 10 of the Convention, which reads, in so far as relevant:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

69. Neither the Government nor the applicant made submissions in respect of the merits of the complaint.

70. For the Court, it is clear that in gathering signatures calling for the resignation of the Minister of Justice and in displaying two posters making statements about the Minister the applicant was exercising his right to freedom of expression (see, *mutatis mutandis*, *Appleby and Others v. the United Kingdom*, no. 44306/98, § 41, ECHR 2003-VI). His arrest and subsequent detention for doing so therefore amounted, quite apart from the opening of criminal proceedings against him, to an interference with the exercise of this right (see *Chorherr v. Austria*, judgment of 25 August 1993, § 23, Series A no. 266-B; and *Steel and Others*, cited above, §§ 92 and 93).

71. Such interference gives rise to a breach of Article 10 unless it can be shown that it was "prescribed by law", pursued one or more legitimate aim or aims as defined in paragraph 2 and was "necessary in a democratic society" to attain them.

72. The Court has already found that the applicant's arrest and detention were not "lawful" within the meaning of Article 5 § 1 (c). Since the requirement under Article 10 § 2 that an interference with the exercise of freedom of expression be "prescribed by law" is similar to that under Article 5 § 1 that any deprivation of liberty be "lawful" (see *Steel and Others*, cited above, p. 2742, § 94; and *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 34 *in fine*, ECHR 1999-VIII), it follows that the applicant's arrest and detention were not "prescribed by law" under Article 10 § 2.

73. Furthermore, assuming that the measures taken against the applicant may be taken to pursue the legitimate aims of preventing disorder and protecting the rights of others (see *Steel and Others*, cited above, § 96), they were clearly disproportionate to these aims. The events must be seen in the context of a political debate which, although, critical of the Government, was not violent. Thus, as found by the Supreme Court of Cassation, the applicant's actions on 10 July 2000 were entirely peaceful, did not obstruct any passers-by and were hardly likely to provoke others to violence (see paragraphs 25 and 26 above, and *Steel and Others*, cited above, § 110). However, the authorities in Pleven chose to react vigorously and on the spot in order to silence the applicant and shield the Minister of Justice from any public expression of criticism. They also kept the applicant in custody for an inordinate amount of time – three days and twenty-three hours – before bringing him before a judge who ordered his release. These measures were clearly not "necessary in a democratic society". In a democratic system the actions or omissions of the Government and of its members must be subject to close scrutiny by the press and public opinion. Furthermore, the dominant position which the Government and its members occupy makes it necessary for them – and for the authorities in general – to display restraint in resorting to criminal proceedings, and the associated custodial measures,

particularly where other means are available for replying to the unjustified attacks and criticisms of their adversaries (see, *mutatis mutandis*, *Castells v. Spain*, judgment of 23 April 1992, § 46, Series A no. 236).

74. There has therefore been a violation of Article 10 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. 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

76. The applicant claimed 4,000 euros (EUR) in respect of non-pecuniary damage.

77. The Government considered that the finding of violations amounted to sufficient redress for any damage suffered by the applicant. The amount of compensation, if any, had to be based on the specific circumstances and be in line with the principles of equity.

78. The Court considers that the applicant must have endured distress and frustration on account of his unlawful deprivation of liberty for exercising his right to freedom of expression. This was aggravated by the amount of time he spent in detention before being brought before a judge. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards him, in respect of non-pecuniary damage, the full amount claimed. To that amount should be added any tax that may be chargeable.

B. Costs and expenses

79. The applicant sought the reimbursement of EUR 3,000 incurred in lawyers' fees for the proceedings before the Court. He submitted a fees agreement between him and his lawyer and a time-sheet.

80. In the Government's view, the claim was exorbitant. They considered that in making an award under this head the Court had to bear in mind the living standards in Bulgaria.

81. According to the Court's settled case-law, applicants are entitled to the reimbursement of their costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, having regard to the information in its possession and the above criteria, and noting that the applicant has been paid EUR 850 in legal aid, the Court considers it

reasonable to award the sum of EUR 2,000, plus any tax that may be chargeable to the applicant.

C. Default interest

82. 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 application admissible;

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

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

4. *Holds* that there has been a violation of Article 10 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final 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 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two 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;

6. *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