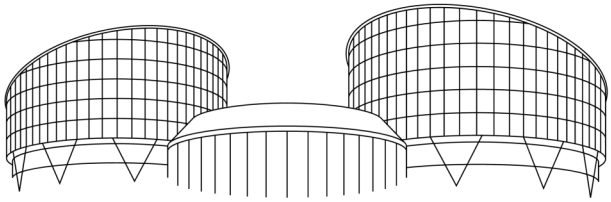

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF PENEV v. BULGARIA

(Application no. 20494/04)

JUDGMENT

STRASBOURG

7 January 2010

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 Penev v. Bulgaria,

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre, *judges,*
Pavlina Panova, ad hoc *judge,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 1 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 20494/04) 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 Nikolay Anatoliev Penev ("the applicant"), on 8 June 2004.

2. The applicant was represented by Mrs Z. Stefanova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Mrs N. Nikolova, of the Ministry of Justice.

3. The applicant alleged that he had not had the opportunity to defend himself against the charge he had been convicted of.

4. On 6 May 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. Mrs Zdravka Kalaydjieva, the judge elected in respect of Bulgaria, withdrew from sitting in the case. On 30 January 2009 the Government appointed in her stead Mrs Pavlina Panova as an ad hoc judge (Article 27 § 2 of the Convention and Rule 29 § 1 of the Rules of the Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1946 and lives in Sofia.

A. Activity of the applicant as trustee in insolvency of Plama

7. In July 1998 the Plama oil refinery, a joint stock company with its main office in Pleven ("Plama" or "the company"), was declared insolvent. On 18 May 1999 the applicant was appointed its trustee in insolvency.

8. On 21 May 1999 Mrs L.T., a former trustee of Plama, lodged a statement of claim on behalf of the company in the Pleven Regional Court.

9. On 22 June 1999 the Pleven Regional Court advised the applicant to specify whether he would confirm this action. The applicant decided to retain a lawyer, Mr Y.N. On 5 July 1999 he obtained the authorisation of the insolvency court to pay Mr Y.N. a fee of 150,000 Bulgarian levs (BGN), the equivalent of approximately 76,900 euros (EUR), for Plama's legal representation in the proceedings.

10. On 7 July 1999 Mr Y.N. attended a court hearing and requested in writing that the proceedings be terminated, since the action had been brought by Mrs L.T., who did not represent Plama at the time. Upon request by the defendant, the case was transferred to the Sofia City Court where the proceedings were subsequently terminated.

11. Meanwhile, the creditors of Plama agreed upon a plan for the company's recovery. On 8 July 1999 the plan was approved by the insolvency court and the applicant's functions as trustee in insolvency were terminated. However, he retained some supervisory functions.

12. On 15 July 1999 the applicant signed two orders for the transfer of BGN 150,000 to Mr Y.N.'s bank account.

B. Indictment of the applicant and judgment of the Pleven District Court

13. Later in 1999 an investigation was opened in relation to the applicant's actions. On 7 June 2001 the prosecution filed an indictment against him. He was indicted with exceeding his powers (Article 282 § 2 of the Criminal Code, see paragraphs 24 and 26 below) in that, acting as an official with whom powers were vested by virtue of law (*длъжностно лице*), he had retained a lawyer to represent the company before obtaining the insolvency court's authorisation to pay the fee agreed upon, and that on 15 July 1999 he had ordered that the sum of BGN 150,000 be paid to Mr Y.N., even though by that time he had ceased to act as a trustee in insolvency of the company and was no longer authorised to act for it.

14. On an unspecified date Plama was constituted as a civil party in the criminal proceedings against the applicant and brought an action for damages in the amount of BGN 150,000.

15. On 5 December 2001 the Pleven District Court convicted the applicant as charged, sentenced him to four years' imprisonment and allowed in full Plama's civil claim.

C. Judgment of the Pleven Regional Court

16. The applicant lodged an appeal against the judgment of the Pleven District Court.

17. On 18 December 2002 the verdict was upheld by the Pleven Regional Court, which dismissed an objection by the applicant that he had not had an official capacity (*длъжностно лице*). It held that it was sufficient that as a trustee he had assumed managerial functions and responsibility for the company's assets.

18. On the first charge against the applicant, that he had exceeded his powers in retaining a lawyer to represent the company, the Regional Court found that it had certainly not been necessary to retain a lawyer, provided that the only thing the latter had done had been to request the termination of the proceedings. Thus, the applicant had indebted the company with the lawyer's fee whereas it had not received any gain in return. The applicant had not therefore acted in accordance with the rights and powers vested in him as a trustee but with the aim of enriching Mr Y.N. and inflicting a financial loss on Plama.

19. Similarly, the Regional Court found that the applicant had exceeded his powers in ordering the payment of Mr Y.N.'s fees.

D. Judgment of the Supreme Court of Cassation

20. The applicant appealed in cassation. He argued that he had not acted as an official and that, therefore, he could not have committed an offence under Article 282 of the Criminal Code. He argued, furthermore, that he had acted in accordance with the law and had not unnecessarily indebted Plama.

21. The Supreme Court of Cassation delivered a judgment on 10 December 2003. It confirmed the lower courts' conclusion that the applicant had had an official capacity. However, it held that in retaining a lawyer and ordering the payment of the legal fees he had not exceeded his powers as a trustee. Retaining a lawyer had been within his powers and, as he had continued to exercise supervisory functions after the adoption of the plan for Plama's recovery, he had had the power to order the payment. Furthermore, Article 282 of the Criminal Code concerned offences against the proper exercise of State power, whereas it had been alleged that the applicant had acted against the interests of a private company. It followed that he could not have committed an offence under Article 282 of the Criminal Code. Therefore, on the charges of having exceeded his powers, the Supreme Court of Cassation acquitted the applicant.

22. Nevertheless, the Supreme Court of Cassation found that as the applicant had deliberately entered into a contract which was disadvantageous to the company he was guilty of an offence under Article 220 § 1 of the Criminal Code (see paragraph 25 below). In the

domestic court's view, returning such an alternative verdict was procedurally lawful, *per argumentum a contrario*, under Article 285 § 1 of the Code of Criminal Procedure, since it was based on the circumstances underlying the initial charges and the applicant had defended himself in respect of those circumstances throughout the proceedings. Only the legal characterisation of the facts had changed.

23. Accordingly, the Supreme Court of Cassation convicted the applicant of deliberately entering into a disadvantageous contract and thus inflicting substantial damage on Plama, and sentenced him to a suspended term of one year's imprisonment. It affirmed the lower courts' judgments in the part allowing Plama's civil claim. That judgment was final.

II. RELEVANT DOMESTIC LAW

A. Criminal Code 1968

24. Article 282 § 1 of the Criminal Code, as in force at the relevant time, provided that an official in whom certain powers were vested by virtue of law (*длъжностно лице*), who breached or failed to fulfil his duties, or exceeded his power, with the aim of obtaining a benefit for himself or a third party, or of causing damage to others, was to be punished by up to five years' imprisonment or correctional labour. Article 282 § 2 envisaged imprisonment of up to eight years where considerable material damage had resulted from these acts or the offender had occupied a senior managerial post.

25. Under Article 220 § 1 of the Criminal Code, an official in whom certain powers are vested by virtue of law (*длъжностно лице*), who deliberately enters into a disadvantageous contract which can result in substantial damage to the company or organisation he represents, is to be punished by imprisonment of up to five years.

26. In accordance with the structure of the Criminal Code of 1968, Article 282 was at the relevant time classified as an offence against the functioning of State bodies and public organisations, while Article 220 was considered an offence against the economy.

B. Code of Criminal Procedure 1974

27. Article 285 § 1 of the Code of Criminal Procedure 1974, in force until April 2006, required that the prosecution file a new indictment in cases where, at the trial stage of the proceedings, it transpired that there were grounds to substantially amend the factual basis of the charges, or to bring charges which required a more severe punishment. Under Article 285 § 3, in cases where a new indictment was necessary and the parties had so

requested, the domestic court had to adjourn the hearing for further argument.

28. Identical provisions are contained in Article 287 §§ 1 and 3 of the new Code of Criminal Procedure, in force from April 2006.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (a) AND (b) OF THE CONVENTION

29. The applicant complained that he had not been given the opportunity to defend himself against the charge under Article 220 of the Criminal Code, after the Supreme Court of Cassation adopted a new legal characterisation of the facts of the case. He relied on Article 6 §§ 1 and 3 (a) and (b) of the Convention, which read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> ..."

30. The Government argued that the Supreme Court of Cassation had correctly interpreted the relevant facts. In their view, the exact legal characterisation of the offence the applicant had been convicted of was of little importance, as long as the factual basis of the conviction remained unchanged.

31. The applicant contested these arguments

A. Admissibility

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

B. Merits

33. The Court reiterates that Article 6 § 3 (a) of the Convention affords the defendant the right to be informed, in detail, not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 51, ECHR 1999-II, and *Drassich v. Italy*, no. 25575/04, § 34, 11 December 2007). Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (see *Pélissier and Sassi*, cited above, § 53).

34. The scope of the above provision must be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. The Court has held that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the domestic courts might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (see ibid., § 52).

35. Furthermore, as regards the complaint under Article 6 § 3 (b) of the Convention, the Court considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence.

36. The Court will therefore examine the present complaint under sub-paragraphs (a) and (b) of Article 6 § 3 of the Convention, taken together with paragraph 1 of that Article, which provides for a fair trial.

37. The Court notes that the applicant was indicted under Article 282 § 2 of the Criminal Code of having exceeded his powers (see paragraph 13 above). There is nothing to suggest that a charge of deliberately entering into a disadvantageous contract (Article 220 § 1 of the Criminal Code) was considered at any time during the investigation.

38. There is likewise no indication that the Pleven District Court and the Pleven Regional Court considered a charge against the applicant under Article 220 § 1 of the Criminal Code.

39. In the Court's view, therefore, the applicant could not have been aware that the Supreme Court of Cassation might return an alternative verdict under Article 220 § 1 of the Criminal Code.

40. The Court observes that under Bulgarian law the offences of acting in excess of power (Article 282 § 2 of the Criminal Code, see paragraph 24 above) and of deliberately entering into a disadvantageous contract (Article 220 § 1 of the Code, see paragraph 25 above) are different. In particular, under Article 282 § 2 the prosecution has to prove that the accused (1) breached or failed to fulfil his duties, or exceeded his powers, and (2) acted with the aim of obtaining a benefit for himself or a third party,

or of causing damage to others (see paragraph 24 above). Under Article 220 § 1, on the other hand, the prosecution has to show that the accused (1) acted deliberately and (2) entered into a disadvantageous contract which could result in substantial damage to the company or organisation (see paragraph 25 above).

41. The Court observes further that the elements of the latter offence were never debated throughout the applicant's trial as it was only through the final judgment of the Supreme Court of Cassation that he became aware of the new legal characterisation of the facts.

42. The Court does not accept the Government's contention (see paragraph 29 above) that the legal characterisation of the offence was of little importance as long as the alternative conviction was based on the same facts. It reiterates that the Convention requires that the accused be informed in detail not only of the acts he is alleged to have committed, that is, of the facts underlying the charges, but also of the legal characterisation given to them (see paragraph 32 above).

43. The Court is therefore of the view that the Supreme Court of Cassation should have given the applicant an opportunity to defend himself against the new charge. It could, for example, adjourn the hearing for further argument, or, alternatively, allow the applicant the opportunity to make written submissions on the new charge. However, it did none of these, as it was not obliged to, since Article 285 § 3 of the Code of Criminal Procedure 1974 (see paragraph 27 above) only required the adjournment of the proceedings in cases of substantial modification of the factual basis of the charges, or of new charges carrying a more severe punishment.

44. In the light of these considerations the Court concludes that the applicant was not informed in detail of the nature and the cause of the accusation against him, that he was not afforded adequate time and facilities for the preparation of his defence, and that he did not receive a fair trial. The absence of a clear requirement in the applicable law to allow the accused to defend himself against the modified charges was undoubtedly decisive in that aspect.

45. Consequently, there has been a violation of paragraph 3 (a) and (b) of Article 6 of the Convention, taken together with paragraph 1 of that Article.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed EUR 80,000 in compensation for non-pecuniary damage.

48. The Government did not comment on the matter.

49. The Court, ruling on an equitable basis, awards the applicant EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

50. The applicant claimed EUR 2,000 for fees charged by his lawyers for the proceedings before the Court. In support of this claim, he submitted a contract for legal representation by Mrs Z. Stefanova and a declaration signed by him in respect of the fees charged by the lawyer who had prepared his initial application to the Court.

51. The applicant also claimed EUR 110 for expenses for translation and postage. He submitted receipts for part of this sum.

52. The Government did not comment.

53. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

54. 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 2,000 covering costs and expenses under all heads.

C. Default interest

55. 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 6 § 3 (a) and (b), taken together with Article 6 § 1 of the Convention, in that the applicant was not informed in detail of the nature and cause of the accusation against him, was not afforded adequate time and facilities for the preparation of his defence and did not receive a fair trial;

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 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of pecuniary and 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;

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

Done in English, and notified in writing on 7 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President