FIRST SECTION

CASE OF PEKOV v. BULGARIA

(Application no. 50358/99)

JUDGMENT

STRASBOURG

30 March 2006

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 Pekov v. Bulgaria,

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

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mr K. HAJIYEV, *judges*,
and Mr S. QUESADA, *Deputy Section Registrar*,

Having deliberated in private on 9 March 2006,

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

PROCEDURE

1. The case originated in an application (no. 50358/99) 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 Rumen Genkov Pekov ("the applicant"), on 1 March 1999.

2. The applicant was represented by Ms T. Krumova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Kotzeva, of the Ministry of Justice.

3. On 8 September 2003 the Court decided to communicate the application to the Government. 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.

4. On 21 March 2005 the Court decided to communicate to the Government an additional complaint in respect of the length of the criminal proceedings against the applicant.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959 and, at the time of the latest information from him, lived in Burgas.

6. In 1993 the applicant became the chairman of the board of a credit and savings cooperative (popular bank) – Popular Bank-Pekov – having its registered office in Burgas.

7. In 1994 the applicant became the chairman of the board of the Union of the Popular Banks, having its registered office in Burgas.

A. The criminal proceedings against the applicant

8. On an unspecified date in mid-1995 criminal proceedings were opened against the applicant in relation with his duties as chairman of the board of Popular Bank-Pekov.

9. On 15 August 1995 the investigation authorities requested the Nesebar District Court to attach certain assets belonging to the applicant and to Popular Bank-Pekov, with a view to securing their forfeiture in the event the applicant was convicted. In a decision of 21 August 1995 the Nesebar District Court allowed that request.

10. On 25 August 1995 an investigator at the Burgas Regional Investigation Service attached further property belonging to Popular Bank-Pekov.

11. On 29 August 1995 the applicant was charged with having engaged in banking business without the requisite licence, contrary to Article 252 § 2 of the Criminal Code ("the CC").

12. On 3 January 1996 new charges were preferred against the applicant. It was alleged that he had misappropriated 65,000,000 old Bulgarian levs (BGL) from the deposits made in Popular Bank-Pekov, contrary to Article 203 § 1 of the CC.

13. It seems that witnesses were questioned on 4 January, 30 and 31 July, 17 and 23 September, 17 and 22 October, 4 November, and 6, 9, 10 and 15 December 1996, 14 and 18 January, 20 and 28 February, 20 March, and 4 and 7 August 1997. On an unspecified date an accounting expert report was drawn up.

14. On 4 February 1998 the applicant was charged anew under Articles 202 § 2, 219 § 1, 252 § 2 and 282 § 2 of the CC.

15. On 7 July 1998 the Burgas Regional Prosecutor's Office decided to drop the charges under Articles 203 § 1 and 219 § 1 of the CC. On 15 December 1998 its decision was quashed by the Burgas Appellate Prosecutor's Office insofar as it concerned the charges under Article 219 § 1 of the CC, and upheld, insofar as it concerned the charges under Article 203 § 1 of the CC.

16. On 10 July 2001 the applicant was charged anew under Articles 201, 202 §§ 1 and 2, 219 § 1, 252 §§ 1 and 2, and 282 § 2 of the CC.

17. On 18 December 2001 the charges against the applicant were amended once again to include counts under Articles 201, 202 §§ 1 and 2, 219 § 1, 252 §§ 1 and 2, and 282 § 2 of the CC.

18. On 3 July 2003 the applicant was charged anew under Articles 202 § 2, 219 § 4, 252 § 2 and 282 § 2 of the CC.

19. On 8 July 2003 the Burgas Regional Prosecutor's Office submitted an indictment against the applicant to the Burgas Regional Court.

20. The first hearing, listed for 27 October 2003, was adjourned at the request of the applicant, who presented a doctor's note to the effect that he was ill and could not attend, and argued that the copy of the indictment which had been sent to him had pages missing. Another reason for the adjournment was that most of the prosecution's witnesses did not show up.

21. A hearing scheduled for 12 January 2004 was adjourned by reason of the failure of a number of witnesses to show up. The court ordered a new accounting expert report to be drawn up by three experts.

22. A hearing planned for 5 April 2004 could not take place because the accounting expert report had not yet been drawn up and a number of witnesses were absent. The court fined some of the missing witnesses and ordered that they be brought by force to the next hearing.

23. At the next hearing, which took place on 12, 13 and 14 July 2004, the applicant requested that the case be remitted for the correction of alleged procedural mistakes made during the preliminary investigation. His request was denied. The court heard the applicant and approximately fifteen witnesses. However, as a number of other witnesses were absent, the court adjourned the case. It gave leave to the parties to ask the experts additional questions.

24. A hearing took place on 15 November 2004. The court heard several witnesses, but as a number of others were absent, it adjourned the case.

25. A hearing listed for 7 February 2005 was adjourned at the request of the applicant, who presented a doctor's note to the effect that he was ill and could not attend.

26. A hearing took place on 25 April 2005. The court heard several witnesses. The prosecution stated that certain amounts allegedly misappropriated and squandered by the applicant had been wrongly noted down in the indictment by reason of an error in the calculations. In reply the applicant submitted that the correction of the mistakes in the indictment constituted an amendment of the charges against him and requested an adjournment in order to prepare his defence. The court agreed and adjourned the case to 27 April 2005.

27. On 27 April 2005 the court heard one witness and adjourned the case at the request of the applicant, holding that in view of the large volume of written evidence, he should be given more time to prepare his defence after the amendment of the charges, even though this amendment consisted only in the correction of an error in the amounts noted down in the indictment.

28. At the time of the latest information from the parties (10 May 2005) the criminal proceedings against the applicant were still pending before the Burgas Regional Court; a hearing had been listed for 20 June 2005.

B. The applicant's pre-trial detention and house arrest

29. On 29 August 1995, when the applicant was first charged, the investigator dealing with his case ordered him to pay bail in the amount of BGL 500,000. The applicant appealed to the Burgas District Prosecutor's Office, stating that this sum was too high and he could not pay it. In a decision of 11 September 1995 the Burgas District Prosecutor's Office dismissed his appeal, reasoning that he owned sufficient assets and that the amount was justified in view of the gravity of the offence alleged against him. On the appeals of the applicant that decision was upheld by the Burgas Regional Prosecutor's Office, but later, on 28 November 1995, varied by the Chief Prosecutor's Office, which reduced the bail amount to BGL 250,000.

30. On 3 January 1996, when preferring new charges of misappropriation of funds against the applicant, the investigator of the Burgas Regional Investigation Service in charge of the case ordered his pre-trial detention. She noted, without providing further detail, that the offence alleged against him was particularly serious, and that there was a risk that he could imperil the investigation. The investigator's decision was confirmed by a prosecutor of the Burgas Regional Prosecutor's Office the same day.

31. On the appeal of the applicant, on 5 January 1996 the Burgas Regional Prosecutor's Office decided to release him on bail, citing his bad health requiring special medical treatment. It seems that the applicant paid the bail amount – BGL 250,000 – the same day and was released.

32. On 6 May 1996 the investigator in charge of the applicant's case once again ordered his pre-trial detention. She reasoned that he had failed to show up for questioning despite having been duly summoned on 26 March 1996. Moreover, on 2, 3 and 4 April 1996 it had proved impossible to find him at the address indicated by him in Sofia. The applicant had also failed to report to the Burgas Regional Investigation Service every second Thursday of the month, as ordered by the investigator. It could thus be inferred that he had failed to show up without good cause and that it was therefore necessary to take him into custody. That decision was confirmed by a prosecutor of the Burgas Regional Prosecutor's Office on 16 May 1996.

33. In May and June 1996 the police conducted initially a local and afterwards a nation-wide search for the applicant.

34. On 5 July 1996 the applicant was arrested. It was found that on 16 May 1996 he had changed his address without notifying the investigation authorities.

35. The applicant appealed against his pre-trial detention to the Burgas Regional Prosecutor's Office. In her observations in reply to the appeal the investigator in charge of his case stated that the his pre-trial detention was

mandatory, as he had been charged with a "serious intentional offence" and there were no reasons to apply the exception provided for by paragraph of 2 of Article 152 of the Code of Criminal Procedure ("the CCP").

36. On 6 August 1996 the Burgas Regional Prosecutor's Office upheld the decision to keep the applicant in custody. It found that he had failed to notify the investigator in charge of his case of his change of address and to report to the Burgas Regional Investigation Service on several dates despite the instructions to that effect. On the other hand, the applicant's state of health did not require his release. In consideration of this and of the fact that the applicant had been charged with an offence under Article 203 § 1 of the CC, i.e. a serious intentional offence, it was justified to maintain him in detention.

37. On the appeal of the applicant, the Chief Prosecutor's Office upheld this decision on 13 September 1996.

38. During the following months the applicant underwent treatment in the prison hospital and was examined several times by medical doctors.

39. On 2 October 1996 the Burgas Regional Prosecutor's Office decided to release the applicant from pre-trial detention and place him under house arrest. It found that his remaining in custody could have an irreversible negative impact on his health. The attempts to treat him in the prison hospital had proved futile, whereas his state of health required immediate specialised hospital treatment.

40. On 10 October 1996 the applicant informed the investigator in charge of his case that he had to be admitted to a hospital in Sofia. He advised the investigator of his address in Sofia and obliged to report to the Burgas Regional Investigation Service every second and fourth Thursday of the month.

41. On 4 February 1998 and 10 July and 18 December 2001 the investigator in charge of the applicant's case confirmed his house arrest of her own motion, without giving reasons.

42. During the period when the applicant was under house arrest, he changed his address several times for health reasons and because of difficulties in finding employment, each time notifying the investigator in charge of his case by mail.

43. The applicant was released from house arrest on 3 July 2003.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The offences with which the applicant was charged at the time of his pre-trial detention and house arrest

44. Article 201 of the CC makes it an offence for an official or a manager to misappropriate public or private funds which are in his or her

possession in his or her professional capacity or which he or she has been entrusted with to keep secure or administer. By Article 202 § 2 (1) of the CC, as in force at the relevant time, if the misappropriated funds were in large amounts, between three and fifteen years' imprisonment could be imposed. If the misappropriated funds were in particularly large amounts and the case was particularly aggravated, the punishment ranged between ten and thirty years' imprisonment (Article 203 § 1 of the CC, as in force at the relevant time).

45. Article 219 § 1 of the CC makes it an offence for an official or a manager to fail to take due care in managing or keeping secure the assets entrusted to him or her, provided this failure results in substantial losses, destruction or dissipation of these assets, or other substantial damage to the undertaking or the economy. At the relevant time the punishment could be up to three years' imprisonment.

46. Article 252 § 1 of the CC makes it an offence to engage in, *inter alia*, banking business without the requisite licence. By paragraph 2 of that Article, as in force at the relevant time, if the perpetrator had obtained substantial illegal gains therefrom, between one and six years' imprisonment could be imposed.

47. Article 282 § 1 of the CC makes it an offence for an official or a manager to, *inter alia*, abuse his powers or rights in order to provide a financial benefit to himself or another, provided that this leads to non-negligible harmful consequences. By paragraph 2 of that Article, as in force at the material time, if the harmful consequences were substantial, the punishment ranged between one and eight years' imprisonment.

B. Pre-trial detention

1. Power to order pre-trial detention

48. At the relevant time and until the reform of the CCP of 1 January 2000 an arrested person was brought before an investigator who decided whether or not he or she should be remanded in custody. The investigator's decision was subject to approval by a prosecutor. The role of investigators and prosecutors under Bulgarian law has been described in paragraphs 25-29 of the Court's judgment in the case of *Nikolova v. Bulgaria* ([GC], no. 31195/96, ECHR 1999-II).

2. Legal criteria and practice regarding the requirements and justification for pre-trial detention

49. The relevant provisions of the CCP and the relevant case-law of the Bulgarian Supreme Court have been summarized in paragraphs 38 and 39 of

the Court's judgment in the case of *Shishkov v. Bulgaria* (no. 38822/97, ECHR 2003-I (extracts)).

C. House arrest

50. A summary of the relevant domestic law may be found in paragraphs 51-55 of the Court's judgment in the case of *Vachev v. Bulgaria* (no. 42987/98, ECHR 2004-VIII (extracts)).

D. Judicial review of pre-trial detention

51. The provisions governing judicial review of pre-trial detention at the time when the applicant was held in such are summarised in paragraphs 72-76 of the Court's judgment in the case of *Assenov and Others v. Bulgaria* (judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII) and paragraphs 33-36 of the Court's judgment in *Nikolova* (cited above).

52. Article 152a of the CCP, as enacted in August 1997 and in force until the end of 1999, read as follows:

Judicial review of pre-trial detention as a measure to secure appearance, and preliminary detention

"1. The detainee shall be immediately provided with a possibility of filing an appeal with [the competent court] against the [imposition of detention]. [The appeal must be filed] not later than seven days after the [imposition of detention]. The court shall consider the appeal in an open hearing to which the [detainee] shall be summoned. The hearing shall take place not later than three days after the receipt of the appeal at the court.

2. The appeal shall be filed though the organ which has ordered the detention ... .

3. The court['s ruling shall not be] subject to appeal ..."

E. Decision No. 1 of 1997 of the Assembly of the Criminal Divisions of the Supreme Court of Cassation

53. On 21 March 1997 the Assembly of the Criminal Divisions of the Supreme Court of Cassation decided to request the Constitutional Court to rule on the compatibility of Article 152 of the CCP, governing pre-trial detention, with, *inter alia*, Article 5 of the Convention. It reasoned that by virtue of Article 5 § 4 of the Constitution the Convention was incorporated into Bulgarian law and that all statutory provisions should therefore be in compliance with it. It also stated that when deciding cases before them the Bulgarian courts should take into account the case-law of the European

Court of Human Rights (опред. № 1 от 21 март 1997 г. по н.д. № 1/ 1997 г. на ОСНК на ВКС).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 3 AND 4 OF THE CONVENTION

54. The applicant complained that upon his arrest he had not been brought before a judge or a judicial officer, as required by Article 5 § 3 of the Convention. He further complained that he had been kept in custody despite the lack of relevant and sufficient reasons justifying his detention, in breach of the same provision. 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 and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

55. The applicant also complained that, contrary to Article 5 § 4 of the Convention, he could not obtain full-fledged judicial review of his pre-trial detention, and that he had not had an opportunity to take proceedings by which the lawfulness of his house arrest could be decided. Article 5 § 4 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

1. Alleged failure to comply with the six-months' time-limit under Article 35 § 1 of the Convention

56. The Government submitted that the applicant's complaints relating to his pre-trial detention had been introduced out of the six-months' time-limit under Article 35 § 1 of the Convention. They pointed out that he had been kept in such detention between 3 and 5 January 1995 and later between 5 July and 2 October 1996, whereas his application to the Court had been registered by the Court's Registry on 23 June 1999.

57. The applicant replied that no change in his situation had occurred on 2 October 1996, when he had been released from detention and put under house arrest, as he had continued to be deprived of his liberty. This

deprivation of liberty had been a continuing situation, which had come to an end only on 1 January 2000, when the amendments to the CCP had come into force. He had lodged his application well before that.

58. The Court notes at the outset that the applicant was first taken into custody on 3 January 1996 and released on bail two days later, on 5 January 1996 (see paragraphs 30 and 31 above). It is beyond doubt that this deprivation of liberty ended more than six months before the introduction of the application on 1 March 1999 and cannot therefore be taken into consideration.

59. The Court further notes that the applicant was arrested for a second time on 5 July 1996 and put in pre-trial detention. On 2 October 1996 he was released from such detention and placed under house arrest, which was eventually lifted on 3 July 2003 (see paragraphs 34, 39 and 43 above).

60. The Court observes that the applicant's complaints under Article 5 §§ 3 and 4 of the Convention relate to certain alleged deficiencies of the relevant provisions of the CCP, in force at the relevant time, as construed by the competent authorities and as applied to him, that allegedly gave rise to a continuing situation against which no effective remedies were available. According to the established case-law of the Convention organs, where no domestic remedy is available the six-month period runs from the act alleged to constitute a violation of the Convention. In the case of a continuing situation it runs from the end of the situation concerned (see, among many other authorities, *Agrotexim Hellas S.A. and Others v. Greece*, no. 14807/89, Commission decision of 12 February 1992, Decisions and Reports 72, p. 148). In the instant case that was the amendment of the relevant provisions of the CCP effective 1 January 2000, which preceded the lifting of the applicant's house arrest on 3 July 2003. The fact that in the meantime the form of the applicant's deprivation of liberty mutated from pre-trial detention to house arrest – which also falls within the scope of Article 5 (see *Mancini v. Italy*, no. 44955/98, § 17, ECHR 2001-IX; *Vachev*, cited above, §§ 64 and 70; and *Nikolova v. Bulgaria (No. 2)*, no. 40896/98, §§ 60 and 74, 30 September 2004) – appears to be of no relevance, as it did not put an end to the alleged violations of Article 5 § 3 concerning the fact that the applicant was not brought before a judge upon his arrest and the justification of his deprivation of liberty, and of Article 5 § 4 concerning the availability of full-fledged judicial review thereof. However, the Court will take into account the differences between the various forms of the applicant's deprivation of liberty when examining the merits of his complaints.

61. The Government's objection must therefore be dismissed, insofar as it concerns the applicant's deprivation of liberty after 5 July 1996.

2. Alleged non-exhaustion of domestic remedies

62. The Government also submitted that the applicant had failed to make use of the available domestic remedies in respect of his complaint under Article 5 § 4 of the Convention about the non-availability of judicial review of his house arrest. They argued that according to the Bulgarian Constitution international treaties, including the Convention, were part of domestic law and took priority over those provisions thereof which went against them. Increasingly often the Bulgarian courts relied on the Convention in deciding the cases before them. As an example the Government cited decision No. 1 of 1997 of the Assembly of the Criminal Divisions of the Supreme Court of Cassation, in which it had decided to refer a provision of the CCP to the Constitutional Court, considering that it was contrary to Article 5 of the Convention. The applicant could have thus applied to a court, relying directly on the Convention. The court would have been obliged, by virtue of the Convention itself, to examine and rule on his application for release. Moreover, the applicant could have relied *mutatis mutandis* on Article 152a of the CCP, which provided for judicial review of pre-trial detention.

63. The applicant replied that the question of exhaustion of domestic remedies was inextricably linked to the merits of the complaint. He invited the Court to follow its ruling in *Vachev* (cited above) and find that at the relevant time Bulgarian law did not provide judicial remedies against house arrest.

64. The Court considers that the question of exhaustion of domestic remedies in respect of complaints under Article 5 § 4 of the Convention is inevitably related to the merits of such complaints. Therefore, to avoid prejudging the latter, both questions should be examined together. Accordingly, the Court holds that the question of exhaustion of domestic remedies should be joined to the merits (see *Öcalan v. Turkey* (dec.), no. 46221/99, 14 December 2000; and *Vachev v. Bulgaria* (dec.), no. 42987/98, 19 June 2003).

3. The Court's decision on admissibility

65. In conclusion, the Court finds that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, or inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Alleged violation of the right to be brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3

66. The applicant invited the Court to follow its assessment of the relevant law made in *Nikolova* (cited above).

67. The Government conceded that at the time of the applicant's arrest the relevant provisions of the CCP had not been in line with the requirements of Article 5 § 3.

68. The Court notes that in previous judgments which concerned the system of detention and house arrest pending trial, as it existed in Bulgaria until 1 January 2000, it found that neither investigators before whom the accused persons were brought, nor prosecutors who approved detention orders and the orders to put an individual under house arrest, could be considered as "officer[s] authorised by law to exercise judicial power" within the meaning of Article 5 § 3 (see *Assenov and Others*, pp. 2298-99, §§ 144-50; *Nikolova*, §§ 49-53; and *Vachev*, §§ 63-65, all cited above).

69. The present case likewise concerns pre-trial detention and house arrest imposed before 1 January 2000. The applicant's pre-trial detention was ordered by an investigator and confirmed by a prosecutor (see paragraphs 32 above), in accordance with the provisions of the CCP then in force. His ensuing house arrest was also ordered by a prosecutor (see paragraph 39 above). 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 trial (see paragraph 48 above). The Court refers to the analysis of the relevant domestic law contained in its judgment in the case of *Nikolova* (cited above, §§ 28, 29 and 49-53).

70. 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.

2. Alleged violation of the right to trial within a reasonable time or to release pending trial, guaranteed by Article 5 § 3 of the Convention

71. The applicant submitted that the authorities had not had regard to important facts militating for his release, while relying on the statutory presumption that, once charged with a "serious intentional offence", he should remain in custody. They had not contemplated the possibility of other, less severe measures, which could have achieved the same objectives. His deprivation of liberty had been a real limitation on his life, even at the time when he had been under house arrest. Finally, the authorities had not displayed due diligence in conducting the proceedings against him.

72. The Government submitted that the applicant had been accused of serious offences and that his deprivation of liberty had been necessary and not excessive in duration. Most of the investigative actions had been carried out before he had lodged his application with the Court. A careful reading of his requests for release indicated that he had failed to invoke any change in the relevant circumstances; it was therefore logical that these requests had been rejected. Each time the competent authorities had dismissed such requests, they had had regard to the risk that the applicant may abscond, obstruct the investigation or re-offend. As a chairman of the board the applicant would have had the opportunity, if released, to destroy documents. Moreover, before being arrested for a second time, the applicant had failed to pay his bail and had took flight for three months. In sum, the Government were of the view that the applicant's deprivation of liberty had been fully warranted, regard being had to his disregard to his duty to cooperate with the authorities. Furthermore, the applicant's house arrest had been de facto fictitious, as the authorities responsible for monitoring compliance with it had been in Burgas, whereas he had been in Sofia for medical treatment. Since the end of 1996 the applicant had had the opportunity to leave and change his place of abode without any control.

73. The Court notes that the applicant was arrested on 5 July 1996. On 2 October 1996 his deprivation of liberty took the form of house arrest, which lasted until 3 July 2003 (see paragraphs 34, 39 and 43 above). The Court has already held that house arrest constitutes deprivation of liberty within the meaning of Article 5 (see *Mancini*, § 17; *Vachev*, §§ 64 and 70; and *Nikolova (No. 2)*, §§ 60 and 74, all cited above). It is furthermore unable to subscribe to the Government's argument that the applicant's house arrest did not in fact amount to a custodial measure because the authorities responsible for monitoring compliance with it were far away, which allowed him to breach it with impunity. To determine whether a person is deprived of his or her liberty the Court must look upon the actual circumstances of the regime to which he or she was subject, as a matter of law and in fact (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 14, § 24 and p. 20, § 42; and *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, p. 22, § 40).

Thus, in a case concerning the detention of a person of unsound mind, the Court was of the view that the facts that she had absconded and had been granted probationary leave had no incidence on the applicability of Article 5 § 4, as she was still detained in law (see *Van der Leer v. the Netherlands*, judgment of 21 February 1990, Series A no. 170-A, p. 14, § 35). Similarly, in a recent case concerning the detention of a person infected with HIV, the Court had no doubt that Article 5 § 1 was applicable for the entire duration of that person's detention, regardless of the fact that he had escaped on several occasions and had actually spent much less time in custody (see *Enhorn v. Sweden*, no. 56529/00, §§ 32 *in fine*, 33, 47 and 55, ECHR 2005-...). By the same token, in the instant case, the fact that the applicant had the opportunity to breach his house arrest cannot lead to the conclusion that it did not fall within the ambit of Article 5 § 3.

74. However, the Court observes that on 1 January 2000 the legal provisions applicable to house arrest were amended and from that date allowed the applicant to challenge his house arrest before a court (see paragraph 50 above). The applicant did not avail himself of this opportunity. In these circumstances, the Court is of the view that, as was conceded by the applicant, it is not called upon to rule on his deprivation of liberty after 1 January 2000. It will accordingly examine it only before that date (see, *mutatis mutandis*, *Boichinov v. Bulgaria* (dec.), no. 35220/97, 20 April 1999).

75. The period to be considered is thus three years and almost six months.

76. The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the authorities continued to justify the deprivation of liberty. Where such grounds were relevant and sufficient, the Court must also ascertain whether the competent authorities displayed special diligence in the conduct of the proceedings (see, among many other authorities, *Labita v. Italy* [GC], no. 26772/95, §§ 152-53, ECHR 2000-IV).

77. The Court sees no reason to doubt that the applicant's pre-trial detention and subsequent house arrest were grounded on a reasonable suspicion of his having committed one or more criminal offences. The applicant was deprived of his liberty on the basis of a suspicion that he had misappropriated funds, had mismanaged the assets entrusted to him, had engaged in banking business without having the requisite licence, and had abused his powers.

78. As to the other grounds for the continued deprivation of liberty, the Court observes that it took two different forms: pre-trial detention between 5 July and 2 October 1996, and house arrest between the latter date and 1 January 2000, the end of the period under consideration.

79. With regard to the pre-trial detention, the Court notes that in the case of *Ilijkov v. Bulgaria*, it observed that during the period in question the authorities had applied law and practice establishing a presumption that detention pending trial was always necessary in cases where the charges concerned a "serious intentional offence" within the meaning of domestic law. The presumption was only rebuttable in very exceptional circumstances where even a hypothetical possibility of absconding, re-offending or collusion was excluded, due to serious illness or other exceptional factors. It was moreover incumbent on the detained individual to prove the existence of such exceptional circumstances, failing which he or she was bound to remain in detention pending trial throughout the proceedings. The above principles were based on Article 152 §§ 1 and 2 of the CCP, as worded at the material time, and the Supreme Court's practice at that stage (see *Ilijkov v. Bulgaria*, no. 33977/96, §§ 79-87, 26 July 2001).

80. At the time of the applicant's pre-trial detention those provisions were still in force and the same practice prevailed.

81. The Court must nevertheless examine whether those provisions and practice, which were clearly incompatible with Article 5 § 3 of the Convention (ibid., §§ 84-87), were actually applied in the instant case.

82. In this connection, the Court notes that in her observations submitted to the Burgas Regional Prosecutor's Office the investigator in charge of the applicant's case stated that the applicant's pre-trial detention was mandatory, as he had been charged with a "serious intentional offence" and there were no reasons to apply the exception provided for by paragraph of 2 of Article 152 of the CCP. The Burgas Regional Prosecutor's Office also relied on the fact that the applicant had been charged with such an offence to deny his application for release. However, it also invoked specific facts which, in its view, called for the applicant's remaining in custody: the fact that he had failed to notify the investigator in charge of his case of his change of address and to report to the competent investigation service on several dates, despite the instructions to that effect (see paragraphs 35 and 36 above). The Court is thus satisfied that, despite the defective legal regime, in the instant case the authorities provided sufficient justification for the applicant's pre-trial detention, which lasted until 2 October 1996 (see, *mutatis mutandis*, *Hristov v. Bulgaria*, no. 35436/97, § 104, 31 July 2003).

83. The question remains, however, whether the reasons relied on by the authorities for keeping the applicant in custody applied with unaltered relevance throughout his ensuing house arrest, which lasted a considerable amount of time. In this connection, the Court notes that no references thereto can be found in the authorities' later decisions, which were not reasoned at all (see paragraph 41 above), while the risk of the applicant's failing to show up had obviously receded with the lapse of time, regard being had in particular to the fact that he diligently notified the investigator in charge of his case of every change of address (ibid., §§ 105-07).

84. Even though facts that could have warranted the applicant's continued house arrest may have existed, they were not mentioned in the decisions of the prosecution and the investigation authorities. It is not the Court's task to establish such facts and take the place of the national authorities who ruled on the applicant's deprivation of liberty. It falls to them to examine all the facts arguing for or against it and set them out in their decisions (see *Ilijkov*, cited above, § 86, with further references).

85. Having regard to the foregoing considerations, the Court finds that the authorities failed to justify the applicant's continued deprivation of liberty for the period of three years and almost six months. It is hence not necessary to examine whether the proceedings against the applicant were conducted with due diligence during that period.

86. It follows that there has been a breach of the applicant's right to trial within a reasonable time or release pending trial, guaranteed by Article 5 § 3 of the Convention.

3. Alleged violation of Article 5 § 4 of the Convention

87. The Government did not comment on the merits of the complaint.

88. The applicant submitted that Article 152a of the CCP, as adopted in August 1997, provided for judicial review of pre-trial detention, not house arrest. At the relevant time the CCP did not provide for judicial review of house arrest. An application for release based on the direct applicability of Article 5 § 4 of the Convention would have had no prospects of success either, in view of the lack of a procedure for its examination and of any relevant precedents.

89. The Court notes at the outset that in examining the question of exhaustion of domestic remedies in respect of the complaint about the alleged non-availability of judicial review of the applicant's house arrest, it found that that issue was so closely related to the merits of the complaint that it could not be detached from them (see paragraph 64 above). Accordingly, the Court will now examine the Government's preliminary objection in that respect together with the merits of the complaint.

90. For the purposes of the analysis the Court would separate the applicant's complaint in two parts: the first relating to the alleged deficient judicial review of his pre-trial detention, and the second relating to the alleged lack of a possibility to obtain judicial review of his house arrest.

91. With respect to the first, the Court notes that in its judgment in the case of *Nikolova* it found that the scope of the judicial review provided by the Bulgarian courts in proceedings against pre-trial detention was deficient, on account of the manner in which the relevant legal provisions had been worded and construed by the Supreme Court (see *Nikolova*, cited above, §§ 59-61). It made similar findings in a number of subsequent cases (see, among many others, *Ilijkov*, cited above, §§ 94-100; and *Hamanov v. Bulgaria*, no. 44062/98, §§ 79-85, 8 April 2004). However, the Court

reiterates that its task is not to rule on the law *in abstracto*. It must rather examine whether its implementation in an individual case gave rise to a violation of the Convention (see *Nikolova*, cited above, § 60). In the instant case, the applicant did not institute judicial proceedings in which to challenge his pre-trial detention. His allegations about the scope of the judicial review of this detention are therefore a matter of speculation. The Court cannot conjecture how the proceedings that the applicant never brought would have unfolded (see *Belchev v. Bulgaria* (dec.), no. 39270/98, 6 February 2003).

92. It follows that there has been no violation of the applicant's rights under Article 5 § 4 in respect of the period which he spent in pre-trial detention.

93. Concerning the availability of a judicial remedy during the applicant's subsequent house arrest, the Court notes that in its judgment in the case of *Vachev* it found that at the relevant time and until 1 January 2000 the CCP did not provide for judicial review of house arrest, and that there existed no other provision of domestic law which established a procedure whereby an individual could apply to a court to review the lawfulness of his or her house arrest. The Court further found that, while the Convention was incorporated in Bulgarian law and was directly applicable in Bulgaria, it was still not entirely clear whether a remedy satisfying the requirements of Article 5 § 4 existed in theory. In any event, the Court noted that the Government had not furnished any example of a judicial decision in which a person put under house arrest had successfully relied on that provision to apply to a court for his or her release. The decision of the Assembly of the Criminal Divisions of the Supreme Court of Cassation to refer the provisions of the CCP governing pre-trial detention to the Constitutional Court as being contrary to Article 5 of the Convention (see paragraph 53 above) did not, in the Court's view, represent a relevant precedent. The Court found that the lack of precedents indicated the uncertainty of the alleged remedy in practice. It accordingly dismissed the Government's objection of non-exhaustion of domestic remedies and concluded that there had been a violation of Article 5 § 4 (see *Vachev*, cited above, §§ 69-74). In a subsequent case the Court found a breach of Article 5 § 4 for the same reason (see *Nikolova (No. 2)*, cited above, §§ 74-77).

94. The Court considers that the present case presents no material difference. While the Government asserted, in addition to their arguments in *Vachev*, that the applicant could have relied *mutatis mutandis* on Article 152a of the CCP, the Court notes that this provision applies, as is apparent from its wording, to pre-trial detention, not house arrest (see paragraph 52 above). Furthermore, the Government have not identified and there is, to the Court's knowledge, no reported case-law or doctrine opinions supporting the Government's assertion. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in

theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see *Vachev*, cited above, §§ 67, 72 and 73; and, *mutatis mutandis*, *Stoichkov v. Bulgaria*, no. 9808/02, § 66, 24 March 2005).

95. The Court therefore dismisses the Government's preliminary objection in respect of Article 5 § 4 of the Convention and holds that there has been a violation of that provision, as regards the period which the applicant spent under house arrest prior to 1 January 2000.

96. As the applicant limited his complaint to the period before 1 January 2000 and did not make use of the judicial remedy in respect of house arrest introduced on that date, it is not necessary to rule in the present case on the adequacy of this remedy.

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

97. The applicant complained that the criminal proceedings against him had lasted unreasonably long. He relied on Article 6 § 1 of the Convention, which provides, as relevant:

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

A. Admissibility

98. 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

99. The applicant submitted that the criminal proceedings against him had remained at the preliminary investigation stage for eight years, because the case had been unnecessarily delayed and complicated by the prosecution authorities. In the applicant's view, the principal reason for this delay had been the poor coordination between the bodies dealing with the case, as evidenced by the numerous reformulations of the charges against him and the many remittals of the case for additional investigation. Further delays had been accumulated during the trial phase on account of the belated preparation of the expert reports and the lengthy gaps between certain hearings.

100. The Government did not comment.

101. The Court notes that the proceedings were opened on an unspecified date in mid-1995 (see paragraph 8 above). Certain assets

belonging to the applicant and to his company were attached by the Nesebar District Court on 21 August 1995 (see paragraph 9 above). Further property was attached on 25 August 1995 (see paragraph 10 above). The applicant was charged on 29 August 1995 (see paragraph 11 above). The Court thus accepts that the period under consideration started in August 1995. At the time of the latest information from the parties (10 May 2005) the proceedings were still pending at first instance before the Burgas Regional Court (see paragraph 28 above). The period to be examined is therefore at least nine years and nine months for a preliminary investigation and one level of court.

102. The Court will assess the reasonableness of the length of the proceedings in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. On the latter point, what was at stake for the applicant has also to be taken into account (see, among many other authorities, *Portington v. Greece*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2630, § 21; and *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI).

103. The Court accepts that the case was factually and legally complex. It involved various charges of engaging in banking business without a licence, abuse of office and mismanagement over an extended period of time. Numerous witnesses had to be questioned and two expert reports drawn up (see paragraphs 13, 22, 23 and 24 above). However, it does not seem that the complexity of the case can alone explain the entire length of the proceedings.

104. As regards the delays attributable to the applicant, the Court notes that during the preliminary investigation he failed to show up for questioning in March 1996 and did not notify the authorities of his change of address in April 1996, which partially accounted for four months of delay until his arrest on 5 July 1996 (see paragraphs 32 and 34 above). The Court further notes that the applicant was responsible for the adjournment of three hearings during the trial phase (see paragraphs 20, 25 and 27 above). However, it seems that the first adjournment was partly due to a procedural mistake by the prosecution (see paragraph 20 above) and that third adjournment was necessary because of the limited time during which the applicant was initially allowed to prepare his defence after the amendment of the charges during the trial (see paragraphs 26 and 27 above). In the light of the information before the Court, the applicant does not seem responsible for any other delays.

105. As regards the delays attributable to the authorities, the Court observes that the preliminary investigation against the applicant lasted more than seven years and ten months (see paragraphs 8 and 19 above). The Government – who did not make any submissions in respect to this

complaint – have not provided an exhaustive account of the investigative actions carried out by the authorities during that time, but it seems that during extended periods of time, especially after mid-1999, the case lay dormant. It is also noteworthy that the investigation and the prosecution authorities several times reformulated the charges against the applicant (see paragraphs 14 and 16-18 above).

106. In addition, at the trial phase five hearings were adjourned by reason of delays in the drawing up of an expert report, problems with the summoning of witnesses and an amendment of the indictment by the prosecution (see paragraphs 20-24 above).

107. Finally, it should be noted that at the time of the latest information from the parties (10 May 2005) the case was still pending before the first-instance court (see paragraph 28 above).

108. Having regard to the criteria established in its case-law for assessment of the reasonableness of the length of proceedings, the Court finds that the length of the criminal proceedings against the applicant failed to satisfy the reasonable time requirement of Article 6 § 1 of the Convention. It follows that there has been a violation of that provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

109. 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

110. The applicant claimed 112,832 euros (EUR) in respect of non-pecuniary damage. EUR 67,832 of that amount represented compensation for the emotional distress suffered for each day of his deprivation of liberty, at EUR 152.50 per day for eighty-nine days spent in pre-trial detention, and EUR 45.75 per day for eleven hundred eighty-six days spent under house arrest. The remainder (EUR 45,000) represented compensation for his damaged health. He pointed to the disproportionate duration of his deprivation of liberty and the length of the criminal proceedings against him, asserting that these had seriously disrupted his family life and had had a negative impact on his ability to provide for his family. His deprivation of liberty had also prevented him from being with his wife at the time when she gave birth. Finally, he had had to move several times because of the resultant difficulties in finding employment.

111. The Government submitted that the claim was excessive and did not correspond to the awards made by the Court in previous similar cases.

112. Having regard to all the circumstances of the case and to its case-law in similar cases, and deciding on an equitable basis, the Court awards the applicant EUR 6,500 in respect of non-pecuniary damage, plus any tax that may chargeable on that amount.

B. Costs and expenses

113. The applicant also claimed EUR 1,680 for forty-two hours of legal work on the proceedings before the Court, at the hourly rate of EUR 40. He submitted a fees agreement between him and his lawyer and a time-sheet.

114. The Government did not comment.

115. 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 1,500 covering costs under all heads, plus any tax that may chargeable on that amount.

C. Default interest

116. 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. *Decides* to join to the merits the question of the exhaustion of domestic remedies in respect of the applicant's complaint about the non-availability of judicial review of his house arrest;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 5 § 3 of the Convention, in that after his arrest on 5 July 1996 the applicant was not brought before a judge or a judicial officer;

4. *Holds* that there has been a violation of Article 5 § 3 of the Convention, in that the applicant's deprivation of liberty between 5 July 1995 and 1 January 2000 was not justified and was excessively lengthy;

5. *Holds* that there has been no violation of the applicant's rights under Article 5 § 4 in respect of the period which he spent in pre-trial detention;

6. *Dismisses* the Government's preliminary objection in respect of the applicant's complaint under Article 5 § 4 concerning the non-availability of judicial review of his house arrest and *holds* that there has been a violation of that provision;

7. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings against the applicant;

8. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to 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 6,500 (six thousand five hundred euros) in respect of non-pecuniary damage;
(ii) EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses;
(iii) any tax that may be chargeable on the above amounts;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 30 March 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President