



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

FOURTH SECTION

CASE OF ZHELYAZKOV v. BULGARIA

(Application no. 11332/04)

JUDGMENT

STRASBOURG

9 October 2012

FINAL

09/01/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Zhelyazkov v. Bulgaria,

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

Lech Garlicki, *President*,
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 18 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 11332/04) 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 Peycho Atanasov Zhelyazkov (“the applicant”), on 27 February 2004.

2. The applicant was represented by Mr M. Ekimdzhiev, Ms K. Boncheva and Ms S. Stefanova, lawyers practising in Plovdiv. The Bulgarian Government (“the Government”) were represented by their Agent, Ms N. Nikolova, of the Ministry of Justice.

3. The applicant alleged, in particular, that he could not appeal his conviction of a minor public order offence, in breach of Article 2 of Protocol No. 7.

4. On 12 May 2009 the Court (Fifth Section) declared the application partly inadmissible and decided to give the Government notice of the complaints concerning the applicant’s alleged compulsory labour and the impossibility of appealing his conviction. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

5. Following the re-composition of the Court’s sections on 1 February 2011, the application was transferred to the Fourth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. At about 3 p.m. on 30 December 2003 the applicant and his father went to the District Prosecutor's Office in Tsarevo to obtain a copy of a document. The clerk refused to give it to them. A quarrel ensued. A prosecutor came in and ordered the applicant to leave the premises. A brawl ensued. The police, who had been called in, drew up a *procès-verbal* saying that, by insulting the prosecutor and trying to hit him, the applicant had committed an offence under the 1963 Decree on Combating Minor Hooliganism ("the 1963 Decree" – see paragraphs 10-11 below). The applicant refused to sign the *procès-verbal*, saying that he would present his objections before a court.

7. About half an hour later the police made an order for the applicant's detention under section 70(1)(8) of the Ministry of Internal Affairs Act 1997, then in force. The order said that the applicant was being detained for committing an offence under the 1963 Decree.

8. At 10 a.m. on 31 December 2003 the applicant was brought before the Tsarevo District Court. He was assisted by two counsel. The court heard the applicant, two witnesses, and the applicant's counsel. In a decision of the same day it found the applicant guilty of an offence under Article 1 § 2 of the Decree for insulting and trying to hit the prosecutor, and sentenced him to fifteen days' detention in the premises of the Ministry of Internal Affairs. The court went on to order, by reference to Article 8 § 2 of the Decree (see paragraph 12 below), that during his detention the applicant was to carry out socially useful work adapted to his health, age and professional skills; he was to take part in public works on the territory of the Tsarevo Municipality. The decision was final and immediately enforceable.

9. The applicant was released at 11 a.m. on 14 January 2004. It is unclear what work exactly was carried out by him during his detention.

II. RELEVANT DOMESTIC LAW

A. Minor Hooliganism

10. Decree No. 904 of 28 December 1963 on Combating Minor Hooliganism was passed by the then existing Presidium of the National Assembly under a simplified legislative procedure, as possible under Article 35 § 5 and Article 36 of the then in force 1947 Constitution. It was published in the State Gazette on 31 December 1963, as required under

section 37(1) of the Normative Acts Act 1973, as worded at that time. The Supreme Administrative Court has on a number of occasions said that the Decree has the same force as an Act of Parliament (опр. № 9959 от 7 ноември 2003 г. по адм. д. № 9327/2003 г., ВАС, I о.; опр. № 10286 от 10 декември 2004 г. по адм. д. № 9761/2004 г., ВАС, петчленен с-в; опр. № 14673 от 3 декември 2009 г. по адм. д. № 15200/2009 г., ВАС, I о.; опр. № 12764 от 1 ноември 2010 г. по адм. д. № 13284/2010 г., ВАС, I о.).

11. Article 1 § 2 of the Decree defines minor hooliganism as an indecent act consisting of uttering swearwords, insults or other offensive words in a public place and in front of many people, in an offensive attitude towards other citizens or public officials, or in a quarrel, fight or suchlike that breach the peace but due to their lower degree of dangerousness do not amount to the criminal offence of hooliganism. Such acts, if perpetrated by persons older than sixteen, carry a penalty of up to fifteen days' detention in the premises of the Ministry of Internal Affairs or a fine (Article 1 § 1).

12. Under Article 8 § 2 of the Decree, the penalty of detention in the premises of the Ministry of Internal Affairs must be accompanied by work determined in accordance with the detainee's health, age and abilities. That work is not remunerated.

13. Cases under the Decree fall under the jurisdiction of the district courts (Articles 3 and 4). Until May 2011 Article 7 provided that the court's decision was not subject to appeal. On 4 May 2011 (реш. № 3 от 4 май 2011 г. по к. д. № 19 от 2010 г., обн., ДВ, бр. 38 от 17 май 2011 г.) the Constitutional Court declared that rule unconstitutional. As a result, in November 2011 Article 7 was amended and now provides, in paragraph 2, that the district court's decision to impose an administrative penalty may be appealed on points of law before the regional court within twenty-four hours. The case must be listed for hearing before the regional court not more than three days after the district court's decision (paragraph 1, as amended), and the regional court must rule, by means of a final decision, on the day it receives the appeal (paragraph 3, as amended). In the explanatory notes to the amendment bill the Government referred to, *inter alia*, the need to bring the Decree into line with the Convention and this Court's case-law.

B. Remuneration of the work carried out by persons in custody convicted of criminal offences

14. Under section 25 of the Execution of Punishments Act 1969, persons serving a custodial sentence following their conviction of a criminal offence were entitled to receive at least thirty per cent of the remuneration due for their work.

15. Section 78(1) of the Execution of Punishments and Pre-Trial Detention Act 2009, which superseded the 1969 Act in June 2009, provides

that persons serving a custodial sentence following their conviction of a criminal offence are entitled to receive at least thirty per cent of the remuneration due for all work carried out by them except voluntary unpaid work and regular shifts to maintain order and hygiene.

III. RELEVANT COUNCIL OF EUROPE MATERIALS

16. The European Prison Rules are recommendations of the Committee of Ministers to member States of the Council of Europe as to the minimum standards to be applied in prisons. States are encouraged to be guided by those rules in legislation and policies.

17. The 1987 European Prison Rules (Recommendation No. R (87) 3 – “the 1987 Rules”) were adopted on 12 February 1987.

18. Rule 76.1 provides that “[t]here shall be a system of equitable remuneration of the work of prisoners”.

19. The commentary in the Explanatory memorandum to the Rules says:

“This rule recognises the importance and value of an adequate and equitable payment system in the context of treatment regimes. No provision to encourage the development of wages systems towards levels that apply for similar work in the community has been made in the rule itself as that would have been premature at this stage. However, a great deal of progress has been made in that respect in a number of countries and that is to be encouraged. ...”

20. On 11 January 2006 the Committee of Ministers adopted a new version of the European Prison Rules, Recommendation Rec(2006)2 (“the 2006 Rules”). It noted that the 1987 Rules “needed to be substantively revised and updated in order to reflect the developments which ha[d] occurred in penal policy, sentencing practice and the overall management of prisons in Europe”.

21. Rule 26.10 provides that “[i]n all instances there shall be equitable remuneration of the work of prisoners”.

22. The commentary on the 2006 Rules (drawn up by the European Committee on Crime Problems) says that the level of remuneration of prisoners should be guided by the principle of mirroring conditions for workers on the outside, and that ideally all prisoners should be paid wages that are related to those in society as a whole.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 § 2 OF THE CONVENTION

23. The applicant complained that he had been required to perform compulsory labour without this falling within one of the exceptions laid down in Article 4 § 3 of the Convention. He therefore considered that he had been a victim of a breach of Article 4 § 2 of the Convention.

24. Article 4 §§ 2 and 3 of the Convention provide, in so far as relevant:

“2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this article the term ‘forced or compulsory labour’ shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention...”

25. The Government submitted that the applicant had been required to work after having been convicted and sentenced by an independent and impartial court, in proceedings in which he had had the assistance of counsel. The work fell within the exception envisaged by Article 2 § 2 (c) of the International Labour Organisation’s Convention concerning Forced or Compulsory Labour (No. 29), and could not therefore be regarded as forced or compulsory labour. Moreover, it had not been inconsistent with the applicant’s health, age or skills, too onerous, or lasting an inordinate amount of time. The work had also been for the benefit of society.

26. The applicant submitted that the work that he had been required to carry out had been compulsory labour because it had been ordered by a court as part of his penalty, because he had been in detention and would have incurred sanctions if he had refused to work, and because the work had not been remunerated. That labour did not fall within the exception laid down in Article 4 § 3 (a) because the applicant’s detention had been in breach of Article 5 §§ 1, 2, 4 and 5 of the Convention. The detention had been based on a Decree, not an Act of Parliament, in breach of the Article 5 § 1 requirement that it be “in accordance with the law”. The applicant had not been duly informed of the reasons for his detention, in breach of Article 5 § 2. He had not been able to appeal against the judicial decision ordering his detention, in breach of Article 5 § 4, and had not been able to seek compensation for his detention, in breach of Article 5 § 5.

27. The Court recently set out the general principles governing the interpretation of Article 4 §§ 2 and 3 of the Convention in paragraphs 116-23 of its judgment in *Stummer v. Austria* ([GC], no. 37452/02, ECHR 2011-..., with further references). They are equally applicable to the present case.

28. In the present case, the obligation for the applicant to work while in detention stemmed from the express terms of Article 8 § 2 of the 1963 Decree and the judicial decision against the applicant (see paragraphs 8 and 12 above). The work was to be carried out while the applicant was in custody and under the full control of the authorities. It can therefore be regarded as work for which the applicant had not offered himself voluntarily and which was exacted from him under the threat of imposition of a penalty, and therefore forced or compulsory labour within the meaning of Article 4 § 2 of the Convention.

29. Although the above point does not appear to be in dispute between the parties, they differ in their views as to whether that work was covered by the terms of Article 4 § 3 (a), which excludes “work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of the Convention” from the definition of “forced or compulsory labour”.

30. Concerning the applicant’s assertion that his work did not fall within that exception because his detention had been in breach of Article 5 §§ 1, 2, 4 and 5 of the Convention, the Court observes that in his initial application the applicant raised complaints under all of those provisions; they were all rejected as manifestly ill-founded in the partial decision in the present case (see *Zhelyazkov v. Bulgaria* (dec.), no. 11332/04, 12 May 2009). The Court sees no reason to depart from its findings in that decision.

31. In particular, the fact that the applicant’s detention was ordered by the Tsarevo District Court by reference to a Decree rather than an Act of Parliament does not make it unlawful within the meaning of Article 5 § 1 of the Convention. Under Bulgarian law, decrees adopted by the Presidium of the National Assembly under Article 35 § 5 and Article 36 of the 1947 Constitution are valid sources of law which have the same force as Acts of Parliament. This has been confirmed many times by the Supreme Administrative Court (see paragraph 10 above) and is implicit in the fact that the Constitutional Court accepted to hear a legal challenge to the 1963 Decree much as it would accept to hear a challenge to an Act of Parliament (see paragraph 13 above). The term “law” in Article 5 § 1 of the Convention must be understood in its substantive sense, not its formal one. The Court has accepted that detention may be based on a sufficiently established custom (see *Drozdz and Janousek v. France and Spain*, 26 June 1992, § 107, Series A no. 240) or on case-law (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 55, *Reports of Judgments and Decisions* 1998-VII). It has adopted the same stance to the term “law” as used in Articles 8 and 10 of the Convention (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A, and *The Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, § 47, Series A no. 30). It follows that the applicant’s detention was provided by Bulgarian law and was imposed in accordance with a procedure prescribed by law (see, *mutatis mutandis*, *Galstyan*

v. Armenia, no. 26986/03, §§ 46-49, 15 November 2007). There is no indication that it was otherwise incompatible with Article 5 § 1.

32. Nor was the applicant's detention in breach of Article 5 § 2. He was informed of the reasons for his detention and must surely have become aware of them following the examination of his case by the Tsarevo District Court (see paragraphs 6-8 above).

33. As for Article 5 § 4, the Court notes that failure to observe that provision does not automatically mean that there has been failure to observe Article 4 (see *De Wilde, Ooms and Versyp v. Belgium*, 18 November 1970, § 89, Series A no. 12, and *Van Droogenbroeck v. Belgium*, 24 June 1982, § 59, Series A no. 50). In any event, there is no appearance of a breach of Article 5 § 4, since judicial control of the detention during which the applicant was required to work was incorporated in the Tsarevo District Court's decision (see *De Wilde, Ooms and Versyp*, cited above, § 76).

34. The same goes for Article 5 § 5. First, there is no basis in the Court's case-law to hold that a breach of that provision automatically causes work required of a detainee to fall outside the scope of Article 4 § 3 (a). Secondly, there is no appearance of a breach of Article 5 § 5 because it applies only if the Court or a domestic authority has found a breach of one of the preceding paragraphs of Article 5, which is not the case.

35. It follows that, contrary to the applicant's assertion, the work that he was required to perform was done in the course of detention imposed according to the provisions of Article 5. It remains to be established whether it was otherwise compatible with the requirements of Article 4.

36. It has not been argued by the applicant, and there is no evidence, that the work that he was required to carry out was too onerous or went beyond what is ordinary. The fact that that work was not remunerated did not in itself cause it to fall outside that definition. In its decision in *Twenty-one Detained Persons v. Germany* (nos. 3134/67, 3172/67, 3188-3206/67, Commission decision of 6 April 1968, Collection 27, pp. 97-116), the former Commission declared a complaint in that respect inadmissible, noting, *inter alia*, that Article 4 does not contain any provision concerning the remuneration of prisoners for their work, and observing that it had consistently rejected applications by prisoners claiming higher remuneration for their work. The Court is mindful that there have been subsequent developments in attitudes to that issue, reflected in particular in the 1987 and 2006 European Prison Rules, which call for the equitable remuneration of the work of prisoners – with the 2006 Rules adding “in all instances” – (see paragraphs 18 and 21 above). Those Rules, and the modification in their wording, reflect an evolving trend. However, the Court does not consider that as matters stood at the time when the applicant was ordered to carry out the work at issue in the present case – approximately two years before the adoption of the 2006 Rules – it could be maintained that there existed an unconditional obligation under Article 4 of the Convention to

remunerate the work of all detainees in all circumstances (see, *mutatis mutandis*, *Stummer*, cited above, § 132). The Court additionally notes that the applicant's detention was effected under special rules designed to deal in a speedy way with minor public order offences, and that the period during which the applicant was detained and required to work without remuneration could not by law exceed, and did not in fact exceed, fifteen days (see paragraphs 9 and 12 above). This can hardly be compared to the situation of inmates who have worked many years in prison (see *Stummer*, cited above, § 130 *in limine*).

37. The Court concludes that the obligatory work performed by the applicant during his fifteen days' detention was covered by the terms of Article 4 § 3 (a) of the Convention, and did not constitute forced or compulsory labour within the meaning of Article 4 § 2.

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

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 7

39. The applicant complained that he had been unable to appeal his conviction. He relied on Article 2 of Protocol No. 7, which provides as follows:

“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

40. The Government submitted that the offence of which the applicant had been convicted was of a minor character, because it was an administrative and not a criminal one. The Decree which defined the offence had been designed to attain speed and efficiency in tackling antisocial behaviour.

41. The applicant submitted that although the offence of which he had been convicted was administrative under Bulgarian law, it was criminal within the meaning of Article 2 of Protocol No. 7 in view of its being identical – save for the degree of dangerousness – with the criminal offence of hooliganism, and of the penalty of imprisonment that it carried. Under Bulgarian law as it stood at the time he could not appeal his conviction, whereas his case did not fall under any of the exceptions under paragraph 2 of the Article. In particular, the offence was not of a minor character because it was almost identical to the criminal offence of hooliganism and carried a penalty of imprisonment.

42. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

43. In *Kambourov v. Bulgaria* (no. 2) (no. 31001/02, §§ 22-27, 23 April 2009) and *Stanchev v. Bulgaria* (no. 8682/02, §§ 44-49, 1 October 2009), the Court held that Article 2 of Protocol No. 7 applied to convictions under the 1963 Decree and that offences under the Decree were not of a minor character within the meaning of paragraph 2 of that Article. The Court went on to find that under Bulgarian law, as it stood at the material time, there was no possibility to challenge a conviction under the Decree, and concluded that there had been a breach of Article 2 of Protocol No. 7.

44. The Court sees no reason to hold otherwise in the present case, and finds that there has been a breach of that provision.

45. It should be noted in this connection that in May 2011 the Constitutional Court declared Article 7 of the 1963 Decree unconstitutional, and that in November 2011 that provision was amended with a view to rendering it compliant with the Convention and the Court's case-law (see paragraph 13 above).

III. 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 20,000 euros (EUR) in respect of the non-pecuniary damage flowing from the alleged breach of Article 4 § 2 of the Convention, and EUR 10,000 in respect of the non-pecuniary damage flowing from the alleged breach of Article 2 of Protocol No. 7. He submitted that the penalty of fifteen days' detention, which he had been unable to challenge, had caused him considerable frustration and had instilled in him a sense of powerlessness and injustice. The intensity of those feelings called for an award of considerable compensation.

48. The Government submitted that a finding of a violation would amount to sufficient just satisfaction, in particular because after the Court's judgments in *Kambourov* (no. 2) and *Stanchev* (both cited above) the Bulgarian courts had started allowing appeals against convictions under the 1963 Decree. In their view, the applicant's claims were exorbitant.

49. The Court observes that in the present case an award of just satisfaction can be based only on the breach of Article 2 of Protocol No. 7. That said, it considers that the applicant must have sustained some non-pecuniary damage which cannot be made good solely by the finding of a violation (see *Zaicevs v. Latvia*, no. 65022/01, § 61, 31 July 2007). The fact that following the Court's judgments in *Kambourov (no. 2)* and *Stanchev* (both cited above) it became possible to appeal against decisions under the 1963 Decree did not alter the situation of the applicant. Ruling in equity, as required under Article 41 of the Convention, the Court awards him EUR 1,000 under this head. To this amount is to be added any tax that may be chargeable.

B. Costs and expenses

50. The applicant sought reimbursement of EUR 3,430 incurred in fees for forty-nine hours of work by his lawyers on the proceedings before the Court, at EUR 70 per hour. He submitted a fee agreement, a time-sheet and a declaration that he agreed that any costs and expenses awarded by the Court be paid directly to his lawyers. He also sought reimbursement of EUR 40 spent by his lawyers on postage and EUR 30 spent by them on office supplies.

51. The Government contested the number of hours spent by the applicant's lawyers on the case. They suggested that in assessing the quantum of the award the Court should have regard to the usual fees paid to counsel for their appearance before the national courts. Lastly, they pointed out that the claim for other expenses was not supported by documents.

52. The Court observes that when considering a claim in respect of costs and expenses for the proceedings before it, it is not bound by domestic scales or standards (see, as a recent authority, *Mileva and Others v. Bulgaria*, nos. 43449/02 and 21475/04, § 125, 25 November 2010). According to its case-law, costs and expenses claimed under Article 41 of the Convention must have been actually and necessarily incurred and reasonable as to quantum.

53. Having regard to the materials in its possession, the above considerations, and the facts that the bulk of the application was declared inadmissible and that the issues relating to the complaint under Article 2 of Protocol No. 7 have already been resolved in two almost identical cases, the Court finds it reasonable to award the applicant EUR 800, plus any tax that may be chargeable to him, in respect of his legal costs. This sum is to be paid directly to the applicant's legal representatives.

54. Concerning the claim for other expenses, the Court observes that the applicant has not submitted any supporting documents. In those circumstances, and bearing in mind the terms of Rule 60 §§ 2 and 3 of its Rules, the Court makes no award in respect of those expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the applicant's impossibility to appeal his conviction admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 2 of Protocol No. 7;
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 the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 800 (eight hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President