



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

FOURTH SECTION

CASE OF TSONYO TSONEV v. BULGARIA (No. 3)

(Application no. 21124/04)

JUDGMENT

STRASBOURG

16 October 2012

FINAL

16/01/2013

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

In the case of Tsonyo Tsonev v. Bulgaria (No. 3),

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,

Vincent A. De Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 25 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 21124/04) 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 Tsonyo Ivanov Tsonev (“the applicant”), on 1 June 2004. The applicant was not legally represented.

2. The Bulgarian Government (“the Government”) were represented by their then Agent, Ms N. Nikolova, of the Ministry of Justice.

3. The applicant alleged, in particular, that a set of criminal proceedings against him had been unfair because the Bulgarian courts had admitted in evidence and had relied on the statement of a police officer which had related a confession made by the applicant, and because the Supreme Court of Cassation had refused to appoint counsel for the applicant.

4. On 10 September 2009 the Court (Fifth Section) decided to give the Government notice of the complaints relating to the admission of the officer’s statement and the Supreme Court of Cassation’s refusal to appoint counsel for the applicant. It was 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. The applicant was born in 1977 and lives in Gabrovo.

A. The applicant's previous convictions and sentences

7. In a judgment of 20 September 1996, which became final on 5 October 1996, the Gabrovo District Court (*Габровски районен съд*) found the applicant guilty of an offence and sentenced him to ten months' imprisonment. In 1996 the applicant spent ten months in prison in execution of that sentence.

8. In a judgment of 20 May 1999, which became final on 20 June 1999, the Gabrovo District Court found the applicant guilty of another offence and sentenced him to ten months' imprisonment, suspended.

9. In a judgment of 14 November 2001, which became final on 22 October 2002, the Gabrovo District Court found the applicant guilty of yet another offence and sentenced him to eighteen months' imprisonment (see *Tsonyo Tsonev v. Bulgaria* (no. 2), no. 2376/03, §§ 10, 14 and 17, 14 January 2010).

B. The proceedings for combination of the applicant's sentences

10. In late 2002 or early 2003 the applicant asked the Gabrovo District Court to combine the above sentences. On 14 February 2003 the court decided to combine the sentences imposed in 1996 and 1999 but not the one imposed in 2001. The resulting sentence, determined in line with the applicable sentencing rules, was ten months' imprisonment. Applying a rule allowing the increase of the combined sentence by up to one half, and taking into account periods that the applicant had already spent in prison, the court ordered that the total amount of time which the applicant was to serve under the combined sentence should be thirteen months. He was to serve the eighteen months meted out in 2001 separately.

11. On an appeal by the applicant, on 3 April 2003 the Gabrovo Regional Court (*Габровски окръжен съд*) upheld that decision. On 3 February 2004 the Supreme Court of Cassation (*Върховен касационен съд*) refused to hear the applicant's ensuing appeal on points of law, finding that no appeal lay against the Gabrovo Regional Court's decision.

C. The fresh criminal proceedings against the applicant

12. In the morning of 26 September 2000 it was discovered that a bag with medicines had been stolen from a pharmacy in Gabrovo the previous night. The police inspected the crime scene and took fingerprints, but the ensuing tests could not establish to whom they belonged.

13. The next day, 27 September 2000, police officer N.D., who was in charge of the area where the applicant resided, visited the applicant at his parents' home, where he lived. The officer invited the applicant to the police station, where the applicant apparently confessed to stealing the bag. The applicant then took the officer back to his home and produced the bag. After that both of them went again to the police station, where a record was drawn up stating that the applicant had voluntarily surrendered the bag, explaining that he had found it near a kindergarten. When later testifying at the trial against him, the applicant said that he had voluntarily followed the officer to the station and had been aware that he could refuse to go there. After surrendering the bag, the applicant was charged and interviewed by an investigator. He said that he understood the charge, was aware of his right to counsel but chose not to have one, and would make a statement. He then went on to confess to stealing the bag. He also said that he had not been sure what to do with the medicines and had decided to surrender them to the police. He expressed regret for his actions.

14. In the following days the police investigator in charge of the case interviewed witnesses and gathered written and expert evidence. On 10 October 2000 he proposed that the applicant be brought to trial.

1. The proceedings before the Gabrovo District Court

15. On 17 October 2000 the applicant was indicted. His trial took place on 25 June and 4 October 2001 and 18 and 21 January 2002 before the Gabrovo District Court. At the outset the court apprised the applicant of his right to counsel, but he said that he did not wish to have one. The court heard as witnesses the owner and an employee of the pharmacy, two police officers who had patrolled the area on the night of the theft, the applicant's father and officer N.D. It also admitted in evidence, among other items, written statements by other officers who had patrolled the area, and the record stating that the applicant had surrendered the bag. The applicant initially objected to officer N.D. testifying on the ground that he had taken part in the investigation. However, noting from documents presented to him in the courtroom that this was not the case, he withdrew his objection and the court allowed officer N.D. to testify.

16. Officer N.D. said that, having learned about the theft, he had visited the applicant at his parents' home and had invited him to go to the police station for "a conversation", because the applicant's name featured on a list of offenders who had previously committed thefts. During the conversation

the applicant had confessed to committing the theft, specifying that he had done so to obtain money which he needed for his defence in other criminal cases against him, but not providing any details as to the manner in which he had gone about perpetrating the offence. He had also agreed to produce the stolen medicines, and, although at first asserting that they were not at his parents' home, had later on admitted that they were there. He had then taken officer N.D. to his parents' home and had produced the medicines. After that, the officer and the applicant had returned to the police station, where the applicant had signed a record to the effect that he was surrendering the medicines voluntarily. This had obviated the need formally to impound them.

17. In his closing speech the applicant pointed out, *inter alia*, that officer N.D. was employed by the criminal investigation department of the Gabrovo Police, and was in charge of the area in which the theft had taken place and where the applicant lived. He had thus been under pressure to identify the person who had committed the theft. His testimony was the only evidence linking the applicant to the commission of the offence.

18. On 21 January 2002 the Gabrovo District Court found the applicant guilty and sentenced him to two years and nine months' imprisonment. It based its finding that the applicant had stolen the medicines chiefly on the testimony of officer N.D. It noted that that testimony was fully corroborated by the statements made by the applicant during his interview with the investigator, but added that it could not take those statements into account because they had not been given in the presence of a judge (see paragraph 36 below). The court went on to say that officer N.D.'s testimony was corroborated, albeit indirectly, by the statements of the officers who had patrolled the area around the pharmacy at the time when the theft had taken place.

19. In addition, the court of its own motion decided to combine the sentences imposed in 1996 and 1999 (see paragraphs 7 and 8 above). The resulting sentence, determined in line with the relevant sentencing rules, was ten months' imprisonment. Applying a rule which allowed the combined sentence to be increased by up to one half, and taking into account the periods which the applicant had already spent in prison, the court ordered that the total amount of time which he was to serve under the combined sentence was thirteen months.

20. In its judgment the court noted that the applicant was unemployed and was financially dependent on his parents.

2. The proceedings before the Gabrovo Regional Court

21. The applicant appealed to the Gabrovo Regional Court, arguing that it had not been proved that he had stolen the medicines, and, in the alternative, that his sentence was too harsh. He also said, without giving

particulars, that the proceedings against him had been in breach of the rules of criminal procedure and of the Convention.

22. The court examined the case at four hearings. At the first two of those hearings it heard a number of witnesses. At the third, noting that a judge who had taken part in the first two hearings could not continue to sit in the case, the court decided to start hearing the case afresh.

23. At that third hearing, held on 11 March 2003, the applicant called two witnesses with a view to undermining officer N.D.'s credibility. The court acceded to his request over the prosecution's objection. The first witness said that when investigating a theft of which he had been suspected by officer N.D. of committing, officer N.D. had threatened him that he would frame him in the same way in which he had framed the applicant. The second witness, detained in the same facility as the applicant, said that officer N.D., when arresting him in relation to other offences, had enquired whether he had been aware of any offences committed by the applicant. The tone of his voice had indicated that he bore a personal animosity towards the applicant and wished to frame him. After that the court heard officer N.D., who repeated his account of the events of 27 September 2000. He additionally said that he knew the witnesses called by the applicant, who were either suspected of criminal offences or had previous convictions, and that their statements were not truthful. The court organised a confrontation between them and officer N.D. All three reiterated their positions. Officer N.D. was then cross-examined by the applicant.

24. At the close of the hearing the applicant, saying that he could not afford to retain counsel, asked the court to appoint one for him. The prosecution objected, observing that the applicant had not made such a request during the preliminary investigation and before the first-instance court. The applicant retorted that he had changed his mind. The court, relying on a declaration about the applicant's financial situation, decided to appoint counsel for him under Article 70 § 1 (7) of the Code of Criminal Procedure 1974 (see paragraph 37 below).

25. At the last hearing, held on 8 April 2003, the court once again heard officer N.D. It also heard the parties' closing arguments. The applicant pointed out that the only evidence linking him to the commission of the offence was the officer's testimony, which was highly suspect and could be the result of collusion between him and the prosecution. Moreover, the officer bore a personal animosity towards him because he had dealt with him on many previous occasions.

26. On 18 April 2003 the Gabrovo Regional Court upheld the applicant's conviction and sentence. It agreed with the lower court's findings of fact, but observed that it had erred in even mentioning the statement made by the applicant during his interview with the investigator – this was not admissible evidence. However, there was other evidence showing that the applicant had committed the theft. This was, in the first

place, officer N.D.'s testimony, which was coherent and reliable. The court analysed in detail the challenge to officer N.D.'s credibility and concluded that it could not be thrown into doubt by the statements of the two witnesses called by the applicant. It also observed that officer N.D.'s testimony was corroborated by indirect evidence, such as the record of voluntary surrender signed by the applicant. After that the court gave detailed reasons why it did not believe the statements of the two witnesses who had purported to provide an alibi for the applicant and the testimony of the applicant's father.

27. The court additionally dealt with the question of the combination of the sentences imposed in 1996 and 1999 (see paragraphs 7 and 8 above), and upheld the lower court's ruling on that point.

3. The proceedings before the Supreme Court of Cassation

28. The applicant appealed on points of law. In a twelve-page additional brief he argued that the lower courts had erred in assessing the evidence. In particular, they had lent too much credence to officer N.D.'s testimony, which was not supported by other evidence, was unspecific, hearsay, based on an informal conversation which had taken place before the institution of criminal proceedings against the applicant, and had been possibly due to officer N.D.'s personal animosity towards the applicant. The lower courts had also failed to analyse properly the testimony of the witnesses called by the applicant. The applicant went on to argue that the lower courts had incorrectly combined his earlier sentences. Lastly, he asked the court to reduce his sentence with a view to providing reparation for the excessive length of the proceedings against him. The brief, although signed by the applicant, gave the impression of having been drafted by a lawyer: it used terms of art, contained numerous citations of case-law and referred to the applicant in the third person.

29. On 3 February 2004 the applicant asked the Supreme Court of Cassation to appoint counsel for him. Referring to Article 70 § 1 (7) of the Code of Criminal Procedure 1974 (see paragraph 37 below), he pointed out that he did not have the means to retain one because he was unemployed, that he risked imprisonment, and that he was unable to conduct effectively his defence in person.

30. The Supreme Court of Cassation heard the appeal on 13 February 2004. The hearing was not attended by the applicant, but was attended by a public prosecutor. The prosecutor opposed the applicant's request for the appointment of counsel, saying that this was not mandatory. The court turned the applicant's request down. It said that the applicant had not pointed out why he had been unable to retain counsel, that he had had a court-appointed counsel in the proceedings before the lower court, and that the manner in which his appeal on points of law had been drafted made it clear that it had been prepared with the help of a qualified lawyer. After

that, the court heard the prosecutor, who submitted that the applicant's appeal should be dismissed.

31. On 9 March 2004 (реш. № 98 от 9 март 2004 г. по н. д. № 707/2003 г., БКЦ, I н. о.) the Supreme Court of Cassation upheld all parts of the lower court's judgment save the part in which it had confirmed the increase of the applicant's combined earlier sentence to thirteen months. It found that there had been no grounds to increase that sentence from ten to thirteen months, because the applicant had served it as early as 1996 and an increase would not further the aims of the punishment. As for the merits of the criminal case against the applicant, the court observed that, in the absence of breaches of procedural rules on the part of the lower courts, it was not competent to deal with arguments concerning the assessment of evidence and those courts' findings of fact. There was no appearance of a breach of the rules of procedure and no error in the application of the substantive law. The applicant's arguments concerning the establishment of the facts had been rejected by the lower courts after careful consideration of all the evidence. The appellate court had allowed the applicant to call witnesses and had re-examined officer N.D. The claim that it had failed to examine the case with due care was therefore ill-founded. The lower courts' findings of fact were based on evidence which had been properly admitted and assessed.

II. RELEVANT DOMESTIC LAW

A. Confessions

32. Article 91 §§ 1 and 2 of the Code of Criminal Procedure 1974, superseded on 29 April 2006 by Article 116 §§ 1 and 2 of the Code of Criminal Procedure 2005, provided that a conviction could not rest solely on the confession of the accused, and that a confession did not relieve the authorities of their duty to gather other evidence.

B. Privilege against self-incrimination

33. The accused may refuse to give explanations (Article 87 § 3 of the 1974 Code and Articles 55 § 1 and 115 § 4 of 2005 Code). Witnesses may also refuse to make statements or give answers that would incriminate them (Article 96 § 1 of the 1974 Code and Article 121 § 1 of 2005 Code). Unlike the 1974 Code, which was silent on the point, the 2005 Code specifically provides, in Article 122 § 2, that witnesses have the right to consult a lawyer if they consider that by answering a question they may incriminate themselves.

C. Persons who cannot be witnesses

34. Article 93 § 1 of the 1974 Code provided that a person who had taken part in the proceedings in another capacity could not be a witness. An exception was made for former accused, private prosecutors, civil claimants, civil defendants, and persons who had attested the carrying out of investigative steps (*ноемни лица*). Article 118 § 1 of the 2005 Code maintained the same position. Its paragraph 2 specifies that the bar also applies to persons who have carried out investigative actions or conducted trial proceedings even if the records of those proceedings have not been drawn up in line with the Code's requirements.

D. Point in time from which persons charged with criminal offences are entitled to the assistance of counsel

35. Article 73 § 1 of the 1974 Code, as amended in 1990, provided that counsel for the accused was entitled to take part in the proceedings from the point when the accused had been arrested or charged. Article 73 § 2, as amended in 1990, provided that the authorities had to explain to the accused that he or she was entitled to the assistance of counsel, and to give him or her the opportunity to contact a counsel. It went on to specify that the authorities could not take any investigative steps until they had done so. Article 97 §§ 1 and 2 of the 2005 Code maintained the same position, with slightly different wording.

E. Admission in evidence of pre-trial statements by the accused

36. Following an amendment that came into force on 1 January 2000, Article 277 § 1 of the 1974 Code allowed the admission in evidence of statements made by the accused during interrogation in the course of the pre-trial investigation only if the interrogation had taken place in the presence of a judge. Article 279 § 1 of the 2005 Code kept the same rule, but paragraphs 2 and 3 of that Article allow for exceptions in certain circumstances, with paragraph 4 adding the proviso that a conviction cannot be based solely on statements not made before a judge.

F. Court-appointed counsel

37. Points (1) to (6) of Article 70 § 1 of the 1974 Code listed certain situations in which an accused who could not retain counsel had to be provided with court-appointed counsel. None of these is relevant to the present case. On 1 January 2000 a new point 7 was added. It was part of a comprehensive overhaul of the Code intended to bring it into line with the Convention. It was based on Article 6 § 3 (c) of the Convention, and

provided that the appointment of counsel was mandatory if the accused could not afford one but wished to be legally represented and the interests of justice so required. The text of Article 94 § 1 (9) of the 2005 Code matches exactly that of Article 70 § 1 (7) of the 1974 Code.

38. Article 94 § 1 (7) of the 2005 Code, as originally enacted, provided that the participation of counsel in the proceedings before the Supreme Court of Cassation was compulsory in all cases, with the result that counsel had to be appointed if not retained by the accused (Article 94 §§ 2 and 3). However, in November 2009 the Government laid before Parliament a bill for the amendment of the Code, which proposed, among other things, the repeal of that provision. The explanatory notes to the bill stated that the system of mandatory appointment of counsel before the Supreme Court of Cassation in all cases without exception had proved ineffective and that the accused did not show any great interest in it. Moreover, Article 94 § 1 (7) often coincided with other grounds for the mandatory appointment of counsel, for instance those predicated on the subject matter of the case or the situation of the accused. Parliament enacted the bill in April 2010 and it became law on 28 May 2010.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 2 OF THE CONVENTION

39. The applicant complained that the proceedings against him had been unfair, and that the Gabrovo District Court and the Gabrovo Regional Court had been biased and had not respected his right to be presumed innocent. They had based his conviction chiefly on the testimony of officer N.D. and had discounted the testimony of several witnesses for the defence. The applicant relied on Article 6 §§ 1 and 2 of the Convention, which provide, in so far as relevant:

“1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

A. The parties' submissions

40. The Government submitted that the criminal proceedings against the applicant had been fully in line with the requirements of Article 6 §§ 1 and 2 of the Convention. The first-instance court had gathered all necessary evidence, and the appellate court had found no grounds to disturb its rulings. The applicant had been interviewed by an investigator on 26 September 2000 and had confessed, expressing remorse for his act. It had to be borne in mind that he was a recidivist offender with settled criminal habits. He had thus surely been aware of his right to remain silent. His confession had been entirely voluntary. There was no evidence that he had been pressured into confessing by threats of force. He had had the opportunity to challenge the evidence against him in adversarial proceedings which had fully complied with the requirements of the Convention. He had declined to have counsel at first instance, had had a court-appointed counsel in the proceedings before the appellate court, and had been able to appeal his conviction and sentence.

41. The applicant pointed out that the confession mentioned by the Government had not been admitted in evidence. The record drawn up when he had voluntarily surrendered the bag with the medicines quoted the applicant as saying that he had found the bag, not that he had stolen it from the pharmacy.

B. The Court's assessment

42. The Court starts by reiterating two points. First, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Secondly, although Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence. The Court is therefore not called upon to determine whether particular types of evidence – for instance, evidence obtained unlawfully in terms of domestic law – may be admissible; the question that must be answered is whether the proceedings as a whole, including the way in which the evidence was taken, were fair (see, among many other authorities, *Gäffen v. Germany* [GC], no. 22978/05, §§ 162-63, ECHR 2010-...).

43. Turning to the specific facts of the case, the Court notes that the national courts' finding that the applicant had committed the theft of which he stood accused was based chiefly on the testimony of police officer N.D., who gave evidence of a confession statement made by the applicant to him (see paragraphs 18 and 26 above). That testimony did indeed repeat what the applicant had said, but this cannot be regarded as in itself contrary to the requirements of Article 6 §§ 1 and 3 (d). It is true that inculpatory hearsay

emanating from a police officer may carry doubts as to its reliability. However, as already noted, Article 6 of the Convention does not lay down any rules on the admissibility of evidence. Similarly, the fact that the testimony emanated from an officer who had already dealt with the applicant and had taken part in the uncovering of the offence does not in itself raise a fairness issue (see, *mutatis mutandis*, *Cornelis v. the Netherlands* (dec.), no. 994/03, ECHR 2004–V). Nor can the Court gainsay the national courts' opinion as to the officer's – or the other witnesses' – credibility and reliability. It is not for it to substitute its own assessment of the evidence made by these courts, unless their assessment was arbitrary or capricious (see *Brennan v. the United Kingdom*, no. 39846/98, § 51, ECHR 2001–X). The applicant was given the opportunity of opposing the use of the officer's testimony, but retracted his initial objection to the officer's being called to give evidence at the trial. He was also able to cross-examine the officer and challenge the truthfulness of his statement. Indeed, he called two witnesses with a view to undermining the officer's credibility. After hearing those witnesses and organising a confrontation between them and the officer, the appellate court specifically found, in a reasoned ruling, that there were no grounds to doubt the accuracy of the officer's testimony (see paragraphs 26 above).

44. It is true that the above considerations do not entirely settle the matter. It remains the case that the applicant was convicted chiefly on the basis of his confession, as related by officer N.D., which raises the question whether that confession was free from improper compulsion (see, among other authorities, *Aleksandr Zaichenko v. Russia*, no. 39660/02, §§ 52–59, 18 February 2010). However, it cannot be overlooked that the applicant does not appear to have raised that issue at any point during the criminal proceedings against him – nor, indeed, in his application to this Court. He has not alleged that officer N.D. had threatened him or had used force or other forms of coercion against him in order to make him confess, or that his confession had not been voluntary for other reasons. The Court is therefore unable to go into that matter.

45. 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 6 §§ 1 AND 3 (c) OF THE CONVENTION

46. The applicant complained that the Supreme Court of Cassation had turned down his request for the appointment of counsel. He relied on Article 6 § 3 (c) of the Convention, which provides, in so far as relevant:

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ...”

A. The parties' submissions

47. The Government submitted that the applicant had been legally represented before the appellate court, which had gathered evidence and had examined the case against him on the merits. They said that at the relevant time legal assistance in cases of indigence had not been mandatory under domestic law, but that legal representation had later been made mandatory for all criminal cases coming before the Supreme Court of Cassation. The applicant had been able to plead in person. A perusal of his appeal on points of law showed that he had raised a number of arguments; some of them had been upheld by the Supreme Court of Cassation. The way in which that appeal had been drafted suggested that it had in fact been prepared by a lawyer.

48. The applicant submitted that, in respect of the refusal of the Supreme Court of Cassation to allow his request for the appointment of counsel, this case did not materially differ from *Tsonyo Tsonnev* (no. 2) (cited above), where the Court had found a breach of Article 6 §§ 1 and 3 (c). The need for legal assistance here had been even greater, given that the applicant risked a harsher sentence. In his request to the Supreme Court of Cassation he had pointed out that he was unemployed and could not afford to retain counsel. He had not benefited from legal assistance in the preparation of his appeal on points of law; he had drafted it with the help of a fellow inmate who had a secondary education. In any event, that had not obviated the need for qualified legal assistance at the hearing before the Supreme Court of Cassation, so as to be on equal terms with the prosecution.

B. The Court's assessment

1. Admissibility

49. 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 other grounds. It must therefore be declared admissible.

2. Merits

50. The right of those charged with criminal offences to free legal assistance is an element, among others, of the concept of a fair trial in criminal proceedings. It is subject to two conditions: the persons concerned must lack sufficient means to pay for legal assistance, and the interests of justice must require that they be granted such assistance (see, among other authorities, *Pham Hoang v. France*, 25 September 1992, § 39, Series A no. 243, and *Tsonyo Tsonev (no. 2)*, cited above, § 38).

51. With regard to the first condition, the Court notes the difficulties in assessing at this stage whether the applicant lacked sufficient means to pay for legal assistance in connection with his representation before the Supreme Court of Cassation. The Court cannot substitute itself for the national courts in carrying out that assessment; it must rather review whether they considered the issue in line with the requirements of Article 6 (see *R.D. v. Poland*, nos. 29692/96 and 34612/97, § 45, 18 December 2001). In this connection, the Court notes three points. First, the first-instance court expressly stated in its judgment that the applicant was unemployed and was financially dependent on his parents (see paragraph 20 above). Secondly, the appellate court appointed counsel for the applicant by reference to a declaration about his financial situation and to Article 70 § 1 (7) of the Code of Criminal Procedure 1974, which predicated the grant of legal assistance on the impossibility for the accused to afford counsel (see paragraphs 24 and 37 above). Thirdly, the applicant expressly asserted that he could not afford to retain counsel (see paragraph 29 above), whereas in rejecting his request the Supreme Court of Cassation did not properly explain why it did not accept that assertion, confining its reasoning to the very brief and blanket statement that the applicant had not pointed out why he had been unable to retain counsel (see paragraph 30 above and, *mutatis mutandis*, *Raykov v. Bulgaria*, no. 35185/03, § 66, 22 October 2009, and contrast *Caresana v. the United Kingdom* (dec.), no. 31541/96, 29 August 2000). The Supreme Court of Cassation did not give any indication whatsoever as to the circumstances, if any, which grounded its refusal (see *R.D. v. Poland*, cited above, § 46). In the light of those facts, the Court is satisfied that the applicant lacked sufficient means to pay for his legal representation before the Supreme Court of Cassation (see, *mutatis mutandis*, *Twalib v. Greece*,

9 June 1998, § 51, *Reports of Judgments and Decisions* 1998-IV, and *Tsonyo Tsonev* (no. 2), cited above, § 39).

52. As to whether the interests of justice required that the applicant be granted free legal assistance, the Court observes that the lower courts had found him guilty and had sentenced him to two years and nine months' imprisonment (see paragraphs 18 and 26 above). Where deprivation of liberty is at stake, the interests of justice in principle call for legal assistance (see *Benham v. the United Kingdom*, 10 June 1996, § 61, *Reports* 1996-III; *Shabelnik v. Ukraine*, no. 16404/03, § 58, 19 February 2009; and *Tsonyo Tsonev* (no. 2), cited above, § 40). There can therefore be little doubt that they required that it be granted to the applicant for the purposes of his representation before the Supreme Court of Cassation. An additional factor was the complexity of the cassation procedure (see *Pham Hoang*, § 40 *in fine*; *Twalib*, § 53; and *Tsonyo Tsonev* (no. 2), § 40, all cited above). Lastly, it cannot be overlooked that a qualified lawyer would have been able to clarify the grounds set out by the applicant in his appeal and effectively counter the pleadings of the public prosecutor at the hearing (see *Artico v. Italy*, 13 May 1980, § 34 *in fine*, Series A no. 37; *Pakelli v. Germany*, 25 April 1983, §§ 37-39, Series A no. 64; *Granger v. the United Kingdom*, 28 March 1990, § 47, Series A no. 174), thus ensuring respect for the principle of equality of arms (see *Tsonyo Tsonev* (no. 2), cited above, § 41).

53. In view of the foregoing, the Court concludes that there has been a violation of paragraph 3 (c), taken together with paragraph 1, of Article 6 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Alleged failure of the Supreme Court of Cassation to deal with arguments raised by the applicant

54. The applicant complained under Article 6 § 1 of the Convention that the Supreme Court of Cassation had refused to deal with some of his arguments.

55. The Court observes that the Supreme Court of Cassation refused to deal with the applicant's arguments concerning the assessment of the evidence and the lower courts' findings of fact because those arguments touched upon issues falling outside the scope of its jurisdiction, which was limited to questions of law. Its refusal to deal with them must therefore be regarded as justified. The manner of application of Article 6 of the Convention to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see, among many other authorities, *Monnell and*

Morris v. the United Kingdom, 2 March 1987, § 56, Series A no. 115). Under Article 2 of Protocol No. 7 the Contracting States may limit the scope of review of a conviction or sentence by a higher court, and in several of those States such review is limited to questions of law (see *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, ECHR 2000-I). Since the Convention and its Protocols must be read as a whole, such a limitation cannot be regarded as falling foul of Article 6 § 1 of the Convention.

56. The fact that the Supreme Court of Cassation did not specifically address the applicant's request for a more lenient sentence on account of the length of the proceedings does not present a problem either – that claim was obviously frivolous in view of the overall duration of the proceedings: less than three and a half years for a preliminary investigation and three levels of court.

57. 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.

B. Alleged unlawfulness of the applicant's imprisonment

58. The applicant complained, referring to Article 5 § 1 (a) of the Convention, that his imprisonment had not been lawful because it had been a result of proceedings conducted in breach of Article 6.

59. The Court finds that the applicant's assertion would be true only if the criminal proceedings against him amounted to a flagrant denial of justice, that is, were manifestly contrary to the provisions of Article 6 or the principles embodied therein (see *Stoichkov v. Bulgaria*, no. 9808/02, § 51, 24 March 2005). This is a stringent test: a flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures that result in a breach of Article 6 of the Convention. What is required is a breach of the principles of fair trial that is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article (see *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 260, 17 January 2012). Until now, the Court has found that a flagrant denial of justice has occurred or would occur only in certain very exceptional circumstances: conviction *in absentia* coupled with an impossibility to obtain from a court which has heard the accused a fresh determination of the merits of the charge (see *Enhorn v. Sweden* (dec.), no. 56529/00, § 33, ECHR 2005-I; *Stoichkov*, cited above, §§ 55-56; and *Sejdovic v. Italy* [GC], no. 56581/00, § 84, ECHR 2006-II); proceedings amounting to a mockery of basic fair trial principles (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 212-16, 286, 436 and 461-63, ECHR 2004-VII); a trial that is summary in nature and conducted with total disregard for the rights of the defence (see *Bader and Kanbor v. Sweden*, no. 13284/04, § 47, ECHR 2005-XI); detention without access to an independent and impartial tribunal able to review its lawfulness (see

Al-Moayad v. Germany (dec.), no. 35865/03, § 101, 20 February 2007); deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country (*ibid.*); or a trial in which evidence obtained under torture is used to secure a conviction (see *Othman (Abu Qatada)*, cited above, §§ 263-67). This is not the case here. Although the proceedings against the applicant were not fully in line with the requirements of Article 6 of the Convention, the flaws in them did not render them so fundamentally unfair as to amount to a flagrant denial of justice.

60. 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.

C. Alleged violation of Article 4 of Protocol No. 7

61. The applicant complained under Article 4 of Protocol No. 7 that the Gabrovo Regional Court's decision of 3 April 2003 (see paragraph 11 above) and the Supreme Court of Cassation's judgment of 9 March 2004 (see paragraph 31 above) had in effect imposed different punishments for the same offence.

62. The Court observes that the two rulings concerned the combination of the applicant's 1996 and 1999 sentences – both of which had previously been meted out in final judgments (see paragraphs 7 and 8 above) – and, more importantly, their increase by up to one half under a sentencing rule so allowing. The situation at hand is therefore far from being the paradigmatic case of double jeopardy envisaged by Article 4 of Protocol No. 7 (compare with *Sagir v. Austria*, no. 32054/96, Commission decision of 2 July 1998, unreported, and with *R.T. v. Switzerland* (dec.), no. 31982/96, 30 May 2000). However, even assuming that, because of the possibility of increasing the combined sentence by up to one half, the situation complained of fell within the ambit of Article 4 of Protocol No. 7 and that the later ruling – that of the Supreme Court of Cassation – impermissibly dealt with a question already settled in a final decision, the result was favourable for the applicant. While the Gabrovo Regional Court upheld the increase of his combined sentence from ten to thirteen months, the Supreme Court of Cassation found such an increase unnecessary and left the combined punishment at ten months, which the applicant had already served in 1996. The applicant can thus hardly claim to be a victim of a violation of Article 4 of Protocol No. 7 (see, *mutatis mutandis*, *Nikitin v. Russia*, no. 50178/99, § 60 *in limine*, ECHR 2004-VIII).

63. 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.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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

65. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage. He submitted that the manner in which the criminal proceedings against him had been conducted had caused him to feel humiliated and hopeless. As a result of the alleged breach of Article 5 § 1 of the Convention, he had remained in prison for a long time without justification, in poor conditions, which had also caused him distress.

66. The Government submitted that the applicant’s claim was frivolous and exorbitant. They pointed out that he had been awarded compensation for the conditions of his detention. Since he already had several applications before the Court, the finding of a violation in the present case would amount to sufficient just satisfaction.

67. The Court observes that in this case an award of just satisfaction can be based only on the breach of Article 6 §§ 1 and 3 (c) of the Convention stemming from the Supreme Court of Cassation’s refusal to appoint counsel for the applicant. The Court finds that, in the circumstances, the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant on that account. The Court notes in this connection the Chief Prosecutor’s power under Bulgarian law to request the reopening of proceedings following a judgment of this Court (see *Stoyanov v. Bulgaria*, no. 39206/07, § 48, 31 January 2012).

B. Costs and expenses

68. The applicant did not claim any costs or expenses.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning the refusal to appoint counsel for the applicant in the proceedings before the Supreme Court of Cassation admissible and the remainder of the application inadmissible;

2. *Holds* unanimously that there has been a violation of Article 6 § 1 taken in conjunction with Article 6 § 3 (c) of the Convention on account of the refusal of the Supreme Court of Cassation to appoint counsel for the applicant;
3. *Holds* by six votes to one that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

Done in English, and notified in writing on 16 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge David Thór Björgvinsson is annexed to this judgment.

L.G.
T.L.E.

PARTLY DISSENTING OPINION OF
JUDGE DAVID THÓR BJÖRGVINSSON

I dissented on the majority's approach to the issue of Article 41. In my view, and in accordance with the Court's established practice, compensation should have been awarded to the applicant for non-pecuniary damage. His right to a fair procedure was breached. In my opinion the breach in question cannot be dismissed as merely technical/procedural and such as to exclude the applicant from any entitlement to compensation for distress or frustration.