



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

FOURTH SECTION

CASE OF ASEN KOSTOV v. BULGARIA

(Application no. 48445/06)

JUDGMENT

STRASBOURG

26 March 2013

FINAL

26/06/2013

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

In the case of Asen Kostov v. Bulgaria,

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

Ineta Ziemele, *President*,

Päivi Hirvelä,

George Nicolaou,

Ledi Bianku,

Zdravka Kalaydjieva,

Krzysztof Wojtyczek,

Faris Vehabović, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 5 March 2013,

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

PROCEDURE

1. The case originated in an application (no. 48445/06) 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 Asen Kostov (“the applicant”), on 21 October 2006.

2. The applicant was represented by Mr A. Atanasov, a lawyer practising in Plovdiv. The Bulgarian Government (“the Government”) were represented by their Agent, Mrs R. Nikolova, of the Ministry of Justice.

3. The applicant alleged, in particular, that his detention over and above the one-year term of imprisonment imposed by a decision of 10 May 2004 had been unlawful and that he had not had an enforceable right to compensation in that regard.

4. On 7 October 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1961 and lives in Striama.

A. Proceedings in which overall sentences for the applicant's convictions were imposed

6. The applicant was convicted of a number of crimes committed between 1991 and 1998. The cases were given the case numbers 70/1995, 343/1998, 805/2001, 751/2002, 660/2002, 868/2003 and 1732/2002.

7. On 13 October 2003 a plea bargain agreement in case no. 868/2003 was approved by the Plovdiv District Court, under the terms of which the applicant pleaded guilty to robbery and was sentenced to one year's imprisonment.

8. The applicant started serving that sentence on 28 October 2003.

9. By a decision of 19 December 2003 in case no. 868/2003, the Plovdiv District Court imposed an overall sentence of two years' imprisonment, which included imprisonment for four of the applicant's other convictions (cases nos. 343/1998, 805/2001, 751/2002 and 660/2002).

10. Following an appeal lodged by the applicant, by a decision of 10 May 2004 the Plovdiv Regional Court set aside the lower court's decision. It imposed an overall sentence of one year's imprisonment solely for the applicant's convictions in cases nos. 343/1998 and 868/2003. From that prison term, the court deducted the six months which had been served by the applicant following his conviction in case no. 343/1998. It also held that the period served by the applicant following his conviction in case no. 868/2003 was also to be deducted from the overall sentence. The court did not specify when the one-year prison term was to expire. In respect of the convictions in cases nos. 70/1995, 805/2001, 751/2002 and 660/2002 (the applicant had already served the sentence imposed in case no. 70/1995 and the sentences in the remaining three cases were suspended), it concluded that imposing a separate overall sentence would be to the applicant's benefit but that another regional court was competent in this respect.

11. Following the decision of 10 May 2004 the applicant, relying on Article 425 of the Code Criminal Procedure of 1974, applied for the suspension of his sentence. On 14 May 2004 the regional prosecutor rejected the application, reasoning that an overall sentence for four other convictions was yet to be imposed.

12. The applicant was released on 1 June 2004, when it would appear that the decision of 10 May 2004, not having been appealed by either the applicant or the prosecution authorities, became final.

13. On an unspecified date in 2005 a new set of proceedings in which an overall sentence would be imposed started on account of the applicant's conviction in case no. 1732/2002, which had not been taken into consideration during the previous set of proceedings.

14. By a decision of 13 December 2005 the Plovdiv District Court imposed an overall sentence of one year and three months' imprisonment

for the applicant's convictions in cases nos. 343/1998, 1732/2002 and 868/2003. On 21 April 2006 the Plovdiv Regional Court upheld that decision.

15. It is not clear from the documents in the case file whether an overall sentence in cases nos. 70/1995, 805/2001, 751/2002 and 660/2002 was imposed.

B. Proceedings under the State and Municipalities' Responsibility for Damage Act concerning the lawfulness of the applicant's detention

16. On 1 October 2004, the applicant brought an action for damages under the State and Municipalities' Responsibility for Damage Act 1988 ("the 1988 Act") against the Plovdiv District Court and public prosecutor's office. He claimed that under the decision of 10 May 2004 he had been sentenced to one year's imprisonment but that he had actually served one year, two months and ten days.

17. By a judgment of 13 May 2005 the Pazardzhik Regional Court held that, after deducting time served and reducing the sentence to take account of the days the applicant had worked in prison, he had served two months and ten days over the prison term imposed by the decision of 10 May 2004. However, the court found that proceedings in which an overall sentence for some of the applicant's convictions would be imposed were pending, and that the period of time served in excess of the sentence imposed by the decision of 10 May 2004 would be taken into consideration when an overall sentence was imposed for the remaining convictions. The court consequently dismissed the action and ordered the applicant to pay the sum of 480 Bulgarian leva (BGN) in court fees.

18. The applicant appealed against the judgment. He stated that by adding another conviction and imposing a higher overall sentence, the decision of 21 April 2006 had contradicted that of 10 May 2004. By a judgment of 12 December 2008 the Plovdiv Court of Appeal upheld the lower court's finding and ordered the applicant to pay an additional BGN 240 in court fees. The court reasoned that his detention had been lawful because the applicant's conviction in case no. 1732/2002 had not been taken into consideration by the decision of 10 May 2004 as it should have been – a shortcoming rectified by the decision of 21 April 2006 – and that consequently in May 2004 the proceedings in which an overall sentence would be imposed had not yet been completed.

19. The applicant subsequently appealed on points of law, claiming that the amount of court fees he had been ordered to pay had breached amendments to the 1988 Act which had come into force on 30 May 2008.

20. By a decision of 5 February 2010 the Supreme Court of Cassation ("SCC") refused to grant the applicant's appeal on points of law, thus

upholding the lower court's judgment. In respect of the complaint against the court fees, the SCC ordered that separate proceedings be initiated.

21. By a final decision of 6 July 2010 the Supreme Court of Cassation upheld the applicant's complaint in respect of the court fees. The court applied section 9a and paragraph 9 of the concluding provisions of the 1988 Act (see paragraph 25 below) and determined that a flat court fee of BGN 15 should apply.

II. RELEVANT DOMESTIC LAW

22. Article 25 § 1 of the Criminal Code 1968 provides that when an individual is convicted pursuant to two or more separate judgments, one overall term of imprisonment shall be imposed if all of the crimes were committed prior to the first conviction. Paragraph 2 of that provision states that time served following conviction pursuant to one of the judgments shall be deducted from the time to be served under the overall term of imprisonment. Paragraph 4 provides that in the event that a sentence imposed in one or more of the judgments is suspended, the court imposing the overall prison term shall decide whether it is, in fact, to be served effectively.

23. Article 371 of the Code of Criminal Procedure 1974 ("the 1974 Code") (in force until 29 April 2006 when it was replaced by a new Code) provided that judgments and decisions were enforced after they become final. A copy of the judgment is sent to the prosecutor who is competent to take the necessary measures for its execution; in the case of a custodial sentence the prosecutor orders the prison authorities to detain the prisoner in execution of the sentence (Article 375 § 2 of the 1974 Code).

24. Article 425 of the 1974 Code provided, *inter alia*, that the service of a sentence of imprisonment could be interrupted on compelling grounds of a family or social nature. Article 426 § 1 of the 1974 Code stipulated that a prison governor could recommend such an interruption, which might then be ordered by the competent public prosecutor.

25. The relevant provisions of the State and Municipalities' Responsibility for Damage Act 1988 ("the 1988 Act") in respect of court fees are summarised in paragraphs 19-21 of the Court's judgment in the case of *Stankov v. Bulgaria* (no. 68490/01, ECHR 2007-VIII).

26. The 1988 Act was amended with effect from 30 May 2008, introducing, in new section 9a, a flat court fee in cases brought under the Act, irrespective of the amount of claim. According to paragraph 9 of the concluding provisions of the 1988 Act, section 9a applied to proceedings pending at the time of its introduction.

THE LAW

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

27. The applicant complained that his detention over and above the one-year term of imprisonment imposed by the decision of 10 May 2004 had been unlawful. He relied on Article 5 § 1 (a) of the Convention, which reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

...”

28. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

a. The Government

30. The Government asserted that the applicant's detention had been in conformity with the requirements of Article 5 § 1 (a) at all times, because he had been detained on 28 October 2003 in order to serve a sentence of one year's imprisonment imposed in case no. 868/2003. According to the decision of 10 May 2004, the applicant's term of imprisonment in that case had expired on 28 April 2004. However, seeing that that decision had only become final on 1 June 2004, the applicant had been detained prior to that date pursuant to his conviction in case no. 868/2003. Even assuming that the applicant had served a longer period of time in prison than the sentence imposed by the decision of 10 May 2004, it should be borne in mind that the process of imposing an overall sentence for all of the applicant's convictions had not finished with that decision. In this regard, the

Government pointed out that he had had a number of outstanding convictions under which an overall penalty was to be set – a fact of which the applicant had been aware – and that the entire period of the applicant's detention until 1 June 2004 had eventually been deducted from the overall sentence.

b. The applicant

31. The applicant contested the Government's assertions. He stated that his detention in excess of the overall penalty imposed by the decision of 10 May 2004, namely from 21 March until 1 June 2004, had stemmed from the decision of 19 December 2003, which he submitted had been erroneous, and from the public prosecutor's office's unwillingness to interrupt the service of his sentence. He further submitted that, contrary to the Government's claim, the decision of 10 May 2004 had become final and binding on the authorities upon delivery. His detention between 21 March and 1 June 2004 could not be justified by the fact that it had been deducted from the term of imprisonment imposed by the decision of 21 April 2006, as that decision had been erroneous and had contradicted the decision of 10 May 2004, which had already become final. Neither could his detention during the period in question be justified by the fact that, at the time when the decision of 10 May 2004 was rendered, he had been aware that he had had outstanding convictions for which an overall sentence had yet to be imposed.

2. The Court's assessment

32. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Subparagraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which individuals may be deprived of their liberty and no deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds (see, as a recent authority, *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 60, 15 March 2012).

33. The Court observes that on 28 October 2003 the applicant started serving the one-year sentence that had been imposed on him in accordance with the plea bargaining agreement of 13 October 2003 in case 868/2003 (see paragraph 7 above). His detention following that date therefore falls within the ambit of Article 5 § 1 (a).

34. The Court further notes that by a decision of 10 May 2004 an overall sentence of one year's imprisonment for two of the applicant's convictions, including that in case no. 868/2003, was imposed (see paragraph 10 above). He was released on 1 June 2004. According to the Government, the overall

term of imprisonment imposed by the decision of 10 May 2004 had expired on 28 April 2004 (see paragraph 29 above).

35. The Court considers that there were two periods during the applicant's detention which must be distinguished. The first is the period from 28 October 2003 until 10 May 2004. During this time, the applicant was detained on the strength of his conviction in case no. 868/2003 for a period of one year in accordance with the plea bargaining agreement of 13 October 2003 (see paragraph 7 above).

36. The second period is that between 10 May 2004 and 1 June 2004. During this period, the applicant was detained despite the fact that the overall term of imprisonment (which included his conviction in case no. 868/2003) imposed by the decision of 10 May 2004 had expired. The authorities refused to release him, citing his outstanding convictions as grounds for their refusal (see paragraph 11 above).

37. Thus the salient question in the present case is whether, in view of the decision of 10 May 2004, the applicant's detention until 1 June 2004 was justified within the meaning of Article 5 § 1 (a).

38. The Court notes that the decision of 10 May 2004 became final on 1 June 2004 and that the applicant was released on that date. However, it cannot be overlooked that as of 10 May 2004 the domestic authorities were aware that the term of the applicant's sentence had expired. However, despite that fact and in spite of not appealing against the decision as they could have done, the prosecution authorities refused to release the applicant, citing the need for an overall sentence for several of his other convictions to be imposed. However, the imposition of an overall penalty is made by the competent court and not by the public prosecutor's office. Thus, the Court is not convinced that, in the absence of the requisite order for the execution of another prison term (see paragraph 23 above), the public prosecutor ought to have relied on a future action by the courts as grounds for keeping the applicant in custody.

39. Next, the Government claimed that the applicant's detention in excess of the overall term of imprisonment imposed by the decision of 10 May 2004 had, in any event, been deducted from the time left to be served under the prison term imposed by the decision of 21 April 2006. On that point, and stressing that there should be justification for one's detention throughout its duration, the Court considers that, while this question might be of relevance for its analysis under Article 41, such retroactive validation of the applicant's detention during the period in question cannot serve as a justification for it.

40. Finally, the Government suggested that at the time the decision of 10 May 2004 was rendered the applicant had been fully aware of his conviction in case no. 1732/2002, but had nevertheless failed to request the domestic court to take it into consideration when imposing an overall sentence. The Court notes that the prosecution authorities did not inform the

domestic court of this conviction either. Further, once the conviction in case no. 1732/2002 was taken into consideration, the applicant's sentence was increased (see paragraph 14 above). In view of the possibility of this occurring, the applicant could not have been expected to embark on a course of action which could have worsened his situation.

41. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's detention following the decision of 10 May 2004, despite the fact that this decision became final on 1 June 2004, was not justified within the meaning of Article 5 § 1 (a) of the Convention.

42. There has accordingly been a violation of Article 5 § 1 of the Convention.

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

43. The applicant complained that he had not had an enforceable right to seek compensation in respect of his detention in breach of the provisions of Article 5. He relied on Article 5 § 5 of the Convention, which provides as follows:

“Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

44. The Government challenged the applicant's assertions. They averred that the applicant could have appealed against the decision of 10 May 2004, asking the domestic courts to impose an overall penalty for his remaining convictions, that he could have sought to have the prison governor recommend that the service of his sentence be interrupted, and that he could have brought an action under the 1988 Act.

A. Admissibility

45. The Court notes that it has found a violation of Article 5 § 1 (a) of the Convention (see paragraph 41 above). Article 5 § 5 is therefore applicable (see *Navushtanov v. Bulgaria*, no. 57847/00, § 78, 24 May 2007).

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

B. Merits

47. In view of the above, the Court must establish whether or not Bulgarian law afforded the applicant an enforceable right to compensation for the breach of Article 5 of the Convention in his case.

48. The Court observes that the Government suggested that the applicant should have sought to have an overall penalty for his remaining convictions imposed. They argued that by doing so he could have had the opportunity to have the period he had served in excess of the sentence imposed by the decision of 10 May 2004 deducted from the overall sentence. In addition, they stated that he had not petitioned the prison authorities, asking them to recommend that the service of his sentence be suspended.

49. The Court has already noted above (see paragraph 39) that the applicant cannot be expected to have attempted a course of action which could have worsened his situation. Thus, the possibility of seeking to have the courts impose an overall sentence for his remaining convictions cannot be seen as an avenue which could have satisfied the requirements of Article 5 § 5. As for the second argument advanced by the Government, it is to be noted that the applicant did approach the prosecution authorities with a request for the suspension of the execution of his sentence following the decision of 10 May 2004 (see paragraph 11 above), but to no avail.

50. It remains to be seen whether an action for damages under the 1988 Act could be seen as providing the applicant with an enforceable right to compensation. In fact, the applicant did bring such an action. While the proceedings were pending, one of the defendants – the public prosecutor's office – requested that a new set of proceedings be opened, in which an overall sentence would be imposed for the applicant's convictions which had already been the subject of the decision of 10 May 2004. The prosecutor's office argued for the inclusion of the applicant's conviction in case no. 1732/2002 in the overall penalty. That argument prompted the domestic courts to hold that the applicant's detention had not been unlawful.

51. That said, the Court cannot speculate as to whether the prosecution authorities initiated a new set of proceedings in which an overall penalty was to be imposed for some of the applicant's convictions in "retaliation" for his action for damages or in order to stifle it (see for a similar approach, *Fileva v. Bulgaria*, no. 3503/06, § 43, 3 April 2012).

52. The fact remains, however, that the applicant's action for damages was rejected in view of the increased sentence imposed by the decision of 21 April 2006 (see paragraph 20 above). Thus, in view of the domestic courts' findings (see paragraph 18 above), the applicant did not have an opportunity to prove his claim that he had sustained damage as a result of the breach of his right under Article 5 § 1.

53. It follows that the 1988 Act as interpreted and applied by the domestic courts in the applicant's case did not provide him with an enforceable right to compensation.

54. Therefore, there has been a violation of Article 5 § 5 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

55. Lastly, the applicant complained under Article 6 § 1 of the Convention and Article 1 of Protocol no. 1 to the Convention that the proceedings which had ended with the decision of 21 April 2006 and those brought under the 1988 Act had been unfair, as well as about the amount of court fees he had been ordered to pay in the proceedings for damages.

56. The Court has examined the complaints as submitted by the applicant. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

57. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed 368 euros (EUR) in respect of pecuniary damage, which represented the expenses incurred by him in the domestic proceedings. He did not present any documents or provide particulars in respect of this claim. He also claimed EUR 12,000 in respect of non-pecuniary damage.

60. The Government contested these claims as exorbitant. They considered that the finding of a violation would constitute sufficient just satisfaction for the applicant.

61. The Court considers the applicant's claims for pecuniary damage unsubstantiated; it therefore rejects this claim. On the other hand, it considers that the applicant must have sustained non-pecuniary damage as a result of the breach of the Convention in his case. In that regard, the Court is mindful of the fact that the period of the applicant's detention up to 1 June 2004, in respect of which the Court found a violation of the Convention, was deducted from the term of imprisonment imposed by the decision of 21 April 2006. However, the Court attaches importance to the fact that in the present case it was only after the increase of the applicant's term of imprisonment which occurred with the decision of 21 April 2006 that his

detention during the period in question could be deducted. Therefore, it awards the applicant EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

62. The applicant also claimed EUR 3,360 for the legal work carried out by his representative in the proceedings before the Court and EUR 52 for postal and clerical expenses. In support of those claims he presented a contract for legal representation at the hourly rate of EUR 80 and a time sheet.

63. The Government contested these claims as excessive.

64. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, and also to the applicant's failure to provide all the necessary documents, such as invoices and receipts in relation to the postal and clerical expenses incurred, the Court considers it reasonable to award the sum of EUR 1,500 for the proceedings before the Court.

C. Default interest

65. 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 complaints under Article 5 § 1 and under Article 5 § 5 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 5 § 5 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian leva at the rate applicable at the date of settlement:

- (i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (iii) EUR 1,500 (one thousand five 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;

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

Done in English, and notified in writing on 26 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Ineta Ziemele
President