



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

FIRST SECTION

CASE OF NIKOLOV v. BULGARIA

(Application no. 38884/97)

JUDGMENT

STRASBOURG

30 January 2003

FINAL

30/04/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nikolov v. Bulgaria,

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

Mr C.L. ROZAKIS, *President*,

Mrs F. TULKENS

Mr G. BONELLO,

Mr P. LORENZEN,

Mrs N. VAJIĆ,

Mrs S. BOTOUCHAROVA,

Mr V. ZAGREBELSKY, *judges*,

and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 9 January 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 38884/97) against the Republic of Bulgaria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Bulgarian national, Borislav Roumenov Nikolov (“the applicant”), on 5 August 1997.

2. The applicant, who had been granted legal aid, was represented by Mr M. Ekimdjiev, a lawyer practising in Plovdiv. The Bulgarian Government (“the Government”) were represented by their Agent, Mrs V. Djidjeva, of the Ministry of Justice.

3. The applicant alleged, in particular, that upon his arrest he was not brought before a judge or other officer authorised by law to exercise judicial power, that his pre-trial detention was unlawful and unjustified, that his appeal against detention was examined with substantial delay and that his lawyer was refused access to the case file.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court).

6. By a decision of 19 September 2000, the Court (Fourth Section) declared the application partly admissible.

The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, who was born in 1981, was a minor at the relevant time.

9. On 5 April 1997 he was arrested on the suspicion of having destroyed a car with the use of explosives.

10. On the day of his arrest he was brought before an investigator who charged him under Article 333 in conjunction with Articles 330 § 1 and 3 of the Penal Code. The investigator also decided to detain the applicant pending trial. This decision, which apparently was confirmed on an unspecified date by a prosecutor, only referred to Article 152 § 1 of the Code of Criminal Procedure.

11. On 2 May 1997 the applicant appealed to the District Prosecutor's Office in Plovdiv requesting his release.

12. On 20 May 1997 this request was refused on the ground that the applicant was charged with a "serious wilful offence", within the meaning of Article 152 § 1 of the Code of Criminal Procedure.

13. On 29 May 1997 the applicant's mother appealed to the Regional Prosecutor's Office against the refusal of the District Public Prosecutor. She requested her son's release on the ground that he needed medical supervision and possibly surgery. A copy of a medical certificate was also produced, indicating that the applicant was suffering from a tumour to his right hand which was reappearing despite two surgical operations for its removal.

14. On 12 June 1997 the applicant's lawyer requested the Regional Investigation Authorities (OSS) to order his client's examination by a medical doctor with a view to establishing his mental state and whether or not the tumour to his hand required treatment. This request was apparently granted.

15. By decision of 4 July 1997 the Regional Public Prosecutor's Office refused to release the applicant. The decision stated that the district prosecutor had erred in relying on Article 152 § 1 of the Code of Criminal Procedure as the offence of which the applicant had been accused was

punishable, in the case of a minor, by up to three years' imprisonment, and therefore Article 152 § 1 of the Code, which concerned "serious wilful offences" (those punishable by more than five years' imprisonment) was not applicable. However, it was clear from the findings of the investigation that there existed a "prima facie" danger of absconding, committing further offences, or obstructing the investigation, such a danger being a ground for detention pending trial under Article 152 § 4 of the Code of Criminal Procedure.

16. On 9 July 1997 the applicant's lawyer submitted to the District Prosecutor's Office another request for release.

He stated that the investigation during which the applicant had fully co-operated and had made confessions, was completed, that the applicant needed medical treatment, that he was psychologically unstable which transpired from the opinion of a psychiatrist who had examined him while in detention, and that Article 378 of the Code of Criminal Procedure allowed pre-trial detention of minors only in exceptional circumstances.

It is unclear whether this request was examined.

17. On 5 August 1997 the applicant's lawyer appealed to the District Court in Plovdiv against his client's pre-trial detention and requested a public hearing.

He relied on the arguments already raised before the prosecutors and emphasised that the provision of Article 378 of the Code of Criminal Procedure had been disregarded. He also relied on the Convention.

18. On the same day the appeal was sent to the District Public Prosecutor to complete the case file.

19. On 21 August 1997 the District Court received the completed case file, including an appeal for release that had been submitted by the applicant's mother to the Chief Public Prosecutor's Office on 8 August 1997. The District Court listed the case for a hearing on 25 August 1997.

20. On 25 August 1997 the court adjourned the hearing to 16 September 1997, as the applicant's lawyer had not been summoned properly. The court also ordered a medical report and appointed three medical experts.

21. On 29 August 1997 the applicant was brought to a hospital where he was diagnosed as suffering from pleurisy, and later from tuberculosis. He remained in hospital for an unspecified period of time and underwent intensive treatment.

22. On 5 September 1997 the applicant's lawyer submitted to the District Court a request for the appointment of medical experts to examine whether the conditions of detention at the premises of the investigator's office would pose a threat to the applicant's health. This request was granted.

23. On 8 September 1997 the experts found that the applicant needed to stay in hospital for at least 45 days, to be followed by a sanatorial placement. The experts concluded that a renewed detention of the applicant

at the premises of the investigator's office in Plovdiv, if ordered within the upcoming six to eight months, would put at peril the applicant's health.

24. On 15 September 1997, the day before the second hearing on his appeal against detention, the applicant's lawyer requested to consult the case file. At that time the case file was held by the judge dealing with the appeal. The judge refused.

25. On the same day the applicant's lawyer repeated his request in writing. The judge refused in writing on 16 September 1997.

26. The hearing before the District Court resumed on 16 September 1997. The applicant and his lawyer were both present. The applicant's lawyer unsuccessfully asked for an adjournment as he had been refused access to the case file.

27. The judge heard the medical expert and decided to substitute the applicant's pre-trial detention by a more lenient measure, "parental supervision", in view of his medical condition.

28. Rejecting the applicant's argument that his detention had been illegal from the outset, the judge stated that he had been lawfully detained. In particular, although the authorities had initially relied on Article 152 § 1 of the Code of Criminal Procedure which was inapplicable, this defect had been remedied on 4 July 1997 when the competent prosecutor had confirmed the applicant's pre-trial detention under the pertinent rule, Article 152 § 4 of the Code.

Furthermore, the substantive elements justifying the applicant's detention had existed. In particular, the nature of the offence he had been charged with was important: it was of the category of offences that imperilled the safety of the public at large.

29. Despite the District Court's decision to release the applicant from pre-trial detention and place him under "parental supervision", he was not released immediately.

30. On 17 September 1997 the District Court transmitted its decision of 16 September 1997 to the District Public Prosecutor for execution.

31. Since the applicant was detained in premises under the administration of the Regional Investigation Service, the decision was thereupon transmitted to that service.

32. On an unspecified date the applicant's mother signed the necessary papers regarding "parental supervision".

33. The applicant was released on 23 September 1997.

34. On 29 May 1998 he was found guilty and sentenced to one year imprisonment, suspended.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Officer ordering arrest and detention

35. At the relevant time and until the reform of 1 January 2000 an arrested person was brought before an investigator who decided whether or not the accused should be remanded in custody. The investigator's decision was subject to approval by a prosecutor.

36. The role of investigators and prosecutors under Bulgarian law has been summarised in paragraphs 25-29 of the Court's *Nikolova v. Bulgaria* judgment ([GC], no. 31195/96, ECHR 1999-II).

B. Grounds for pre-trial detention

37. Article 152 of the Code of Criminal Procedure, as in force at the relevant time, set out the legal grounds for pre-trial detention and distinguished between cases where the charges concerned a “serious wilful offences” and all other cases.

Under its paragraphs 1 and 2, and according to the practice of the Supreme Court, Article 152 required that a person charged with a serious wilful offence had to be remanded in custody. An exception was only possible where it was clear beyond doubt that any danger of absconding or reoffending was objectively excluded since, for example, the accused was seriously ill. The detainee bore the burden to prove the existence of such exceptional circumstances.

Under paragraph 4 of Article 152, where the case concerned an offence which was not a “serious offence”, the accused could be detained pending trial only if it was established that there existed a danger of absconding, reoffending or obstructing the course of justice.

38. Article 93(7) of the Penal Code provides that a “serious offence” is one punishable by more than five years' imprisonment.

39. The wilful infliction of substantial damage to objects with the use of explosives is an offence under Article 333 in conjunction with 330 §§ 1 and 3 of the Penal Code which, if committed by a minor (Article 63 § 1(3) of the Penal Code), is punishable by up to three years' imprisonment.

C. Pre-trial detention of minors; parental supervision

40. Article 378 § 2 of the Code of Criminal Procedure provides that minors may be remanded in custody only in exceptional circumstances. No relevant case-law under this provision is reported.

41. Paragraph 1(1) of the same provision states that a minor charged with having committed a criminal offence may be placed under “parental

supervision”, as a measure to secure appearance before the competent authorities and prevent reoffending. In such cases, the parent must sign a declaration undertaking to supervise the minor and secure his or her appearance before the competent authority.

42. The Code of Criminal Procedure as in force at the relevant time did not state expressly whether a minor whose pre-trial detention was substituted by parental supervision should be detained pending the making of an undertaking by a parent.

In respect of release on bail, Article 150 § 5 of the Code stated that it was only possible after recognisance was given.

By contrast, release must be immediate upon acquittal or where a sentence without imprisonment has been pronounced (Article 307 § 2 of the Code).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 1 AND 3 OF THE CONVENTION

43. The applicant complained that upon his arrest he had not been brought before a judge or other officer exercising judicial power and that he had been deprived of liberty unlawfully and without justification.

44. The relevant part of Article 5 of the Convention provides:

“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:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. The parties' submissions

1. *The applicant*

45. The applicant stated that investigators and prosecutors under Bulgarian law could not be considered independent officers authorised by law to exercise judicial power. He referred to the case of *Asenov and Others v. Bulgaria* (judgement of 28 October 1998, *Reports* 1998-VIII).

46. Further, he submitted that his detention had been unlawful, unnecessary and contrary to the Convention.

In particular, for a period of three months the authorities had relied on Article 152 § 1 of the Code of Criminal Procedure on the erroneous assumption that the applicant had been charged with a “serious offence”. During that period the prosecutors, on the basis of the law and practice according to which everyone charged with a serious offence must be remanded in custody, had not inquired whether there was a danger of absconding, reoffending or obstructing the course of justice.

Furthermore, the authorities had disregarded Article 378 § 2 of the Code of Criminal Procedure which provided that minors should be remanded in custody only in exceptional circumstances.

47. The applicant also stated that even after the erroneous characterisation of the charges had been acknowledged on 4 July 1997, his pre-trial detention had been confirmed and prolonged without any reference to evidence demonstrating that there existed a danger of his absconding, reoffending or obstructing the course of justice. The seriousness of the charges had again been the sole argument. In the applicant's submission that approach was contrary to the Convention. Moreover, the applicant's submissions about his ill-health had initially been disregarded, although the facts demonstrated that he would not have been physically able to abscond.

48. As regards his detention between 16 September 1997, when the District Court decided to release him, and 23 September 1997, when he was actually released, the applicant submitted that it was unacceptable that a seriously ill minor, whose release had been ordered by a judge, could be kept in detention for seven additional days without any legal basis, owing to technical and administrative formalities. In the applicant's view the provision of the Code of Criminal Procedure which requires immediate release upon acquittal or where a sentence without imprisonment was pronounced (Article 307 § 2) should be applied by analogy.

2. *The Government*

49. The Government stated that public prosecutors fulfilled the criteria to be considered as officers authorised by law to exercise judicial power. Furthermore, the applicant appealed against his detention to a court only after four months from the date when he was detained, which demonstrated

that he considered the public prosecutor to be an independent and impartial body.

50. The Government maintained that the imprecise reference to Article 152 § 1 of the Code of Criminal Procedure did not render the applicant's detention unlawful as Article 152 § 4 represented a clear legal basis for the applicant's detention. This had been confirmed by the public prosecutor's decision of 4 July 1997 which established that there had been a danger of the applicant's absconding, committing further offences, or obstructing the course of justice.

51. The Government also informed the Court that at the relevant time the applicant did not go to school or work, lived only with one of his parents and associated with people from the criminal milieu. Therefore, there existed exceptional circumstances to impose a pre-trial detention as provided for under Article 378 § 2 of the Code of Criminal Procedure.

52. As regards the period 16 - 23 September 1997, the Government stated that some delay in the implementation of the court's decision to release the applicant was inevitable. In particular, the decision had to be transmitted to the investigation authorities who had to verify whether or not there were other grounds to detain the applicant. Furthermore, in cases where pre-trial detention of a minor was substituted by parental supervision, domestic law required that one of the parents should sign the papers necessary for his release. On 16 September 1997 none of the applicant's parents, who were divorced, had attended the court's hearing. Solely his mother's address was available. Therefore, additional time was taken up by the efforts to contact the applicant's mother.

B. The Court's assessment

53. The Court will examine the applicant's complaints in the order in which the procedural steps on his arrest and detention were taken.

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

54. The Court recalls that in the above mentioned *Assenov and Others* and *Nikolova* judgments, which concerned the system of detention pending trial as it existed in Bulgaria until 1 January 2000 (see paragraph 35 above), it found that neither investigators before whom accused persons were brought, nor prosecutors who approved detention orders, could be considered to be "officer[s] authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention (see, as another recent authority, *H.B. v Switzerland*, no. 26899/95, 5 April 2001, unreported).

55. The present case also concerns detention pending trial before 1 January 2000. The applicant was brought before an investigator who did not have power to make a binding decision to detain him. In any event, neither the investigator nor the prosecutor who authorised the detention were sufficiently independent and impartial for the purposes of Article 5 § 3, in view of the practical role they played in the prosecution and their potential participation as a party to the criminal proceedings. The Court refers to its analysis of the relevant domestic law contained in its *Nikolova* judgment (see §§ 28, 29 and 45-53 of that judgment).

56. It follows that there has been a violation of the applicant's right to be brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention.

2. Alleged violation of Article 5 § 1 in respect of the lawfulness of the applicant's detention during its first three months

57. It is common ground between the parties that the initial detention order of 5 April 1997 erroneously referred to paragraph 1 of Article 152 of the Code of Criminal Procedure. Approximately three months later, on 4 July 1997, the competent prosecutor found that the correct legal reference had been paragraph 4 of the same Article (see paragraphs 10, 12 and 15 above).

58. The issue before the Court is whether the above error rendered the applicant's deprivation of liberty during its first three months unlawful under domestic law or contrary to the Convention.

59. The District Court examined the question of the detention's lawfulness in its decision of 16 September 1997. It considered that it had been lawful at all times since the material conditions under the applicable provision, Article 152 § 4 of the Code of Criminal Procedure - which contained stricter requirements -, had been met (see paragraphs 28 and 37 above).

60. The applicant has not relied on any relevant domestic case-law to demonstrate that the District Court's decision in his case was at variance with provisions or practice on the effects in domestic law of similar errors.

61. As the difference between the two provisions was solely in the standard of proof as to the existence of a danger of absconding, reoffending or obstructing the course of justice and since the competent prosecutor found on 4 July 1997 that such a danger had existed at all times under the more stringent standard, the Court does not consider that the District Court's conclusion was unreasonable or arbitrary in the circumstances.

62. Whether or not the findings of the prosecutor of 4 July 1997 and of the District Court of 16 September 1997 on the alleged danger of absconding, reoffending or collusion were substantiated or constituted relevant and sufficient reasons to justify the applicant's deprivation of

liberty throughout its duration is a separate question, to be examined under Article 5 § 3 of the Convention.

63. For the purposes of the applicant's complaint under Article 5 § 1 of the Convention, however, having regard to the submissions of the parties and the material in the case, the Court does not find it established that the defect in the initial detention order was of such a nature so as to deprive the applicant's detention of its legal basis under domestic law (see, *mutatis mutandis*, *Perks and Others v. the United Kingdom*, no. 25277/94 and others, 12 October 1999, unreported, and *Douiyeb v. the Netherlands* [GC], no. 31464/96, 4 August 1999, unreported).

64. Finally, it is undisputed that the applicant was remanded in custody by decision of the competent authorities for the purpose of bringing him before them on criminal charges. It is also undisputed that there existed a reasonable suspicion against him having committed the offence he was charged with. There has been no substantiated allegation of arbitrariness.

65. The Court finds, therefore, that there has been no violation of Article 5 § 1 of the Convention in respect of the first three months of the applicant's detention.

3. Alleged violation of the right to trial within a reasonable time or to release pending trial in accordance with Article 5 § 3

66. The applicant was arrested on 5 April 1997 and was released on 23 September 1997 (see paragraphs 9 and 33 above). The period under consideration is therefore approximately five and a half months.

67. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the authorities continued to justify the deprivation of liberty. Where such grounds were relevant and sufficient, the Court must also ascertain whether the competent national authorities displayed special diligence in the conduct of the proceedings (*Labita v. Italy*, cited above, §§ 152 and 153).

68. The Court observes, firstly, that the authorities failed to state any reason to justify the applicant's detention under Article 378 § 2 of the Code of Criminal Procedure, which provides that minors can only be remanded in custody in "exceptional cases". They never replied in their decisions to the applicant's repeated submissions that there were no exceptional circumstances (see paragraphs 10, 12, 15 - 17 and 28 above). Indeed, it appears that there was no case-law clarifying the meaning of Article 378 § 2 of the Code (see paragraph 40 above).

69. The Court considers that while succinct reasoning may be inevitable in practice, it is difficult to accept that pre-trial detention was based on "sufficient" reasons if, in disregard of repeated arguable submissions, no reasons were given in respect of one of the relevant statutory criteria.

70. Secondly, as in the cases of *Ilijkov v. Bulgaria* (no. 33977/97, 26 July 2001, unreported), and *Shishkov v. Bulgaria*, (no. 38822/97, 9 January 2003, unreported), the authorities relied, during the first three months of the applicant's detention, solely on a statutory presumption based on the gravity of the charges which shifted to the accused the burden of proving that there was not even a hypothetical danger of absconding, reoffending or collusion (see paragraphs 10, 12 and 37 above). This approach was incompatible with Article 5 § 3 of the Convention, as the Court found in *Ilijkov* and *Shishkov* (cited above).

71. Moreover, the authorities erred in the legal characterisation of the charges and, as a consequence, during the first three months of the applicant's detention grounded their decisions on reasons which were at least partly irrelevant (see paragraphs 15, 38 and 39 above).

72. It is true that the error was eventually acknowledged and that on 4 July 1997 the competent prosecutor stated that there was a danger of the applicant absconding, reoffending or obstructing the course of justice. It is also true that the District Court stated that the applicant's detention had been necessary in view of the dangerous nature of the offence he had been charged with.

73. However, the authorities still failed to address one of the relevant statutory criteria, that under Article 378 § 2 of the Code of Criminal Procedure. Furthermore, the regional prosecutor, in his decision of 4 July 1997, did not provide any reasoning in support of his findings which were, therefore, of a purely declaratory nature. Finally, the District Court's remark was made after the applicant's release had already been decided (see paragraphs 15 and 28 above).

74. As regards the Government's submission that at the relevant time the applicant did not go to school or work, lived only with one of his parents and associated with people from the criminal milieu (see paragraph 51 above), the Court reiterates that it is not its task to take the place of the national authorities who ruled on the applicant's detention. It falls to them to examine all the facts arguing for or against detention and set them out in their decisions (see, *Labita v. Italy*, cited above, § 152). The Government's allegation as to the applicant's personal circumstances were made for the first time in the proceedings before the Court. They were never mentioned by the authorities who decided on the applicant's detention.

75. In sum, the Court finds that for at least a part of the period under consideration the applicant's pre-trial detention was prolonged on grounds which cannot be seen as relevant and sufficient. It follows that his deprivation of liberty for a period lasting five and a half months was not justified.

76. In these circumstances it is not necessary to examine whether the authorities displayed the special diligence required in the handling of criminal proceedings against remand prisoners.

77. The Court thus finds that there has been a violation of the applicant's right under Article 5 § 3 of the Convention to trial within a reasonable time or to release pending trial.

4. Alleged violation of Article 5 § 1 as regards the applicant's detention between 16 and 23 September 1997

78. On 16 September 1997 the District Court did not order the applicant's unconditional release but his placement under parental supervision, within the meaning of Article 378 § 1(1) of the Code of Criminal Procedure (see paragraph 27 above).

Under the relevant law, that meant that one of his parents had to make a declaration undertaking to supervise the applicant and secure his appearance before the competent authority. The authorities interpreted the law in the sense that release was only possible after the fulfilment of that condition, an approach which cannot be seen as unreasonable or unforeseeable (see paragraphs 41 and 42 above).

79. In accordance with Article 5 § 3 *in fine* of the Convention, release pending trial may be conditioned by guarantees. In such cases, continued deprivation of liberty for a certain period of time pending the giving of a recognisance or until the fulfilment of other lawful conditions set out in law or in a judicial decision is undoubtedly a continuation of the initial detention "effected for the purpose of bringing [the accused] before the competent legal authority on ... suspicion of having committed an offence ..." and falls under Article 5 § 1(c) of the Convention (see *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8).

80. However, only a narrow interpretation of the list of exceptions to the right to liberty secured in Article 5 § 1 is consistent with the aim of that provision, to ensure that no one is arbitrarily deprived of his or her liberty. The Court must, therefore, scrutinise complaints of delays in release of detainees with particular vigilance. It is incumbent on the respondent Government to provide a detailed account of the relevant facts (see, *Labita v. Italy* ([GC], no. 26772/95, ECHR 2000-IV, § 170).

81. The Government's position was that the delay in the applicant's release following the District Court's decision of 16 September 1997 had two causes: regular administrative formalities and difficulties in locating the applicant's mother who had to sign a declaration that she would secure her son's appearance before the competent authority (see paragraph 52 above).

82. The Court reiterates that administrative formalities connected with release cannot justify a delay of more than several hours (see, *Giulia Manzoni v. Italy*, judgment of 1 July 1997, *Reports* 1997-IV and *Labita v. Italy*, cited above).

83. Further, the Court observes that the Government have not provided any details about the alleged difficulties in contacting the applicant's mother. It is undisputed that her address was available (see paragraphs 13,

19 and 52 above). The day on which she was eventually contacted and the day on which she signed the necessary papers have not been indicated. As a result, the Government have not established that the applicant was released immediately upon the fulfilment of the conditions attached to the District Court's decision.

84. The Court thus finds that in the absence of a strict account of the relevant events, hour by hour, the Government's position that the entire period of the applicant's deprivation of liberty between 16 and 23 September 1997 fell under paragraph 1(c) of Article 5 must be rejected.

85. It follows that there has been a violation of Article 5 § 1 as regards the applicant's deprivation of liberty between 16 and 23 September 1997.

II. ALLEGED VIOLATIONS OF ARTICLE 5 § 4 OF THE CONVENTION

86. Relying on Articles 5 § 4 and 13 of the Convention, the applicant complained that his appeal to the District Court was examined 42 days following its submission and that his lawyer was refused access to the case-file.

87. The Court finds that these complaints fall to be examined under Article 5 § 4 of the Convention, which provides:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. The parties' submissions

88. The applicant stated that the authorities were under an obligation to organise the examination of his judicial appeal speedily. It was inconceivable that the public prosecutor would need sixteen days to complete the file. In addition, in accordance with an amendment to the Code of Criminal Procedure of 13 August 1997, the District Court had to examine the appeal at a public hearing, within three days. In breach of that requirement, after having been responsible for an adjournment as it had not summoned the applicant's lawyer on 25 August 1997, the District Court fixed the next hearing in three weeks.

89. As regards access to the case file, the applicant's lawyer stated that at the relevant time there had been an informal agreement between the Prosecutor's Office and the District Court to bar consultations of case files pending investigations.

Further, the applicant considered that he could claim to be the victim of a violation of Article 5 § 4 of the Convention, regardless of the fact that the District Court had ordered his release in the proceedings in which his lawyer

was refused access to the case file. In particular, release had been ordered on medical grounds and the District Court had dismissed his claim that his detention had been unlawful, thus precluding any compensation claim that he might have had under the State Responsibility for Damage Act.

90. The Government stated that the delay was attributable to the applicant's lawyer. Firstly, on 5 August 1997 he requested a public hearing, which took more time to organise. The court immediately took all the necessary steps and sent the case file to the public prosecutor for completion. Secondly, on 25 August 1997 the hearing was adjourned as the applicant's lawyer was absent.

91. In respect of the alleged refusal of access to the case file, the Government observed that the applicant could not claim to be a victim of a violation of his rights, as the District Court had in any event decided to release him.

92. The Government also submitted that according to the domestic law and practice the case file could only be consulted upon the completion of the preliminary investigation, whereas in the applicant's case the investigation was pending. Furthermore, the applicant's lawyer had only asked to see the file on the day before the second hearing.

B. The Court's assessment

1. Alleged violation of the applicant's right to a "speedy" examination of his appeal against detention

93. The appeal against the applicant's detention was examined 42 days after its submission.

94. The Court finds that the prosecutor's office was responsible for an unjustified delay of more than two weeks as it did not transmit the appeal to the competent court immediately (see paragraphs 17-19 above). Further delays attributable to the authorities were the result of defective summoning of the applicant's lawyer and the fact that the District Court allowed three weeks between the hearings.

95. Although several days were undoubtedly necessary for the presentation of a medical report on the applicant's health, the remaining delays exceeded the acceptable limits under Article 5 § 4 of the Convention. The applicant's appeal was not examined speedily.

There has been therefore a violation of Article 5 § 4 of the Convention in this respect.

2. *Alleged refusal of access to the case file in the proceedings concerning the applicant's appeal against his detention*

96. Insofar as the Government disputed the applicant's quality as a victim, the Court observes that his release was ordered on medical grounds and that the District Court dismissed the claim that his detention had been unlawful. It follows that the applicant may claim to be a victim of violations of his right to access to the case file in these proceedings, as protected by Article 5 § 4 of the Convention.

97. The Court reiterates that in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial.

The proceedings must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness, in the sense of the Convention, of his client's detention (see, *Garcia Alva v. Germany*, no. 23541/94, 13 February 2001, unreported, §§ 39-43 and *Shishkov v. Bulgaria*, cited above).

98. It is undisputed that the applicant's lawyer was not allowed to consult his client's case file. As confirmed by the Government, at the relevant time access to the case files in pending investigation proceedings was refused as a matter of established practice.

99. That approach was incompatible with Article 5 § 4 of the Convention.

There has been therefore a violation of that provision as regards the denial of access to the case file.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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

101. The applicant claimed 21,000 Bulgarian leva (“BGN”) in respect of non-pecuniary damage. He stated, *inter alia*, that his detention had been unlawful from the outset, that he had been the victim of very serious breaches of his rights, and that his health had deteriorated as a result of the

conditions of detention. He referred to the case of *Lukanov v. Bulgaria* (judgment of 20 March 1997, *Reports* 1997-II).

102. The Government submitted that the Court should dismiss the claim for non-pecuniary damage as it did in *Nikolova v. Bulgaria* ([GC], no. 31195/96, ECHR 1999-II). They also reiterated their arguments - already raised in a number of previous cases - that the economic conditions in Bulgaria should be taken into consideration.

103. The Court has found, *inter alia*, that the applicant's pre-trial detention lasting approximately five months and a half was not justified under Article 5 § 3 of the Convention, that his deprivation of liberty between 16 and 23 September 1997 was in breach of Article 5 § 1 and that in contravention of Article 5 § 4 his judicial appeal against detention was not examined speedily and he did not have access to the case file.

104. These violations of the applicant's rights under the Convention warrant an award under Article 41 as the mere finding of a violation cannot be considered sufficient just satisfaction.

105. Having regard to its case-law (see, *Lukanov v. Bulgaria*, judgment of 10 March 1997, *Reports* 1997-II, § 56; *Assenov and Others v. Bulgaria*, judgment of 28 October 1998; *Reports* 1998-VIII, §§ 176-178; *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II; *Ječius v. Lithuania*, *loc. cit.*, § 109; *Punzelt v. the Czech Republic*, no. 31315/96, 25 April 2000, unreported; *Grauslys v. Lithuania*, *loc. cit.*; *Musial v. Poland*, 24557/94, ECHR 1999-II; *Sabeur Ben Ali v. Malta*, no. 35892/97; *Varbanov v. Bulgaria*, no. 31365/98, § 67, ECHR 2000-X; *Ilijkov v. Bulgaria*, cited above, and *Filiz and Kalkan v. Turkey*, no. 34481/97, 20 June 2002, unreported), and deciding on an equitable basis the Court awards 2,000 euros ("EUR") in respect of non-pecuniary damage.

B. Costs and expenses

106. The applicant claimed 4,809 US dollars ("USD"), including USD 3,890 for eighty hours of legal work, at rates between USD 30 and 50, allegedly spent in work on the applicant's appeal against detention in Bulgaria and on the proceedings under the Convention, USD 660 for the translation of 110 pages, USD 99 for telephone and mailing expenses and USD 160 in other expenses.

107. The applicant presented a fees agreement with his lawyer and a time-sheet.

108. The Government stated that contingency fee agreements were unacceptable. They analysed the number of hours claimed in detail and stated that it was highly excessive and arbitrary. The Government also disputed the hourly rate, stating that it was far higher than that usually charged by lawyers in Bulgaria.

109. The Government stated that the claims for translation and other expenses should be rejected in the absence of documents certifying payments actually made.

110. The Court finds that the number of hours claimed is excessive in view of, in particular, the limited complexity of the case. Certain reduction must be applied.

111. As to the hourly rate, the Court notes that it has not been claimed that it exceeded the rates charged by leading law firms in Bulgaria (see, *Anguelova v. Bulgaria*, no. 38361/97, ECHR 2002- , § 176).

112. The Court finds that the claims for translation and other expenses are excessive and are not supported by documentary proof. While it is undisputed that the applicant must have incurred expenses in respect of translation, the Court is unable to accept the figure claimed by the applicant.

113. A certain reduction must also be applied on the account of the fact that part of the initial application was declared inadmissible.

114. Having regard to all relevant circumstances, the Court, deducting the amount of EUR 625.04 (4,100 French francs) paid to the applicant in legal aid by the Council of Europe, awards EUR 2,500 in respect of costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 3 of the Convention in that upon his arrest the applicant was not brought before a judge or other officer exercising judicial power;
2. *Holds* that there has been no violation of Article 5 § 1 of the Convention in respect of the applicant's detention during its first three months;
3. *Holds* that there has been a violation of Article 5 § 3 of the Convention in respect of the length and lack of justification for the applicant's detention pending trial;
4. *Holds* that there has been a violation of Article 5 § 1 of the Convention in respect of the applicant's detention between 16 and 23 September 1997;

5. *Holds* that there has been a violation of Article 5 § 4 of the Convention in that the applicant's judicial appeal against detention was not examined speedily;
6. *Holds* that there has been a violation of Article 5 § 4 of the Convention in that the applicant's lawyer was refused access to the case file;
7. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at a rate applicable at the date of settlement:
 - (i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 2,500 (two thousand and five hundred euros) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 January 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President