



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

Translation © European Roma Rights Centre. www.errc.org - Permission to re-publish this translation has been granted for the sole purpose of its inclusion in the Court's database HUDOC.

FIFTH SECTION

CASE OF PARASKEVA TODOROVA v. BULGARIA

(Application no. 37193/07)

JUDGMENT

STRASBOURG

25 mars 2010

FINAL

25/06/2010

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

In the case of Paraskeva Todorova v. Bulgaria,

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

Peer Lorenzen, *president*,

Renate Jaeger,

Karel Jungwiert,

Rait Maruste,

Mark Villiger,

Isabelle Berro-Lefèvre,

Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 2 March 2010,

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

PROCEDURE

1. The case originated in an application (n° 37193/07) 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, Ms Paraskeva Dimitrova Todorova (“the applicant”), on 9 August 2007.

2. The applicant, who has been admitted legal aid, was represented by Ms S. Stefanova and Mr Ekimdzhiev, lawyers practising in Plovdiv. The Bulgarian Government (“the Government”) were represented by their Agent, Ms Svetla Atanasova, of the Ministry of Justice.

3. The applicant alleges, in particular, that the Bulgarian criminal courts which convicted her of fraud, put forward discriminatory grounds for refusing to stay the execution of her prison sentence and that her criminal case was not examined by an impartial tribunal.

4. On 5 September 2007, the President of the Chamber in charge of examining the case accepted the applicant’s request to treat her case as a matter of priority (Rule 41). On 28 January 2008, the President decided to communicate the request to the Government. As permitted by Article 29 § 3 of the Convention, it was further decided that the Chamber would decide on admissibility and merits at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1952 and lives in Trud, in the Plovdiv region. She is a Bulgarian citizen and belongs to the Roma ethnocultural minority.

6. In 2005, on an undisclosed date, the Plovdiv District Prosecutor's Office opened criminal proceedings against the applicant for fraud; she was reproached in particular for the fraudulent appropriation of the sum of 2,600 Bulgarian leva (approximately 1,300 euros) and the jewels of a certain G.S. On 23 December 2005, she was sentenced to trial in the District Court of Plovdiv.

7. During the proceedings, the District Court heard the prosecution and defence witnesses, gathering documentary evidence and the conclusions of experts. The concerned party claimed that on the day of the events in question, 12 July 2005, she was in Zlatitsa, a town about 100 kilometres from the victim's village, and that she had consulted a doctor because she had felt ill. She submitted a doctor's medical certificate and had her son's companion interviewed. In her defence speech, her lawyer emphasised that the police had not found significant amounts of money or jewellery at the applicant's home. She challenged the reliability of the identity parade carried out at the preliminary stages of investigation and drew the court's attention to the contradictions in the evidence of the prosecution's witnesses as to the age and the physical appearance of the applicant who had defrauded the victim. The lawyer insisted that the first of three prosecution witnesses, a neighbour, had seen a woman of Roma origin approaching and speaking with the victim, but that she was not in a position to recognize the individual. In addition, during the identity parades and in the courtroom, the second witness, another neighbour, had stated that she was not sure whether the applicant was the woman who had defrauded the victim. As for the third of these witnesses, the counsel for the applicant noted that she was the granddaughter of the victim and invited the court not to grant credit to her statements. The lawyer admitted that the applicant had previously been sentenced for theft. However, her last conviction was more than twenty years old.

8. In her defence speech, the district prosecutor invited the court to recognize the applicant guilty of the alleged facts: she had been recognized by the victim and two witnesses against her. The testimony of a third witness corroborated the conclusion that the concerned party had fraudulently taken the money and jewels of the victim. She invited the court not to grant credit to the evidence of the defence's witness, who was among those close to the applicant. In view of the preponderance of mitigating circumstances in the present case and of the applicant's state of health, the

prosecutor argued in favour of a suspended conviction and a sentence close to the minimum provided for by the Criminal Code.

9. On 29 May 2006, the Plovdiv District Court, consisting of a professional judge and of two lay assessors (*съдебни заседатели*), pronounced its judgment in which it found the applicant guilty of defrauding G.S. and sentenced her to three years of imprisonment. The reasons for the judgment were issued to the applicant in June 2006 and bore the signature of the professional judge who had presided over the District Court's trial. At the beginning of these reasons, among other personal information used to identify the applicant, such as her place and date of birth, her home address and her unique identification number, her Roma origin was also listed. In the fact-finding portion of the reasoning, the court found that the accused had entered the victim's home fraudulently, suggesting to her that her family had been struck by black magic which she could dispel. Taking advantage of G.S.'s credulity, she took the money and jewellery that she then kept in her home. The court based these findings on the statements of the prosecution witnesses which it found to be consistent with the other evidence gathered. It did not retain the statements of the defence witness who had explained that the applicant had visited relatives in Zlatitsa in July 2005 and that she had consulted a doctor there. The court refused to take into account the medical certificate presented by the applicant: even if it was dated 12 July 2005, there was no date after its reference number, as is normally the case. Similarly, the doctor had affixed his stamp on the document, but it lacked the stamp of the hospital. The court found that the sentence should be three years' imprisonment because of the balance between the aggravating and mitigating circumstances in this case. Among the aggravating circumstances, it mentioned the negative data on the applicant's personality, previous convictions, the absence of a stable job, the gravity of the alleged acts, the high amount of money taken by the applicant, and the operating mode thereof. The court held as a mitigating circumstance the advanced age of the applicant.

10. The District Court refused to suspend the execution of the three-year sentence for the following reasons:

"The decision to impose an effective sentence of imprisonment in this case arises from the legal obligation for the court (Article 66 of the Penal Code) to determine whether suspension of the sentence's execution is compatible with the objectives of the penal sanction. The court considers that this is not the case in this case, especially as there is a feeling of impunity, especially among members of minority groups, for whom a conditional sentence is not a conviction (this concerns general prevention). Moreover, this conclusion is equally valid with regard to special prevention – the execution of the sentence imposed will prevent [the applicant] from committing other criminal offenses and [will enable her] to correct her behaviour and to rehabilitate herself."

11. The applicant appealed against this judgment. She considered that the court based its findings on the statements of the prosecution's witnesses, who did not prove her implication in the acts alleged against her, and that the lower court refused to obtain evidence corroborating the defence's case.

At her request, the Plovdiv Regional Court questioned the doctor who issued the medical certificate, as well as the nurse who worked with him. Both confirmed that the applicant had come to the doctor's office on the morning of 12 July 2005 for a matter of high blood pressure. The examination was finished after twenty minutes. In her plea, the applicant's lawyer reiterated her arguments before the first-instance court concerning the credibility of the prosecution's witnesses' statements and the accountant's alibi (see paragraph 7 above) and argued that the lower court had taken into account the applicant's ethnicity to justify its decision. She invited the regional court to acquit her client or to give her no more than a suspended sentence.

12. On 16 October 2006, the Plovdiv Regional Court upheld the judgment of the first-instance court. It upheld again the statements of the prosecution's witnesses, which it considered consistent with the other evidence. It did not uphold the statements of the applicant's son's companion, believing that they were not sufficiently specific. It found that the applicant's allegation that she had, on 12 July 2005, consulted a doctor in Zlatitsa was well established. However, in the absence of any indication as to the exact time of the medical visit, the court found that, given the length of the consultation and the distance between the town of Zlatitsa and the victim's village, in theory as well as in practice, the interested party would have had the opportunity to go to G.S.'s home at the time indicated by the witnesses, namely around noon on the same day. In its part on the appropriateness of suspending the execution of the sentence, the judgment of the Regional Court reads as follows:

"The appeal court shares the reasons for the inapplicability of a suspended sentence with respect to Paraskeva Todorova. It agrees wholeheartedly with the opinion of the initial court that a possible suspension of execution could not contribute to the accomplishment of the objectives of general and specific prevention because, on one hand, it would have created a feeling of impunity, and on the other, it would not have prevented [the applicant] from resuming her wrongful behaviour, and the sentence would not have had a deterring effect on other members of society."

This judgment was not subject to appeal in ordinary cassation.

13. On 6 November 2006, the applicant lodged an appeal with the Supreme Court of Cassation provided for by Article 422, paragraph 1, point 5 of the Code of Criminal Procedure. She claimed that her conviction was unfair, discriminatory, and contrary to domestic law and to international conventions ratified by Bulgaria, including Article 6 § 1 of the Convention. The applicant requested the High Court to order the re-examination of the case or to potentially modify the judgment of the Regional Court.

14. In her defence brief submitted to the High Court, the applicant's counsel challenged in particular the courts' reasoning concerning sentencing and the refusal to suspend the execution of the sentence. It argued that the file contained no information which could lead to the conclusion that there was negative information on the applicant's personality. The applicant had received a pardon after her prior convictions, which obligated the courts to no longer consider her criminal record as an aggravating circumstance.

Given the unemployment rate in the country and the age of the applicant, the lack of a stable job could not be considered as such a circumstance. As for the gravity of the events, this was part of the very characteristics of the penal infraction for which the conviction had been made, which prevented the courts from taking up the same argument for also arguing it as an aggravating circumstance. Moreover, according to the consistent legal precedents of the domestic courts, the amount of the money appropriated was not significant. The decision of the courts not to suspend the execution of the applicant's sentence was motivated by her membership with a minority ethnic group. The applicant's counsel argued that this same motivation demonstrated the bias of the court that had sentenced her client.

15. In a judgment on 5 June 2007, the Supreme Court of Cassation dismissed the applicant's appeal. The High Court found that the lower courts had correctly established the facts on the bases of the relevant evidence gathered during the criminal investigation and in court. They had correctly characterized the established events as fraud and determined the length of the sentence imposed by taking into account the seriousness of the events and the personality of the applicant in light of previous criminal infractions. The Supreme Court of Cassation admitted that the formal conditions for a sentence suspension had been met, particularly in view of the fact that the applicant had been rehabilitated. However, it found that the conviction of an effective sentence was justified for the following reasons:

“It has been rightly admitted [by the lower courts] that the execution of the sentence was indispensable and justified from society's point of view. Thus, the accused will be deprived of the opportunity to resume her wrongful behaviour and [the penal sanction] will have a deterring effect on other members of society.”

II. RELEVANT DOMESTIC LAW AND PRACTISE

A. The principle of equality before the law

16. Article 6, paragraph 2 of the Constitution proclaims the principle of equality of citizens before the law and prohibits any restriction of their rights or privileges based on, among others, race or ethnicity. Article 11, paragraph 2 of the Code of Criminal Procedure of 2006 (hereinafter the CCP), obligates the courts, the public prosecutor's department, and the bodies responsible for the criminal investigation to apply the law uniformly to all citizens.

B. The Penal Code

17. According to Article 66 of the Penal Code, the court may suspend enforcement of the sentence of imprisonment imposed if the term of imprisonment does not exceed three years, if the concerned party has not already been convicted to a term of imprisonment for a criminal offense

prosecuted *ex officio* and if the court finds that the objectives of the penal sanction can be attained without the imposition of an effective penalty. The existence of a previous conviction does not preclude, in principle, the application of Article 66 of the Penal Code, if the party in question has benefited from rehabilitation (see, for example, *Решение № 13 от 25.01.2001г. на БКЦ по н.д. № 700/2000г., II н.о.*).

18. According to Article 36 of the Penal Code, the imposition of a criminal penalty has the following objectives: to correct the behaviour of the convicted person and encourage him or her to respect the laws and virtue; to prevent the possibility for him or her to commit other criminal offenses; to prevent criminal offenses by other members of society and encourage in them respect for the law and good virtues.

C. Appeal against final judgements rendered in the appeal court

19. According to Article 346 of the CCP, the judgments of regional courts rendered in the appeal court, when they confirm the judgments of initial courts, are not susceptible to ordinary appeal.

20. Nevertheless, these judgments can be criticised for the same deficiencies which justify appeal in cassation (non-observance of substantive or procedural legislation or imposition of an unfair penalty) before the Supreme Court of Cassation by the appeal provided by Article 422, paragraph 1, point 5 of the CCP. This plea, which the legislature regulated in the chapter of the CCP dedicated to the reopening of criminal proceedings, can be introduced by the sentenced person, through the court of first instance (Article 422, paragraph 2) within a period of six months from the date of the judgment of the appeal court (Article 421, paragraph 3 of the CCP).

21. If the Supreme Court of Cassation finds any of the aforementioned breaches of substantive or procedural rules, it is bound to overturn the judgment of the lower court and may remit the case for reconsideration, terminate the criminal proceedings, acquit the person concerned or amend the judgment under appeal (Article 425, paragraph 1 of the CCP).

D. The reopening of proceedings in criminal courts following a judgment of the European Court of Human Rights

22. In view of Articles 420, paragraph 1, Article 421, paragraph 2 and Article 422, paragraph 1, point 4 of the CCP, the public prosecutor is obligated to request the reopening of the criminal proceedings of a convicted person within one month of the judgement of the European Court of Human Rights finding a violation of the Convention, if the violation found is of particular importance for the outcome of the criminal proceedings. The body competent to decide in this case is the Supreme Court of Cassation.

IN LAW

I. ON THE ALLEGED VIOLATIONS OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 6 § 1 OF THE CONVENTION

23. The applicant alleges that the refusal of the domestic courts to suspend her execution of her sentence was based on her Roma ethnicity. She considers that this approach of the courts, which she describes as openly discriminatory, undermined her right to a fair trial and that the reasoning of the District Court's decision clearly demonstrates the judge's bias. The complaint also denounces the domestic law's inability to remedy this situation. She invokes articles Article 6 § 1, 13 et 14 of the Convention. The Court considers it appropriate to examine the applicant's allegations under Article 14 in conjunction with Article 6 § 1. The relevant parts of those articles of the Convention read as follows:

Article 14

"The enjoyment of the rights and freedoms recognized in the (...) Convention shall be secured without discrimination on any ground such as sex, race, colour, language, origin, political opinions or any other opinions, national or social origin, association with a national minority, property, birth, or any other status."

Article 6 § 1

"Everyone is entitled to a fair and public hearing (...), by an independent and impartial tribunal established by law (...) which will determine (...) any criminal charge against him or her (...)"

A. On admissibility

24. The Court observes that the applicant introduced her request on 9 August 2007, less than six months after the judgment on 5 June 2007 of the Supreme Court of Cassation, but more than six months after the judgment of 16 October 2006 of the Regional Court of Plovdiv. It further observes that, according to domestic legislation, the judgment of the Regional Court was final (see paragraph 19 above) and that the decision of 5 June 2007 of the Supreme Court of Cassation was not delivered in the context of an ordinary cassation procedure. In these circumstances, the Court considers the main question which arises as to the admissibility of the present application to be whether the applicant complied with the six-month time-limit set forth by Article 35 § 1 of the Convention.

25. The Court recalls that the rules of the six-month period and the exhaustion of domestic options, provided for in Article 35 § 1 of the Convention, are closely linked. In effect, the six-month period runs from the

final decision in the context of the exhaustion of domestic options (see, *inter alia*, *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001). This last rule obligates the applicants to gather only the pleas normally available and sufficient in the domestic legal order to allow reparations for the alleged violations to be obtained (*Kiiskinen v. Finland* (dec.), no. 26323/95, ECHR 1999-V (extracts)). Thus, Article 35 § 1 does not require the exhaustion of extraordinary or discretionary remedies and the decision taken as the result of such an appeal is not normally regarded as the ‘final domestic decision’ for the calculation of the six-month period (see, *inter alia*, *Berdzenichvili v. Russia* (dec.), no. 31697/03, ECHR 2004-II (extracts)). It follows that the Court can examine the merits of the present application only if it finds that the appeal lodged by the applicant, namely that provided for by Article 422, paragraph 1, point 5 of the CCP, is a normally available and effective remedy for the alleged violations of the Convention.

26. The Court observes in the first place that domestic law allows convicted person to appeal directly to the Supreme Court of Cassation of the appeal in question within a period which does not appear excessively long (see paragraph 20 above).

The introduction of such an application is not subject to any authorisation or approval by the administrative or judicial authorities. In this case, the applicant availed herself of this opportunity to expressly contest the partiality of the first-instance court and its reasons for imposing an effective sentence (see paragraphs 13 and 14 above). Accordingly, the Court considers that the remedy provided for by Article 422, paragraph 1, point 5 of the CCP was sufficiently accessible to the applicant, both in theory and in practise.

27. With regard to the efficacy of the proceedings initiated, the Court notes that the appeal in question allows the concerned party to invoke the same deficiencies which open the path to ordinary cassation (see paragraph 20 above). The Supreme Court of Cassation, for its part, has a wide range of powers in the context of this procedure: it can overturn the judgment and refer the case to the lower court for reconsideration, it may also amend the judgment under appeal, terminate criminal proceedings, or acquit the concerned party (see paragraph 21 above).

28. The Court further observes that the competent court examined all aspects of the substance of the criminal charge against the applicant – the establishment of the facts, their legal qualification, the appropriateness of the sentence and the possibility of suspending its execution (see paragraph 15 above). Moreover, the proceedings in question took place within a brief period of time: the applicant applied to the competent court less than one month after the contested judgment was delivered (see paragraphs 12 and 13 above) and the Supreme Court of Cassation delivered its judgment without significant delay (see paragraph 15 above). It is true that, in the end, the applicant’s request was rejected. However, in light of domestic legal provisions and other circumstances relevant to the case, the Court cannot

blame the applicant for lodging the appeal provided for by Article 422, paragraph 1, point 5 of the CCP, which was directly available to her and which could address the alleged unfairness of the proceedings brought against her.

29. Consequently, the Court considers that the judgment of 5 June 2007 of the Supreme Court of Cassation represents the “final domestic decision” for the purposes of Article 35 § 1. It follows that the present application was introduced in the six-month period provided for by this provision of the Convention.

30. The Court notes, moreover, that the complaints in question are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that they face no other ground of inadmissibility. They should therefore be declared admissible.

B. On the merits

31. The Court observes at the outset that the applicant denounces, on one hand, the discriminatory motive behind her conviction to an effective sentence and, on the other hand, the lack of impartiality by the domestic courts which adopted and ratified this decision on the grounds that her ethnicity had been taken into account in determining her sentence. The Court considers it appropriate to first examine the grievance concerning the domestic courts’ motives in the context of the prohibition of discrimination in the enjoyment of a guaranteed fair trial.

1. On the allegedly discriminatory nature of the courts’ reasoning

a) The parties’ submissions

32. The applicant states that the refusal of the first-instance court to suspend the execution of her sentence was motivated by her Roma ethnicity. She maintains that all the other conditions required by criminal law for the application of the suspended sentence procedure were met in her case – the court had set the prison sentence at three years and she had received a pardon for her previous convictions, which were more than twenty years old. However, the first-instance court imposed an effective sentence on the sole basis that a suspended sentence could not be seriously considered, especially among minorities. The applicant considers that this argument directly referred to her belonging to the Roma minority, which she considers proof that in the same circumstances, someone representing the ethnic majority of the country would not have been sentenced to an actual prison sentence. For that matter, the higher courts have joined the arguments put forth by the first-instance court.

33. The Government categorically rejects this view and considers that the applicant was not subjected to discriminatory treatment based on her ethnicity. It recalls that, according to domestic law, the imposition of a criminal sanction must serve two purposes: general prevention, aimed at

detering other members of society from committing criminal offenses, and specific prevention, which serves to prevent the convicted person from recidivism. In order to properly enforce the legislation concerning suspended sentencing, the domestic courts must take into account these two aspects of the deterrent effect of the sentence, as well as the relevant circumstances of each concrete case.

34. The Government considers the courts to have correctly applied domestic law in considering that only the imposition of an effective penalty could deter both the applicant and other members of society from committing this type of fraud. The Government considers that, in the reasoning for its judgment, the first-instance court simply highlighted that a possible suspended sentence would have created a feeling of impunity among all members of society, regardless of their ethnicity. It maintains that in the process of adopting the contentious decision, the fact that the applicant was of Roma origin played only a significant role.

b) The Court's assessment

35. The Court reiterates that, while it is not up to them to replace the domestic courts in assessing the facts and in interpreting domestic law, it is required to ensure that the procedure followed in this case, taken as a whole, is of an equitable nature, as required by Article 6 of the Convention (see among many others *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII; *Van Kück v. Germany*, no. 35968/97, §§ 46 and 47, ECHR 2003-VII).

36. Article 14 prohibits any unjustified difference in the enjoyment of rights and freedoms guaranteed by the Convention based on any of the criteria enumerated in a non-exhaustive manner by this Article, including the ethnicity or race of the concerned party. The Court has already had the opportunity to rule on the question of under what conditions the motivation behind a court's decision infringes upon the combined provisions of Articles 14 and 6 § 1 of the Convention. In particular, it considered that when the argument of a domestic court's judgement introduces a difference in treatment exclusively based on one of the criteria enumerated in Article 14, the State is under an obligation to justify that difference in treatment. In the absence of such a justification, Articles 14 and 6 § 1 of the Convention are considered to be violated (*Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 67, Series A No. 263; *Moldovan v. Roumania (No. 2)*, nos. 41138/98 and 64320/01, §§ 139 and 140, ECHR 2005-VII (extracts)).

37. Turning to the present case, in light of the aforementioned principles, established in its case law and in light of each party's arguments (see paragraphs 32 and 34 above), The Court considers it appropriate to consider first whether the argument of the domestic courts resulted in the introduction of a difference in treatment disadvantaging the applicant on the basis of her ethnicity. If so, it must consider whether the difference in treatment in question was objectively and reasonably justified by the defendant State.

38. The Court observes that in the part of the reasoning of the judgment of 29 May 2006 pertaining to the appropriateness of suspending the execution of the imposed sentence, the first-instance court had to seek, as required by domestic law, whether the objectives of general and specific prevention could be achieved without the execution of the prison sentence (see paragraphs 17 and 18 above). In motivating its conclusion on general prevention, the first-instance court referred to the existence of a widespread sentiment of impunity in society, highlighting in particular the extent of this phenomenon in the case of minority groups, “for whom a suspended sentence is not a conviction” (see paragraph 10 above).

39. The Court accepts that in assessing the deterring effect of a sentence vis-à-vis other members of society, a court may have to take into consideration phenomena of a more or less general nature, such as, for example, the situation of crime in the country, the perception by the general public of this or that type of crime, or the possible existence of a social climate of insecurity. Nonetheless, such observations by the court must, in the opinion of the Court, rest on a certain factual basis; however, the Court observes that the domestic court has not put forth a single argument or fact capable of supporting its findings.

40. The Court is not convinced by the Government’s arguments that the contested motivation of the court was directed at the entire society and that the applicant’s ethnicity played only a minor role in the court’s assessment (see paragraph 34 above). It observes that the court expressly mentioned the applicant’s Roma origin among the personal data used to identify her from the outset of the reasoning for their judgment (see paragraph 9 above). The remark about the existence of a feeling of impunity in society, which was very general in nature, was focused on minority groups and hence on the applicant herself: she was sentenced to an effective punishment. The Court is of the view that this assertion, taken together with the applicant’s ethnic affiliation, was likely to inspire the public, as well as the applicant, with the sentiment that the court was seeking to impose, in this case, an exemplary sentence for the Roma community, by condemning to an effective sentence a person belonging to the same minority group.

41. The Court considers that other circumstances corroborate the impression that there was a difference in treatment to the disadvantage of the applicant in her criminal proceedings. It observes that in her plea before the District Court, the prosecutor spoke in favour of a suspended sentence, given the preponderance of mitigating circumstances in this specific case and the state of the applicant’s health (see paragraph 8 above). Although it is true that the District Court was not obligated to accept the prosecution’s proposal pertaining to the possible suspension of the sentence, the fact remains that the argument concerning the applicant’s health was ignored in the District Court’s reasons for its judgment, even though this issue may have had some bearing on the decision to impose an effective sentence or not. Moreover, the rejection for purely formal reasons of the medical certificate submitted by the applicant (see paragraph 9 above), even while it

was essential proof in support of her alibi, contributed to reinforcing, to some extent, the impression of the applicant.

42. The Court proceeds to point out that the supervision of superior courts is of particular importance in the event of alleged failure to respect the guarantee of a fair trial, in so far as they can correct the defects of the original proceedings by setting aside the judgment under appeal (see *mutatis mutandis* *Kyprianou v. Cyprus* [GC], no. 73797/01, § 134, ECHR 2005 XIII, *Chmelíř v. Czech Republic*, n. 64935/01, § 68, ECHR 2005-IV). It observes that the applicant has raised in essence and expressly her grievance concerning the discriminatory reasoning of the first-instance court before the superior courts (see paragraphs 11, 13, and 14 above). It must be noted that her appeals were neither accepted by the Regional Court nor the Supreme Court of Cassation.

43. Moreover, these courts simply supported the reasoning of the District Court with respect to the refusal to suspend the sentence (see paragraphs 12 and 15 above) and the argument relating to the discriminatory nature of her conviction to an effective sentence was not expressly addressed by either of them. Admittedly Article 6 § 1 does not require the domestic courts to reply in detail to all the arguments of the parties in dispute (see *mutatis mutandis* *Hiro Balani v. Spain*, 9 December 1994, § 27, series A no. 303-B). However, in the Court's opinion, this was a relevant objection, to which the answer was of particular importance in view of the circumstances of the case. Thus, the domestic courts have not remedied the failure of the first-instance court and have not dispelled the present and serious doubt about its discriminatory nature.

44. These elements are sufficient for the Court to find that the applicant was indeed subjected to a difference in treatment based on her ethnicity, on account of the ambiguous reason for the courts' decision to impose on her an effective prison sentencing.

45. The Court then observes that in its observations the defending Government merely contested the existence of discriminatory treatment vis-à-vis the applicant and that it did not provide any evidence to justify the difference in treatment found in this specific case (see paragraphs 33 and 34 above). The Court, for its part, does not perceive any circumstances of an objective nature capable of justifying this situation. It wishes to stress in this respect the seriousness of the situation contested by the applicant, since, in contemporary European multicultural society, the eradication of racism has become a priority objective for all contracting States (see *Sander v. United Kingdom*, no. 34129/96, § 23, ECHR 2000 V). It further observes that the principle of equality of all citizens before the law is enshrined in the Bulgarian Constitution and that the Code of Criminal Procedure requires the courts to apply the criminal law uniformly vis-à-vis all citizens (see paragraph 16 above). It must be stated that the contested motivation of the courts in the present case seems to depart from these principles.

46. The Court cannot speculate as to the outcome of the criminal proceedings against the applicant if the domestic courts had not taken the

applicant's ethnicity into account in refusing to impose upon her a suspended sentence. However, it considers that in the present case, the contested approach of the courts resulted in an unjustified difference of treatment in the enjoyment of fair trial guarantees based on the applicant's ethnicity. There has therefore been a violation of Article 14 in conjunction with Article 6 § 1 of the Convention on this account.

2. On the impartiality of domestic courts

47. The applicant also denounces the lack of impartiality of the domestic courts on account of the arguments they put forth in support of the decision to impose an effective sentence. With regard to the finding of a violation of Article 14 in conjunction with Article 6 § 1 concerning the statement of reasons for the applicant's conviction, and given the particular circumstances of this case, the Court considers that no separate issue arises with regard to the domestic courts' impartiality. Therefore, there is no need to examine this grievance by the applicant separately.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. According to Article 41 of the Convention,

"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

49. The applicant claims 50,000 euros (EUR) by virtue of the non-penitentiary damage to which she was subjected. She considers the most appropriate remedy to this violation of her guaranteed rights by Articles 14 and 6 § 1 to be the reopening of the criminal proceedings against her.

50. The Government considers the sum claimed by the applicant by virtue of the non-penitentiary damage to be exorbitant.

51. The Court considers that the applicant has suffered some non-penitentiary damage as a result of the violation of her right guaranteed by Article 14 in conjunction with Article 6 § 1 of the Convention. It considers that the finding of a violation of the aforementioned articles cannot suffice for the purposes of Article 41 of the Convention. Pronouncing its ruling in fairness, as required by that provision, it considers it appropriate to award the applicant the sum of EUR 5,000 for the non-penitentiary damage to which she has been subjected.

52. The Court also recalls that, according to its well-established case-law, it is necessary, in the event of a violation of Article 6 of the Convention, as much as possible, to place the applicant in a situation equivalent to that in which she would be found if there had been no breach of that provision's

requirements (*Piersack v. Belgium* (Article 50), 26 October 1984, § 12, Series A no. 85). A judgment declaring a violation imposes upon the defending State the legal obligation not only to pay the concerned party the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers of the Council of Europe, general measures and/or, if appropriate, individual measures, to adopt in its domestic legal order in order to put an end to the breach and to make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*Ilașcu and others v. Moldova and Russia* [GC], No. 48787/99, § 487, ECHR 2004 VIII). In particular, in cases of non-compliance with one of the guarantees of Article 6 § 1 of the Convention, the most appropriate remedy is, in principle, to retry the case or to reopen the proceedings in due course and in compliance with Article 6 (see *Lungoci v. Romania*, no. 62710/00, § 56, 26 January 2006, and *Yanakiyev v. Bulgaria*, no. 40476/98, § 90, 10 August 2006, for the right of access to a court; *Somogyi v. Italy*, no. 67972/01, § 86, ECHR 2004 IV, for the right to participate in the proceedings; and *Gencel v. Turkey*, no. 53431/99, § 27, 23 October 2003, and *Tahir Duran v. Turkey*, No. 40997/98, § 23, 29 January 2004, for the lack of independence and impartiality of the trial court).

53. In this case, the Court observes that when it found a violation of one of the Convention's provisions, the provisions of the Code of Criminal Procedure require the Attorney General to request the reopening of the proceedings before the criminal courts. This provision therefore appears to allow the applicant to have her case reconsidered. In any event, in view of the nature of the violation found in the present case (see paragraph 46 above), and taking into account the particular circumstances of the case, the Court considers the most appropriate remedy to be to reopen the criminal procedure.

B. Costs and expenses

54. The applicant also demands EUR 3,068 for the costs and expenses incurred before the Court, equivalent to 42 hours of legal work at an hourly rate of EUR 70, plus postage and translation fees. She presented the contract with her lawyers, together with a note of charges and excess fees. She asks the Court to order the payment of the sum in question directly to the account of her representatives.

55. The Government considers the amount claimed to be exaggerated and unjustified. It emphasizes that the reasonableness of lawyers' remunerations for the proceedings before the Court must be determined in relation to the minimum rates applicable in proceedings before the domestic courts.

56. According to the case-law of the Court, an applicant can obtain reimbursement of her costs and expenses insofar as their reality, their necessity and the reasonableness of their rate are established. In regard to

the hourly rate of EUR 70, the Court observes that it has not been claimed that this rate would be higher than the hourly rate charged, for example, by the large Bulgarian law firms (see *mutatis mutandis Anguelova v. Bulgaria*, no. 38361/97, § 176, ECHR 2002 IV).

57. The Court then notes that the applicant has provided sufficient evidence for the totality of the amount claimed. In view of the documents in her possession and the aforementioned criteria, the Court considers the sum requested to be neither exorbitant nor unjustified. After deducting the amount awarded to the applicant by the Council of Europe for legal aid, EUR 850, the Court awards her the sum of EUR 2, 218 by way of costs and expenses, to be deposited into the accounts of her representatives.

C. Default interest

58. The Court considers it appropriate to model the default interest rate on the interest rate of the European Central Bank's marginal lending facility of three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the request admissible;
2. *Holds* that there has been a violation of Article 14 in conjunction with Article 6 § 1 of the Convention on account of the reasons given by the domestic courts;
3. *Holds* that it is not necessary to separately examine the applicant's grievance concerning the impartiality of the domestic courts;
4. *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 to Bulgarian leva at the rate applicable at the date of payment:
 - i. EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - ii. EUR 2,218 (two thousand and two hundred and eighteen euros), plus any tax that may be chargeable to the applicant, for the costs and expenses incurred before the Court, to be deposited into the accounts of her representatives;
 - b) from the expiry of the aforementioned period until payment, such amounts shall be increased by simple interest at a rate equal to that of the marginal lending facility of the European Central Bank applicable during that period, increased by three percentage points;

5. *Dismisses* the claim for just satisfaction for the remainder.

Done in French, and delivered in writing on 25 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President