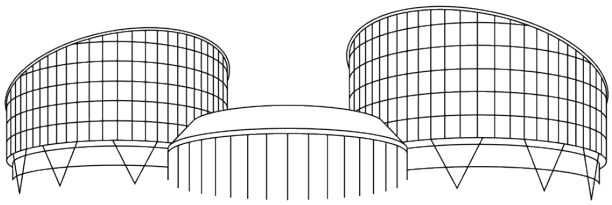

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 48059/06 by Stoyan Tsochev DIMITROV against Bulgaria	Application no. 2708/09 by Nikolai Tomov HAMANOV against Bulgaria

The European Court of Human Rights (Fifth Section), sitting on 23 February 2010 as a Chamber composed of:

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*
and Claudia Westerdiek, *Section Registrar*,

Having regard to the above applications lodged on 10 November 2006 and 6 January 2009 respectively,

Having regard to the decision to grant priority to the above applications under Rule 41 of the Rules of Court,

Having deliberated, decides as follows:

THE FACTS

The applicant in no. 48059/06, Mr Stoyan Tsochev Dimitrov, is a Bulgarian national who was born in 1977 and lives in Plovdiv. He is represented before the Court by Mr A. Atanasov and Ms G. Chernicherska, lawyers practising in Plovdiv.

The applicant in no. 2708/09, Mr Nikolai Tomov Hamanov, is a Bulgarian national who was born in 1963 and lives in Plovdiv. He is represented before the Court by Mr M. Ekimdzhiev and Ms K. Boncheva, lawyers practising in Plovdiv.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The criminal proceedings against Mr Dimitrov

On 21 September 1995 the applicant was arrested by the police while trying to break into a car with two other individuals, M.M. and S.D. He was brought to a police station, where he made a written confession. M.M., who was apparently also taken into custody, made a confession as well and turned over to the police two radio cassette players stolen from two cars which he had broken into earlier. On the same day a police officer made a report about the incident.

On 1 November 1995 a police investigator interviewed S.D. who confessed that he had committed the offence in concert with the applicant and M.M.

On an unspecified date in 1995 the case was given the number 1074/95.

On 19 February 2002 the investigator in charge of the case interviewed one of the police officers who had arrested the applicant. On 21 February 2002 he interviewed the owner of one of the cars, and on the same day ordered an expert report on the value of the stolen goods. The report was ready the same day. On 1 March 2002 the investigator interviewed the owner of another car.

On 4 March 2002 the applicant was formally charged with attempted theft committed in concert with M.M. and S.D. He was interviewed in the presence of his counsel and pleaded guilty. On the same day the investigator interviewed S.D. as a witness.

On 22 May 2002 the Plovdiv District Prosecutor's Office, noting that in January 2000 M.M. had left Bulgaria and was in Spain, and that it was impossible to establish the facts without interviewing him, decided to stay the proceedings pending his return. On 11 April 2005, noting that on 28 March 2005 M.M. had come back from Spain, the same Public Prosecutor's Office decided to resume the proceedings.

On 18 April 2005 M.M. was interviewed as a witness. He was interviewed again on 15 June 2005 in the presence of a judge. S.D. was also interviewed as a witness in the presence of the judge.

On 11 July 2005 the applicant was allowed to acquaint himself with the case file. On 19 July 2005 the investigator recommended that the applicant be brought for trial, and on 25 August 2005 the Plovdiv District Prosecutor's Office indicted him.

The Plovdiv District Court heard the case on 18 May 2006. The prosecution and the applicant stated that they had entered into a plea bargain. The court approved the agreement, sentenced the applicant to five months' imprisonment, suspended, and terminated the proceedings.

2. The criminal proceedings against Mr Hamanov

On 11 March 1996 a criminal investigation was opened against Mr Hamanov, a bank branch manager, and several other individuals in connection with a number of financial transactions. After March 1996 the case went through a preliminary investigation, trial and appeal. Following a remittal to the preliminary investigation stage in June 2000, in April 2003 it was again pending before the prosecuting authorities. The detailed course of the proceedings up to April 2003 has been set out in paragraphs 11-32 of the Court's judgment in the case of *Hamanov v. Bulgaria* (no. 44062/98, 8 April 2004).

In September 2003 one of Mr Hamanov's co-accused made a request under the new Article 239a of the 1974 Code of Criminal Procedure (see Relevant domestic law below). On 31 October 2003 the Plovdiv District Court requested the Plovdiv District Prosecutor's Office to send it the case file. On 6 November 2003 the District Prosecutor's Office transmitted the request to the Plovdiv Regional Prosecutor's Office, which was dealing with the case.

Apparently as a result of the above, on 10 November 2003 the Plovdiv Regional Prosecutor's Office submitted to the Plovdiv Regional Court an indictment against Mr Hamanov and seven other accused. The indictment accused Mr Hamanov of breaching his duties of bank branch manager by making, in breach of the applicable financial regulations, thirty-five unauthorised bank transfers, and by guaranteeing, between September 1994 and February 1995, nine promissory notes, in breach of a decision of the bank's management board prohibiting branch managers from issuing such guarantees, and thus causing a pecuniary loss for the bank. The offences were characterised by the prosecution under Article 282 of the Criminal Code (see Relevant domestic law below). Another accused, Mr A.B., was charged with aiding and abetting the applicant in connection with the guarantees, in order to profit from his conduct. The applicant was additionally charged with unlawfully acquiring and possessing ammunitions.

On 30 January 2004 the court set the case down for trial.

Two hearings, listed for 26 April and 15 June 2004, were adjourned, the first because the State had not been properly summoned as a civil party, and the second because Mr Hamanov was ill and could not attend.

A hearing was held from 25 to 28 October 2004.

Three hearings, fixed for 23 February, 14 April and 13 June 2005, failed to take place, the first because Mr Hamanov's counsel was absent, the second because another accused's counsel had to be replaced, and the third because another accused was ill and could not attend.

A hearing was held on from 26 to 30 September 2005.

Two hearings, listed for 19 December 2005 and 23 February 2006, were adjourned because other accused and their counsel were ill and could not attend.

Two hearings were held from 25 to 28 April and from 26 to 28 June 2006. Counsel for the applicant pleaded, among other things, that by guaranteeing the promissory notes he had acted negligently.

The Plovdiv Regional Court gave its judgment on 29 June 2006. It convicted Mr Hamanov of guaranteeing the promissory notes, holding that this had amounted to a wilful breach of Article 219 of the Criminal Code (see Relevant domestic law below). It went on to hold that this had not amounted to a breach of Article 282 of the Code, and acquitted the applicant of that charge. It convicted A.B. of aiding and abetting the applicant. It acquitted the applicant of the other charges against him.

Between 10 and 13 July 2006 the applicant and the other accused, as well as the prosecution, filed appeals against the judgment. Counsel for A.B. argued, among other things, that the prosecution was time-barred because the proceedings had concerned charges under Article 282 of the Criminal Code, whereas the charges under Article 219 had in fact been preferred only after delivery of the Plovdiv Regional Court's judgment.

On 17 May 2007 the Plovdiv Court of Appeal set the appeal down for hearing on 28 June 2007. However, the hearing failed to take place on that date because another accused did not have legal representation. It was held on 27 September 2007. The prosecution withdrew the charge against Mr Hamanov under Article 282. Counsel for the applicant said that he agreed with counsel for A.B.'s submission that the prosecution was time-barred.

The Plovdiv Court of Appeal gave its judgment on 23 October 2007, fully upholding the lower court's judgment. It held, among other things, that the lower court had not erred in reclassifying the offence of which it had convicted Mr Hamanov under Article 219 because that was an offence which carried a more lenient penalty and because the facts alleged against him had not been modified. In such cases, there was no need for a formal amendment of the charges. The available evidence clearly showed that the applicant had guaranteed the promissory notes, thus wilfully breaching the bank's internal regulations and causing the bank serious financial damage.

Mr Hamanov and the other accused appealed on points of law. The applicant argued that the reclassification of the offence under Article 219 had surprised him because that offence was materially different from the one under Article 282, on which he had concentrated his defence. Moreover, the lower courts had not specified how exactly he had breached Article 219. Lastly, the appellate court had not addressed the argument that he had not acted wilfully but merely negligently with the result that the prosecution was time-barred because a negligent offence under Article 219 was subject to a much shorter limitation period.

The hearing before the Supreme Court of Cassation was fixed for 4 April 2008, but was adjourned because the civil party had not been properly summoned and because another accused, who was prevented from attending but wished to be present, was absent. It took place on 9 May 2008.

The Supreme Court of Cassation gave its judgment on 9 July 2008, upholding the lower court's judgment concerning the applicant in its entirety. It held, among other things, that the trial court had not erred in convicting him under Article 219 instead of under Article 282. It had not relied on any facts not originally included in the charges (it had actually relied just on part of those facts) and had applied a more lenient provision than the one relied on by the prosecution. It had observed a failure to take due care, within the meaning of Article 219, in the issuing of guarantees in respect of the nine promissory notes. The reclassification had not breached the applicant's defence rights because the actus reus of the offence under Article 219 was identical to the one under Article 282. The court went on to say that the lower courts should have examined more thoroughly the argument that the applicant had not acted wilfully. However, that failure had not breached his defence rights either because it could be remedied at cassation level. The court then analysed in detail the applicant's conduct, and found that he had acted with oblique intent. It also found that the limitation period for prosecuting the offence of which A.B. had been convicted had not expired because it had been interrupted by numerous procedural measures carried out during the proceedings.

B. Relevant domestic law

1. The Judicial Powers Act of 2007

Section 7(1) of the 2007 Judicial Powers Act provides that “[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal”.

2. The Code of Criminal Procedure of 1974

An amendment to the 1974 Code of Criminal Procedure that entered into force on 2 June 2003 introduced the possibility for accused persons to

request that their case be brought for trial if the investigation had not been completed within two years in cases concerning serious offences and one year in all other cases (new Article 239a). Paragraph 140 of the amendment's transitional provisions provided that that possibility applied with immediate effect in respect of investigations opened before 1 June 2003.

The procedure under that provision was as follows. The accused person had to submit a request to the relevant court, which then had seven days to examine the file. It could refer the case back to the prosecuting authorities or terminate the criminal proceedings. If the case was referred to the prosecuting authorities, they had two months to file an indictment or to terminate the proceedings, failing which the court was bound to terminate the proceedings against the person who had made the request.

The 2003 amendment was put before Parliament with the reasoning that it was necessary in order to secure observance of the right to a hearing within a reasonable time guaranteed by the Convention.

3. The Code of Criminal Procedure of 2005

The 2005 Code of Criminal Procedure came into force on 29 April 2006. Article 22 provides as follows:

> "1. The court shall examine and decide cases within a reasonable time.
>
> 2. The prosecutor and the investigating authorities must ensure that the pre-trial proceedings are conducted within the time-limits set forth in this Code.
>
> 3. Cases in which the accused is remanded in custody shall be investigated, examined and decided as a matter of priority."

Articles 368 and 369 of the 2005 Code, which superseded Article 239a of the 1974 Code, provide as follows:

Article 368 – Request by the accused to the court

> "1. If, in pre-trial proceedings, more than two years have passed since a person has been charged with a serious offence, or, in case of other offences, one year, the accused may request that his or her case be examined by the court.
>
> 2. In the cases envisaged in subparagraph 1 the accused shall file a request with the relevant first-instance court, which shall request the case file immediately."

Article 369 – Examination of the request

> "1. The court, consisting of a single judge, shall rule on the request within seven days. If it finds that the requirements of Article 368 § 1 are in place, it shall return the case to the prosecutor and give him or her two months within which he or she must submit an indictment, a proposal for the imposition of an administrative punishment, or a plea agreement, or discontinue the criminal proceedings and inform the court accordingly.

2. If, within the above-mentioned period of two months, the prosecutor does not carry out any of the measures referred to in subparagraph 1 or if the court does not approve the proposed plea bargain, the court, sitting as a single judge and in private, shall request the case file and shall discontinue the criminal proceedings by means of a decision. After the delivery of the decision the criminal proceedings shall continue with regard to the other accused as well as with regard to the other offences with which the accused has been charged.

3. If the prosecutor carries out [one of] the steps referred to in subparagraph 1, but the pre-trial proceedings have been tainted by substantive breaches of the rules of procedure, the court, sitting as a single judge and in private, shall discontinue the judicial proceedings and refer the case back to the prosecutor for rectification of the breaches and re-submission of the case to the court within one month.

4. If within the time-limit referred to in subparagraph 3 the prosecutor does not submit the case to the court or the substantive breaches of the rules of procedure have not been made good, or further ones have been committed, the court, sitting as a single judge and in private, shall discontinue the criminal proceedings by means of a decision.

5. The decisions referred to in subparagraphs 2 and 4 shall be final."

4. The State Responsibility for Damage Act of 1988

Section 1 of the 1988 State Responsibility for Damage Caused to Citizens Act (on 12 July 2006 its name was changed to "State and Municipalities Responsibility for Damage Act"), as in force since July 2006, provides as follows:

"The State and the municipalities shall be liable for damage caused to individuals and legal persons by unlawful decisions, actions or omissions by their organs and officials, committed in the course of or in connection with the performance of administrative action."

Section 2(1) of the Act provides, in so far as relevant:

"The State shall be liable for damage caused to individuals by organs of [the investigation], the prosecution and the courts through unlawful:

...

2. bringing of criminal charges, if the person concerned has been acquitted or if the criminal proceedings are discontinued because the offence has not been committed by the person concerned, or [that person's] act does not constitute a criminal offence..."

Individuals who have been acquitted or had the proceedings against them discontinued on one of the grounds set forth in section 2(1)(2), which, according to an interpretative decision of the Supreme Court of Cassation (тълк. реш. № 3 от 22 април 2004 г. по тълк. гр. д. № 3/2004 г., ОСГК на ВКС), include discontinuance because the charges have not been made out, can obtain compensation for the mere fact that criminal proceedings were instituted against them. According to the same decision, compensation is due in respect of the proceedings themselves and in respect of any

incidental measures, such as pre-trial detention. The decision also says that compensation is due in cases of partial acquittal, but only if there is a proven causal link between the charges in respect of which a person has been acquitted and the damage sustained.

In several judgments given between 2005 and 2008 the Supreme Court of Cassation, when fixing the amount of damages it awarded pursuant to such claims, had regard to, among other factors, the length of the proceedings (реш. № 1599 от 22 юни 2005 г. по гр. д. № 876/2004 г., ВКС, IV г. о.; реш. № 1017 от 15 декември 2005 г. по гр. д. № 524/2004 г., ВКС, IV г.; о.; реш. № 2851 от 23 януари 2006 г. по гр. д. № 2252/2004 г., ВКС, IV г. о.; реш. № 429 от 30 март 2006 г. на гр. д. № 3163/2004 г., ВКС, IV г. о.; реш. № 156 от 10 май 2006 г. по гр. д. № 2633/2004 г., ВКС, IV г. о.; реш. № 1557 от 27 декември 2006 г. по гр. д. № 2800/2005 г., ВКС, IV г. о.;реш. № 1323 от 27 ноември 2007 г. по гр. д. № 1400/ 2006 г., ВКС, I г. о.; реш. № 148 от 11 февруари 2008 г. по гр. д. № 1518/2007 г., ВКС, V г. о.; реш. № 692 от 12 май 2008 г. по гр. д. № 2394/2007 г., ВКС, IV г. о.).

5. The Criminal Code of 1968

Under Article 54 § 1 of the 1968 Criminal Code, when sentencing a convicted offender the court has to fix the punishment within the limits set by law, by reference to the Code's general rules and taking into account the dangerousness of the offence and of the offender, the motives, as well as all other aggravating and mitigating circumstances.

Article 219 § 1 of the Code makes it an offence for officials or managers to fail to take due care in managing or keeping secure the assets entrusted to them, where such failure results in substantial losses, destruction or dissipation of such assets, or other substantial damage to the undertaking or the economy. The punishment can be up to three years' imprisonment. Article 219 § 3 provides that if the offence has been committed wilfully, it is punishable by up to eight years' imprisonment. Article 219 § 4 provides that if the offence is particularly serious, the punishment ranges between one and five years if the offence has been committed negligently, and one and ten years if the offence has been committed wilfully.

Article 282 § 1 of the Code makes it an offence for officials or managers to, among other things, abuse their powers or rights in order to secure a financial benefit to themselves or others, where this leads to non-negligible harmful consequences.

Under Article 80 of the Code, the limitation period for prosecuting an offender depends on the penalty carried by the offence. The period is ten years in respect of offences punishable by more than three years' imprisonment and five years in respect of offences punishable by more than one year's imprisonment. It is interrupted by every act effected by the competent authorities with a view to prosecuting the offender (Article 81 § 2 of the Code). Such interruptions notwithstanding, prosecution is no

longer possible if the time that has elapsed since the perpetration of the offence is more than one and a half times the limitation period (Article 81 § 3 of the Code).

COMPLAINTS

1. Both applicants complained under Article 6 § 1 of the Convention that the criminal charges against them had not been determined within a reasonable time.

2. Both of them further complained, under Article 13 of the Convention, that they had not had at their disposal effective domestic remedies in that respect.

3. The applicant in no. 2708/09, Mr Hamanov, additionally complained under Article 6 §§ 1, 2 and 3 and Article 7 of the Convention that the national courts had found him guilty of an offence with which he had not been charged, that those courts had not stated in what way he had breached Article 219 of the Criminal Code, and had convicted him in spite of the expiration of the applicable limitation period.

THE LAW

1. As the two applications are based on similar facts and as they contain, for the most part, identical complaints, the Court considers it appropriate to join them under Rule 42 (former 43) § 1 of the Rules of Court.

2. In respect of their complaints about the length of the proceedings and the lack of effective remedies in that respect the applicants relied on Article 6 § 1 and Article 13 of the Convention, which provide, in so far as relevant:

Article 6 § 1 (right to a fair hearing)

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

Article 13 (right to an effective remedy)

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court considers that it cannot, on the basis of the case file, determine the admissibility of these parts of the applications and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of them to the respondent Government.

3. In respect of his complaints that the national courts had found him guilty of an offence with which he had not been charged, that those courts had not stated in what way he had breached Article 219 of the Criminal Code, and had convicted him in spite of the expiration of the applicable limitation period, Mr Hamanov relied on Article 6 and Article 7 of the Convention, which provide, in so far as relevant:

Article 6 (right to a fair hearing)

"1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing...

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

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

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence; ..."

Article 7 § 1 (no punishment without law)

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Court observes that the charge of which Mr Hamanov was convicted was given a different legal characterisation by the first-instance court with no prior warning. It is not the Court's task to verify whether this was done in breach of the domestic rules of criminal procedure, but merely to assess its effect on the fairness of the proceedings as a whole (see *D.C. v. Italy* (dec.), no. 55990/00, 28 February 2002). It does not consider that it rendered the proceedings against the applicant unfair as a whole, because he had the opportunity of advancing his defence in respect of the reformulated charge before the appellate and the cassation courts, both of which were able fully to review his case and replace his conviction with an acquittal (see *Dallos v. Hungary*, no. 29082/95, §§ 48-52, ECHR 2001-II; *Lakatos v. Hungary* (dec.), no. 43659/98, 20 September 2001; *Feldman v. France* (dec.), no. 53426/99, 6 June 2002; *Sipavičius v. Lithuania*, no. 49093/99, §§ 30-33, 21 February 2002; *D.C. v. Italy*, cited above; and *Balette v. Belgium* (dec.), no. 48193/99, 24 June 2004; and, as examples to the contrary, *Drassich v. Italy*, no. 25575/04, § 36, 11 December 2007, and *Penev v. Bulgaria*, no. 20494/04, §§ 37-39, 7 January 2010).

In so far as Mr Hamanov alleged that the national courts had not spelled out how exactly he had acted contrary to Article 219 of the Criminal Code, the Court observes that the Supreme Court of Cassation found that the lower

court had seen a "failure to take due care" within the meaning of that provision in the applicant's unauthorised issuing of bank guarantees. The Court is not a court of appeal from the national courts (see *Cornelis v. the Netherlands* (dec.), no. 994/03, ECHR 2004-V (extracts)) and it is not its task to verify whether their ruling on that point, which does not appear arbitrary, was correct in terms of Bulgarian law (see *Rumyana Ivanova v. Bulgaria*, no. 36207/03, § 43, 14 February 2008, with further references).

Lastly, the Court observes that the Supreme Court of Cassation dealt with the limitation issue and gave reasons in respect of the points raised by the applicant in that connection. As already noted, it is not for the Court to assess whether that reasoning, which does not appear arbitrary, correctly applied Bulgarian law.

In view of the foregoing considerations, the Court does not consider that the proceedings against Mr Hamanov, seen as a whole, were in breach of the requirements of Article 6 §§ 1, 2 or 3 of the Convention.

For the same reasons, the Court does not find that Mr Hamanov's conviction and punishment were contrary to the requirements of Article 7 of the Convention (see, *mutatis mutandis*, *Previti v. Italy (no. 2)* (dec.), no. 45291/06, §§ 270-87, 8 December 2009).

It follows that this part of application no. 2708/09 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Decides to adjourn the examination of the applicants' complaints concerning the length of the proceedings and the lack of effective remedies in that respect;

Declares the remainder of application no. 2708/09 inadmissible.

Claudia Westerdiek
Registrar

Peer Lorenzen
President