

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

FIFTH SECTION

CASE OF YONCHEV v. BULGARIA

(Application no. 12504/09)

JUDGMENT

STRASBOURG

7 December 2017

FINAL

07/03/2018

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



In the case of Yonchev v. Bulgaria,

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

Angelika Nußberger, *President,*
Erik Møse,
André Potocki,
Yonko Grozev,
Síofra O'Leary,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov, *judges,*

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 14 November 2017,

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

PROCEDURE

1. The case originated in an application (no. 12504/09) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Ivan Hristov Yonchev ("the applicant"), on 8 January 2009.

2. The applicant was represented by Mr A. Kashamov and Mr K. Terziyski, lawyers practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Dimova of the Ministry of Justice.

3. The applicant, a former police officer, alleged that he had been unjustifiably refused access to personal data held by the Ministry of the Interior containing, among others, two psychological assessments.

4. On 2 June 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 and lives in Sofia.

6. The applicant was employed as a police officer in 1977. After having participated in several international missions, in 2001 he applied for a position as police observer in a new mission. This necessitated an assessment of his psychological suitability, which he underwent at the

Ministry of the Interior's Psychology Institute (hereinafter "the Institute") on 1 September 2001.

7. The result of the assessment was negative and the applicant was not included in the contingent to be sent to the international mission.

8. The applicant complained of the negative result of his psychological assessment to the head of the Institute, but was informed, in a letter dated 1 February 2002, that a check-up had shown that the assessment had been objective and correct. In an explanatory note sent to the head of the Institute in relation to that check-up the psychologist who had carried out the assessment explained that during his interview with the applicant he had informed the latter of the results of the assessment in a "clement manner", and that the applicant had been able to pose questions and to comment.

9. After the negative outcome of the assessment, on 1 March 2002 the applicant retired from service. The parties have not specified whether he would have been able to continue working for the Ministry of the Interior at a different position.

10. Despite having formally retired, after the expiry of the statutory time-limit of one year the applicant was allowed to undergo a fresh psychological assessment at the Institute, in relation to the preparation of a new international police mission. The new psychological assessment was conducted on 11 October 2002, and the Institute psychologists concluded once again that the applicant was psychologically unfit for the job. Thus, the applicant's application to join the new mission was rejected.

11. The applicant complained of this outcome to the Minister of the Interior and other bodies, such as the parliamentary commission on internal security and public order and the President of the Republic. The human resources department of the Ministry of the Interior informed him, in a letter dated 29 January 2003, that the refusals to include him in the international contingents had been lawful.

12. On 12 February 2003 the applicant applied under the Protection of Personal Data Act (see paragraph 22 below) to receive access to the documents contained in his personnel file at the Ministry of the Interior. He argued that the file contained data which could be considered personal for the purposes of this Act, including "appraisals, the results of different tests, data from psychological assessments".

13. In the subsequent administrative and judicial proceedings, as described below, the competent national authorities did not refer to any individual documents or a category of documents, but instead referred generally to the information sought by the applicant as "personal data" contained in his personnel file.

14. An initial refusal to allow him access to the file, signed by the head of the Ministry's human-resources department and dated 2 April 2003, was quashed on 17 November 2003 by the Sofia City Court, as it had not been ordered by the competent body, namely the Minister of the Interior. This

conclusion was upheld on 30 July 2004 by the Supreme Administrative Court.

15. On 31 January 2005 the Minister of the Interior issued a decision refusing the applicant access to his personnel file. He relied in general terms on the provisions of section 34(3) of the Protection of Personal Data Act and section 182(7) of the Ministry of the Interior Act, as in force at the time (see paragraphs 22 and 25 below).

16. This refusal was quashed by a three-member panel of the Supreme Administrative Court on 29 July 2005, on the grounds that it had not been reasoned, as it had merely referred to the provisions restricting access to personal data without explaining how they had been relevant to the circumstances of the case and without accounting for the applicant's own right to access to data concerning him. On 15 August 2006 a five-member panel of the Supreme Administrative Court upheld these findings.

17. In a new decision dated 17 October 2006, the Minister of the Interior refused the applicant access to his personnel file at the Ministry. The Minister relied once again on section 34(3) of the Protection of Personal Data Act, as well as on section 161 of the Ministry of the Interior Act of 2006 (see paragraphs 22 and 26 below). He explained that personnel files of officers contained information on "the enquiries in respect of a person applying to be employed" at the Ministry and information revealing the Ministry's "structures, positions and functions". He noted that the first category of information was classed as an official secret, but at the same time mentioned that, in accordance with an internal instruction of the Ministry, officers' personnel files had to be considered to contain information which was a State secret. It was explained further that even though personnel files also comprised documents which contained no sensitive information, owing to the presence of some classified documents the files had to be classified in their entirety.

18. The applicant applied for judicial review. He explained the circumstances in which he had left the Ministry of the Interior and that he had a "particularly strong interest" to get acquainted with his psychological assessments. He stated furthermore that his application for access to his personnel file concerned his "professional identity". He argued that the Minister of the Interior had not duly taken into account his right to access to information, that there were no legal grounds to consider the information referred to in the decision as classified, and that in any event, seeing that the applicant had left the Ministry in 2002 and that the relevant time-limits for keeping classified documents representing official secrets had expired, any such documents in his file had had in the meantime to be declassified.

19. In a judgment of 25 March 2008 a three-member panel of the Supreme Administrative Court dismissed the application for judicial review. It held that the Minister's decision was well reasoned, and that the Minister had correctly considered that the information concerned was classified. It

pointed out that even though personnel files of police officers also comprised documents which contained no sensitive information, they had to be classified in their entirety due to the presence of some classified documents.

20. Upon appeal by the applicant, in a final judgment of 8 July 2008 the judgment above was upheld by a five-member panel of the Supreme Administrative Court. It endorsed the three-member panel's reasoning, adding that the declassification of documents could only occur after an express decision of the competent official, despite the expiry of the relevant time-limits.

21. In the proceedings before the Court the Government submitted copies of the applicant's psychological assessments of September 2001 and October 2002. They bear no security markings.

II. RELEVANT DOMESTIC LAW

A. Protection of Personal Data Act (*Закон за защита на личните данни*)

22. That Act provides, in its section 26, that each person should have access to personal data concerning him or herself. An exception to that rule is contained in section 34(3), which provides that such access can be entirely or partially denied when provided by another statute and when access would "endanger defence or national security, or the protection of classified information".

23. The Commission for the Protection of Personal Data (hereinafter "the Commission") is an independent State body which, pursuant to section 6 of the Act, is tasked with supervising "the protection of individuals in the process of treatment of their personal data and their access to such data", and with participating in "the implementation of State policy in the area of data protection". The Commission has five members who are appointed by Parliament. It is competent to examine individual complaints concerning any breach of the rights conferred upon individuals under the Act and, where finding such a breach, it can issue binding instructions, advice the relevant body to put an end to the breach or impose administrative punishments (section 38(1) and (2) of the Act). Its decisions are amenable to judicial review (section 38(6)).

24. In addition, anyone whose rights under the Act have been breached can seek directly the judicial review of the respective administrative decision, without being obliged to lodge first a complaint with the Commission (section 39 of the Act).

B. Ministry of the Interior Act (*Закон за Министерството на вътрешните работи*)

25. Under section 182(4) of that Act, in force from 1997 to 2006, every person was entitled to seek access to personal data concerning him or herself held by the Ministry of the Interior. Section 182(7) provided that such access could nevertheless be refused where this would have, in particular, "endanger[ed] national security or public order, the protection of information classified as a State or official secret, the secrecy of sources of information or nonverbal methods and means for its collection".

26. Almost identical provisions were contained in section 161 of the new Ministry of the Interior Act, which was in force from 2006 to 2014.

27. The provisions of the Ministry of the Interior Act 1997 on psychological unfitness for work at the Ministry and the psychological assessments of servicemen have been summarised in the case of *Fazliyski v. Bulgaria* (no. 40908/05, §§ 29-39, 16 April 2013).

C. Protection of Classified Information Act (*Закон за защита на класифицираната информация*)

28. Under the third paragraph of section 1 of this Act, which entered into force in 2002, classified information comprises any information which constitutes a State secret (*държавна тайна*) or an official secret (*служебна тайна*), and classified information received from another country.

29. Section 25 of the Act defines in more detail a State secret as "information set out in Schedule no. 1 [to the Act], the unregulated access to which could endanger or prejudice the interests of the Republic of Bulgaria and which relates to national security, defence, foreign policy, or the protection of the constitutional order". Schedule no. 1 to the Act sets out a list of categories of information which are liable to be classified as being a State secret. In addition, section 26(1) of the Act defines an official secret as "information created or stored by the State or local government authorities, which is not a State secret, but the unregulated access to which could have a negative impact on the interests of the State or on another legally protected interest".

30. Pursuant to section 30(1) and (2) of the Act, classified information is to be marked as such and the security markings should in particular mention the level of security. The official authorised to sign documents containing sensitive information is obliged to re-examine the justifiability and validity of the respective markings at least once every two years (section 35(4) of the Act). A set in which some of the documents are classified is to be considered classified in its entirety (section 30(3) of the Act and section 44 of the Regulations for its Implementation).

31. Section 34(1) of the Act lays down time-limits for protecting classified information. They vary from thirty years for information marked as "highly secret" to six months (until 2007 – two years) for information graded as official secret. These time-limits may be extended only once.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

32. The applicant complained under Article 8 of the Convention that he had been unjustifiably refused access to personal data held the Ministry of the Interior, containing, among others, two psychological assessments. He also complained under Article 13 of the Convention in conjunction with Article 8, claiming that the procedure he had had resort to had been ineffective.

33. The Court is of the view that it suffices to examine the complaints under Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Arguments of the parties

1. The Government

34. The Government pointed out that the applicant had not lodged a complaint with the Commission for the Protection of Personal Data ("the Commission").

35. The Government argued further that the Supreme Administrative Court's judgments, upholding the Minister of the Interior's refusal to allow the applicant access to his personnel file, had been well-reasoned and had duly accounted for the facts of the case and the applicable law. They asserted in addition that the documents the applicant had been particularly interested in, namely his psychological assessments, had been classified, meaning that the applicant had not been able to access them because he had not had security clearance. Moreover, they argued that the applicant had been "fully and completely" informed of the results of these assessments, even if the information had been given to him in a "clement manner".

36. The Government submitted a decision of the Minister of the Interior dated 28 August 2006, defining the categories of information to be considered official secret at the Ministry of the Interior. In particular, the list defined as official secret information related to "inquiries as to the reliability" of persons.

2. The applicant

37. As concerns the Government's argument (see paragraph 34 above) that he had not complained to the Commission, the applicant pointed out that he had chosen to challenge directly before the courts the decisions to refuse him access to the information he sought.

38. The applicant pointed out that he had never had the chance to get acquainted with the full text of his psychological assessments. In fact, it had been exactly the "disturbing, yet unclear and incomplete" information given to him about them that had provoked him to seek the full results. The applicant pointed out also that the psychological assessments concerned his state of health and his mental integrity, which justified his legitimate interest in them. The nature of the information sought by him meant in addition that it had to be considered part of his "private life", within the meaning of Article 8 of the Convention.

39. The applicant considered that his case concerned the positive obligations of the State under Article 8. He relied in particular on the Court's judgment in *Gaskin v. the United Kingdom* (7 July 1989, Series A no. 160).

40. The applicant observed that it had never been shown by the Ministry of the Interior in the domestic proceedings that his psychological assessments or any other document contained in his personnel file had been classified. The assessments, copies of which were submitted by the Government in the proceedings before the Court, bore no security markings; yet, in order to be considered classified under domestic law, any document had to meet a number of requirements, including to have been expressly marked to that end. In any event, if any other document contained in his personnel file had been classified, the authorities had had to be able to envisage partial access to that file.

41. The applicant argued also that the applicable law was deficient, because it did not oblige the competent bodies to balance any legitimate interest requiring the withholding of certain information from the public against the individual's right of access to that information. Such a balancing exercise had, at any rate, not been carried out in his case.

42. Lastly, the applicant pointed out that it had taken the authorities too much time to decide on his request for access to information. This had rendered the procedure ineffective, seeing that the nature of the right to access to information required, in principle, a quick response.

B. The Court's assessment

1. Admissibility

43. The Government pointed out (see paragraph 34 above) that the applicant had not complained to the Commission about the decisions to refuse him access to the information sought by him. In so far as the Government should be understood as having raised an objection for non-exhaustion of domestic remedies, the Court notes that, indeed, the remedy at issue, provided for under the Protection of Personal Data Act (see paragraph 23 above), appears to have been available to the applicant and might have, in principle, been effective. However, the applicant chose to pursue another remedy which was available under the same Act (see paragraph 24 above), namely he sought judicial review of the decisions to refuse him access to his file before the national courts. Under the Court's established case-law, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see, among other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009). Accordingly, the Court dismisses the Government's objection for non-exhaustion of domestic remedies.

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

2. Merits

(a) Applicability of Article 8 of the Convention

45. The concept of "private life" under Article 8 is a broad term. It covers physical and psychological integrity and can therefore embrace multiple aspects of a person's physical and social identity. Information about the person's health is an important element of private life. Article 8 protects in addition a right to personal development and the right to establish and develop relationships with other human beings and the outside world (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008).

46. In the present case, the applicant sought to obtain access to his personnel file at the Ministry of the Interior, and in particular to his psychological assessments, made on the occasion of his application to participate in an international police mission. In these circumstances, access to information about the reasons for his having been found unfit to participate in the international mission, especially as this was the result of a psychological assessment, must be seen as sufficiently closely linked to his private life, within the meaning of Article 8 of the Convention, as to raise an issue under that provision.

47. Accordingly, Article 8 is applicable.

(b) Access to information in the Court's case law under Article 8 of the Convention

48. The Court has held that, in addition to the primarily negative undertakings in Article 8, there may be positive obligations inherent in effective respect for private life (see *Roche v. the United Kingdom* [GC], no. 32555/96, § 157, ECHR 2005-X).

49. With regard to access to personal data held by the public authorities, with the exception of information related to national security considerations (see *Leander v. Sweden*, 26 March 1987, § 51, Series A no. 116), the Court has recognised a vital interest, protected by Article 8 of the Convention, of persons wishing to receive information necessary to know and to understand their childhood and early development (see *Gaskin*, cited above, § 49) or to trace their origins, in particular the identity of their natural parents (see *Odièvre v. France* [GC], no. 42326/98, § 41-47, ECHR 2003-III), information concerning health risks to which interested persons had been exposed (see *Roche*, cited above, § 161; *McGinley and Egan v. the United Kingdom*, 9 June 1998, § 99, *Reports of Judgments and Decisions* 1998-III; *Guerra and Others v. Italy*, 19 February 1998, § 60, *Reports* 1998-I), or information about a person's records created by the secret services during the period of a totalitarian regime (see *Haralambie v. Romania*, no. 21737/03, §§ 87-89, 27 October 2009, and *Joanna Szulc v. Poland*, no. 43932/08, § 87, 13 November 2012).

50. In these contexts, the Court held that the respondent State's positive obligation under Article 8 of the Convention required it to provide an effective and accessible procedure enabling the applicants to have access to all relevant and appropriate information necessary for the specific purposes described above (see *Roche*, § 162, *Haralambie*, § 86, *Joanna Szulc*, §§ 86 and 94, all cited above).

(c) Analysis in the present case

51. In the present case, the applicant sought to obtain access to his personnel file at the Ministry of the Interior, and in particular to his psychological assessments. He had a vital interest to receive, as noted above, information necessary to understand the evaluation of his psychological fitness for the position of a police observer in an international mission.

52. Regarding the Government's argument that the applicant had been "fully and completely" informed of the results of his psychological assessments, but in a "clement manner" (see paragraph 38 above), the Court observes that it has not been established that the applicant was ever allowed to consult those documents' full versions. The applicant himself pointed out (see paragraph 38 above) that it had been exactly the "disturbing, yet

unclear and incomplete" information given to him that had provoked him to seek the full results.

53. In these circumstances, as already pointed out, the respondent State's positive obligation under Article 8 of the Convention required it to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information necessary for the purpose defined above.

54. The Court is not prepared to accept, as claimed by the applicant (see paragraph 41 above), that the procedure available to him, under the Protection of Personal Data Act, was inherently ineffective on the grounds that the applicable legislation did not expressly oblige the competent bodies to carry out a balancing exercise. Both the Protection of Personal Data Act and the Ministry of the Interior Act guaranteed an individual's access to information concerning him or her (see paragraphs 22 and 25-26 above). The Court cannot thus conclude that, when deciding on requests concerning access to information, the competent domestic bodies are, in principle, prevented from taking into account the individual's right to such access.

55. The applicant was refused access to the relevant and appropriate information necessary for him to understand the assessment of his psychological fitness for a particular service on the ground that his whole personnel file at the Ministry of the Interior, containing that information, was classified. The Minister of the Interior explained in his decision of 17 October 2006 that the file contained the results of "enquiries in respect of a person applying to be employed", which represented an official secret, and added in general terms that other unspecified documents in the file were State secret (see paragraph 17 above). The Minister's position was endorsed by three-member and five-member panels of the Supreme Administrative Court (see paragraphs 19-20 above). The domestic authorities did not rely on any other ground for refusing access to the information sought by the applicant, in particular the remaining grounds provided for in section 182(7) of the Ministry of the Interior Act (see paragraph 25 above).

56. However, is has never been shown by the authorities, in the domestic proceedings or the proceedings before the Court, that any documents in the applicant's personnel file had been classified as State secrets. Nor has it been explained which of the documents contained in the file would have met the requirements of section 25 of, and Schedule no. 1 to, the Protection of Classified Information Act (see paragraph 29 above).

57. While, on the other hand, it appears possible that the applicant's personnel file contained at some point of time information which could have been classified as an official secret – seeing that the Minister of the Interior's decision on the categories of information to be considered such a secret listed in particular different types of information related to "inquiries as to the reliability" of persons (see paragraph 36 above) – it is noteworthy that the relevant statutory time-limits for protecting official secrets are

relatively short, namely two years, and after 2007 six months, with the possibility to renew the time-limit only once (see paragraph 31 above).

58. In their review of the applicant's application for access to information the domestic courts failed to assess these points. They never examined which of the documents in his personnel file could have met the relevant requirements and were classified, and during which period of time.

59. Moreover, taking into account the fact that not all documents in the file were classified, one option for the authorities would have been to allow the applicant partial access to it, providing him the information he was interested in, namely his psychological assessments. While the Government claimed that those assessments were classified (see paragraph 35 above), this does not appear to have been the case, since the copies presented in the procedure before he Court bore none of the obligatory security markings (see paragraph 21 above). In addition, the Ministry of the Interior never claimed in the domestic proceedings that the psychological assessments were themselves classified.

60. Partial access to the applicant's personnel file was however precluded by the rule requiring that where even one of the documents in a file is classified, the rest is automatically also to be considered classified and thus subject to the rules on the protection of classified information (see paragraph 30 above). As a result, the authorities were precluded from determining which of the information contained in the applicant's personnel file was classified and which was not. The domestic courts adopted this line of reasoning and also refused to assess which documents in the file were classified, whether this had been done in accordance with domestic law, and whether partial access to the file was possible.

61. Lastly, the Court observes that the applicant applied to receive access to his personnel file at the Ministry of the Interior in February 2003, but was only refused such access with finality in 2008. The delay of many years in the determination of the matter was mostly due to the fact that the initial decision refusing him access had been given by a body lacking competence, and then the Minister of the Interior adopted an unreasoned decision, which on both occasions had resulted in the examination of the matter by two levels of court (see paragraphs 14-16 above). A reasoned decision by a competent body was for the first time given on 17 October 2006 (see paragraph 17 above).

62. Having regard to all the foregoing considerations, the Court finds that the respondent State has not fulfilled its positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant information that would allow him to understand the assessment of his psychological fitness for the position of a police observer in an international mission.

63. The Court concludes therefore that there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

65. The applicant claimed non-pecuniary damage, asking the Court to determine the award to be made on an equitable basis.

66. The Government argued that any finding of a violation of the Convention would constitute sufficient just satisfaction.

67. The Court is of the view that the applicant must have suffered non-pecuniary damage for which the finding of a violation of the Convention is not a sufficient remedy. Judging on an equitable basis, it awards him EUR 1,500 under this head.

B. Costs and expenses

68. The applicant also claimed 2,250 euros (EUR) for the work performed by his lawyers in the proceedings before the Court, and 350 Bulgarian levs (BGN – the equivalent of approximately EUR 180) for translation. In support of these claims he submitted a contract for legal representation, a time-sheet, and a contract with a translator. The applicant requested that any sum awarded under the present head be paid directly to his representatives.

69. The Government contested the claims.

70. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court allows the applicant's claims in full. As requested by the applicant, the award made under this head, totalling EUR 2,430, is to be paid directly to his legal representatives, Mr A. Kashamov and Mr K. Terziyski.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
      (i) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,430 (two thousand four hundred and thirty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid directly to the applicant's legal representatives;
   (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.

Done in English, and notified in writing on 7 December 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President