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

FIFTH SECTION

DECISION

Application no. 49418/09
Georgi Todorov GEORGIEV
against Bulgaria

The European Court of Human Rights (Fifth Section), sitting on 31 October 2017as a Committee composed of:
Mr Erik *Møse, President*,
Yonko Grozev,
Gabriele Kucsko-Stadlmayer, *judges*,
and Anne-Marie Dougin, *Acting Deputy Section Registrar*,
Having regard to the above application lodged on 19 August 2009,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Georgi Todorov Georgiev, is a Bulgarian national who was born in 1966. At the time of the latest communication from him he was in Belene Prison.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant and as established by the Court of its own motion, may be summarised as follows.

1. The 1994-95 criminal proceedings against the applicant

3. In 1994 and 1995 the applicant was tried *in absentia* by the Varna District Court (н. о. х. д. № 622/1994 г.). He was convicted and sentenced to five years' imprisonment. The conviction and sentence were apparently not appealed against and became final on 4 May 1995. The applicant submitted that until he was arrested in March 2002 with a view to being

imprisoned pursuant to that sentence (see paragraph 5 below), he had been unaware of those proceedings.

4. It appears that between January 1994 and 1998 the applicant was out of Bulgaria.

2. The applicant's arrest, the serving of his sentence and his attempts to obtain the reopening of the 1994-95 proceedings

5. In March 2002 the applicant was arrested with a view to the execution of the above-mentioned sentence. He apparently began serving it on 13 March 2002.

6. The applicant submitted that on 17 April 2002 and on 16 April 2003 he had asked the Chief Prosecutor to seek the reopening of the 1994-95 proceedings against him. His requests were apparently turned down.

7. The applicant submitted that on 27 November 2006 he had lodged applications for reopening with the Varna District Court and the Varna Regional Court. It is unclear what happened with those.

8. In 2006 the applicant once again asked the Chief Prosecutor to seek the reopening of the 1994-95 proceedings against him. On 2 July 2007 a prosecutor from the Supreme cassation prosecutor's office refused his request, noting that convictions and sentences which had become final before 1 April 1998 could not be reopened under Article 422 § 1 (5) of the 2005 Code of Criminal Procedure (see paragraphs 25 and 26 below), and that the case file of the criminal proceedings against the applicant had in any event been destroyed, which made it in practice impossible to check it for irregularities.

9. On 10 November 2008 the applicant lodged through the Varna District Court an application to the Supreme Court of Cassation. He sought reopening under Article 423 § 1 of the 2005 Code of Criminal Procedure (see paragraph 19 below) and argued, *inter alia*, that he had been convicted without having had the opportunity to be heard. The application was received at the Varna District Court on 13 November 2008.

10. The next day, 14 November 2008, the clerk in charge of the court's archives noted that the case file of the 1994-95 criminal proceedings against the applicant had been archived in 1997 and then destroyed after the expiry of the relevant time-limit. Based on that, the same day the judge of Varna District Court to whom the application had been assigned decided that it was to be added to the applicant's file, without other procedural steps being taken, and that the applicant was to be informed of the destruction of the original case file. The applicant was advised of that in a letter sent to him by the Varna District Court on 18 November 2008.

3. The applicant's other sentences of imprisonment

11. In three separate sets of proceedings which ended in 2000, 2004 and 2010, the applicant was convicted and sentenced respectively to eight years' imprisonment, seven years' imprisonment and a year and a half's imprisonment, in respect of different offences (see прис. по н. о. х. д. № 277/1999 г., ОС-Варна; прис. по н. о. х. д. № 972/2002 г., ОС-Варна; and прис. № 148 от 26.02.2010 г. по н. о. х. д. № 366/2009 г., РС-Плевен).

4. The combination of the applicant's custodial sentences

12. In the meantime, on 10 April 2006 the Varna Regional Court, following a request by the applicant for the combination of his sentences (three custodial ones at that point), decided that he should serve the five-year sentence which had become final in 1995 separately, but that the eight-year and seven-year sentences should be combined into an aggregate sentence of eight years' imprisonment, which was to be increased by a further two years, to ten years (see опр. от 10.04.2006 г. по ч. н. д. № 548/2006 г., ОС-Варна). It appears that a month and a half later that decision was upheld by the Varna Court of Appeal (see реш. № 92 от 29.05.2006 г. по в. ч. н. д. № 145/2006 г., АС-Варна).

13. In 2010, following the applicant's fourth sentence of imprisonment (see paragraph 11 above), the prosecuting authorities applied to the Pleven District Court for a fresh combination of his sentences. On 15 April 2010 that court gave a decision in the same terms as the above-mentioned decision of the Varna Regional Court, but also ordered that the applicant should serve separately the year-and-a-half sentence imposed in 2010, and subtracted from the time which he still had to spend in prison the five years which he had already served pursuant to the 1994-95 sentence and the four years, nine months and twenty-two days which he had already served pursuant to the aggregated eight-year and seven-year sentences (see опр. № 665 от 15.04.2010 г. по н. ч. д. № 1209/2010 г., РС-Плевен). The applicant appealed, arguing, *inter alia*, that his five-year sentence should also have been aggregated with his other custodial sentences. On 10 June 2010 the Pleven Regional Court quashed the Pleven District Court's decision (see реш. № 226 от 10.06.2010 г. по в. н. ч. д. № 501/2010 г., ОС-Плевен). On 28 October 2010, however, the Supreme Court of Cassation reopened the proceedings, quashed the Pleven Regional Court's decision, and referred the case back to that court (see реш. № 456 от 28.10.2010 г. по к. д. № 451/2010 г., ВКС, II н. о.). On remittal, the Pleven Regional Court upheld the Pleven District Court's initial decision, except as regards the increase of the applicant's aggregated eight-year and seven-year sentences by a further two years (see реш. № 421 от 25.11.2011 г. по н. д. № 936/2011 г., ОС-Плевен).

B. Relevant domestic law and practice

1. *Reopening of criminal proceedings conducted* in absentia

(a) Under the 1974 Code of Criminal Procedure

14. Until 1 January 2000 Bulgarian law did not provide for the reopening of criminal proceedings conducted *in absentia*. Under the new Article 362a § 1 of the 1974 Code of Criminal Procedure, added with effect from that date, such reopening became possible in cases in which someone convicted *in absentia* had been unaware of the proceedings and sought reopening within one year of learning of the conviction.

(i) Application ratione temporis

15. In a 2007 judgment, the Supreme Court of Cassation held that proceedings which had ended before 1 January 2000, when Article 362a § 1 had entered into force, could not be reopened under that provision (see реш. № 76 от 12.04.2007 г. по н. д. № 759/2006 г., ВКС, II н. о., cited in *Stoyanov-Kobuladze v. Bulgaria*, no. 25714/05, § 22, 25 March 2014). In other cases, however, even though it did not expressly comment on the point, that court examined on the merits requests for the reopening of proceedings which had ended before that date (see the two judgments cited in *Kounov v. Bulgaria*, no. 24379/02, §§ 20 and 22, 23 May 2006, as well as реш. № 348 от 26.06.2000 г. по н. д. № 258/2000 г., ВКС, II н. о.; реш. № 723 от 23.01.2004 г. по н. д. № 582/2003 г., ВКС, I н. о., both cited in *Stoyanov-Kobuladze*, cited above, § 27).

(ii) Time-limit

16. There are no reported cases in which the Supreme Court of Cassation has expressly commented on the starting point of the one-year time-limit under Article 362a § 1.

(iii) Competent court and procedure for lodging

17. By Article 363 of the 1974 Code, applications for reopening were examined by the Supreme Court of Cassation. Although the Code did not specify how they were to be lodged, its Article 365 said that the rules governing appeals on points of law applied to all points not expressly mentioned in the chapter on reopening, and Article 353 § 3, which was thus applicable, provided that appeals on points of law were to be lodged through the court which had handed down the decision appealed against.

(iv) Reopening when the original case file had been destroyed

18. In two judgments given in 2001 and 2007 (реш. № 233 от 19.06.2001 г. по н. д. № 173/2001 г., ВКС, I н. о., and реш. № 76 от

12.04.2007 г. по н. д. № 759/2006 г., ВКС, II н. о., cited respectively in *Stoichkov v. Bulgaria*, no. 9808/02, § 33, 24 March 2005, and in *Stoyanov-Kobuladze*, cited above, § 22), the Supreme Court of Cassation held that the destruction of the case file of the original proceedings precluded reopening under Article 362a § 1.

(b) Under the 2005 Code of Criminal Procedure

19. The 2005 Code of Criminal Procedure, which superseded the 1974 Code with effect from 29 April 2006, provides for a possibility to seek the reopening of proceedings conducted *in absentia* in Article 423 § 1.

(i) Application ratione temporis

20. The Supreme Court of Cassation has examined applications relating to proceedings which had ended before 1 January 2000 under that provision (see, for instance, реш. № 632 от 19.07.2006 г. по н. д. № 85/2006 г., ВКС, I н. о.).

(ii) Time-limit

21. By Article 423 § 1 of the 2005 Code, the request for reopening must be made within six months – rather than one year, as used to be the case under the 1974 Code (see paragraph 14 above) – after the person convicted *in absentia* has learned of the conviction.

22. In many cases the Supreme Court of Cassation has found that in the absence of evidence about when someone tried *in absentia* and sentenced to a term of imprisonment has learned of the conviction, the time-limit begins to run when he or she is arrested with a view to being imprisoned (see, among others, реш. № 437 от 10.12.2008 г. по н. д. № 317/2008 г., ВКС, II н. о.; реш. № 62 от 23.02.2009 г. по к. н. д. № 785/2008 г., ВКС, I н. о.; реш. № 258 от 15.06.2010 г. по н. д. № 194/2010 г., НК, ВКС, III н. о.; реш. № 228 от 08.05.2012 г. по н. д. № 540/2012 г., ВКС, III н. о.; реш. № 220 от 08.05.2013 г. по н. д. № 629/2013 г., ВКС, II н. о.; реш. № 321 от 31.10.2014 г. по н. д. № 968/2014 г., ВКС, II н. о.; реш. № 34 от 21.04.2015 г. по н. д. № 1836/2014 г., ВКС, II н. о.; and реш. № 190 от 18.10.2016 г. по н. д. № 913/2016 г., ВКС, I н. о.). In a few cases, it has held that the time-limit starts running when those concerned have been placed in prison to serve their sentence (see реш. № 423 от 18.11.2009 г. по н. д. № 445/2009 г., ВКС, II н. о.; реш. № 82 от 19.02.2010 г. по н. д. № 752/2009 г., ВКС, III н. о.; and реш. № 2 от 18.04.2017 г. по н. д. № 1113/2016 г., ВКС, II н. о.).

(iii) Competent court and procedure for lodging

23. As used to be the case under the 1974 Code (see paragraph 17 above), applications for reopening are examined by the Supreme Court of

Cassation (Article 424 § 1, as in force between April 2006 and June 2015, and Article 424 § 2, as in force since June 2015). They must, however, be lodged through the competent first-instance court, which must immediately send a copy to the prosecuting authorities and forward the case file to the Supreme Court of Cassation (Article 424 § 2, as in force between April 2006 and June 2015, in June 2015 renumbered to Article 424 § 3).

(iv) Reopening when the original case file has been destroyed

24. In two judgments given in 2014 and 2015 (реш. № 503 от 08.12.2014 г. по н. д. № 1517/2014 г., ВКС, I н. о., and реш. № 334 от 25.11.2015 г. по н. д. № 953/2015 г., ВКС, III н. о.) the Supreme Court of Cassation reopened proceedings conducted *in absentia* whose case files had been destroyed in breach of the relevant archiving regulations.

2. Reopening under Article 422 § 1 (5) of the 2005 Code

25. By Article 422 § 1 (5) of the 2005 Code – which is the successor of Article 362 § 1 (5) of the 1974 Code, which had been added with effect from 1 April 1998 – criminal proceedings can be reopened if the judgment or decision which had concluded them has not been appealed on points of law but is tainted by serious irregularities of the kind which would be grounds to quash it pursuant to an appeal on points of law.

26. The Supreme Court of Cassation has held that applications under that provision could be used to seek the reopening of proceedings conducted *in absentia* (see опр. № 293 от 23.06.2015 г. по н. д. № 722/2015 г., ВКС, I н. о.), but that they are subsidiary *vis-à-vis* the remedy under Article 423 § 1 (see реш. № 429 от 22.01.2010 г. по н. о. х. д. № 423/2009 г., ВКС, III н. о., and реш. № 292 от 27.06.2012 г. по н. д. № 671/2012 г., ВКС, I н. о.). That kind of reopening is, however, not available with respect to convictions *in absentia* which have become final before 1 April 1998, when it was first introduced in the 1974 Code (see опр. № 128 от 08.10.2009 г. по н. д. № 451/2009 г., ВКС, III н. о.).

COMPLAINTS

27. The applicant complained under Article 6 of the Convention and Article 2 of Protocol No. 7 that the 1994-95 criminal proceedings against him had been conducted *in absentia* and that he had been unable to obtain their reopening.

28. The applicant further complained that this had had serious effects on the lawfulness and length of his imprisonment.

THE LAW

A. Alleged unfairness of the 1994-95 proceedings

29. The complaint of the alleged unfairness of the 1994-95 criminal proceedings against the applicant, which had been conducted *in absentia*, falls to be examined solely under Article 6 §§ 1 and 3 of the Convention; no separate issue arises under Article 2 of Protocol No. 7 (see *R.R. v. Italy*, no. 42191/02, § 64, 9 June 2005; *Ay Ali v. Italy*, no. 24691/04, § 51, 14 December 2006; and *Popovitsi v. Greece*, no. 53451/07, § 31, 14 January 2010). There is, however, no need to go into the merits of the complaint, as it does not meet the admissibility requirements set out in Article 35 § 1 of the Convention.

30. To exhaust domestic remedies, as required under that provision, when bringing domestic proceedings applicants must comply with the formal requirements and time-limits laid down in domestic law (see, in general, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200; *Sejdovic v. Italy* [GC], no. 56581/00, § 44, ECHR 2006-II; and *Gäfgen v. Germany* [GC], no. 22978/05, § 142 *in fine*, ECHR 2010, and, specifically as regards time-limits, *Ben Salah Adraqui and Dhaime v. Spain* (dec.), no. 45023/98, ECHR 2000-IV; *UTE Saur Vallnet v. Andorra*, no. 16047/10, §§ 62-64, 29 May 2012; and *Peruš v. Slovenia*, no. 35016/05, § 47, 27 September 2012).

31. By Article 362a § 1 of the 1974 Code of Criminal Procedure, in force between 2000 and 2006, anyone convicted *in absentia* and unaware of the criminal proceedings against him or her could seek reopening within one year of learning of the conviction (see paragraph 14 above). The Supreme Court of Cassation's prevailing case-law under that provision was that this possibility was open with respect to convictions, such as the applicant's, which had become final before its introduction (see paragraph 15 above). There are no reported contemporaneous cases in which that court has commented on the time-limit's starting point, but there is nothing to suggest that its position was any different from that expressed in later case-law – that it normally starts to run when the person concerned is arrested with a view to being imprisoned (see paragraphs 16, 21 and 22 above).

32. There is, however, nothing to suggest that the applicant made such a request within one year of his arrest in March 2002, when, according to him, he learned of his 1994-95 conviction. Although during that time the applicant attempted an inapposite procedure, asking the Chief Public Prosecutor to seek the reopening of his conviction (see paragraph 6 above), he only applied for reopening to the Supreme Court of Cassation more than six years later, in November 2008 (see paragraph 9 above). In view of that considerable lapse of time, it is unsurprising that at that point the request was not seen as a properly made reopening request (see paragraph 10 above,

and, *mutatis mutandis*, *Qama v. Albania and Italy*, no. 4604/09, § 63, 8 January 2013).

33. The applicant did not therefore properly exhaust domestic remedies.

34. If, however, he is to be taken to argue that inasmuch as the case file of the 1994-95 proceedings had been destroyed and as the Supreme Court of Cassation had in 2001 and 2007 twice refused requests for reopening in such circumstances (see paragraphs 8, 10 and 18 above), in his case the remedy under Article 362a § 1 of the 1974 Code was ineffective and did not have to be used, his complaint is out of time. Given that no other remedy was open to the applicant (see paragraphs 8 and 25-26 above), in that case the six-month time-limit under Article 35 § 1 of the Convention started to run either when he learned of his conviction in March 2002 (see *Lazzari v. Italy* (dec.), no. 9363/04, 24 March 2005; *Rašnik v. Italy* (dec.), no. 45989/06, 10 July 2007; and *Vergara v. Italy* (dec.), no. 49984/07, 11 December 2007), or at the latest when the one-year time-limit to seek its reopening expired in March 2003 (see *Dvorak v. Italy* (dec.), no. 9290/02, 23 September 2004). He lodged his application on 19 August 2009, more than six months after that.

35. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention.

B. The imprisonment pursuant to the sentence handed down in the 1994-95 proceedings

36. Imprisonment pursuant to a "conviction" handed down in proceedings conducted *in absentia* whose reopening it is impossible to obtain cannot be justified under Article 5 § 1 (a) of the Convention (see *Stoichkov v. Bulgaria*, no. 9808/02, §§ 51-59, 24 March 2005; *Willcox and Hurford v. the United Kingdom* (dec.), nos. 43759/10 and 43771/12, § 95, ECHR 2013; and *Baratta v. Italy*, no. 28263/09, § 114, 13 October 2015). The complaint about the applicant's imprisonment pursuant to the sentence handed down in the 1994-95 proceedings therefore falls to be examined under that provision.

37. There is, however, no need to go into its merits, as it does not meet the admissibility requirements set out in Article 35 § 1 of the Convention.

38. As regards exhaustion of domestic remedies, the considerations in paragraphs 30-32 above apply to this complaint as well.

39. If it is to be assumed that the remedy under Article 362a § 1 of the 1974 Code of Criminal Procedure was not effective in the applicant's case (see paragraph 34 above), the complaint is out of time.

40. When there is no effective domestic remedy, the six-month time-limit under Article 35 § 1 of the Convention with respect to a complaint of the kind at issue here begins to run when the relevant term of imprisonment comes to an end (see *Baratta*, cited above, § 108).

41. In this case, the courts' decisions relating to the combination of the applicant's sentences show that the period that he spent in custody pursuant to his conviction and sentence in the 1994-95 proceedings came to an end five years after his imprisonment in March 2002 – in March 2007 –, and that his ensuing deprivation of liberty was pursuant to his other sentences of imprisonment (see paragraphs 11, 12 and 13 above). He lodged his application on 19 August 2009, more than six months after that.

42. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 23 November 2017.

Anne-Marie Dougin	Erik Møse
Acting Deputy Registrar	President