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

FOURTH SECTION

DECISION

Application no. 663/11
Krasimir Aleksandrov Nedyalkov and Others
against Bulgaria

The European Court of Human Rights (Fourth Section), sitting on 10 September 2013 as a Chamber composed of:

Ineta Ziemele, *President*,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Krzysztof Wojtyczek,
Faris Vehabović, *judges*,
and Françoise Elens-Passos, *Section Registrar*,

Having regard to the above application lodged on 6 December 2010,

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

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The first applicant, Mr Krasimir Aleksandrov Nedyalkov, is a Bulgarian national born in 1969 and living in Varna. The second and the third applicants, Ms Anna Krasimirova Nedyalkova and Ms Aleksandrina Krasimirova Nedyalkova, are also Bulgarian nationals born respectively in 1993 and 2002 and living in Varna. They are Mr Nedyalkov's daughters. The fourth applicant, Kadans EOOD, is a single-member limited-liability company having its registered office in Varna. It is wholly owned and managed by Mr Nedyalkov.

A. The circumstances of the case

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

3. At the relevant time the first applicant was a sole trader. He married in 1992 but divorced his wife in 2001. Two daughters were born out of the marriage; they are the second and the third applicants.

1. The criminal proceedings against the first applicant

4. On 25 April 2001 the police raided the first applicant's office, conducting a search and seizing a number of documents. In 2002 criminal proceedings were opened against him on suspicion of tax evasion. He was interviewed as a witness on 10 September 2002. During the following years the authorities interviewed a number of witnesses and obtained expert reports.

5. On 30 June 2009 the first applicant was formally charged with filing, on a number of occasions between 2 November 1999 and 15 January 2001, false tax returns relating to transactions which had not in fact taken place, in order unduly to obtain tax credit and thus avoid the payment of large amounts of value-added tax.

6. On 23 November 2009 the Varna Regional Prosecutor's Office filed an indictment against the first applicant with the Varna Regional Court. The court held two hearings, on 23 February and 14 June 2010, during which it heard witnesses and admitted in evidence expert reports. However, having heard the parties, at the close of the hearing on 14 June 2010 the court observed that the charges against the applicant had not been properly formulated and that an expert report obtained during the preliminary investigation suffered from a number of shortcomings. It held that those issues amounted to breaches of the first applicant's defence rights which needed to be made good, and decided to refer the case back to the prosecuting authorities.

7. The first applicant was indicted again on an unspecified date. Following a trial which took place on unspecified dates, on 6 December 2011 the Varna Regional Court acquitted him.

8. The prosecution appealed. On 5 April 2012 the Varna Court of Appeal upheld the acquittal.

9. The prosecution appealed on points of law. The Supreme Court of Cassation heard the appeal on 27 September 2012, and in a final judgment of 25 January 2013 (реш. № 395 от 25 януари 2013 г. по н. д. № 1286/2012 г., ВКС, III н. о.) likewise upheld the acquittal.

2. The proceedings under the Forfeiture of Proceeds of Crime Act 2005

(a) The preliminary inquiry and the opening of the forfeiture proceedings

10. Having been apprised of the criminal charges against the first applicant, on 17 March 2010 the Commission for Uncovering Proceeds of Crime (see paragraph 35 below) started an inquiry. In the course of that inquiry it gathered information from a number of State authorities and banks about the first applicant and his family, and companies controlled by them, as well as about their declared income and their present and past assets. The applicants were not informed of the inquiry.

11. Based on the results of the inquiry, on 14 April 2010 the Commission decided to open forfeiture proceedings against the first applicant. It reasoned that all the prerequisites for that were in place. Criminal proceedings had been opened against him, he had acquired assets whose value came to 1,714.76 minimum monthly salaries, and it could reasonably be assumed that those assets were the proceeds of crime, in as much as no legitimate source could be established for their acquisition. The Commission went on to specify that the period covered by the proceedings would be twenty-five years prior to the filing of the prospective forfeiture claim.

12. The decision was not notified to the applicants and was not amenable to legal challenge, in line with section 15(3) of the Forfeiture of Proceeds of Crime Act 2005 (see paragraph 45 below).

(b) The freezing orders against the applicants

(i) The freezing order issued by the Varna Regional Court

13. Referring to information about a number of assets acquired and disposed of by the first applicant, members of his family (including the second and the third applicants), and companies wholly or partly owned by him (including the fourth applicant), and about the first applicant's, his family members', and his companies' income declared before the tax and the social security authorities between 1999 and 2009, on 21 July 2010 the Commission for Uncovering Proceeds of Crime applied to the Varna Regional Court for an order freezing a number of assets, including real properties, motor vehicles and bank accounts, that were held by the applicants and that could be subjected to a prospective forfeiture claim in the amount of 840,264 Bulgarian levs (BGN).

14. The Commission argued that the first applicant's and his former wife's legitimate income during the relevant period had been 1,688 minimum monthly salaries, and their expenditures during the same period 3,388 minimum monthly salaries, resulting in a shortfall of 1,700 minimum monthly salaries, whereas during the same period the first applicant had

acquired assets whose value was 2,915 minimum monthly salaries. The first applicant's company, the fourth applicant, had for its part acquired assets whose value was 538 minimum monthly salaries, bringing the total value of the acquired assets to 3,458 minimum monthly salaries.[1] In view of that, it could reasonably be assumed, in line with section 4(1) of the 2005 Act (see paragraph 40 below), that those assets were the proceeds of crime. Their current monetary value was said to amount to BGN 325,559. The application satisfied both requirements of Article 391 §§ 1 and 3 of the Code of Civil Procedure 2007 (see paragraph 47 below). Firstly, it was supported by written evidence showing that the first applicant had engaged in criminal conduct and that he and persons associated with him had acquired assets without a legitimate source of income, which made a prospective forfeiture claim arguably well-founded. Secondly, there was a risk that the applicants might dissipate their assets and thus prevent the satisfaction of a future forfeiture order.

15. On 22 July 2010 the Varna Regional Court examined the application *ex parte* and on the papers, and allowed it. It froze all assets covered by the Commission's application: two real properties owned by the first applicant; two real properties owned by the fourth applicant; two cars owned by the first applicant; one half-share of two cars and seven mopeds owned by a partnership in which the first applicant was partner; one car owned by the fourth applicant; six bank accounts held by the first applicant; one bank safe held by the first applicant; two bank accounts held by the second applicant; one bank account held by the third applicant; two bank accounts held by the fourth applicant; and the first applicant's shareholding in the fourth applicant.

16. The court held that it could not assess whether the indictment against the first applicant was lawful, and that in itself it constituted formal grounds for opening forfeiture proceedings. The fact that the trial court had referred the criminal case against the first applicant back to the preliminary investigation stage due to breaches of his defence rights (see paragraph 6 above) did not alter the conclusion that criminal proceedings were pending against him. As for the arguable well-foundedness of the prospective forfeiture claim, it was incumbent on the Commission to prove a link between the alleged but yet unproven criminal conduct by the first applicant and the transactions described in the Commission's application. However, although it had presented a number of documents, the Commission had in effect not led evidence on that point. In those circumstances, and seeing that the formal prerequisites for allowing the Commission's application were nonetheless in place, a freezing order could be issued only if the Commission agreed to provide a guarantee securing a future claim for

1. It appears that this was a clerical mistake, because the addition of 2,915 and 538 gives 3,453.

damages by the applicants in relation to the loss that they might suffer as a result of the order. That guarantee was to be set at ten per cent of the Commission's prospective forfeiture claim, and thus amount to BGN 84,026.40. In the court's view, that was the estimated amount of the direct and proximate damage that the applicants would sustain if the freezing later turned out to have been unjustified. That would be the case if the criminal proceedings against the first applicant were discontinued or result in his acquittal, or if the prospective forfeiture claim against the applicants were dismissed as unfounded. Naturally, that did not mean that the Commission had to pay that money into court, because State authorities were exempt from providing such guarantee (see paragraph 47 *in fine* below).

17. On 30 July 2010 a bailiff at the Varna District Court wrote to the banks holding the applicants' accounts, advising them to freeze the funds in those accounts up to BGN 840,264 (the value of the prospective forfeiture claim).

18. The applicants, represented by a lawyer, appealed to the Varna Court of Appeal. They argued that the Commission had failed to carry out a proper inquiry into the first applicant's legitimate income, ignoring possible sources of information, such as movements on his bank accounts, making vague and opaque calculations, and failing to take into account income earned in 1997 and 2010. Secondly, they asserted that during the relevant period the first applicant, his company (the fourth applicant), and a partnership in which he was partner had had a combined legitimate income of BGN 1,237,235, well above the alleged proceeds of crime. It could not therefore reasonably be assumed that the frozen assets had been acquired through such proceeds. Thirdly, they contested the Commission's valuation method, whose deficiencies were in their view apparent. Fourthly, they argued that the freezing order was overbroad and covering more assets than necessary for the satisfaction of a prospective forfeiture order; that was especially true of the bank accounts used by the first and the fourth applicants for their daily business. Fifthly, they pointed to the already significant duration of the criminal proceedings against the first applicant and the uncertainty regarding their future progress. Sixthly, they pointed out that the frozen assets had been acquired either before or after the offence with which the first applicant had been charged. They requested the appellate court either to set aside the freezing order in its entirety or to reduce its scope by excluding from it the bank accounts used by the first and the fourth applicants for their daily business.

19. In an additional memorial the applicants further argued, *inter alia*, that the Commission had failed properly to specify the period covered by the forfeiture proceedings, that it had failed to explain why the assumption that the assets were the proceeds of crime was reasonable or why assets held by persons other than the first applicant were also the proceeds of crime,

and had sought the freezing of assets shielded from enforcement, in breach of the prohibition laid down in section 23(7) of the 2005 Act (see paragraph 48 below).

20. It does not appear that the applicants asked the Varna Court of Appeal to hold a public hearing.

21. On 31 August 2010 the Varna Court of Appeal, examining the appeal on the papers, dismissed it in the following terms:

> "The Court finds the prospective [forfeiture] claim admissible and, in view of the numerous pieces of written evidence, arguably well-founded. Proceedings under the [2005 Act] may be opened if it is established that a person has acquired assets of considerable value, in respect of which it may reasonably be assumed that they are the proceeds of crime, and criminal proceedings have been opened against that person for an offence.
>
> The written evidence shows that [the first applicant] has been indicted for a [tax evasion] offence...
>
> During an inquiry it was found that considerable assets have been acquired, some of which were later disposed of. Apart from immovable property, during the period covered by the inquiry the [first applicant] acquired considerable movable property. It is described in detail in the application and the evidence shows its acquisition.
>
> On the other hand, the written evidence shows that before the dissolution of their marriage the [first applicant] and [his former wife] declared income amounting to 1,688 minimum monthly salaries, whereas the expenditures of the [first applicant] and his family were 3,388 minimum monthly salaries, which yields a shortfall of 1,700 minimum monthly salaries.
>
> In as much as no legitimate source has been established for the acquired assets, under section 4 of the [2005 Act] it is to be presumed to be the proceeds of crime. The court finds that without the requested freezing the satisfaction of a prospective forfeiture order would be hindered or prevented. This interim measure is admissible and appropriate. Evidence has been led that the assets sought to be frozen are owned by the [applicants]."

22. The applicants tried to appeal on points of law. In a decision of 19 October 2010 (опр. № 503 от 19 октомври 2010 г. по ч. гр. д. № 499/2012 г., ВКС, III г. о.) the Supreme Court of Cassation refused to give them leave to do so.

(ii) The freezing order issued by the Smolyan Regional Court

23. At the same time the Commission for Uncovering Proceeds of Crime made a similar application to the Smolyan Regional Court. It sought the freezing of twelve plots of land in the Smolyan region acquired by the first applicant in 2004.

24. On 26 July 2010 the Smolyan Regional Court examined the application *ex parte* and on the papers, and allowed it. It froze the twelve plots. It held that the application had been duly lodged, and that the prospective forfeiture claim was admissible and arguably well-founded. It noted that relevant criminal proceedings had been opened against the first

applicant, that he had acquired assets of considerable value, and that his declared income was lower than that value, which meant that it could be presumed that the assets were the proceeds of crime. Both prerequisites under Article 391 of the Code of Civil Procedure 2007 (see paragraph 47 below) were in place: the application was supported by enough written evidence, and there existed a risk that the assets might be dissipated.

25. The applicants, represented by a lawyer, appealed to the Plovdiv Court of Appeal. They relied on the same arguments as those raised by them before the Varna Court of Appeal (see paragraphs 18 and 19 above).

26. It does not appear that the applicants asked the Plovdiv Court of Appeal to hold a public hearing.

27. On 1 September 2010 the Plovdiv Court of Appeal examined the appeal on the papers and dismissed it. It held that the lower court's decision was correct, because the Commission had opened proceedings under the 2005 Act, criminal proceedings had been instituted against the first applicant, and the assets owned by the first applicant and his former wife had a considerable value. In the court's view, that was enough to allow the application for a freezing order. All arguments raised in the appeal in relation to the legality of the sources of income used to acquire the assets were irrelevant at that stage. Those were issues touching on the merits of the prospective forfeiture claim. They had to be reviewed carefully, both by the Commission before it sought forfeiture, and by the court dealing with the prospective forfeiture claim, but could not be examined in proceedings relating to freezing orders. The court went on to say, without further detail, that the well-foundedness of the application for a freezing order was "established on the basis of the written evidence".

28. The applicants did not try to appeal to the Supreme Court of Cassation.

(c) The discharge of the freezing orders against the applicants

29. Following the first applicant's final acquittal on 25 January 2013 (see paragraph 9 above), on 26 February 2013 the applicants asked the Varna Regional Court to discharge the freezing order that it had made on 22 July 2010 (see paragraph 15 above). On 15 March 2013 the court allowed the application. It found that the first applicant's final acquittal had rendered the further freezing of the applicants' assets groundless.

30. On 21 March 2013 the Smolyan Regional Court, acting of its own motion and noting that the first applicant's acquittal had become final, decided to discharge the freezing order that it had made on 26 July 2010 (see paragraph 24 above).

(d) The discontinuance of the forfeiture proceedings against the applicants

31. After the first applicant's acquittal became final on 25 January 2013 (see paragraph 9 above), the head of the regional office of the Commission

for Uncovering Proceeds of Crime proposed that the forfeiture proceedings against the applicants be discontinued. On 29 March 2013 the Commission, noting that no relevant criminal proceedings were pending against the first applicant, decided to discontinue the proceedings.

3. The first applicant's application for compensation under sections 60a et seq. *of the Judiciary Act 2007*

32. On 25 February 2013 the first applicant applied to the Inspectorate attached to the Supreme Judicial Council under the newly enacted sections 60a *et seq.* of the Judiciary Act 2007 (see paragraph 70 below). He sought compensation for the allegedly unreasonable length of the criminal proceedings against him (see paragraphs 4-9 above). On 2 August 2013 the Minister of Justice informed the first applicant that the Inspectorate had examined his application and, noting that the criminal proceedings against him had lasted eleven years and nine months, had found it well-founded. Based on that, the Minister fixed the amount of compensation to be paid to the first applicant at BGN 4,700 and offered him to enter into a settlement. The Minister pointed out that the proposed sum was not subject to negotiation, and had been fixed in line with this Court's case-law. If the first applicant did not wish to conclude a settlement, he was free to bring a claim under section 2b of the State and Municipalities Liability for Damage Act 1988 (see paragraph 70 below). On 9 August 2013 the first applicant replied that he could not accept that the sum offered to him was consistent with this Court's case-law. In his view, the sum was inadequate, and he therefore rejected the offer.

B. Relevant domestic law

1. The Forfeiture of Proceeds of Crime Act 2005

(a) Introduction

33. The Forfeiture of Proceeds of Crime Act 2005 (*Закон за отнемане в полза на държавата на имущество придобито от престъпна дейност*) was enacted by Parliament in February 2005 and came into force in March 2005. On 19 November 2012 it was superseded by the Forfeiture of Unlawfully Acquired Assets Act 2012 (*Закон за отнемане в полза на държавата на незаконно придобито имущество*), but with the proviso that all pending proceedings would continue to be governed by the 2005 Act (paragraph 5 of the transitional and concluding provisions of the 2012 Act)

34. The 2005 Act made provision for the freezing and forfeiture of the direct or indirect proceeds of crime (section 1(1)), with a view to preventing criminals from profiting from their activities (section 2).

(b) Authority in charge of administering the 2005 Act

35. The authority in charge of initiating and pursuing proceedings under the 2005 Act was the Commission for Uncovering Proceeds of Crime. It had five members: its president was appointed by the prime minister, its vice-president and two of its regular members were elected by Parliament, and the third regular member was appointed by the President of the Republic (section 12(3)). Their terms of office were five years, renewable once (section 12(4)). They had to have a university degree in law or economics (section 12(5)).

36. The Commission had regional offices (section 12(9)), run by directors and staffed by inspectors (section 12(10)).

(c) Grounds for opening proceedings under the 2005 Act

37. Proceedings under the 2005 Act could be opened when it was established that a person charged with a relevant criminal offence had acquired assets which had "considerable value" and in respect of which a reasonable assumption could be made that they were the proceeds of crime (section 3(1)). "Considerable value" was defined in paragraph 1(2) of the transitional and concluding provisions of the Act as more than BGN 60,000 (equivalent to 30,677.51 euros (EUR)). In the Commission's and the courts' practice, for the purpose of cross-time comparisons, that amount was also presented as the equivalent of 400 minimum monthly salaries. According to the Supreme Court of Cassation, that had to be the aggregate value of the assets, determined on the basis of their fair market value at the time of their acquisition (see реш. № 89 от 29 януари 2010 г. по гр. д. № 717/2009 г., ВКС, III г. о.). Proceedings could be opened in respect of assets acquired before the Act's entry into force (paragraph 3 of the Act's transitional and concluding provisions).

38. Proceedings could be opened even in the absence of criminal charges if such charges could not be brought or had been dropped because the alleged offender had died, had become mentally unfit for trial or had been amnestied, or if the criminal proceedings had been stayed because the alleged offender had become unfit to take part in them, was absent, or had immunity (section 3(2)). Proceedings could also be opened even if the alleged offences had been committed abroad and did not fall under Bulgaria's criminal jurisdiction (section 3(3)).

39. The offences that could trigger the opening of proceedings under the 2005 Act were set out in section 3(1). They included various terrorism-related offences; murder for gain or for hire; pimping; abduction with a view to prostitution; distribution of pornography; trafficking in human beings; vehicle theft or robbery; embezzlement; fraud; documentary fraud entailing misappropriation of European Union funds; insurance fraud; racketeering; handling large quantities of stolen goods; insolvency fraud; dealing in weapons or dual-use goods without licence; poaching;

smuggling; counterfeiting of money; making illegal bank transfers; failing to declare money at the border; engaging in banking, insurance or another licensed financial activity without licence; money laundering or preparation for money laundering; misuse of European Union funds; tax evasion; misappropriation of budgetary funds; abuse of office in relation to narcotic drugs; all forms of bribery; unduly influencing sport events; aggravated document forgery; being a member of a criminal gang; running a racketeering gang; organising or taking part in illegal gambling; dealing in, acquiring, or possessing arms or explosives without licence; vehicle theft with a view to extracting ransom; producing, acquiring, holding or distributing narcotic drugs; systematically allowing the use of premises for drug-taking; illegally prescribing narcotic drugs; and growing opium poppy, coca or cannabis.

(d) Forfeitable assets

40. Assets that could be forfeited under the 2005 Act were those that had been acquired by persons charged with a criminal offence and in respect of which it could reasonably be assumed that they were the proceeds of crime, in as much as no legal source had been established (section 4(1)). If such assets had been transferred to bona fide third parties for consideration, and those third parties had paid the assets' real value, only the proceeds received by the target of the proceedings could be forfeited (section 4(2)). Assets inherited by the heirs of the target were also subject to forfeiture (section 5), as were assets included in the capital of a legal person controlled by the target alone or jointly with others (section 6), and assets transferred by the target to spouses, lineal relatives of all degrees, and second-degree collateral relatives and in-laws, provided those persons knew that the assets were the proceeds of crime (section 8(1)). Such knowledge was presumed until proved otherwise (section 8(2)). Assets that were joint marital property, if not traced to a source of income of the spouse of the target, were also subject to forfeiture (section 10). Assets acquired by the target's spouse or minor children from third parties were regarded as assets acquired on behalf of the target if they were of significant value, exceeded the spouse's or children's income during the relevant period and could not be traced to another source of income (section 9).

41. Transactions with third parties in respect of proceeds of crime were invalid *vis-à-vis* the State if they were not for consideration, or were for consideration but the third parties knew that the assets involved were the proceeds of crime, or acquired them with a view to concealing them or their criminal origin or the real rights pertaining to them (section 7).

42. The State's right to forfeit an asset expired twenty-five years after it had been acquired (section 11).

(e) Manner of unfolding of proceedings under the 2005 Act

(i) Opening of the proceedings

43. If an individual had been charged with one of the offences set out in section 3(1), the prosecuting authorities had to immediately inform the Commission's regional office, specifying the period of criminal activity and any assets of the accused of which they were aware (section 21(1)). The director of the regional office then drew up a report to the Commission.

44. The Commission carried out an inquiry with a view to ascertaining the source and the whereabouts of assets reasonably suspected of being the direct or indirect proceeds of crime (section 15(1)). In particular, the Commission checked the target's assets, the manner of their acquisition and their value, the target's income, the taxes paid by him or her, his or her usual and extraordinary expenses, tax returns, etc. (section 18(1)). The inquiry could not last longer than ten months, extendable once by three months (section 15(2)). In the course of the inquiry the Commission could obtain information from various authorities (section 16(1)), gather written, expert and other evidence and accounting records (section 18(2)(2), (2)(3), (2)(5) and (2)(6)), carry out searches and seizures (section 18(2)(7)), and seek the lifting of bank secrecy (section 19). The Commission could also request information from the target of the inquiry (section 18(2)(1)). In particular, it could require targets to file within fourteen days a declaration detailing their and their families' assets, bank accounts, sources of income, transactions, and debts (if mentioned in the annual tax return). Third parties who had acquired property from targets could also be required to file such declarations (section 17(3)). If the person concerned did not file a declaration, filed an incomplete declaration, or refused to file a declaration, it was presumed that any undeclared assets were the proceeds of crime (section 17(5)).

45. On the basis of that inquiry, the Commission determined whether to open forfeiture proceedings; its decision to do so was not notified to the person concerned and was not subject to legal challenge (section 15(3)).

(ii) Freezing of assets with a view to their forfeiture

46. The Commission could apply to the regional court for an order freezing the target's assets (section 22(1)). The application had to describe in detail the assets whose freezing was being sought (see опр. № 416 от 16 юни 2010 г. по ч. т. д. № 368/2010 г. ВКС, II т. о.). The court had to rule the same day, and its decision to allow the application was immediately enforceable (section 23(1)).

47. The assets were to be frozen in the manner laid down in the Code of Civil Procedure 2007 (section 22(2) of the 2005 Act). That meant that the court had to examine the case in private and *ex parte* (Article 395 §§ 1 and 2 of the Code), and allow the application if it satisfied two conditions. First,

there had to exist a risk that the prospective forfeiture claim could be frustrated or hindered. Secondly, either the application had to be supported by convincing written evidence or the applicant had to provide a guarantee to secure any future claim for damages by the person whose assets were to be frozen (Article 391 §§ 1 and 3 of the Code). The court could require the applicant to provide a guarantee even if the application was supported by convincing written evidence (Article 391 § 2 of the Code). However, the State and State bodies are exempt from providing such a guarantee (Article 391 § 4 of the Code).

48. Assets that were by statute shielded from enforcement could not be frozen (section 23(7) of the 2005 Act).

49. According to the Supreme Court of Cassation, the determination whether the prospective forfeiture claim was arguably well-founded was made solely on the basis of an *ex facie* examination of the written evidence submitted by the Commission (see опр. № 128 от 10 март 2011 г. по ч. гр. д. № 44/2011 г., ВКС, III г. о.). The court could not verify whether the facts described in the Commission's evidence were true; such verification could be carried out upon the examination of the prospective forfeiture claim (see опр. № 398 от 29 юни 2010 г. по ч. гр. д. № 200/2010 г. ВКС, IV г. о.). At the asset-freezing stage the courts were not concerned with whether the assets whose freezing was being sought could reasonably be regarded as the proceeds of crime; that question was to be dealt with only when the prospective forfeiture claim came for determination (see опр. № 66 от 18 февруари 2009 г. по ч. гр. д. № 84/2009 г., ВКС, III г. о.). The question whether there was a link between criminal conduct and the assets sought to be forfeited could not be examined at the asset-freezing stage but only at the actual forfeiture stage (see опр. № 343 от 7 юли 2010 г. по ч. гр. д. № 333/2010 г. ВКС, III г. о.; опр. № 424 от 8 юли 2010 г. по ч. гр. д. № 363/2010 г. ВКС, IV г. о.; опр. № 734 от 23 декември 2010 г. по ч. пр. д. № 698/2010 г., ВКС, IV г. о.; опр. № 79 от 14 февруари 2011 г. по ч. гр. д. № 7/2011 г., ВКС, IV г. о.; опр. № 100 от 2 февруари 2012 г. по ч. гр. д. № 767/2011 г., ВКС, IV г. о.; and опр. № 175 от 29 февруари 2012 г. по ч. гр. д. № 742/ 2011 г., ВКС, IV г. о.). However, that meant only that the target of the proceedings could not seek to establish the lack of such link; if that lack was already apparent from the evidence presented by the Commission, the court could not overlook that and had to refuse to freeze the assets (see опр. № 118 от 2 март 2011 г. по ч. гр. д. № 90/2011 г., ВКС, IV г. о.).

50. Nonetheless, in some instances, in particular cases concerning the freezing of third-party assets, the Supreme Court of Cassation refused to overturn lower courts' findings that the assets whose freezing was being sought were not the proceeds of crime (see опр. № 541 от 25 септември 2009 г. по ч. гр. д. № 448/2009 г., ВКС, IV г. о.; опр. № 576 от 30 октомври 2009 г. по ч. гр. д. № 545/2009 г., ВКС, III г. о.; and опр.

№ 112 от 1 март 2011 г. по ч. гр. д. № 49/2011 г., ВКС, IV г. о.), or inquired whether the presumption that the assets were the proceeds of crime was clearly inapplicable (see опр. № 449 от 24 септември 2010 г. по ч. гр. д. № 408/2010 г. ВКС, III г. о.)

51. Intermediate steps in the unfolding of the criminal proceedings against the target – such as referrals of the case back to the preliminary investigation stage – had no incidence on the possibility to freeze his or her assets (see опр. № 609 от 12 ноември 2009 г. по ч. гр. д. № 496/2009 г. ВКС, III г.о.)

(iii) Appeals against freezing orders

52. The court's freezing order was subject to appeal and then appeal on points of law (section 23(2) of the 2005 Act). Appeals against orders imposing interim measures are as a rule heard in private, but the appellate court may, if it considers it necessary, opt for a public hearing (Article 278 § 1 of the Code of Civil Procedure 2007). Until July 2010 it was unclear whether further appeal lay to the Supreme Court of Cassation in respect of appellate decisions upholding interim measures. The point was resolved in a binding interpretative decision of the General Meeting of the Civil and Commercial Chambers of that court of 21 July 2010 (see тълк. реш. № 1 от 21 юли 2010 г. по тълк. д. 1/2010 г., ВКС, ОСГТК). The court held that appellate court decisions determining appeals against orders imposing interim measures were not in turn subject to appeal on points of law. However, it appears that this general rule did not apply to freezing orders under the 2005 Act, in view of the clear language of its section 23(2). In a number of cases post-dating the interpretative decision the Supreme Court of Cassation held that appellate decisions upholding freezing orders under the 2005 Act were in principle subject to appeal on points of law, subject of course to the general admissibility requirements for such appeals (see опр. № 734 от 23 декември 2010 г. по ч. пр. д. № 698/2010 г., ВКС, IV г. о.; опр. № 4 от 10 януари 2011 г. по ч. пр. д. № 513/2010 г., ВКС, III г. о.; опр. № 112 от 1 март 2011 г. по ч. гр. д. № 49/2011 г., ВКС, IV г. о.; опр. № 128 от 10 март 2011 г. по ч. гр. д. № 44/2011 г., ВКС, III г. о.; опр. № 481 от 28 юли 2011 г. по ч. пр. д. № 338/2011 г., ВКС, IV г. о.; опр. № 413 от 9 август 2011 г. по ч. пр. д. № 385/2011 г., ВКС, III г. о.; and опр. № 100 от 2 февруари 2012 г. по ч. гр. д. № 767/2011 г., ВКС, IV г. о.).

(iv) Unfreezing of assets during the main forfeiture proceedings

53. If the Commission found that an asset that had been frozen had a legitimate source, the court could, at the request of the person concerned or of the Commission, unfreeze the asset (section 24(1)). According to the Supreme Court of Cassation, if the Commission failed to act in that respect, the person concerned could apply directly to a court for the unfreezing of

asset (see опр. № 447 от 17 септември 2011 г. по ч. гр. д. № 491/2011 г., ВКС, III г. о.). However, in such proceedings the courts again refused to go into the substance of the case or examine the source of the asset, holding that the point could be judicially determined only in the main forfeiture proceedings, and that before that assets could be unfrozen only if the Commission reversed, in a decision under section 24(1), its earlier assessment that those assets were the proceeds of crime (see опр. № 409 от 7 юли 2011 г. по ч. гр. д. № 369/2011 г., ВАпС, г. о.).

54. Under Article 402 § 1 of the Code of Civil Procedure 2007, any affected party could seek the discharge of a freezing order. The court had to discharge the order either if it found that that the reason why the assets had been frozen no longer existed, or if the party provided a guarantee in money or securities (Article 402 § 2 of the Code). According to the Sofia Court of Appeal, that avenue could not be used to discharge a freezing order on grounds that it had frozen assets in excess of the potential forfeiture amount, and a guarantee could not be substituted for frozen bank accounts (see опр. № 143 от 24 януари 2012 г. по в. гр. д. № 3840/2011 г., САпС, г. о., 2 с-в).

55. Third parties who claimed proprietary title to frozen assets could request their unfreezing, if their requests were supported by evidence as to the manner of acquisition of the assets and the sources of income used for that (section 24(2) and (3)).

56. The court could allow payments to be made out of frozen assets if this was necessary for medical treatment or other humanitarian needs, payment of alimony, taxes, salaries and social security contributions, or the costs of the proceedings (section 23(4)). Judicial permission was required for every individual expense; the court had to determine such applications within forty-eight hours (section 23(5)).

57. Of course, the freezing order had to be discharged if the criminal proceedings against the target were discontinued or resulted in an acquittal (see опр. № 649 от 14 ноември 2011 г. по ч. пр. д. № 499/2011 г., ВКС, IV г. о.).

(v) Forfeiture claims

58. If the criminal proceedings against the target were concluded by means of a final conviction, the Commission had one month to file a forfeiture claim (section 27(2) of the 2005 Act, Article 390 § 2 of the Code of Civil Procedure 2007, and тълк. реш. № 1 от 14 септември 2009 по тълк. д. № 1/2008 г., ВКС, ОСГТК). The claim had to be based on a report drawn up by the Commission's regional director that set out the assets suspected of being the proceeds of crime and the evidence in support of that conclusion (section 27(1)). After receiving the claim, the regional court published a notice in the State Gazette and set the case down for hearing. The hearing could not take place earlier than three months after publication

of the notice (section 28(2)). All persons connected with the target (spouses, relatives, legal persons controlled by him or her, third parties, etc.) were also constituted as defendants (section 28(3)). All defendants had to put forward all their defences in those proceedings (section 28(4)). Third parties who asserted proprietary title to the assets had to bring their claims before the first-instance court (section 29).

59. The court heard the case at a public hearing, in the presence of a public prosecutor (section 30(1)). Its decision was subject to appeal (section 30(2)). If it dismissed the forfeiture claim, it had to unfreeze the assets (section 30(3)).

60. If the proceedings did not result in forfeiture, the Commission could refer the case to the tax authorities; in that case, the evidence gathered in the forfeiture proceedings could be used in the tax proceedings (section 31).

(f) Liability of the authorities

61. Under section 32 of the 2005 Act, the State was liable in respect of any damage caused by unlawful actions or omissions carried out under the Act. Claims for damages had to be brought under the State and Municipalities Liability for Damage Act 1988 (see paragraphs 62-68 below). There are no reported cases in which persons affected by measures under the 2005 Act have sought damages under that provision. However, in several cases the Supreme Court of Cassation said that compensation may be due under it in respect of damage resulting from the freezing of assets under that Act (see реш. № 87 от 29 януари 2010 г. по гр. д. № 369/2009 г., ВКС, III г. о.; опр. № 269 от 19 май 2011 г. по гр. д. № 272/2011 г., ВКС, III г. о.; and опр. № 478 от 1 август 2011 г. по ч. гр. д. № 378/2011 г., ВКС, IV г. о.). The reasons given by the Varna Regional Court in the applicants' case (see paragraph 16 above) suggest that liability under that provision would arise if the criminal proceedings which had triggered the opening of forfeiture proceedings under the 2005 Act were discontinued or resulted in an acquittal, or if the forfeiture claim was dismissed as unfounded.

2. The State and Municipalities Liability for Damage Act 1988

62. Article 7 of the 1991 Constitution provides that the State is liable for damage caused by the unlawful decisions or actions of its organs and servants. In an interpretative decision of 22 April 2005 (see тълк. реш. № 3 от 22 април 2005 г. по т. гр. д. № 3/2004 г., ВКС, ОСГК) the Supreme Court of Cassation, confirming the courts' earlier case-law, held that that Article did not provide a direct avenue of redress, but merely laid down a general principle whose implementation was to be effected through a statute. As no such statute had been enacted after the Constitution came into force in 1991, that function was being served by the State and Municipalities Liability for Damage Act 1988.

63. Section 1 of that Act provides that the State is liable in respect of damage suffered by individuals (and since 1 January 2006 also legal persons) as a result of unlawful decisions, actions or omissions by civil servants, committed in the course of or in connection with administrative action.

64. Section 2(1) of the Act provides for liability of the investigating and prosecuting authorities or the courts in several situations: unlawful detention; bringing of charges, if the accused has been acquitted or the proceedings have been discontinued on certain grounds; conviction and sentencing, if the conviction has later been set aside; coercive medical treatment or coercive measures imposed by a court, if its decision has later been quashed as being unlawful; and serving of a sentence over and above its prescribed duration. In March 2009 the list was expanded to include the unlawful use of means of special surveillance, and in December 2012 expanded further to include deprivation of liberty in breach of Article 5 § 1 of the Convention and breaches of the rights enshrined in Article 5 §§ 2-4 of the Convention.

65. According to the above-mentioned interpretative decision of the Supreme Court of Cassation, persons who have been finally acquitted can obtain compensation under section 2(1) of the Act for the mere fact that criminal proceedings have been brought against them, on the basis that the charges against them are retrospectively considered to have been "unlawful". 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.

66. Section 4 of the Act provides that the State's liability extends to all pecuniary and non-pecuniary damage which is a direct and proximate result of the impugned act, action or omission. In applying that provision the Supreme Court of Cassation and the Supreme Administrative Court have held that legal persons, such as commercial companies, cannot suffer non-pecuniary damage and are not entitled to compensation for such damage (see опр. № 271 от 19 март 2010 г. по гр. д. № 8/2010 г., ВКС, III г. о., and реш. № 7861 от 6 юни 2011 г. по адм. д. № 3689/2011 г., ВАС, III о.).

67. In a judgment of 11 February 2008 (see реш. № 148 от 11 февруари 2008 г. по гр. д. № 1518/2007 г., ВКС, V г. о.) the Supreme Court of Cassation upheld an award of BGN 24,000 (the equivalent of 12,271 euros) made under section 2(1) of the Act to the manager of a commercial company who, following criminal proceedings which had lasted more than nine years, had been finally acquitted of serious criminal charges. In assessing the quantum of the non-pecuniary damage suffered by him, the court had regard the negative publicity attracted by the proceedings, the damage to his reputation and social and professional

standing, and to the interim measures – including the freezing of his assets – incident to the proceedings.

68. The Forfeiture of Unlawfully Acquired Assets Act 2012 (see paragraph 33 above) added two new provisions to the 1988 Act: section 2(2) and section 2a. Section 2(2) provides that the State is liable in respect of damage flowing from judicial decisions under the 2012 Act, and section 2a provides that the State is liable in respect of damage flowing from unlawful actions, omissions or decisions of the administrative authorities and civil servants in charge of applying the 2012 Act. The two sections came into force on 19 December 2012.

3. Provisions and case-law concerning the length of criminal proceedings

69. The constitutional and statutory provisions and case-law concerning length of criminal proceedings have been set out in detail in paragraphs 33-45 of the Court's pilot judgment in the case of *Dimitrov and Hamanov v. Bulgaria* (nos. 48059/06 and 2708/09, 10 May 2011).

70. The ensuing legislative developments, in particular the enactment of new sections 60a *et seq.* of the Judiciary Act 2007 and new section 2b of the State and Municipalities Liability for Damage Act 1988, which allow persons who have become victim of unreasonably lengthy criminal proceedings to seek compensation, have been set out in detail in the Court's decision in the case of *Valcheva and Abrashev v. Bulgaria* ((dec.), nos. 6194/11 and 34887/11, 18 June 2013).

COMPLAINTS

71. The applicants complained under Article 6 § 1 of the Convention that the law serving as a basis for the freezing of their assets with a view to their forfeiture was not sufficiently clear and foreseeable in its application and did not contain enough safeguards against arbitrary action.

72. The applicants complained under Article 6 § 2 of the Convention of the statutory presumption that all assets that they had acquired during the twenty-five years preceding the prospective forfeiture were the proceeds of crime. They submitted that the proceedings for freezing their property had in effect amounted to the bringing of a criminal charge against them and had thus attracted the strictures of that provision. They pointed out that even though the criminal charges against the first applicant had concerned events in 1999-2001, the inquiry into their assets had covered a much longer period, up to twenty-five years before the prospective forfeiture. They also complained that under the 2005 Act, when the Commission filed a forfeiture claim, the court had to publish a notice to that effect in the State Gazette.

73. The applicants complained under Article 6 § 1 of the Convention that when ordering the freezing of their assets the courts had refused to examine whether the criminal charges against the first applicant were well-founded or whether there existed any connection between those charges and the assets in issue, and that by law those courts did not have any possibility to limit the extent or the temporal operation of the freezing orders.

74. The applicants complained under Article 6 § 1 of the Convention of the reversal of the burden of proof in the proceedings brought against them and of the nature and the extent of the presumptions laid down in the 2005 Act.

75. The applicants complained under Article 6 § 1 of the Convention of the lack of public hearings in the proceedings relating to the freezing orders.

76. Lastly, the applicants complained under Article 1 of Protocol No. 1 of the freezing of their assets. They argued that that freezing (a) had not been based on a clear and foreseeable law, because the law did not lay down a clear time-limit for bringing a forfeiture claim, and (b) had been disproportionate, because the Commission's application had not been supported by enough evidence, because there was no established link between the attached assets and the offence allegedly committed by the first applicant, and because there was no time-limit for bringing the forfeiture claim, with the result that the freezing could last a very long time.

77. The first applicant additionally complained under Article 6 § 1 of the Convention of the length of the criminal proceedings against him, and under Article 13 of the Convention of the lack of effective remedies in that respect.

THE LAW

A. Complaint concerning the freezing of the applicants' assets

78. In respect of their complaint concerning the freezing of their assets the applicants relied on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

79. The Court considers that this complaint falls to be examined solely under Article 1 of Protocol No. 1, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

1. The parties' submissions

80. The Government submitted that the applicants had not exhausted domestic remedies. They had not appealed on points of law against the Plovdiv Court of Appeal's decision of 1 September 2010. They had not requested payments to be made out of frozen assets under section 23(4) of the 2005 Act or individual assets to be unfrozen under section 24 of the Act. Lastly, they had not brought a claim for damages under section 32 of the Act. Under Article 7 of the 1991 Constitution, the State was liable for damage caused by the unlawful decisions or actions of its organs and servants; that liability could be realised in proceedings under the 1988 Act, to which section 32 of the 2005 Act referred. Moreover, following the first applicant's acquittal, he could have brought a claim under section 2 of the 1988 Act.

81. The applicants submitted, firstly, that under the interpretative decision of the Supreme Court of Cassation of 21 July 2010, it was not possible to appeal on points of law against appellate decisions upholding freezing orders. All cases in which the Supreme Court of Cassation had accepted to examine such appeals post-dated that decision and the Plovdiv Court of Appeal's decision.

82. The applicants went on to say that applications under sections 23(4) or 24 of the 2005 Act could not have provided them adequate redress. The aim of section 23(4) was to allow payments to be made out of frozen assets on an *ad hoc* basis, on humanitarian or similar grounds, and its application was dependent on the discretion of the courts. An application under section 24(1) would not have had a reasonable prospect of success, because before the actual forfeiture stage the Commission and the courts did not seek to establish the lawful or otherwise source of an individual asset. That approach, and the lack of an established case-law, shed uncertainty on the manner of application of section 24(1).

83. In relation to the possibility to claim damages under section 32 of the 2005 Act in conjunction with the 1988 Act, the applicants submitted that under that provision, construed in line with the transitional provisions of the Forfeiture of Unlawfully Acquired Assets Act 2012 and the new section 2(2) of the 1988 Act, it was possible to seek compensation only in relation to judicial decisions, not decisions of the Commission. It was not possible to seek compensation under the new section 2a of the 1988 Act either, because it applied only to actions, omissions or decisions under the 2012 Act, whereas the proceedings in the applicants' case had taken place under the 2005 Act. Moreover, according to the applicants, section 32 of the

2005 Act was to be construed as providing for liability only in relation to actions, omissions or decisions of the Commission, not judicial decisions. However, in the case of the applicants, the Commission was not alone responsible for the damage suffered by them; it had merely applied for freezing orders, but those orders had been made by the courts. Moreover, those orders had not been unlawful in terms of domestic law – they had been upheld on appeal and had become final. The applicants also drew attention to the fact that there existed no reported case-law under section 32, even though it had been on the statute book for a number of years, and to this Court's position that the availability of effective domestic remedies is normally assessed by reference to the date of lodging of the application.

84. The applicants further argued that it had been impossible to seek damages under section 32 of the 2005 Act while the criminal proceedings against the first applicant were still pending. Although it had become hypothetically possible to bring such a claim after those proceedings had resulted in an acquittal, it would be very hard to make out a direct causal link between the criminal proceedings and any damage flowing from the freezing of the applicants' assets. It was true that the two issues were connected and that the two procedures had unfolded in parallel. However, they had unfolded before different authorities and courts, and the forfeiture proceedings had not been directly dependent on the criminal ones. Moreover, section 32 of the 2005 Act and its vague reference to the 1988 Act did not correspond to the requirement to have clear and predictable rules preventing arbitrariness. In this perspective, it was hard to argue that the freezing of the applicants' assets had been a direct result of the criminal proceedings, and the first applicant's acquittal in those proceedings could not lead to an award of damages in relation to the freezing of the applicants' assets during their pendency.

85. Lastly, the applicants expressed a number of general criticisms of the procedure under the 1988 Act. First, claims under the Act often had to be directed against the court hearing them, entailing the need to transfer the case to another court, which resulted in delay. Also, sums awarded by way of compensation were to be paid out of the budget of the courts awarding them, which could give rise to doubts about those courts' impartiality. It was moreover not possible to enforce awards of damages against the State if it did not pay them voluntarily. Another issue was the courts' approach to the mode of proof of non-pecuniary damage: they were often too formalistic, requiring witness evidence to make out the existence of such damage, and failing to take into account the cumulative effect of all contributing factors when assessing its quantum. There were in addition no uniform criteria – laid down in case-law or otherwise – on which the courts could draw when fixing of the amount of damages in equity, as required under Bulgarian law. Lastly, under the courts' established case-law, legal persons were not entitled to compensation for non-pecuniary damage.

2. The Court's assessment

(a) General principles

86. Article 35 § 1 of the Convention provides, in so far as relevant:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."

87. The rule set out in this provision, commonly referred to as the rule of exhaustion of domestic remedies, is an indispensable part of the functioning of the system of protection established under the Convention. States are dispensed from answering before an international body for their acts or omissions before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, among other authorities, *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 69, ECHR 2010).

88. Under the rule of exhaustion of domestic remedies, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of those remedies must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 of the Convention also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (ibid., § 70, with further references).

89. In the area of exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time: that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact used, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving the applicant from the requirement to exhaust (ibid., with further references).

90. In particular, an applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or other suitable evidence, that a remedy which he or she has not used was bound to fail or had a negligible prospect of success (see

Kleyn and Others v. the Netherlands [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI; *Miler v. the Czech Republic* (dec.), no. 56347/10, § 21, 25 September 2012; and *Vomočil and Art 38, a.s. v. the Czech Republic* (dec.), nos. 38817/04 and 1458/07, § 47, 5 March 2013). However, the existence of mere doubts as to the prospects of success of a remedy which is not obviously futile is not a valid reason for failing to have recourse to it (see, among other authorities, *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX; *Milošević v. the Netherlands* (dec.), no. 77631/01, 19 March 2002; *Kane v. Cyprus* (dec.), no. 33655/06, 13 September 2011; *Miler*, cited above, § 21; and *Vomočil and Art 38, a.s.*, cited above, § 47). In other words, if there are doubts about the effectiveness of a remedy, the issue must be tested in domestic proceedings (see *Roseiro Bento v. Portugal* (dec.), no. 29288/02, 30 November 2004; *Kirilov v. Bulgaria*, no. 15158/02, § 46, 22 May 2008; and *Kamburov v. Bulgaria* (dec.), no. 14336/05, § 61 *in fine*, 6 January 2011).

(b) Application of those principles in the present case

91. In the instant case, the criminal proceedings against the first applicant ended on 25 January 2013 with his acquittal (see paragraphs 7-9 above). As a result, in March 2013 the forfeiture proceedings against the applicants were discontinued, and their assets were unfrozen (see paragraphs 29-31 above). The Government submitted that following those developments it was now open to the applicants to seek compensation for any damage suffered by them as a result of the freezing of their assets.

92. The Court, for its part, notes that section 32 of the 2005 Act provided for liability of the State in respect of any damage caused by unlawful actions or omissions carried out under the Act, and went on to say that that liability could be realised in proceedings under the 1988 Act (see paragraph 61 above). It is true that there are no reported cases in which persons affected by freezing orders under the 2005 Act have sought damages under that provision. However, in several cases the Supreme Court of Cassation has said that compensation could be due under it in respect of damage resulting from the freezing of assets under that Act (see paragraph 61 above). Moreover, the reasons given by the Varna Regional Court when it decided, when freezing the applicants' assets, to set a guarantee securing a future claim for damages by the applicants (see paragraph 16 above) suggest that liability under section 32 would arise if the criminal proceedings which had triggered the opening of forfeiture proceedings under the 2005 Act were discontinued or resulted in an acquittal, which is exactly what happened in the applicants' case. The applicants have not provided examples in support of their assertion that a claim under that provision would be bound to fail. It cannot therefore be regarded as having no or negligible chances of success.

93. The applicants might be correct in asserting that the proper construction of that section is that only administrative authorities, not courts, can incur liability in relation to the freezing of alleged proceeds of crime, and that they will therefore be unable to obtain damages for the court orders freezing of their assets. However, it may equally be that the section is interpreted as providing an independent cause of action, distinct from the ones under sections 1 and 2(1) of the 1988 Act, and covering both administrative and judicial decisions. There is no indication that the point has ever been tested in domestic proceedings. It is therefore open to the applicants to bring a claim under that section and argue that it should be construed in the way most favourable to them. The point appears an arguable one with sufficient chances of success (see, *mutatis mutandis*, *D. v. Ireland* (dec.), no. 26499/02, § 92, 28 June 2006).

94. By a similar token, it is open to question whether, following the first applicant's acquittal and the ensuing discontinuance of the forfeiture proceedings against the applicants, the decisions in relation to the freezing of their assets would – like criminal charges which have resulted in an acquittal or in a discontinuance in proceedings under section 2(1) of the 1988 Act (see paragraph 65 above) – be retrospectively regarded as "unlawful" and sounding in damages under section 32 of the 2005 Act. It is an arguable proposition which can be put before the domestic courts.

95. The applicants in addition argued that proceedings under the 1988 Act suffered from the structural defects affecting negatively their remedial capacity: undue delay, judicial bias, the impossibility to enforce awards, and the courts' approach to the assessment of non-pecuniary damage. However, it is not more than a conjecture to say that the courts dealing with such claims will not act with due diligence – this is a question of judicial administration and case management (see, *mutatis mutandis*, *Demopoulos and Others*, cited above, § 125). Nor can it be presumed that the courts will as a rule be inclined to award less by way of damages because that might negatively affect the finances of the judiciary. It is true that in *Mihalkov v. Bulgaria* (no. 67719/01, §§ 45-50, 10 April 2008) the Court expressed misgivings in relation to the objective impartiality of a court hearing a claim under the 1988 Act directed against itself. However, in that case the link was immediate. It would be speculative to say that the same would be true in relation to different courts – the connection appears too tenuous to give rise to concern. Nor is the capability of proceedings under the 1988 Act to provide redress hampered by the impossibility to enforce awards of damages against the State. It is true that in several cases this Court has found breaches of Article 6 § 1 of the Convention in relation to the non-enforcement of money judgments against the authorities (see *Angelov v. Bulgaria*, no. 44076/98, §§ 34-40, 22 April 2004; *Mancheva v. Bulgaria*, no. 39609/98, §§ 54-63, 30 September 2004; *Rahbar-Pagard v. Bulgaria*, nos. 45466/99 et 29903/02, §§ 94-97 and 100-03, 6 April 2006; *Sirmanov*

v. Bulgaria, no. 67353/01, §§ 31-34, 10 May 2007; *Dimitar Yanakiev v. Bulgaria*, no. 1152/03, §§ 18-21, 2 July 2009; and *Puleva and Radeva v. Bulgaria* [Committee], no. 36265/05, §§ 35-45, 14 February 2012). However, this does not suffice to define the problem as a systemic one, and it would be speculative at this stage to say that compensation awarded in proceedings under the 1988 Act will not be paid in due time (see *Valcheva and Abrashev*, cited above, § 113).

96. The same goes for the way in which the Bulgarian courts will assess the nature and the quantum of the pecuniary or non-pecuniary damage suffered by the applicants. There exist examples suggesting that they may award substantial compensation in relation to non-pecuniary damage suffered as a result of criminal proceedings (see paragraph 67 above). It is true that those courts have held that legal persons are in principle not entitled to compensation for non-pecuniary damage (see paragraph 66 above). However, that does not automatically call into question the remedial effectiveness of a prospective claim under the 1988 Act brought by the applicants. First, all but one of the applicants are physical persons, and the fourth applicant is a company wholly owned and managed by the first applicant (see paragraph 1 above). Secondly, there is no support in the Court's case-law for the proposition that legal persons are as a rule entitled to compensation for non-pecuniary damage flowing from breaches of the Convention or its Protocols; the Court has merely not excluded that possibility (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 35, ECHR 2000-IV). It has on a number of occasions refused to award such compensation in view of the individual circumstances of the case (see *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, § 38, ECHR 2001-VIII; *Immobiliare Sole S.r.l. v. Italy*, no. 32766/96, § 30, 19 December 2002; *Soc. De.ro.sa. v. Italy*, no. 64449/01, § 33, 4 December 2003; and *Elia S.r.l. v. Italy* (just satisfaction), no. 37710/97, § 30, 22 July 2004), in particular to applicant companies wholly owned by other applicants who have claimed and been awarded compensation in respect of non-pecuniary damage in their own right (see *Shesti Mai Engineering OOD and Others v. Bulgaria*, no. 17854/04, § 115, 20 September 2011).

97. In view of the above considerations, the Court concludes that a claim under section 32 of the 2005 Act is a remedy open to the applicants. Any doubts about its effectiveness must be tested in domestic proceedings.

98. In addition, the first applicant can, following his acquittal, seek compensation for any damage suffered as a result of the criminal proceedings against him by way of a claim under section 2(1) of the 1988 Act, on the basis that the criminal charges against him are retrospectively considered to have been "unlawful" (see paragraphs 64 and 65 above). It appears that in such proceedings it is open to the Bulgarian courts to award him compensation in respect of any measures incidental to the criminal proceedings against him, such as the freezing of his assets (see

paragraphs 65 *in fine* and 67 above). It is at least arguable that in such a claim the first applicant will be able to show that that freezing was a direct and proximate result of the criminal proceedings against him. The Court therefore concludes that a claim under section 2(1) of the 1988 Act cannot, following the first applicant's acquittal, be regarded as an ineffective remedy.

99. It is true that the possibility to bring claims under section 32 of the 2005 Act and under section 2(1) of the 1988 Act arose only when the first applicant's acquittal became final and when the forfeiture proceedings against the applicants were discontinued, and that, had it been otherwise, the applicants would not have been entitled to claim compensation under those provisions. However, this cannot be regarded as decisive (see, *mutatis mutandis*, *N.C. v. Italy* [GC], no. 24952/94, §§ 55-56, ECHR 2002-X).

100. It is also true that under the Court's case-law the availability of effective domestic remedies is normally assessed by reference to the date of lodging of the application. However, this rule is subject to exceptions if this is justified by the circumstances of the case (see *Demopoulos and Others*, cited above, § 87, with further references). In the present case, the fresh developments in the criminal proceedings against the first applicant and in the forfeiture proceedings against the applicants, which clearly post-date the lodging of the application, cannot be overlooked. Those developments made it possible for the applicants to turn to remedies which existed but were not available to them at the time of lodging of their application. It does not appear that the applicants are at present precluded from turning to those remedies by the operation of time-limits of other procedural bars (contrast, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 62, Series A no. 12, and *Ratajczyk v. Poland* (dec.), no. 11215/02, ECHR 2005-VIII).

101. In view of the above analysis, the Court does not find it necessary to determine whether an appeal against the Plovdiv Court of Appeal's decision upholding the second freezing order or applications under section 23(4) or section 24 of the 2005 Act were effective remedies that should have been used by the applicants.

102. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Complaint under Article 6 § 2 of the Convention

103. In respect of their complaint that the statutory presumption that all assets that they had acquired during the twenty-five years preceding the prospective forfeiture were the proceeds of crime was incompatible with the presumption of innocence, the applicants relied on Article 6 § 2 of the Convention, which reads as follows:

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

104. The Court notes that in issue in the present case is solely the freezing of the applicants' assets, not their forfeiture. The Court has already held that the provisional seizure of assets with a view to their forfeiture does not engage Article 6 of the Convention under its criminal limb (see *Dogmoch v. Germany* (dec.), no. 26315/03, ECHR 2006-XIII, and *Dassa Foundation and Others v. Liechtenstein* (dec.), no. 696/05, 10 July 2007). The former Commission has in addition held that provisional coercive measures – such as pre-trial detention – imposed in connection with criminal proceedings are not in themselves incompatible with the presumption of innocence enshrined in Article 6 § 2 (see *Deweer v. Belgium*, no. 6903/75, Commission's report of 5 October 1978, Series B no. 33, § 63; *L.B. v. Spain*, no. 12476/86, Commission decision of 8 May 1987, unreported; and *Hellegouarch v. France*, no. 11994/86, Commission decision of 12 October 1988, unreported).

105. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

C. The alleged unfairness of the proceedings relating to the freezing orders

106. In respect of their complaints of the alleged unfairness of the proceedings relating to the freezing orders the applicants relied on Article 6 § 1 of the Convention, which provides, in so far as relevant:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ..."

107. It must first be determined whether Article 6 § 1 of the Convention was applicable to the proceedings relating to the freezing orders under its civil or its criminal limb.

108. It must be noted in this connection that those proceedings were not the main forfeiture proceedings, but preliminary proceedings whose purpose was to prevent the dissipation of assets potentially liable to forfeiture. The Court's case-law on the applicability of Article 6 of the Convention to forfeiture or confiscation proceedings – whether following a criminal conviction or independent of such conviction – is therefore not directly relevant. Rather, assistance may be derived from cases concerning interim measures. As already noted, in the cases of *Dogmoch* and *Dassa Foundation and Others* (both cited above), the Court held that the provisional seizure of assets with a view to their forfeiture did not fall under the civil or the criminal limb of Article 6; the rulings in relation to the civil limb were based on the long-standing position that interim measures in civil

proceedings do not engage that provision. However, in the subsequent Grand Chamber case of *Micallef v. Malta* ([GC], no. 17056/06, §§ 83-85, ECHR 2009), the Court reversed its earlier position and held that Article 6 § 1 applies to such measures if the right at stake in both the main and the interim proceedings is civil, and if the interim measure can be considered effectively to determine that right.

109. In the instant case, the rights affected by the freezing orders were undoubtedly civil, and the restrictions resulting from those orders were substantial: they prevented the applicants from dealing with a number of assets, including their bank accounts, for a potentially very long period of time. The Court therefore finds that the proceedings engaged Article 6 § 1 of the Convention under its civil limb (see also, *mutatis mutandis*, the pre-*Micallef* case of *Markass Car Hire Ltd. v. Cyprus* (dec.), no. 51591/99, 23 October 2001, in which an interim decision whose effects were drastic was considered to fall within the ambit of that Article).

110. The applicants raised two complaints under that provision.

111. They firstly complained of the allegedly limited scope of the courts' jurisdiction. However, although the applicants tried to frame this complaint in terms of limitations on the competence of the courts ordering the freezing of their assets, the Court finds that it in effect seeks to challenge the correctness of those courts' rulings in terms of Bulgarian law and to derive a particular content for civil rights and obligations under that law. That law, as consistently interpreted by the Supreme Court of Cassation, did not require the courts examining applications for freezing orders to determine whether the charges triggering the opening of forfeiture proceedings were well-founded – the mere laying of such charges constituted grounds to open forfeiture proceedings – or whether there existed a link between those charges and the assets sought to be frozen. Nor did the law lay down any time-limits on the freezing of assets – they were in principle to remain frozen at least until the conclusion of the criminal proceedings against the target. All the law required was the existence of a risk that the prospective forfeiture claim could be frustrated or hindered and the application for a freezing order to be supported by convincing written evidence or backed by a guarantee securing a prospective claim for damages by the person whose assets were to be frozen (see paragraphs 47 and 49-51 above). That legislative setup and the way it was applied in the present case may give rise to lawfulness and proportionality concerns under Article 1 of Protocol No. 1. However, the Court already found that such issues may be aired in domestic proceedings. Seen from the perspective of Article 6 § 1 of the Convention under its civil limb, the complaints in that regard appear to be of a fourth-instance nature. The Court is not a court of appeal from the national courts, and it is not its function to deal with errors of fact or law allegedly committed by those courts (see, as a recent authority, *Yordanova and Toshev v. Bulgaria*, no. 5126/05, § 65, 2 October 2012), or to substitute,

in the examination of complaints under Article 6 § 1 of the Convention, its own views as to the proper interpretation and content of domestic law (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 101 *in fine*, ECHR 2001-V).

112. The applicants secondly complained of the alleged reversal of the burden of proof in proceedings under the 2005 Act. However, since the forfeiture proceedings in the present case were discontinued, no issue arises in relation to the reversal of the burden of proof and the nature and extent of the presumptions laid down in the 2005 Act. The Court already found that Article 6 § 1 of the Convention applied to the asset-freezing proceedings under its civil but not under its criminal limb. This means that no issues arise in relation to the presumption of innocence, in so far as protected under that provision as part of the general notion of a fair hearing in criminal proceedings (contrast *Phillips v. the United Kingdom*, no. 41087/98, §§ 37-47, ECHR 2001-VII, and *Grayson and Barnham v. the United Kingdom*, nos. 19955/05 and 15085/06, §§ 37-49, 23 September 2008, and see, *mutatis mutandis*, *Walsh v. the United Kingdom* (dec.), no. 43384/05, 21 November 2006).

113. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

D. The lack of public hearings in the proceedings relating to the freezing orders

In respect of their complaint of the lack of public hearings in the proceedings relating to the freezing orders the applicants relied on Article 6 § 1 of the Convention, which reads, in so far as relevant:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a ... public hearing ..."

114. The Government submitted that the courts had not held public hearings because the nature of the issues arising in the proceedings and the applicable law did not require it. The applicants had been able to put forward their arguments against the freezing of their assets in their written submissions before the courts of appeal.

115. The applicants submitted that the lack of public hearings had prevented them from acquainting themselves with, and responding to, the arguments put forward in the written comments of the Commission on their appeals against the freezing orders.

116. On the applicability of Article 6 § 1 of the Convention to the proceedings at issue, the Court refers to its analysis in paragraphs 107 to 109 above.

117. In relation to the substance of the complaint, the Court notes that the first-instance proceedings leading to the making of the freezing orders

were conducted on the papers and *ex parte*. However, no issue arises in relation to that. To be able to serve their purpose of preventing the dissipation of forfeitable assets, applications for freezing orders need to be heard without notice, and that is not in itself incompatible with the requirements of Article 6 § 1 of the Convention (see *Micallef*, cited above, § 86).

118. The position in relation to the appeal proceedings is different. They were *inter partes*, but were likewise conducted on the papers. However, a public hearing was arguably required, in view of what was at stake for the applicants – the potentially long-term freezing of a considerable number of assets, including their bank accounts (see, *mutatis mutandis*, *Bocellari and Rizza v. Italy*, no. 399/02, §§ 34-41, 13 November 2007, and *Bongiorno and Others v. Italy*, no. 4514/07, §§ 27-32, 5 January 2010, where the Court held that actual forfeiture proceedings require a public hearing). However, it cannot be overlooked that although under Article 278 § 1 of the Code of Civil Procedure 2007 such appeals are as a rule heard in private, the court may, if it considers it necessary, opt for a public hearing (see paragraph 52 above). There is no indication that the applicants, who were legally represented, made such requests, either in the proceedings before the Varna Court of Appeal or in those before the Plovdiv Court of Appeal (see paragraphs 20 and 26 above, as well as *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 67, Series A no. 171-A; *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 58, Series A no. 263; *Zumtobel v. Austria*, 21 September 1993, § 34, Series A no. 268-A; *Pauger v. Austria*, 28 May 1997, §§ 60-61, *Reports of Judgments and Decisions* 1997-III; *Döry v. Sweden*, no. 28394/95, § 38, 12 November 2002; and *Lundevall v. Sweden*, no. 38629/97, § 35, 12 November 2002). The applicants have not showed that in practice such requests would have had no prospect of success (contrast *H. v. Belgium*, 30 November 1987, § 54 *in fine*, Series A no. 127-B, and *Werner v. Austria*, 24 November 1997, § 48, *Reports* 1997-VII).

119. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

E. The length of the criminal proceedings against the first applicant and the alleged lack of an effective remedy in that respect

120. In respect of his complaints concerning the length of the criminal proceedings against him and the alleged lack of an effective remedy in that respect the first applicant relied on Articles 6 § 1 and 13 of the Convention, which provide, in so far as relevant:

Article 6 (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."

1. The parties' submissions

121. The Government submitted that it was open to the first applicant to apply for compensation under the newly enacted sections 60a *et seq.* of the 2007 Act. That remedy was open to persons, such as the first applicant, who had complained to the Court in relation to the duration of criminal proceedings against them, and operated retrospectively. It was in addition possible to bring a claim under the new amendments of the 1988 Act.

122. The applicants submitted that the newly introduced remedies were not effective and did not comply with the requirements set out in the Court's pilot judgments as a result of which they had been put in place. Their first defect was that they were solely intended to provide compensation for delay, but could not be used to accelerate proceedings. Secondly, under the Court's prevalent case-law the availability of effective domestic remedies was to be assessed by reference to the time of lodging of the application, whereas the two remedies had been put into place after the Government had been given notice of the application.

123. The administrative remedy under the 2007 Act did not entail an open and contentious procedure, in breach of the requirement, set out in the pilot judgments, that the procedural rules governing such remedy had to conform to the principle of fairness enshrined in Article 6 of the Convention. Moreover, the authority fixing the amount of compensation was not only not independent of the executive but part of it. There were no guarantees that the six-month time-limit for the examination of applications for compensation would be complied with, or that the compensation would be paid in a timely manner. The requirement of section 60b(1)(4) of the 2007 Act to specify the decision, action or omission alleged to amount to a breach of the right to a hearing within a reasonable time was unclear and impossible to comply with, because in most cases that breach flowed from a multitude of such decisions, actions or omissions. Thus, instead of having unimpeded access to a simple and rapid procedure, victims of unreasonable delay would have to resort to the services of a lawyer familiar with this Court's case-law. The problem was amplified by the lack of clear criteria for fixing the amount of compensation. Moreover, that amount was capped at BGN 10,000, which in some cases would be too low and prevent awards similar to those made by this Court. Since the compensation was to be paid

out of the budget of the Ministry of Justice, the Minister could not be relied on to fix its amount impartially. That defect could not be overcome, because the Act made no provision for judicial review of the Minister's decision on the amount of compensation. It was not possible to enforce awards of compensation against the Ministry if it did not pay them voluntarily. The only avenue open to persons in whose cases the Minister would fix a manifestly unfair amount of compensation was to refuse to conclude the settlement.

124. The judicial remedy under the 1988 Act could be resorted to only if the administrative remedy under the 2007 Act had already been used. Claims under section 2b of the 1988 Act were to be examined in normal three-instance proceedings, with no provision for shortened time-limits, which in most cases would be too slow. That could lead to a situation where the compensation proceedings would be lengthier than the proceedings in respect of whose length compensation was being sought. Such claims would often be directed against the court hearing them, entailing the need to transfer the case to another court, which would result in yet more delay. The sums awarded by way of compensation were to be paid out of the budget of the courts awarding them, which could give rise to doubts about those courts' impartiality. Indeed, that point had been noted in the two pilot judgments. Another issue was the Bulgarian courts' approach to the mode of proof of non-pecuniary damage in proceedings under the 1988 Act: they were often too formalistic, requiring witness evidence to make out the existence of such damage, and failing to take into account the cumulative effect of all factors when assessing its quantum. In addition, under the courts' prevailing case-law, legal persons were not entitled to compensation for non-pecuniary damage. There were also no settled criteria for assessing its quantum, as evidenced by, *inter alia*, several cases in which this Court had found awards made by the Bulgarian courts unreasonably low.

125. The defects common to the two remedies were the lack of a time-limit for the payment of compensation; the impossibility to enforce the payment of compensation if it was not paid voluntarily by the authorities; and the lack of settled case-law under the new provisions of the 1988 Act and the 2007 Act.

126. Lastly, the new remedies would not be able to provide adequate redress to the first applicant because, unlike this Court, the national courts considered that a person was under a "criminal charge" only from the point when he or she was formally charged, and did not consider that other actions, such as arrests or searches, could amount to the bringing of a charge.

2. The Court's assessment

127. In its recent decision in the case of *Valcheva and Abrashev* (cited above) the Court found that: (a) the newly enacted sections 60a *et seq.* of

the Judiciary Act 2007 and section 2b of the State and Municipalities Liability Act 1988 (see paragraph 70 above) provide an effective remedy in respect of the unreasonable length of criminal proceedings; and that (b) applicants who have lodged their applications with the Court before the introduction of those remedies are also required to have recourse to them to comply with the requirement to have exhausted domestic remedies. There is nothing in the present case to suggest that those remedies will not be able to provide the first applicant adequate redress. Indeed, he has already availed himself of the first of them (see paragraph 32 above). The fact that he refused to accept the compensation offered to him by the Minister of Justice, which amounted to about two thirds of the compensation that he might have obtained from the Court under Article 41 of the Convention in relation to the length of the criminal proceedings against him, does not alter that conclusion. The procedure under section 60a *et seq.* of the 2007 Act took just over five months and resulted in an offer which, although lower than the sums awarded by the Court in similar cases, cannot be regarded as unreasonable (see *Najvar v. the Czech Republic* (dec.), no. 8302/06, 3 March 2009; *Haškovcová and Věříšová v. the Czech Republic* (dec.), no. 43905/04, 25 August 2009; *Boniface v. France* (dec.), 28785/09, 25 May 2010; *Baccini and Others v. Italy* (dec.), 26423/03, 1 June 2010; and *Maccora and Ravasio v. Italy* (dec.), no. 26348/03, 31 August 2010). Moreover, there is no indication that the applicant, feeling dissatisfied with the Ministry's proposal, tried to bring a claim under section 2b of the 1988 Act (see paragraph 70 above, as well as *Slunský v. the Czech Republic* (dec.), no. 31225/06, 10 March 2009, and, *mutatis mutandis*, *Enke v. the Czech Republic* (dec.), no. 82/04, 20 May 2008; *Gáborová v. the Czech Republic* (dec.), no. 17467/04, 24 June 2008; and *Koudelka v. the Czech Republic* (dec.), no. 32416/09, 15 February 2011).

128. It follows that the first applicant's complaint under Article 6 § 1 of the Convention must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies, and that his complaint under Article 13 of the Convention is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President