AS TO THE ADMISSIBILITY OF

Application No. 31195/96
by Ivanka NIKOLOVA
against Bulgaria

The European Commission of Human Rights (First Chamber) sitting in private on 27 February 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 6 February 1996 by Ivanka NIKOLOVA against Bulgaria and registered on 26 April 1996 under file No. 31195/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Bulgarian national born in 1943 and residing in Plovdiv. Before the Commission she is represented by Mr. Mihail Ekimdjiev, a lawyer practising in Plovdiv.

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

Particular circumstances of the case

The applicant used to work as a cashier and accountant in a State owned enterprise. An audit undertaken in the enterprise in the beginning of 1995 revealed a cash deficit of 1,290,059 leva.

In February 1995 the applicant was given a copy of the final act of the audit, which stated inter alia that the she was responsible for the shortage. The auditors considered that the applicant had made deliberately false entries in the accounting books and had thus misappropriated funds.

In accordance with the provisions of the Financial Control Act (Zakon za finansovia kontrol), as in force at the relevant time, the final act of the audit was sent to the prosecution authorities who had to examine whether the circumstances in which the cash deficit occurred revealed criminal acts.

On 15 March 1995 the Regional Investigation Office (Regionalna sledstvena sluzhba) in Plovdiv ordered the opening of criminal proceedings on the matter. The order of 15 March 1995 allegedly indicated that the criminal proceedings were instituted "against" the applicant. In the months which followed Mr. S., the investigator (sledovatel) in the case, examined a number of witnesses and collected other evidence. The applicant was also examined as a witness.

On 24 October 1995 the applicant was arrested and charged under Section 203 para. 1 in conjunction with Section 201 of the Penal Code (Nakazatelen kodeks), with misappropriation of funds in large amounts. On the same day investigator S. heard the applicant and decided to detain her on remand. On 9 November 1995, apparently without having heard the applicant, a prosecutor from the Regional Prosecutor's Office in Plovdiv (Okrazhna prokuratura) confirmed the investigator's decision to detain her.

On an unspecified date the applicant appealed to the Plovdiv Regional Court (Okrazhen sad) against her detention on remand. In his written submissions to the Court the applicant's lawyer stated inter alia that the charges were unfounded and that there was no danger of absconding because the applicant had a husband and two children, and because she had not attempted to abscond during the six months since she had become aware of the criminal charges against her. Also, the lawyer submitted that a year earlier the applicant had undergone gynaecological surgery from which she had not yet completely recovered. He enclosed medical certificates.

In accordance with the established practice the applicant's lawyer transmitted his appeal and submissions to the Regional Court through the Regional Prosecutor's Office. The Prosecutor's Office apparently added to the file the investigator's decision of 24 October 1995 to detain the applicant and the prosecutor's confirmation of 9 November 1995, and transmitted the file to the Regional Court. The Court decided in camera, without the presence of the parties.

On 11 December 1995 the Court dismissed the appeal. The Court noted that the applicant was accused of misappropriation of funds in large amount, a crime which carried a penalty of imprisonment of ten or more years. Also, the medical certificates presented by the applicant concerned her state of health during a past period of time.

On 5 February 1996 the applicant was urgently transferred to hospital due to pain in her gall bladder. On the same day she underwent surgery.

On 19 February 1996 the applicant's detention on remand was discontinued and she was put under house arrest. On the same day she was transferred from the hospital to her home.

In June 1996 the investigator concluded his work on the case and sent the file to the Regional Prosecutor's Office with a proposal to submit an indictment in court. On an unspecified date the competent prosecutor returned the case to the investigator for further clarifications.

On an unspecified date the applicant's lawyer unsuccessfully requested the investigator in the case to repeat, in his and the applicant's presence, the examinations and the other acts undertaken during the period of time between the opening of the criminal

proceedings on 15 March 1995 and 24 October 1995, when the applicant was officially charged.

In September 1996 the applicant's lawyer asked the regional prosecutor in charge of the case to provide him with authenticated copies of certain documents, explaining that these documents had been requested by the Secretariat of the Commission. On 29 October 1996 the prosecutor answered that any international correspondence had to be transmitted officially through the Chief Public Prosecutor's Office.

The applicant's lawyer does not claim that there existed any obstacles for him to consult the file of his client's case and to make unofficial copies of the documents at issue.

Relevant domestic law and practice

a. The Constitution and the Act on the Judiciary (Zakon za sadebnata vlast) provide for the structure of the prosecution and of the investigation authorities. A National Investigation Authority (Natzionalna sledstvena sluzhba), comprising all investigators is set up under the Act. The prosecutors of all levels are under the authority of the Chief Public Prosecutor.

All investigators and prosecutors except the Chief Public Prosecutor are appointed, promoted, or dismissed by the Supreme Judicial Council (Vissh sadeben savet), an independent body part of whose members are elected by the Parliament and the remainder by the judiciary. Upon completion of three years on the respective position an investigator or a prosecutor obtains tenure and can be removed only on limited grounds such as retirement or disability. Investigators and prosecutors enjoy immunity from suit, which can be lifted by decision of the Supreme Judicial Council.

b. Code of Criminal Procedure (Nakazatelno-protzesualen kodeks)

It follows from Sections 152, 172 and 201 that an accused can be detained on remand by decision of an investigator or of a prosecutor. In cases where the decision to detain has been taken by an investigator without the prior consent of a prosecutor it has to be subsequently approved by the prosecutor.

Based on Sections 209 and 210 and according to the usual practice, an arrested person is brought before an investigator who officially informs him of the charges brought against him and proceeds immediately with his questioning. After the questioning the investigator decides whether to detain the accused, or informs him of the prior decision taken in this respect by a prosecutor. In cases where the decision to detain is taken by the investigator the file is then transmitted to the supervising prosecutor who decides whether to approve the detention on remand. In all cases the prosecutor decides on the basis of the file, without hearing the accused.

Sections 43, 48, 176 - 178, 196, 201, 208, 219 - 220 and 235 - 237 concern the competence of the prosecutor and of the investigator in penal proceedings.

Section 43 provides that the prosecutor has the following functions in penal proceedings: "to direct the preliminary investigation"; "to participate in the judicial stage of the proceedings as a State prosecutor"; and "to effect a supervisory control of lawfulness at all stages of the penal proceedings ..." At the preliminary investigation stage of the proceedings according to Sections 176 - 178 the prosecutor is competent, inter alia: to give mandatory instructions to the investigator; to participate in examinations, searches or any other acts of investigation; to withdraw a case from the competence of an investigator and to assign it to another; to conduct himself an entire preliminary investigation or

particular acts of investigation.

According to Sections 48 para. 2 and 201 the investigator has certain independence from the prosecutor in respect of his working methods and particular acts of investigation, but performs his functions under the instructions and the supervision of the prosecutor.

An investigator disagreeing with the instructions of the prosecutor can submit objections to the higher prosecutor, whose decision is final and obligatory for the investigator. Section 178 read in conjunction with Sections 219 and 220 provides that, as an exception to this rule, the investigator is free to conclude his work on the preliminary investigation with a proposal to terminate the proceedings or with a proposal to prepare an indictment.

Under Sections 235 - 237 the prosecutor is competent, after receiving the investigator's proposal, to terminate the proceedings, to order additional investigations, or to prepare an indictment and submit the case to the court.

c. The appeal to a court against detention on remand is provided for under Section 152 para. 5 of the Code of Criminal Procedure:

<Translation>

"... (5) The detained person shall be provided immediately a possibility to file an appeal to the respective court against the [imposition of detention]. The Court shall decide within a time-limit of three days by means of a decision which is final."

In a decision of 17 September 1992 the Supreme Court found that the imposition of detention on remand could be contested before a court only once. A new appeal was only possible where a detained person had been released and then again detained. In all other cases a detained person could always request his release from the prosecution authorities if there had been a change of circumstances (opredelenie No. 94 po n.ch.h.d. No. 754/92, I n.o., Sb. 1992-93 str. 173).

Periodic judicial review of the lawfulness of a detention on remand becomes possible only when the criminal case is already in the hands of the court. At this stage of the proceedings the court before which the case is pending also decides whether to release or detain the accused. At the preliminary investigation stage of the criminal proceedings the detained can file unlimited number of applications for release to the investigator and to the prosecution authorities, who decide usually in camera.

d. Under Section 75 of the Code of Criminal Procedure the lawyer of an accused has the right to consult the file of the case and to make excerpts.

e. The Penal Code

A crime under Section 201 in conjunction with Section 203 para. 1 is a misappropriation, in particularly large amounts, of funds, objects and other valuables handed to the offender in his capacity of a civil servant or entrusted to him to safeguard or manage. This crime carries a penalty of ten to thirty years imprisonment.

COMPLAINTS

1. The applicant submits that there has been a breach of Article 5 para. 3 of the Convention. Thus, after her arrest she was brought only before an investigator. She was not brought before the prosecutor who confirmed her detention on remand. Furthermore, the prosecutor cannot be regarded as "officer authorised to exercise judicial power" as he was conducting and supervising the criminal proceedings against the

applicant. Moreover, the applicant was not brought before the Regional Court which examined her appeal against detention.

2. The applicant also complains that there has been a breach of Article 5 para. 4 of the Convention. She submits that this provision requires implicitly that the habeas corpus proceedings be adversarial and be conducted in the presence of the detained person. Moreover, the same facts also amount to a breach of Article 6 of the Convention as she did not have a "fair hearing" of her appeal against detention.

3. The applicant further complains under Article 6 paras. 1 and 3 of the Convention that she was deprived of the possibility to participate, personally or through her lawyer, when the investigator examined witnesses and collected other evidence in the period between 15 March 1995, when criminal proceedings against her were opened, and 24 October 1995, when she was officially charged. The applicant submits that there existed a "criminal charge" within the meaning of Article 6 of the Convention since the opening of the criminal proceedings against her on 15 March 1995. However, she was officially charged, and thus could enjoy the defence rights and procedural safeguards applicable to an accused, only on 24 October 1995. In the meantime the investigator collected evidence and even examined her as a witness, thus putting her in a situation where she had to say the truth even if this would incriminate her. The applicant submits that there is a widespread deliberate tactic of the investigation authorities to delay the official bringing of charges in breach of the right of the accused to a fair trial.

4. The applicant invokes also Article 13 of the Convention stating that the possibilities to appeal against her detention were not effective remedies. Thus, the law did not provide for a possibility to appeal before a higher tribunal against the decision of the Regional Court of 11 December 1995. Also, a detained person can appeal before a court against detention only once. There is no possibility for a periodical judicial review.

5. The applicant alleges that there has been a breach of Article 25 of the Convention in that the regional prosecutor refused copies of certain documents requested by the Secretariat of the Commission.

THE LAW

1. The applicant raises complaints under Article 5 paras. 3 and 4 (Art. 5-3, 5-4) of the Convention as regards her arrest and detention and also in respect of the examination of her appeal against detention. She invokes also Articles 6 and 13 (Art. 6, 13).

The Commission considers that it cannot, on the basis of the file, determine the admissibility of the above complaints and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of these complaints to the respondent Government.

2. The applicant complains under Article 6 (Art. 6) of the Convention that part of the preliminary investigation in her case was conducted without her being able to participate or defend herself, due to a deliberate delay in the official bringing of charges against her. Also, she was put in a situation where she could incriminate herself, because she was examined as a witness in the course of the criminal proceedings against her.

The Commission recalls that under Article 25 (Art. 25) of the Convention the Commission may examine complaints only from persons claiming to be victims of a violation of one of the Convention provisions.

The primary purpose of Article 6 (Art. 6), as far as criminal

matters are concerned, is to ensure as a whole a fair trial by a "tribunal" competent to determine "any criminal charge". Nevertheless, the requirements of paragraph 3(c) of Article 6 (Art. 6-3-c) could be relevant in pre-trial proceedings insofar as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them (Eur. Court HR, Imbrioscia v. Switzerland judgment of 24 November 1993, Series A no. 275, p. 13, para. 36; cf. also Can v. Austria, Comm. Report 12.7.84, paras. 49, 50, Eur. Court HR, Series A no. 96, pp. 15, 16).

In particular, as regards the alleged danger of self-incrimination, the Commission recalls that the right not to incriminate oneself is an important element of the right to a fair trial under Article 6 (Art. 6) of the Convention. When faced with a complaint in this respect the Convention organs must examine, in the light of all circumstances of the case, whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure inherent in Article 6 para. 1 (Art. 6-1) of the Convention (cf. Eur. Court HR, Saunders v. the United Kingdom judgment of 17 December 1996, paras. 68, 69, to be published in Reports of Judgments and Decisions 1996).

However, the applicant's complaints concern an early stage of the proceedings, namely the preliminary investigation, and not a "trial" before a "tribunal" within the meaning of Article 6 (Art. 6) of the Convention. The criminal proceedings against the applicant are still at this stage. The Commission cannot speculate whether the applicant will be put on trial, whether the evidence taken allegedly in breach of her rights will be used at this trial, whether the trial will be fair as a whole, or whether the applicant will be convicted. The Commission finds that the applicant cannot, at this stage, claim to be a victim of the alleged violations of her rights under Article 6 (Art. 6) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant also alleges that the regional prosecutor's refusal to provide copies of certain documents amounted to a breach of Article 25 (Art. 25) of the Convention.

However, the Commission notes that under Section 75 of the Code of Criminal Procedure the applicant's lawyer had the right to consult the file and to make excerpts and that no complaint has been raised about the existence of any impediments in the exercise of this right. In these circumstances it does not appear that the prosecutor's refusal to provide authenticated copies of certain documents interfered with the applicant's right to effectively present and pursue her complaints before the Commission (cf. Eur. Court HR, Akdivar v. Turkey judgment of 16 September 1996, para. 103, to be published in Reports of Judgments and Decisions 1996).

For these reasons, the Commission,

DECIDES TO ADJOURN the examination of the applicant's complaints under Articles 5, 6 and 13 (Art. 5, 6, 13) of the Convention concerning her arrest and detention and the examination of her appeal against detention;

by a majority,
DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary

J. LIDDY
President

to the First Chamber

of the First Chamber