AS TO THE ADMISSIBILITY OF

Application No. 35125/97
by Sevdelin PANEV
against Bulgaria

The European Commission of Human Rights (Second Chamber) sitting in private on 3 December 1997, the following members being present:

Mrs G.H. THUNE, President
MM J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA
A. ARABADJIEV
Ms M.-T. SCHOEPFER, 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 13 November 1996 by Sevdelin Panev against Bulgaria and registered on 28 February 1997 under file No. 35125/97;

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 citizen born in 1955 and residing in Sofia. Before the Commission he is represented by Mr Yonko Grozev, a lawyer practising in Sofia.

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

A. Particular circumstances of the case

At the pertinent time the applicant was living in the town of Samokov. He is a physician and used to work in a hospital in Samokov. In 1990 he became an active member of the trade union Podkepa and of an organisation called Independent Human Rights Association. It appears that he also started working as a journalist for the "Express" newspaper.

On 17 April 1991 the applicant published a short article in "Vek 21", a weekly newspaper. The article followed earlier publications in 1990 and 1991 by other journalists which revealed that following the

communist takeover in Bulgaria on 9 September 1944 many persons from Samokov opposing the new regime had been massacred in the locality of Black Rock (Chernata skala), in the mountains near Borovetz.

The applicant's article read as follows:

"MORE ABOUT THE BLACK ROCK
(the squadrons of death)

The truth remained hidden despite all efforts of the opposition in Samokov before the [October 1991] elections to inform the voters, so that they would know for whom they vote, about the bloody villainies of the communist authorities in the region after 9 September [1944].

Here are some facts which are published for the first time. On 24 September 1944 the partisan commander H. delivers a speech in Samokov, standing on top of a truck full of empty coffins. He states that revenge will reach the "enemies of the people, responsible for the death of our comrades". The fulfilment of this threat is not late to come. On 27 September after midnight the arrests commence. To clarify for our readers, it should be pointed out that this act of revenge was directed by a special detachment of NKVD [the Soviet security police], positioned at three locations in Bulgaria - Sofia, Plovdiv, Borovetz. It is known that the questioning and the torture in Borovetz were conducted in the villa of Mr A. and in the villa "Korabut", and in Samokov, at the police station and in the former American college, as well as in the clinic of doctor K. A special order issued by the Central Committee of the Communist Party and distributed to all communist organisations in the country deals with the execution of the satanic plan. This order is still kept in the Communist (now Socialist) Party's archives. The name of Ms D. figures there.

Here is a portion of the names of persons who dealt with all instructions, arrests, torture and killings, the so called "fist of the Party" in the region of Samokov:

....

14. Mr P., lawyer.

...

20. ... and others.

Some of those who drafted the lists [of names of persons to be arrested] as well as some of the assistants and of the executioners are still among the living. I would urge those people to find a way to say the truth about the killings, because the relatives and the heirs of the victims are still waiting, patiently.

Sevdelin Panev"

On an unspecified date in 1991 Mr P., whose name appeared in the list of alleged perpetrators, brought a private prosecution action before the Sofia District Court (Raionen sad), seeking the applicant's conviction for defamation under Section 148 para. 2 of the Penal Code (Nakazatelen kodeks). Mr P. claimed that the statement that he had been involved in the events described in the applicant's article was false.

It appears that in 1991 Mr P. was not politically active and was not standing for election for public office.

The Sofia District Court heard the parties and several witnesses. The applicant initially refused to answer the charges against him and to make any submissions. Later he requested the questioning of certain

witnesses. These witnesses established that together with other persons the applicant had conducted a journalistic investigation prior to the publication of his article. It transpired that this investigation had included interviews with relatives of victims, research of the press published during the relevant period and of other publications and archives.

Based on this material the applicant had established that Mr P. had been a supporter of the Communist Party in Samokov and had participated in its meetings. Also, some of the persons interviewed by the applicant had maintained that Mr P. had been in very close relations with the communist leaders in town.

At his trial the applicant clarified that he never alleged that Mr P. had participated directly in the arrests and the killings. The applicant believed that Mr P. may have been involved in the organisation of the arrests. This had been stated by some of the persons interviewed during the journalistic investigation. In particular, one interviewee had stated that in 1944 Mr P. had promised him to arrange for the release of his brother who, however, never returned. It appears that this interviewee was not heard as a witness in the applicant's trial. The applicant has not stated whether the person concerned did not want to testify or whether he was not summoned for other reasons.

On 1 December 1994 the Sofia District Court convicted the applicant of defamation under Section 148 para. 2 in conjunction with para. 1 item 2, first part, and in conjunction with Section 147 para. 1 of the Penal Code and sentenced him to six months' imprisonment suspended for a probation period of three years.

The Court found that the applicant had knowingly accused Mr P. of involvement in the killing of people without having evidence to support this accusation.

The applicant missed the statutory 14 days' time-limit to file an appeal to the Sofia Regional Court (Okrazhen sad). However, he submitted on time a petition for review (cassation) (molba za pregled po reda na nadzora) to the Supreme Court (Varhoven sad). He argued that the subjective element of the crime was missing because he never aimed at tarnishing Mr P. but genuinely believed that the latter had been involved in the crimes committed in September 1944 and, therefore, listed his name among those who "participated, in one way or another, in the massacres...". The applicant also submitted that there had been a breach of procedure in that the case against him could only have been dealt with by way of public prosecution. This was so because he had written the impugned article in his capacity of a member of the Independent Human Rights Association and was, therefore, a "public figure acting in the circle of his functions" (predstavitel na obstestvenostta pri i po povod izpalnenie na funktziata mu) within the meaning of the Penal Code. It allegedly followed that there should have been a public and not a private prosecution.

The Supreme Court held a hearing on 1 April 1996. By judgment dated 3 April 1996 the Supreme Court dismissed the applicant's petition on the merits. The Court noted, inter alia, that the reliable information which had been at the applicant's disposal at the time of the publishing of the article had been to the effect that Mr P. had been politically active and had been supporting the Communist Party. On this basis the applicant assumed that Mr P. may have indirectly participated in the massacres. However, instead of explaining his supposition, the applicant simply enlisted Mr P.'s name as an accomplice in a crime. Therefore, the Court found that the applicant had acted with reckless disregard of the consequences.

The Supreme Court's decision was apparently delivered in camera. On an unknown date it was entered in the Supreme Court's register (see

below, Relevant domestic law and practice).

The applicant claims that he learned about the decision and obtained a copy thereof in early June 1996.

B. Relevant domestic law and practice

a. A crime under Section 148 para. 2 in conjunction with para. 1 item 2, the first part, and in conjunction with Section 147 para. 1 of the Penal Code is a defamation through a publication in the press. The punishment is up to three years' imprisonment. Defamation is defined as the public announcement of false information about a person where the facts alleged are disgraceful or where it is alleged that a crime has been committed by the person concerned.

b. Judgments of the Supreme Court dismissing petitions for review (cassation) are final and no domestic appeal lies against them (cf. Section 354 para. 3 of the Code of Criminal Procedure (Nakazatelno-protzesualen kodeks). For this reason such judgments are not served. According to the usual practice, they are entered in the Court's register where the parties can consult them and obtain copies. In practice the entry in the register is often done several months following the hearing in the case. Therefore, the parties have to visit the Court's register time and again to verify whether their case has been decided.

COMPLAINTS

The applicant complains that his conviction and sentence amounted to an interference with his right to freedom of expression under Article 10 of the Convention. This interference was lawful and had a legitimate aim, but was allegedly disproportionate to the aim pursued.

The applicant submits that his article clearly aimed at attracting the attention of the public and not at presenting the "final truth" on the matter. Moreover, the last sentence made it clear that the accusations were in the context of a continuing search to establish the historical facts.

Also, the applicant argues that it was extremely difficult to establish facts which had occurred more than forty-five years ago and that he had carried out an extensive investigation prior to the publication of the article.

The applicant further submits that the public had a right to receive what limited information was available about the events of September 1944 after decades of deliberate distortion of the historical facts. Informing the public about the communist atrocities was particularly essential in 1991, when Bulgaria was an emerging democracy, in order to spread the values of public accountability. In the applicant's view the existing public interest to have the information available outweighed Mr P.'s right to respect for his personal reputation. The applicant claims that instead of recognising this the courts required him to "prove" that Mr P. had committed the crimes with which he had been accused only in fairly general terms in the impugned article.

In respect of the requirements of Article 26 of the Convention the applicant submits that although he missed the opportunity to appeal against his conviction and sentence, he later obtained a decision on the merits by the Supreme Court, the highest competent court. Also, the applicant submits that the application to the Commission was submitted less than six months after the decision of the Supreme Court became known to him. As this decision was not served, his only way to learn about it was to visit the registration office at the Court at intervals of several weeks.

THE LAW

The applicant complains that his conviction and sentence amounted to an unjustified interference with his right to freedom of expression under Article 10 (Art. 10) of the Convention.

Article 10 (Art. 10) of the Convention, insofar as relevant, reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ... "

The Commission notes at the outset that the applicant missed the time-limit to file an appeal against his conviction and sentence. He did file a petition for review (cassation) to the Supreme Court but the material submitted by the applicant to the Commission does not show that he invoked before the national authorities, at least in substance, the question of his freedom of expression. At his trial and then before the Supreme Court the applicant apparently claimed only that his act was not criminally punishable as there was no intent to harm (cf. Eur. Court HR, Ahmet Sadik v. Greece judgment of 15 November 1996, Reports 1996-V, No. 20,).

However, the Commission finds it not necessary to decide whether or not in these circumstances the applicant can be considered as having exhausted all domestic remedies within the meaning of Article 26 (Art. 26) of the Convention and whether or not the application has been submitted within the six months' time-limit under Article 26 (Art. 26) of the Convention, as it must in any event be rejected for the following reasons.

The Commission recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (see, among other authorities, the Jersild v. Denmark judgment of 23*September 1994, Series*A no.*298, p.*23, para.*31). Subject to paragraph 2 of Article 10 (Art. 10-2), freedom of expression is applicable not only to "information" and "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (Eur. Court HR, Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, para. 41). Journalistic freedom in particular also covers possible recourse to a degree of exaggeration, or even provocation (Eur. Court HR, Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313, p. 19, para. 38).

The Commission further recalls that the press plays a pre-eminent role in a State governed by the rule of law. It is incumbent on it to impart - in a way consistent with its duties and responsibilities - information and ideas on matters of public interest. At the same time it must not overstep certain bounds set, inter alia, for the protection of the reputation of others (cf. Eur. Court HR, Prager and Oberschlick v. Austria judgment, loc. cit., p. 17, para. 34). The limits of permissible criticism are wider in respect of the Government, or of a

political figure, than in relation to a private citizen (cf. Eur. Court HR, Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 23, para. 46).

The Convention organs' task, in exercising their supervisory function, is not to take the place of the national authorities but rather to review under Article*10 (Art. 10) the decisions they have taken pursuant to their power of appreciation. In so doing, the Convention organs must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, as a recent authority, Eur. Court HR, Worm v. Austria judgment of 29 August 1997, Reports 1997-V, No. 45, paras. 47 and 49).

Factors to be analysed in this respect, in a case of a journalist convicted for defamation, may include the seriousness and the breadth of the accusations made by the journalist, the question whether there had been adequate previous research and factual basis for the accusations, the journalist's good faith and respect for the ethics of journalism (cf. Prager and Oberschlick v. Austria judgment of 26 April 1995, loc. cit., p. 18, para. 37).

In the instant case the Commission notes that it was Mr P. and not the State who sought the applicant's conviction for defamation. The courts, after examining the impugned article, concluded that the article accused Mr P. of a serious crime. The Commission, likewise, considers that when read as a whole the applicant's article leaves no doubt that Mr P. was accused of having been one of those who "dealt with all instructions [to arrest and kill], arrests, torture and killings" of many persons.

The Commission agrees with the applicant that the public had a legitimate interest in obtaining whatever information was available about the events of September 1944. However, the Commission notes that the applicant did not in fact explain in his article what information he had obtained about Mr P. through his journalistic investigation.

On the basis of the material in the case the Commission cannot accept the applicant's contention that he was convicted only because he failed to prove beyond doubt that Mr P. had committed crimes. Like the conviction of the journalist in the Prager and Oberschlick v. Austria case (loc. cit.), the judgments in the applicant's case "were not directed against [his] use as such of his freedom of expression" or against the fact that he revealed dreadful crimes committed in the past. The Commission notes from the Supreme Court's judgment that the applicant was convicted because he made a blunt personal accusation in the absence of a reasonable factual basis whereas he could have achieved his goal to inform the public, and at the same time preserve the reputation of others, by simply letting the public know the results of his investigation as they were.

Furthermore, it does not appear that what was said in the article about Mr P. could be considered a journalistic exaggeration protected by the right to freedom of expression. It was not a value-judgment but a plain factual allegation (cf. No. 8803/79, Lingens and Leitgeb v. Austria, Dec. 11.12.81, D.R. 26, pp. 171, 181; Eur. Court HR, De Haes and Gijsels v. Belgium judgment of 24 February 1997, Reports 1997-I, No. 30, paras. 42 and 47; Oberschlick v. Austria (No. 2) judgment of 1 July 1997, Reports 1997-IV, No. 42, para. 33).

Finally, the Commission notes that the courts imposed a suspended sentence.

Having regard to all the circumstances of the case the Commission considers that the interference with the applicant's rights under Article 10 (Art. 10) of the Convention does not appear to have been disproportionate to the legitimate aim pursued and that, therefore, it

can be considered as having been "necessary in a democratic society" within the meaning of paragraph 2 of this provision.

It follows that the application is manifestly ill-founded and has to be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber