CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41171/98
by Zaprian Iordanov ZAPRIANOV
against Bulgaria

The European Court of Human Rights (First Section), sitting on 6 March 2003 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr G. BONELLO,
Mr P. LORENZEN,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 1 February 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the partial decision of 27 April 2000,

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

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Zaprian Iordanov Zaprianov, is a Bulgarian national, who was born in 1948 and lives in Plovdiv. He was represented before the Court by Mr M. Ekimdjiev, a lawyer practising in Plovdiv. The respondent Government were represented by Mrs V. Djidjeva, co-agent, Ministry of Justice.

A. The circumstances of the case

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

1. The applicant's detention pending the preliminary investigation against him

The applicant worked as chief financial expert at the Municipal Privatisation Agency in Plovdiv. In the end of 1995 the competent financial control authority commenced an audit in the course of which it was established that public funds might have been misappropriated by the applicant. He was questioned several times.

On 10 May 1996 criminal proceedings were opened against him and on 14 May 1996 he was arrested and remanded in custody on suspicion of having misappropriated public funds by means of several separate acts between 1994 and 1996. Charges were also brought against two other persons.

On 17 June 1996 the applicant requested the Regional Prosecutor to release him. He stated that there was no danger of him absconding, committing an offence or obstructing the course of justice as he did not have a criminal record, had a permanent address and a family and, ever since his daughter's tragic death, had been taking care of his five years' old granddaughter. The applicant's daughter had been killed by her husband. Their child, the applicant's granddaughter, had thus remained without parents, her father being in prison for the murder of her mother.

The request was dismissed on 21 June 1996 by the Regional Public Prosecutor who stated that the danger of absconding could not be excluded in view of the large amounts that the applicant might have misappropriated.

On 15 July 1996 the applicant appealed that decision to the Chief Public Prosecutor, adding that he had never attempted to abscond during the financial audit and had even collaborated actively and had arranged for the reimbursement of certain amounts. The applicant also stated that his health was unstable and that his wife was ill.

The appeal was dismissed by decision of the Chief Public Prosecutor's Office of 31 July 1996, registered on 2 August 1996. The decision stated that an exception from the mandatory detention under Article 152 § 1 of the

Code of Criminal Procedure was only possible on health grounds. However, no such grounds had been established.

On 20 December 1996 the applicant appealed against his pre-trial detention. On 11 March 1997 the Regional Prosecutor's Office confirmed the applicant's remand in custody without giving reasons.

On an unspecified date the applicant again requested that his pre-trial detention be substituted by a more lenient measure.

On 12 May 1997 the Regional Public Prosecutor dismissed the applicant's request stating that the fact that the applicant had been taking care of his grand-daughter could not lead to the conclusion that no danger of his absconding existed. Furthermore, the medical doctors who had examined the applicant had found that he was healthy.

The applicant's ensuing appeal of 19 May 1997, in which he submitted, *inter alia*, that the investigation had been unreasonably lengthy, was dismissed on 11 June 1997 by the Chief Public Prosecutor's Office. The decision stated that only exceptional circumstances, excluding any hypothetical danger of absconding, reoffending or obstructing the course of justice, could warrant the applicant's release. The applicant's reference to the length of the investigation, to "justice" and international treaties could not be taken into consideration.

On 29 June 1997 the applicant appealed to the Chief Public Prosecutor against the decision of 11 June 1997. He reiterated his arguments that during the 6-months investigation conducted by the financial authorities he had reported regularly when summoned and had never attempted to suppress evidence or evade justice. On 16 July 1997 the applicant's appeal was dismissed on the ground that no exceptional circumstances warranting release had been established.

In July 1997 the investigator completed his work on the case. During the preliminary investigation he questioned 23 witnesses, appointed 5 experts and examined their reports and studied numerous financial, commercial and other documents.

On 6 October 1997 the competent prosecutor submitted an indictment to the Plovdiv Regional Court against the applicant and two other persons.

2. The trial and the applicant's continuing remand in custody

The fist hearing was listed for 3 November 1997 but could not proceed as one of the accused persons had not been allowed sufficient time to prepare his defence. The case was adjourned until 10 December 1997.

On 24 November 1997 the applicant lodged an application for release with the Regional Court, claiming that his health had deteriorated and that he had to take care of his granddaughter. On 27 November 1997, at a public hearing, that court dismissed the application on the ground that the criminal offence with which he was charged was very serious and that he might tamper with evidence or influence witnesses.

On 10 and 11 December 1997 the Regional Court began the examination of the criminal case. The applicant and the other two accused persons were questioned and nineteen witnesses and two experts were heard. The hearing was adjourned as some of the witnesses had not appeared and the parties sought to call additional witnesses.

At the next hearing, on 5 and 6 February 1998, the Regional Court heard twelve witnesses and several experts. Three witnesses and one expert had not been summoned which necessitated an adjournment. Before closing the hearing, the Regional Court heard the applicant's renewed appeal against detention and dismissed it, stating that remand in custody was mandatory in all cases where the charges concerned a serious offence. The case did not fall within the exception from that rule, as provided under Article 152 § 2 of the Code of Criminal Procedure.

The hearing resumed on 10 April 1998. The Regional Court heard an expert and accepted the request of the accused persons for the appointment of three additional experts in banking and finance. It again dismissed the applicant's application for release on the grounds that there were no new circumstances warranting release and that, since new experts would be working on the case, there was a danger of the applicant tampering with evidence.

On 22 April 1998 the applicant's lawyer lodged an appeal with the Appellate Court against the decision of 10 April 1998 concerning his detention. He reiterated the arguments stated in previous appeals. Before transmitting the appeal to the Appellate Court, on 27 April 1998 the Plovdiv Regional Court confirmed its decision.

On 12 May 1998 the Appellate Court, sitting in private, dismissed the appeal. It stated that Article 152 of the Code of Criminal Procedure was incompatible with Article 5 of the Convention, which was directly applicable. The applicant's appeal was however ill founded in any event. That was so because the applicant was charged with the misappropriation of approximately 16 million old Bulgarian levs (at a time when this amount was the equivalent of about 200,000 US dollars). Therefore, there was a real danger of absconding. Furthermore, the trial was close to conclusion.

The hearing listed for 19 and 20 May 1998 was adjourned until 17 June 1998 as the lawyer of one the applicant's co-accused could not attend.

On 15 June 1998 the applicant complained against his detention, arguing that it was not reasonable to believe that he could forge documents to be examined by the experts or influence witnesses. He also invoked the fact that the he had already been detained for two years and several months.

The appeal was dismissed at the hearing on 17 June 1998 before the Regional Court on the ground that the applicant might forge some important financial documents and obstruct the fact-finding, taking into consideration that there were more witnesses and expert-witnesses to be heard. The hearing was again adjourned as the lawyer of one of the applicant's

co-accused had not appeared. The court also decided to summon another witness.

On 25 June 1998 the applicant appealed to the Appellate Court against the refusal of the Regional Court to release him. On 24 July 1998 the Appellate Court, sitting in private, dismissed the applicant's appeal. Referring to the statement of one of the other accused persons that shortly before his arrest in May 1996 the applicant had asked him to forge or destroy banking documents, the court stated that the applicant could obstruct the course of justice. Further, it has not been established that no danger of the applicant's absconding or committing an offence existed. Finally, the Regional Court was trying to conduct a prompt trial, but the investigation activities and examination of evidence were too complex.

The next hearing in the criminal case took place on 9 September 1998. The Regional Court heard two witnesses and adjourned the hearing, as the experts had not deposited their report. The applicant renewed his appeal against detention. That was dismissed on the ground that under Article 152 § 2 of the Code of Criminal Procedure release was only possible if the existence of any danger of absconding, committing an offence or obstruction was excluded beyond doubt. Furthermore, it was not true that the applicant's detention had become unreasonably lengthy.

On 10 September 1998 the applicant appealed to the Appellate Court setting out detailed arguments based on the Convention.

On 19 October 1998 that court, sitting in camera, dismissed the applicant's appeal holding that in view of the seriousness of the case and the applicant's behaviour during the preliminary investigation, there was a danger of obstructing the course of justice. As to the allegedly excessive length of the detention, the requirements of the Convention in this respect did not mean that the provisions of domestic law on pre-trial detention could be ignored. Finally, the trial was approaching its end.

The hearing in the criminal case resumed on 14 December 1998 before the Regional Court but was adjourned as some important issues were yet to be tackled by the experts. In particular, no annual statement, declaration of funds or the text of certain regulations of the Privatisation Agency could be found. Other vital documents from the Privatisation Agency and from a bank were missing and some important documents could only be obtained as copies.

At that hearing the applicant's renewed request for release on bail was dismissed as he was charged with a serious criminal offence for which pre-trial detention was mandatory by law. He could not rely on the exception provided for under Article 152 § 2 of the Code of Criminal Procedure as the experts had yet to prepare their report and, therefore, there was a danger of the applicant obstructing the course of justice. The length of the applicant's detention was not excessive in view of the gravity of the charges.

On 21 December 1998 the applicant filed an appeal against the above decision with the Appellate Court.

On 26 January 1999 that court, sitting in chambers, dismissed the applicant's appeal. The court stated that under the Code of Criminal Procedure preventive measures were imposed on the basis of the gravity of the charges. It was for the prosecution authorities to charge the accused and to decide on the corresponding preventive measures, having regard to the gravity of the charges and the personal circumstances of the accused. The trial court, pending the determination of the criminal charges, was bound by the terms of the indictment as there was a presumption that the prosecution authorities had the necessary evidence to charge the accused. Therefore, since the applicant was charged with a serious offence and no exceptional circumstances under Article 152 § 2 of the Code of Criminal Procedure had been established, there were no grounds to order release on bail. In any event, the case would soon be decided.

The next hearing before the Regional Court took place on 9 February 1999. A completed expert's report was examined. The applicant sought an adjournment as his second lawyer was absent. The court noted that no good cause had been shown for his absence, but acceded to the request in view of the applicant's insistence that his second lawyer should make final oral pleadings on his behalf.

The applicant again requested to be released, considering that the detention exceeded the reasonable time and that it was unreasonable to believe that he could commit further offences or evade justice. The court again dismissed the applicant's request.

On 10 February 1999 the applicant filed an appeal with the Appellate Court against the refusal of the Regional Court to release him. On 19 March 1999 that court dismissed the applicant's appeal on the ground that the fact that the expert's report was completed did not constitute a new fact in favour of the applicant's release. It further held that there were no exceptional circumstances within the meaning of Article 152 § 2 of the Code of Criminal Procedure. The length of the detention could not be relied upon by the applicant as the applicant's lawyer had caused a delay by failing to appear in court.

The next hearing was scheduled for 12 April 1999 and then adjourned to 12 May 1999, apparently owing to the failure of the Appellate Court to return the case file in due time.

On 12 May 1999 the Regional Court heard the final oral pleadings of the parties and dismissed the applicant's request for release on bail.

On 17 May 1999 the applicant was found guilty and sentenced to seven years' imprisonment.

3. Proceedings on appeal and before the Supreme Court of Cassation

Upon the applicant's appeal, on 14 December 1999 the Plovdiv Appellate Court upheld his conviction and mitigated the sentence to five years' imprisonment.

On 12 January 2000 the applicant filed a petition for review with the Supreme Court of Cassation.

On 6 July 2000 the Supreme Court of Cassation upheld the Appellate Court's judgment.

4. The applicant's challenge to his conviction on one of the charges, based on an amendment to Article 201 of the Penal Code

In his pleadings before the courts the applicant relied, *inter alia*, on an amendment to the Penal Code of 1 June 1995. The amendment had added a new constitutive element - proof of a "personal advantage" - to the offence of misappropriation of funds. As a result, in the applicant's view, acts such as those which had been the object of one of the charges against him had been decriminalised.

The June 1995 amendment was declared unconstitutional by the Constitutional Court on 12 October 1995. Nevertheless, since in Bulgaria the judgments of the Constitutional Court have no retroactive effect, the amended Article 201 was in force between 1 June and 12 October 1995. According to Article 2 of the Penal Code, in case of legislative amendments during the period between the commission of the offence and the final judgment, the law "most favourable" to the accused should be applied.

The applicant argued before all three levels of jurisdiction that therefore part of the charges against him should be dismissed, the law in force between 1 June and 12 October 1995 being the "most favourable" law.

The charges in question concerned misappropriation of an amount which the applicant had transferred on 24 March 1995 from an account of the Privatisation Agency to an account of a private limited liability company. Referring to the judgment of the Constitutional Court of 12 October 1995 (see Relevant domestic law and practice), the applicant maintained that the 1995 amendment had excluded criminal responsibility for misallocation of funds in favour of legal persons and that therefore the bank transfer on account of which he had been charged was not punishable under the amended text of Article 201, as in force between 1 June and 12 October 1995. Hence, that "favourable" law had to be applied.

The Regional Court dismissed this argument, stating that the very fact that the bank transfer had been made to an account of a legal person was not conclusive. As established from the evidence in the case, the money had been transferred to the "personal advantage" of the applicant and one of the other accused persons. The Appellate Court and the Supreme Court of Cassation upheld that reasoning while adding that the Constitutional Court's

judgment relied upon by the applicant had been limited to issues of constitutionality. Therefore, the interpretation of the relevant provision of the Penal Code contained therein was not binding.

B. Relevant domestic law and practice

1. Officer ordering remand in custody

At the relevant time and until the reform of 1 January 2000 an arrested person was brought before an investigator who decided whether or not the accused should be remanded in custody. The investigator's decision was subject to approval by a prosecutor.

The role of investigators and prosecutors under Bulgarian law has been summarised in paragraphs 25-29 of the Court's *Nikolova v. Bulgaria* judgment ([GC], no. 31195/96, ECHR 1999-II).

2. Grounds for pre-trial detention and scope of judicial review of detention

Paragraphs 1 and 2 of Article 152 of the Code of Criminal Procedure, as worded at the material time, provided as follows:

> "(1) Detention pending trial shall be ordered [in cases where the charges concern] a serious intentional offence.
>
> (2) In cases falling under paragraph 1 [detention pending trial] may be dispensed with if there is no danger of the accused's absconding, obstructing the investigation, or committing further offences."

According to Article 93 § 7 of the Penal Code a "serious" offence is one punishable by more than five years' imprisonment.

The Supreme Court's practice at the relevant time (which has since become obsolete as a result of the amendments in force since 1 January 2000) was to construe Article 152 § 1 of the Code of Criminal Procedure as requiring that a person charged with a serious intentional offence had to be remanded in custody. An exception was only possible, in accordance with Article 152 § 2, where it was clear and beyond doubt that any danger of absconding or reoffending was objectively excluded, for example, if the accused was seriously ill, elderly, or already detained on other grounds, such as serving a sentence (Decision no. 1 of 4 May1992, case no. 1/92, II Chamber, Bulletin 1992/93, p. 172; Decision no. 4 of 21 February 1995, case no. 76/95, II Chamber; Decision no. 78 of 6 November 1995, case no. 768/95, II Chamber; Decision no. 24, case no. 268/95, I Chamber, Bulletin 1995, p. 149). In some other decisions, the Supreme Court nevertheless embarked on an analysis of the particular facts to justify findings that there existed a danger of absconding or of offending (Decision

No. 76 of 25.07.1997, case no. 507/97 II Chamber, Bulletin no. 9-10/97, p. 5; Decision no. 107 of 27.05.1998, case no. 257/98, II Chamber, Bulletin no. 3-4/98, p. 12).

The Supreme Court has stated that it is not open to the courts, when examining an appeal against pre-trial detention, to inquire whether there exists sufficient evidence to support the charges against the detainee. The courts must only examine the lawfulness of the detention order under domestic law (Decision no. 24 of 23 May 1995 in case no. 268/95, I Chamber, Bulletin 1995, p. 149).

3. Appeals against detention at the trial stage of the proceedings

According to Section 304 § 1 of the Code of Criminal Procedure at the trial stage of the criminal proceedings the detainee's requests for release are examined by the trial court. It follows from Section 304 §§ 1 and 2 that these requests may be examined in camera or at an oral hearing. The law does not require the trial court to decide within a particular time-limit.

The trial court's decision as regards a request for release is subject to appeal to the higher court (Section 344 § 3). The appeal must be lodged in a seven days' time-limit (Section 345) with the trial court (Section 348 § 4 in conjunction with Section 317 as in force at the relevant time). According to Section 347, after having received the appeal, the trial court, sitting in camera, shall decide whether there exist grounds to annul or alter its decision. If it does not find a reason to do so the trial court shall transmit the appeal to the higher court.

Section 348 provides that the appeals court may examine the appeal in camera or, if it considers it necessary, at an oral hearing. The law does not require the appeals court to decide within a particular time-limit.

4. The June 1995 amendment and its interpretation

Before June 1995, Article 201 of the Penal Code, insofar as relevant, provided that "misappropriation of others' property by a person managing such property ..." was punishable. The June 1995 amendment added a new element, by stating that misappropriation must be "to the perpetrator's or others' *personal* advantage". On 12 October 1995 the Constitutional Court struck down these additional words, finding that they could result in leaving unpunished certain cases of encroachment on property and were thus incompatible with the Constitutional protection of property.

To reach that conclusion, the Constitutional Court, which does not examine individual complaints, made its own interpretation of the new text and also analysed the *travaux preparatoires* of the 1995 amendment. It considered that by requiring proof that property had been disposed of to someone's *personal* advantage, the amendment could be seen as excluding criminal responsibility for misappropriation in cases where the perpetrator

had disposed of the property to others' *collective* advantage. The drafters of the amendment had stated that they had merely sought to bring Article 201 of the Penal Code in line with the Supreme Court's practice, according to which proof of disposal with property to someone's personal benefit, as opposed to public advantage, was required. However, that practice had been obsolete: it had been developed at the time when all property other than "personal" belonged to the State. At that time misallocation of State resources did not result in change of ownership. Under the Constitution of 1991, however, the protection of property as enshrined therein could not depend on the identity of the person or body that had profited from a criminal misappropriation. Moreover, during the debates in Parliament and in the proceedings before the Constitutional Court it had been stated that the amendment excluded criminal responsibility for taking of property to the advantage of legal persons. Such an approach constituted an unjustified differentiation incompatible with the Constitutional protection of property. On that basis the Constitutional Court struck down the 1995 amendment.

It appears that there was no established view in the judicial practice on the amended Article 201, which was in force for several months, as to the meaning of the "personal advantage" requirement.

COMPLAINTS

1. The applicant complained under Article 5 § 3 of the Convention that upon his arrest he had not been brought before a judge or other judicial authority.

2. He complained under the same provision that his detention had been unjustified and excessively lengthy.

3. Relying on Article 5 § 4 of the Convention, the applicant complained that the courts had not examined his appeals against detention speedily, that the scope of judicial review had been too narrow, and that on several occasions the courts had failed to hold open hearings, which had affected the adversarial character of the proceedings.

4. The applicant complained under Article 6 § 1 of the Convention that the criminal proceedings against him had been excessively lengthy.

5. Following the communication of the application to the respondent Government, by letter of 21 August 2000 the applicant submitted an additional complaint concerning the dismissal by the domestic courts of his arguments based on the June 1995 amendment to Article 201 of the Penal Code. He maintained that a bank transfer to an account of a limited liability company in respect of which he had been convicted did not constitute a criminal offence under the June 1995 amendment. Therefore, the prohibition enshrined in Article 7 of the Convention had been violated and

the relevant part of his conviction and sentence had been arbitrary, which in turn allegedly disclosed bias and a violation of Article 6 of the Convention.

THE LAW

1. *The Government's objections as regards the exhaustion of domestic remedies and alleged abuse*

The Government maintained that the applicant had failed to exhaust all domestic remedies. In particular, the decision of the Chief Public Prosecutor's Office confirming the refusal to release the applicant could be appealed before the Deputy Chief Public Prosecutor and the Chief Public Prosecutor. Also, all prosecutors' decisions already into force could be altered at any time. Further, the applicant could have appealed against his detention to a court earlier and could have brought an action for damages against the State.

The Government also stated that the applicant had been responsible for delays in the proceedings. On that basis, and referring to their objection as regards the exhaustion of domestic remedies, the Government submitted that the application was abusive.

The applicant replied that he had made normal use of the remedies available under Bulgarian law and that the remedies suggested by the Government were ineffective or irrelevant in the particular case.

The Court notes that the applicant submitted numerous appeals against his detention to the prosecution authorities and to the courts, including in the last several months spent in custody. All appeals were dismissed. The Government have not explained why they considered that more frequent or earlier appeals would have had better chances of success. Further, the allegation of abuse is groundless.

The Government's above objections are therefore dismissed.

2. *Complaint under Article 5 § 3 of the Convention that upon his arrest the applicant was not brought before a judge or other officer authorised by law to exercise judicial power*

Article 5 § 3 provides, in so far as relevant here:

> "Everyone arrested or detained in accordance with the provisions of paragraph1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power..."

The Government stated that at the relevant time it was widely believed by legal professionals and scholars in Bulgaria that the investigators and prosecutors, before whom arrested persons were brought, could be regarded

as "officer[s] authorised by law to exercise judicial power" despite their participation in the prosecution of the detainee. That opinion changed after the Court's Assenov and Others v. Bulgaria judgment (28 October 1998, Reports 1998-) and the system was reformed with effect from 1 January 2000.

The applicant referred to the Court's case-law in similar cases against Bulgaria and stated that investigators and prosecutors in Bulgaria could not be regarded as officers authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which should depend on an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

3. Complaint under Article 5 § 3 of the Convention of the alleged lack of justification and excessive length of the applicant's detention

The relevant part of Article 5 § 3 provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The Government stated that the applicant's detention had been necessary and justified throughout in view of the seriousness of the charges against him and the context in which the offences under investigation had been committed. The charges concerned a number of criminal offences committed by the applicant, a civil servant in charge of privatisation of state enterprises, in complicity with others. Therefore, the authorities' finding that there existed a danger that the applicant would obstruct the course of justice if released was justified. There were no medical reasons to release the applicant.

Furthermore, the case was complex and required time. The investigator's file consisted of three volumes containing numerous financial documents. Seven handwriting analysis reports and four accounting reports were necessary at the preliminary investigation stage and more at the trial stage. Numerous witnesses were questioned.

The Government submitted that there were no delays attributable to the authorities. Certain delays were inevitable as witnesses or experts did not appear, but the trial court took all possible measures to minimise the consequences. By contrast, in the Government's view, the applicant's disorganised defence was at the origin of many delays. In particular, the applicant did not object when the other accused persons requested adjournments or sought to adduce additional evidence. The applicant

himself requested the collection of additional evidence on several occasions at the advanced stage of the trial, although he could have done that earlier.

On this basis the Government concluded that the applicant's detention had not been unreasonably lengthy.

The applicant replied that his detention had not been justified and that the authorities had not proceeded with the diligence due in proceedings in which the accused is in custody.

As regards the preliminary investigation, he stated that the investigator did not need to wait the experts' reports before proceeding with his work on the case. In the applicant's view, even if the month during which his lawyer was unavailable is deducted, the remaining period of sixteen months taken up by the preliminary investigation was excessive.

As to the trial stage, the intervals between hearings were too long, several adjournments were caused by the failure of the court-appointed experts to finalise their reports in time and one or two adjournments occurred owing to the failure of the Appellate Court to examine speedily the applicant's requests for release. The applicant was responsible for one adjournment only.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which should depend on an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

4. Complaints under Article 5 § 4 of the Convention

The applicant complained that his appeals against detention were not examined speedily, that the scope of judicial review was too narrow and that on some occasions no hearings were held.

Article 5 § 4 of the Convention provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government, apparently considering that the complaint was limited to the period of time prior to the beginning of the trial, maintained that the applicant, not having appealed to a court during that period, could not raise complaints *in abstracto.* In any event, as regards the scope of judicial review, the Government stated that a court examining an appeal against detention of a person accused of a serious offence could only examine, in accordance with Article 152 § 2 of the Code of Criminal Procedure, whether or not release was necessary on health grounds. All other arguments were irrelevant.

The applicant replied that the Government's position was incomprehensible and untenable. Further, he reiterated his complaints, clarifying that they concerned all proceedings which ended less than six months prior to the introduction of the application to the former Commission. As regards the scope of judicial review, the applicant submitted that the courts, relying solely on the gravity of the charges, had failed to address numerous arguments relevant to the lawfulness of his continuing detention. He referred to the Court's findings in the case of *Nikolova v. Bulgaria* [GC], no. 31195/96, ECHR 1999-.

The Court considers, in the light of the parties' submissions, that the complaints raise serious issues of fact and law under the Convention, the determination of which should depend on an examination of the merits. The Court concludes therefore that the above complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

5. Complaint under Article 6 § 1 of the Convention of the length of the criminal proceedings

The applicant complained that the proceedings were unreasonably lengthy. Article 6 § 1, insofar as relevant, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

The parties referred to their submissions under Article 5 § 3 of the Convention. The applicant added that the Appellate Court and the Supreme Court of Cassation had not decided the case within a reasonable time.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which should depend on an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

6. Complaints under Articles 6 and 7 as regards the June 1995 amendment of the Penal Code

The applicant submitted that the domestic courts acted in violation of Articles 6 and 7 of the Convention in that they convicted him, in respect of one of the charges, on the basis of facts which had allegedly been decriminalised for a certain period of time, between 1 June and 12 October 1995. He reiterated his arguments made before the domestic courts (see above, "The facts").

Insofar as relevant, the provisions relied upon by the applicant provide:

Article 6 § 1

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

Article 7 § 1

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Court notes that the above complaint was introduced on 21 August 2000, less than six months after the Supreme Court of Cassation's final judgment of 6 July 2000. Therefore, the Court must deal with the complaint.

It observes, firstly, that there is no allegation on the part of the applicant that the relevant act on account of which he was convicted - misappropriation by means of a bank transfer to a private limited liability company - did not constitute an offence on 24 March 1995, when it was made. He submits that a law adopted later, on 1 June 1995, decriminalised his behaviour in respect of that bank transfer and should have been applied, being the most favourable law. However, Article 7 of the Convention does not guarantee the right to have the most favourable criminal law applied (X. v. Germany, no. 7900/77, Commission decision of 6 March 1978, DR 13 p. 70, and *Le Petit v. the United Kingdom*, no. 35574/97, 5 December 2000, unreported).

Insofar as domestic law did guarantee such a right, the Court must also examine whether the applicant's conviction was not arbitrary or unlawful and thus contrary to Article 6 of the Convention.

In this respect the Court observes that the applicant's act in question was criminally punishable under the amended Article 201 of the Penal Code, in force between 1 June and 12 October 1995, even if that provision is construed as excluding criminal responsibility for misappropriation to others' "collective advantage". That was so because, as established by the courts on the basis of the evidence in the case, the bank transfer had been to the applicant's and others' "personal advantage".

Further, it does not appear that the Appellate Court and the Supreme Court of Cassation acted arbitrarily by rejecting the applicant's argument that the pertinent and binding interpretation of the amended Article 201 of the Penal Code should be found in the Constitutional Court's judgment of 12 October 1995. It is apparent that the Constitutional Court merely examined the amendment's constitutionality and, for that purpose only, proceeded on the basis of the new provision's aim and likely interpretations, without seeking to impose on the criminal courts any of the several possible constructions it had noted.

In these circumstances the complaints under Articles 6 and 7 of the Convention are manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected under its Article 35 § 4.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints under Article 5 § 3 that he was not brought promptly before a judge or other office authorised by law to exercise judicial power and that his pre-trial detention was unjustified and excessively lengthy; under Article 5 § 4 concerning the speediness, the procedure and the scope of the judicial review of his detention and under Article 6 § 1 concerning the alleged excessive length of the criminal proceedings against the applicant;

Declares the remainder of the application inadmissible.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President