FIFTH SECTION

CASE OF ANDREI GEORGIEV v. BULGARIA

(Application no. 61507/00)

JUDGMENT

STRASBOURG

26 July 2007

FINAL

26/10/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Andrei Georgiev v. Bulgaria,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER,
Mr M. VILLIGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 3 July 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 61507/00) against the Republic of **Bulgaria** lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Andrei Petrov **Georgiev** who was born in 1973 and lives in Slivnitsa ("the applicant"), on 1 August 2000.

2. The applicant was represented by Mr N. Runevski, a lawyer practising in Sofia.

3. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Kotseva, of the Ministry of Justice.

4. The applicant complained that his detention had been unlawful, that the domestic courts had denied him a fair hearing and that he did not have an enforceable right to seek compensation for being a victim of arrest or detention in contravention of the provisions of the Article 5 of the Convention. He also claimed that he had been subjected to inhuman or degrading treatment as a result of having been detained in allegedly inadequate conditions of detention at the Slivnitsa Investigation detention facility.

5. On 26 May 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The criminal proceedings against the applicant

6. On 3 October 1999 an individual was found bleeding in front of a discotheque with a broken jawbone. The applicant had previously had a confrontation with that person in the discotheque and both had been seen leaving at approximately the same time.

7. The victim's father filed a complaint with the police on an unspecified date naming the applicant as one of the perpetrators of the beating.

8. On 5 October 1999 a police enquiry or a preliminary investigation was opened into the incident. In a decision of the same day, the Slivnitsa Prosecutor's Office brought charges against the applicant and another individual for median bodily injury (Article 129 of the Criminal Code) and ordered their arrest. A police report of the same day considered them to have absconded as they had not been found at their known addresses. The applicant claimed, however, that the police never visited his official residence nor sent him a notice inviting him to appear for questioning. Thus, he claimed not to have been informed of the proceedings or that the authorities were looking for him.

9. On 22 November 1999 the applicant was placed on the national most-wanted list.

10. The applicant claimed, which the Government did not expressly challenge, that during this period he presented himself to the authorities and was charged with offences stemming from two other preliminary investigations which were being conducted against him at the time. In spite of being on the national most-wanted list, the authorities did not arrest him.

11. In a decision of 30 May 2000 the Slivnitsa Prosecutor's Office suspended the criminal proceedings until the arrest of the applicant.

12. The applicant claimed that after he found out that criminal proceedings for median bodily injury had been initiated against him he presented himself voluntarily at the Slivnitsa police station on 26 June 2000, accompanied by his attorney. He was detained immediately, separated from his attorney and, soon thereafter, transferred to the Slivnitsa Investigation detention facility. The fact that the applicant had presented himself to the police on his own accord was reflected in a police report of the same day. The applicant was not allowed further access to his attorney on that day.

13. On the next day, 27 June 2000, the applicant was charged with median bodily injury.

14. While in detention, the applicant was questioned on two occasions without his attorney, even though he requested her presence. He refused to give any statements to the authorities.

15. On unspecified dates, two witnesses were questioned by the authorities of which the applicant was not informed.

16. The preliminary investigation against the applicant was concluded on 16 May 2002. The resulting report of the investigator, which proposed that the criminal proceedings be discontinued due to insufficient evidence that the applicant was the perpetrator, was presented to the latter on 18 August 2002.

17. On the next day, 19 August 2002, the Slivnitsa Prosecutor's Office terminated the criminal proceedings against the applicant on the grounds that the accusation was not proven (Article 237, § 1 (2) of the Code of Criminal Procedure).

B. The applicant's appeals against his detention

1. The first appeal

18. The applicant filed an appeal against his detention on the day he was detained – 26 June 2000. He claimed that there was no risk that he would abscond because he lived together with his family at a known registered address and had voluntarily presented himself to the authorities. The applicant also challenged the lawfulness of the order for his arrest

and detention, because it had been issued solely on the basis of the complaint of the victim and he had never been invited to present himself to the authorities for questioning.

19. The applicant's appeal was examined on the next day, 27 June 2000. In a decision of the same day the Slivnitsa District Court dismissed the applicant's appeal on the basis that he had absconded and had been placed on the national most-wanted list as a result. From the minutes of the hearing it becomes apparent that there was some degree of confusion on the part of the parties as to whether the applicant had already been placed in pre-trial detention or was still being held in preliminary twenty-four hours police detention. The applicant claimed, which the Government did not expressly challenge, that the police report evidencing that he had presented himself voluntarily to the authorities on 26 June 2000 had not been presented for consideration by the court. In addition, he claimed that the examination of his appeal had been transferred to a new formation at the very last minute and that the presiding judge had previously ruled against him in a different set of criminal proceedings whereby he had imposed on him an administrative sanction.

20. Following the hearing on 27 June 2000, the applicant's attorney filed four petitions with the court seeking, *inter alia*, (1) to be allowed access to the investigation file, (2) a correction to the minutes of the hearing so that they reflected the applicant's assertions that he had voluntarily presented himself to the authorities, and (3) a copy of said minutes. Only the last request was granted.

21. The applicant appealed against the decision of the Slivnitsa District Court on 28 June 2000.

22. The appeal was examined and dismissed in a decision of 3 July 2000 by the Sofia Regional Court. During the hearing the prosecution presented the domestic court with a list of pending criminal investigations against the applicant which allegedly supported their argument that he might re-offend or abscond. His lawyer, however, challenged that assertion and noted that in some of those cases the applicant had presented himself to the authorities during the period when he was allegedly in hiding (see paragraph 10 above). In any event, the court found, in spite of the fact that the applicant had voluntarily presented himself to the authorities, that there was sufficient evidence that he might abscond or re-offend considering that he had already absconded in the context of the proceedings, had been placed on the national most-wanted list, had a prior conviction and there were other criminal proceedings opened against him. The court also considered that there was sufficient evidence that the applicant had perpetrated the offence with which he had been charged.

2. The second appeal

23. The applicant filed a second appeal against his detention on 13 July 2000, which was examined on 14 July 2000. In a decision of the same day the Slivnitsa District Court found in favour of the applicant and ordered his release on bail, which was to be paid within five days.

24. The applicant was released on 19 July 2000 after he deposited the bail amount.

C. The conditions of detention

25. The applicant was held at the Slivnitsa Investigation detention facility from 26 June to 19 July 2000.

26. The applicant contended, which the Government challenged, that (1) for the duration he was detained together with another three individuals in the same cell, (2) the cell had an area of six sq.m., (3) there were no windows or lighting, the cell being illuminated only from the light in the corridor, and (4) there were no beds, but just wooden racks on which to sleep and that the bed covers were lice-ridden.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Power to order pre-trial detention, grounds for pre-trial detention and appeals against detention

27. The relevant provisions of the Code of Criminal Procedure (the "CCP") and the Bulgarian courts' practice before 1 January 2000 are summarised in the Court's judgments in several similar cases (see, among others, *Nikolova v.* ***Bulgaria*** [GC], no. 31195/96, §§ 25-36, ECHR 1999-II; *Ilijkov v.* ***Bulgaria***, no. 33977/96, §§ 55-59, 26 July 2001; and *Yankov v.* ***Bulgaria***, no. 39084/97, §§ 79-88, ECHR 2003-XII (extracts)).

28. As of 1 January 2000 the legal regime of detention under the CCP was amended with the aim to ensure compliance with the Convention (TR 1-02 Supreme Court of Cassation). The effected amendments and the resulting practice of the Bulgarian courts are summarised in the Court's judgments in the cases of *Dobrev v.* ***Bulgaria*** (no. 55389/00, §§ 32-35, 10 August 2006) and *Yordanov v.* ***Bulgaria*** (no. 56856/00, §§ 21-24, 10 August 2006).

B. The State and Municipalities Responsibility for Damage Act

29. The State and Municipalities Responsibility for Damage Act of 1988 (the "SMRDA" : title changed in 2006) provided, as in force at the relevant time, that the State was liable for damage caused to private persons by (a) the illegal orders, actions or omissions of government bodies and officials acting within the scope of, or in connection with, their administrative duties; and (b) the organs of the investigation, the prosecution and the courts in specific, exhaustively listed situations (sections 1-2).

30. In respect of conditions of detention, the relevant domestic law and practice under the SMRDA at the relevant time has been summarised in the cases of *Iovchev v.* ***Bulgaria*** (no. 41211/98, §§ 76-80, 2 February 2006) and *Yordanov* (cited above, §§ 29-30).

31. In respect of the regime of detention, section 2 of the SMRDA provides, as relevant:

> "The State shall be liable for damage caused to [private persons] by the organs of ... the investigation, the prosecution, the courts ... for [an] unlawful:
>
> 1. pre-trial detention..., if [the detention order] has been set aside for lack of lawful grounds;
>
> 2. indictment for a criminal offence if... the opened criminal proceedings have been terminated [on the ground] that the act was not perpetrated by the [accused] person..."

32. Persons seeking redress for damage occasioned by decisions of the investigating and prosecuting authorities or the courts in circumstances falling within the scope of the SMRDA have no claim under general tort law as the Act is a *lex specialis* and excludes the application of the general regime (section 8(1) of the Act; решение № 1370 от 16.XII.1992 г. по гр.д. № 1181/92 г., IV г.о. and Тълкувателно решение № 3 от 22.04.2005 г. по т. гр. д. № 3/2004 г., ОСГК на ВКС).

33. The reported case-law of the Supreme Court of Cassation under section 2, item 1 of the SMRDA prior to 2005 suggested that the term "lack of lawful grounds" referred to unlawfulness under domestic law (решение № 859/2001 г. от 10 септември 2001 г. г.д. № 2017/2000 г. на ВКС, решение № 978/2001 г. от 10 юли 2001 г. по г.д. № 1036/2001 г. на ВКС).

34. At the same time, the reported case-law during the same period under section 2, item 2 of the SMRDA excluded its applicability to instances when the criminal proceedings were discontinued at the pre-trial stage on the grounds that the accusation was not proven (решение № 1085/2001 г. от 26 юли 2001 г. по г.д. № 2263/2000 г. на ВКС IV г.о.).

35. On 22 April 2005 the General Assembly of the Civil Chambers of the Supreme Court of Cassation (the "Supreme Court of Cassation") adopted Interpretative decision no. 3/2004 (Тълкувателно решение № 3 от 22.04.2005 г. по т. гр. д. № 3/2004 г., ОСГК на ВКС), which is binding on the domestic courts. It decreed the following under item 7 of the said decision:

> "The respective organ [of the investigation, the prosecution or the courts] is also liable in the instances when the criminal proceedings have been terminated on the grounds that the accusation was not proven. The grounds for discontinuing [criminal proceedings] under Article 237, § 1 (2) of the Code of Criminal Procedure corresponds to the basis for seeking damage under section 2, item 2, alternative 3 of the SMRDA, namely '...that the act was not perpetrated by the [accused] person'".

36. The Supreme Court of Cassation also decreed the following under item 13 of the said decision:

> "The pre-trial detention is unlawful when it does not adhere to the requirements of [the Code of Criminal Procedure].
>
> The State is liable under section 2, item 1 of the SMRDA when the pre-trial detention has been revoked as unlawful, irrespective of the [subsequent] development of the pre-trial and court proceedings. In such case, the compensation is determined separately.
>
> If the person has been acquitted or the opened criminal proceedings have been terminated, the State is liable under section 2, item 2 of the SMRDA. In such case, the compensation for non-pecuniary damages includes the damage [stemming] from the unlawful pre-trial detention. If pecuniary damages have been suffered, the compensation for them is not included, but is awarded separately taking into account the particulars of each given case".

37. The statute of limitations for actions for damage under the SMRDA is five years. In respect of persons seeking redress for criminal proceedings opened against them that are later terminated on the grounds that the act was not perpetrated by him or her, the time limit begins to run from the date of the decision for termination of the proceedings (section 110 of the Obligations and Contracts Act in connection with paragraph 1 of the Final Provision of the SMRDA and Тълкувателно решение № 3 от 22.04.2005 г. по т. гр. д. № 3/2004 г., ОСГК на ВКС).

III. REPORTS OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT ("THE CPT")

38. The CPT visited **Bulgaria** in 1995, 1999, 2002, 2003 and 2006. All but its most recent visit report have since been made public.

39. The Slivnitsa Investigation detention facility was visited in 2006, but the CPT report of that visit has not been made public.

40. There are general observations about the problems in all investigation service establishments in the 1995, 1999 and 2002 reports, which are summarised in the Court's judgment in the case of *Dobrev* (cited above, §§ 44-48 and §§ 52-55).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

41. The applicant complained under Article 3 of the Convention that he was subjected to inhuman or degrading treatment as a result of being detained at the Slivnitsa Investigation detention facility.

Article 3 of the Convention provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

42. The Government challenged the applicant's submissions, argued that his complaints were formulated in a very general manner and that they were not supported by evidence of a violation.

43. In addition, the Government presented a report from the Execution of Sentences Division of the Ministry of Justice, dated 11 July 2005, which detailed the conditions at the Slivnitsa Investigation detention facility. The information provided therein is summarised below.

44. The applicant was held at the Slivnitsa Investigation detention facility from 26 June to 19 July 2000, a period of twenty-three days.

45. The detention facility had four cells situated below street level, each 3.2 m long, 1.9 m wide and 2.5 m high. There were communal toilet and shower facilities for use by detainees.

46. Natural light and fresh air entered the cells through windows, measuring 0.9 m by 0.6 m, situated above the doors, and six windows, measuring 1.2 m by 0.6 m, in the corridor in front of the cells. Artificial light was provided by a fixture above each door. Each cell was also provided with a bed rack for detainees to sleep on.

47. The applicant was accommodated in cell no. 4. The occupancy rate of the cell during the period of his detention was the following: from 26 to 30 June 2000 there were four detainees; from 1 to 10 July 2000 – five; on 11 July 2000 – four; and from 12 to 19 July – two. The applicant was brought out of his cell nine times for questioning and six times for visits by his mother.

48. The Government noted the relatively short period of the applicant's detention at the Slivnitsa Investigation detention facility and that he had not complained or claimed that his physical or mental health had deteriorated as a result. They also argued that measures depriving a person of his liberty may often involve an element of suffering or humiliation, that the conditions of detention at the Slivnitsa Investigation detention facility were not intended to degrade or humiliate the applicant and, in conclusion, that the ill-treatment complained did not go beyond the threshold of severity under Article 3 of the Convention. Thus, the Government considered that the said article had not been violated.

49. The applicant reiterated his complaints. He noted that the Government consented that the applicant's cell measured approximately six square meters and had been occupied by four to five detainees, for whom there had not been enough beds to sleep on. The applicant claimed that the artificial light fixture in the cell had been broken and that the only light came in through the opening above the door.

B. Admissibility

50. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. General principles

51. The Court reiterates at the outset that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, among others, *Kudła v. Poland* [GC], no. 30210/96, § 90, ECHR 2000-XI and *Poltoratskiy v. Ukraine*, no. 38812/97, § 130, ECHR 2003-V).

52. To fall within the scope of Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Kudła*, § 91, and *Poltoratskiy*, § 131, both cited above).

53. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see *Kudła*, cited above, § 92). The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account, but the absence of any such purpose cannot conclusively rule out a violation of Article 3 (see *Kalashnikov v. Russia*, no. 47095/99, §§ 95 and 101, ECHR 2002-VI).

54. The suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that detention in itself raises an issue under Article 3 of the Convention. Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with the respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (see*Kudła*, cited above, § 92-94).

55. When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions and the duration of the detention (see *Kalashnikov*, cited above, §§

95 and 102; *Kehayov v.**Bulgaria***, no. 41035/98, § 64, 18 January 2005; and *Iovchev*, cited above, § 127). In particular, the Court must have regard to the state of health of the detained person (see *Assenov and Others*, cited above, § 135).

56. An important factor, together with the material conditions, is the detention regime. In assessing whether a restrictive regime may amount to treatment contrary to Article 3 in a given case, regard must be had to the particular conditions, the stringency of the regime, its duration, the objective pursued and its effects on the person concerned (see *Kehayov*, § 65 and *Iovchev*, § 128, both cited above; and, *mutatis mutandis*, *Van der Ven v. the Netherlands*, no. 50901/99, § 51, ECHR 2003-II).

2. Application of these principles to the present case

57. The Court observes that the applicant was detained on the premises of the Slivnitsa Investigation detention facility from 26 June to 19 July 2000, a period of twenty-three days (see paragraph 25 above).

58. The Court further observes that the detention facility was below street level and that cells had no direct sun light. Fresh air could only come in through windows above the cell doors. There were no sanitary facilities in the cells, but communal such were situated on the same floor. It is unclear how access was provided to those facilities.

59. During the period of his detention the applicant was held in cell no. 4 with another one to four detainees with whom he shared a bed rack and lice-ridden sleeping covers. The living area he had available was between 3.04 square meters and 1.22 square meter. The CPT, meanwhile, has in general applied a standard of a minimum of four square meters per prisoner in multiple occupancy cells [see, for example, the CPT reports on the 2002 visit to **Bulgaria**, CPT/Inf (2004) 21, paragraphs 82 and 87, and on the 2004 visit to Poland, CPT/Inf (2006) 11, paragraphs 87 and 111]. Accordingly, the Court finds that the living area available to the applicant was inadequate.

60. The Court notes, however, that the applicant did not complain that his physical or mental health deteriorated during or as a result of his detention at this facility. Neither did he complain of the food, the out-of-cell activities or his ability to maintain contacts with the outside world. Accordingly, no considerations in this respect are warranted.

61. In conclusion, the Court recognises that as a result of the overcrowding the applicant may have endured some distress and hardship during the period of his detention at the Slivnitsa Investigation detention facility. However, given that he was twenty-seven years old at the time, did not claim that his physical or mental health was affected in any way and did not complain of any other aspects of the regime in this facility, the Court does not find that in the particular circumstances of the present case the treatment complained of went beyond the threshold of severity under Article 3 of the Convention.

62. Thus, there has been no violation of Article 3 of the Convention on account of the applicant's detention at the Slivnitsa Investigation detention facility.

II. ALLEGED VIOLATION OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 3 OF THE CONVENTION

63. The applicant complained under Article 13 of the Convention that he lacked an effective remedy for, *inter alia*, his complaint regarding the conditions of detention at the Slivnitsa Investigation detention facility.

Article 13 of the Convention provides:

> "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."

64. The Government did not comment.

A. Admissibility

65. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

66. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 of the Convention is thus to require the provision of a domestic remedy to deal with the substance of an "arguable claim" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 of the Convention varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, pp. 329-30, § 106).

67. The Court observes that the applicant's complaint under Article 3 of the Convention was declared admissible and was examined on the merits (see paragraphs 50-62 above). In spite of the finding that there had been "no violation" in respect of the aforesaid complaint (see paragraph 62 above), an "arguable claim" clearly arises for the purpose of Article 13 of the Convention (see, *mutatis mutandis*, *Ramirez Sanchez v. France*[GC], no. 59450/00, §§ 157-60, 4 July 2006). Thus, it remains to be established whether the applicant had available an effective remedy in Bulgarian law to raise a complaint about the allegedly inadequate conditions of detention at the Slivnitsa Investigation detention facility.

68. The Court notes that the Government did not submit any information or arguments about the possible existence or effectiveness of a domestic remedy. Thus, it considers that in the present case it has not been shown by the said Government that at the relevant time an effective remedy existed in Bulgarian law for the applicant to raise his complaint about the allegedly inadequate conditions of detention at the Slivnitsa Investigation detention facility.

Accordingly, there has been a violation of Article 13 in conjunction with Article 3 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

69. The applicant made several complaints falling under Article 5 of the Convention.

The applicant complained under Article 5 § 1 (c) of the Convention that the order for his arrest and detention was improperly issued and that his detention was unlawful as a result. He submitted that (1) the evidence against him was not sufficient to lead to the conclusion that he was guilty of an offence; (2) the authorities never made an attempt to find him; (3) he had presented himself voluntarily on 26 June 2000; and (4) there was no viable risk that he might abscond, obstruct the investigation or re-offend. The applicant also complained that he was detained unlawfully between 14 and 19 July 2000, because the courts had already ordered his release on bail.

He further complained, relying on Articles 5 § 4 and 6 of the Convention, that in respect of his first appeal the domestic courts denied him a fair hearing, failed to examine all factors relevant to the lawfulness of his detention (such as the report of his voluntary presentation to the police), gave unreasoned decisions and that the Slivnitsa District Court was not impartial. In addition, he maintained that he was denied access to the investigation file and could not, therefore, adequately prepare his position.

Lastly, the applicant complained under Article 5 § 5 of the Convention that he did not have an enforceable right to seek compensation for being a victim of arrest or detention in contravention of the provisions of Article 5.

The relevant part of Article 5 of the Convention provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 4. 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.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

70. The applicant also relied on Article 13 of the Convention in respect of his complaints under Article 5 of the Convention. However, the Court considers that, as it relates to Article 5 § 1 of the Convention, this complaint should be understood as referring to the applicant's inability to effectively challenge his detention under Article 5 § 4 of the Convention and to the alleged lack of an enforceable right to compensation under Article 5 § 5 of the Convention. In addition, the Court observes that Article 5 §§ 4 and 5 of the Convention constitute *lex specialis* in relation to the more general requirements of Article 13 (see *Nikolova*, cited above, § 69, and *Tsirlis and Kouloumpas v. Greece*, judgment of 29 May 1997, *Reports of Judgments and Decisions* 1997-III, p. 927, § 73).

Accordingly, the Court will examine the complaint that the applicant lacked effective domestic remedies under Article 5 §§ 4 and 5 of the Convention.

A. Exhaustion of domestic remedies

1. The parties' submissions

71. The Government submitted that the applicant failed to exhaust the available domestic remedies because he did not initiate an action for damages under the SMRDA.

They noted that the criminal proceedings against him had been discontinued on 19 August 2002 by the Slivnitsa Prosecutor's Office on the grounds that the accusation was not proven (see paragraph 17 above). Thus, the Government claimed that the applicant had had a right of action to seek redress from the authorities for the unlawful detention in the context of the criminal proceedings against him.

72. In his submissions in reply the applicant presented arguments on the merits of his complaints, but did not expressly challenge the Government objection of non-exhaustion of domestic remedies.

In the context of his submissions under Article 5 § 5 of the Convention, he stated that no procedure existed under domestic legislation through which he could have effectively sought compensation stemming from his detention in contravention of Article 5 §§ 1 and 4 of the Convention.

The applicant referred to the requirement under the SMRDA that the detention order must be set aside as unlawful in order for the liability of the State to arise under the said Act. Thus, he argued that in so far as his detention had not been unlawful under domestic legislation that he would not have been entitled to any compensation under the SMRDA.

He also noted that the preliminary investigation against him had been terminated because the accusation had not been proven and referred to the case law of the Supreme Court of Cassation prior to 2005 which excluded the applicability of section 2, item 2 of the SMRDA to such instances (решение № 1085/2001 г. от 26 юли 2001 г. по г.д. № 2263/2000 г. на ВКС IV г.о.).

2. The Court's assessment

73. The Court reiterates that, according to Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, p. 18, § 33 and *Remli v. France*, judgment of 23 April 1996, *Reports* 1996-II, p. 571, § 33). Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. Nevertheless, the obligation to exhaust domestic remedies only requires that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004 and *John Sammut and Visa Investments Limited v. Malta*(dec.), no. 27023/03, 28 June 2005).

74. The Court observes that in the present case, the applicant's complaints fall to be examined under Article 5 §§ 1, 4 and 5 of the Convention. They relate to and stem from his pre-trial detention in the context of the preliminary investigation for the charge of median bodily injury and the examination of his appeals against it. The Court further observes that the said investigation was terminated on 19 August 2002 by the Slivnitsa Prosecutor's Office because the accusation was not proven against the applicant (see paragraph 17 above).

75. The Court notes that in so far as the applicant's complaints related to the actions of the investigation, the prosecution and the domestic courts he would have been restricted under domestic legislation only to an action for damages under the SMRDA (see paragraph 32 above). Thus, it must be assessed whether such an action was available to him.

76. The Court recognises that prior to 2005 the applicant does not appear to have had a definitive right of action given the domestic case law that excluded the applicability of section 2, item 2 of the SMRDA to instances where the criminal proceedings had been discontinued because the accusation was not proven (see paragraph 34 above). However, on 22 April 2005 the Supreme Court of Cassation clarified the interpretation and applicability of the SMRDA and held that where criminal proceedings have been terminated, such as in the applicant's case, because the accusation was not proven the State would be liable under section 2, item 2 of the Act (see paragraph 35 above). The view taken appears to have been that in such cases the termination of the proceedings retroactively rendered the pre-trial detention unlawful. In such case, the compensation for pecuniary and non-pecuniary damage would have included the damage resulting from the unlawful pre-trial detention in the course of the terminated proceedings (see paragraph 36 above). Lastly, the deadline for initiating such an action is five years from the date of the decision for terminating the proceedings (see paragraph 37 above), which in the applicant's case expires on 19 August 2007.

77. In this connection, the Court reiterates that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it. However, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Baumann v. France*, no. 33592/96, § 47, 22 May 2001).

78. The Court recognises that the purpose of the interpretative decision of the Supreme Court of Cassation was to clarify the scope of the SMRDA and, in respect to the applicant, made the State liable for damage for his pre-trial detention in the course of the terminated criminal proceedings. Consequently, this represented a remedy which enabled the authorities of the respondent State to redress the breach of the Convention alleged by the applicant (see, *mutatis mutandis*, *Brusco v. Italy*, no. 69789/01, ECHR 2001-IX, and *Giacometti and others v. Italy*, no. 34939/97, ECHR 2001-XII).

79. In the light of the foregoing, the Court considers that the applicant was required by Article 35 § 1 of the Convention, and still has the opportunity, to lodge a claim with the domestic courts under the SMRDA and to seek compensation for damage for the pre-trial detention in the course of the terminated criminal proceedings against him. Furthermore, there do not appear to be any exceptional circumstances capable of exempting him from the obligation to exhaust domestic remedies.

80. There are no indications that a similar right of action existed under the SMRDA which could be considered to be able to remedy the alleged violation of Article 5 § 4 of the Convention in respect of the examination of the applicant's first appeal against his detention.

81. Considering the above, the Court partially upholds the Government's objection of failure to exhaust the available domestic remedies.

It follows that the applicant's complaints under Article 5 § 1 of the Convention must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Complaint regarding the limited scope and nature of the judicial control of lawfulness of the applicant's detention

82. The Government did not submit separate comments and observations on this complaint other than in the context of their objection of non-exhaustion examined above (see paragraph 71 above).

83. The applicant reiterated his complaints and referred to the Court's case law against **Bulgaria** where violations had been found in similar cases. The applicant claimed that the courts relied primarily on the statutory provisions for justifying his continued detention and failed to consider whether there was a reasonable suspicion that he was guilty of an offence, the police report that he had presented himself voluntarily to the authorities and his arguments that there was no risk that he might abscond. He also claimed that in the first appeal proceedings the presiding judge of the Slivnitsa District Court had been partial because he had previously ruled against him in another set of proceedings. Finally, the applicant claimed that he lacked the necessary time and facilities to prepare for the proceedings as had been denied access to the investigation file.

84. The Court recalls that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine "not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention".

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention (see *Nikolova*, cited above, § 58).

85. The Court observes that in the present case, the Slivnitsa District Court examined and dismissed the applicant's first appeal on the very next morning after it was filed, 27 June 2000, which was upheld by the Sofia Regional Court on 3 July 2000 (see paragraphs 18-19 and 21-22 above).

86. In respect of the scope and nature of the judicial control of lawfulness of the detention, the Court finds that – unlike in other cases against **Bulgaria** where the authorities relied primarily on statutory provisions requiring detention in certain instances – in the present case the domestic courts did make an assessment and took into account specific facts and evidence on which they then based their finding that there was a likelihood that the applicant might abscond or re-offend. In particular, they noted that there were other criminal proceedings opened against him, that he had a prior criminal conviction, had already absconded in the context of these criminal proceedings and had been placed on the national most-wanted list as a result (see paragraphs 19 and 22 above).

87. Although there is some uncertainty whether the Slivnitsa District Court was aware that the applicant had presented himself voluntarily to the authorities on 26 June 2000, there is no doubt that the Sofia Regional Court was informed of this fact when deciding on the appeal before it (see paragraphs 19 and 22 above).

88. The Court also notes that the initial police enquiry or preliminary investigation was opened against the applicant on the basis of a complaint of the victim's father (see paragraphs 7 and 8 above) and that the Sofia Regional Court subsequently found that there

was sufficient evidence that the applicant had perpetrated the offence with which he had been charged (see paragraph 22 above).

89. The Court further finds that the applicant failed to substantiate his complaint that he was denied access to certain documents in the investigation file which were essential in order effectively to challenge the lawfulness of his detention. It notes that he simply complained of the fact that he was denied access to the said file, but did not claim or allege that there were certain documents, evidence or facts therein with which he had been unable to acquaint himself in order to challenge them effectively but to which the prosecution had access to and on which the domestic courts relied to justify his continued detention. In particular, in its decision of 3 July 2000 the Sofia Regional Court primarily relied on the fact that the applicant had already absconded in the same proceedings and the existence of other pending criminal proceedings against him – information which was known to the applicant or was presented at the hearing of that day and which he challenged (see paragraph 22 above). Moreover, the applicant's lawyer used the information provided by the prosecution to her advantage by challenging their assertion that her client had been hiding from the authorities by showing that he had in fact been participating in some of the other criminal proceedings against him (ibid.). The Court finds this situation to be different from instances where the domestic courts ordered the continued detention of a detainee by citing and relying on documents and information which were contained in the investigation or court file to which the said detainee was not given access to (see, for example, *Lamy v. Belgium*, judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29; *Garcia Alva v. Germany*, no. 23541/94, § 41, 13 February 2001; *Schöps v. Germany*, no. 25116/94, § 53, ECHR 2001-I; and *Lietzow v. Germany*, no. 24479/94, § 48, ECHR 2001-I), or where he was denied the opportunity to acquaint himself with pleadings or submissions of the prosecuting authorities and to challenge them (see, for example, *Nikolova*, cited above, § 63; *Ilijkov*, cited above, § 104; *Kuibishev v.* ***Bulgaria***, no. 39271/98, § 76, 30 September 2004; and *Trzaska v. Poland*, no. 25792/94, § 78, 11 July 2000). Thus, it does not find that in the circumstances of the present case the applicant's inability to review the investigation file, which principally should be provided, made these particular proceedings any less adversarial.

90. In respect of the alleged partiality of the presiding judge of the Slivnitsa District Court, the Court finds no indication that the applicant raised an objection to his appointment or requested that he recuse himself. Neither is there any indication that the applicant ever raised this matter in his appeal to the Sofia Regional Court.

91. In conclusion, the Court does not find that in the specific circumstances of the present case the procedure before the domestic courts in the context of the applicant's first appeal failed to comply with the guarantees afforded by Article 5 § 4 of the Convention.

It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

C. Complaint of the lack of an enforceable right to seek compensation for being a victim of arrest or detention in contravention of the provisions of Article 5 of the Convention

92. The Government did not submit separate comments and observations on this complaint other than in the context of their objection of non-exhaustion examined above (see paragraph 71 above).

93. The applicant reiterated his complaints and referred to the Court's case law against **Bulgaria** where violations had been found in similar cases.

94. According to the Court's case-law, Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 of that Article. The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions. The effective enjoyment of the right to compensation guaranteed by that provision must be ensured with a sufficient degree of certainty (see *N.C. v. Italy* [GC], no. 24952/94, §§ 49 and 52, ECHR 2002-X).

95. The Court notes that the applicant's complaint under Article 5 § 1 of the Convention was rejected for non-exhaustion of domestic remedies. His complaint under Article 5 § 4 of the Convention was found to be manifestly ill-founded and was likewise rejected. Thus, it has not been established by the Court that the applicant's detention was at any time contrary to Article 5 §§ 1 to 4 of the Convention which would then require for the possibility to exist for the applicant to be able to apply for compensation at the domestic level. Likewise, the Court notes its finding in respect of Article 5 § 1 of the Convention that after 22 April 2005 the applicant, with a sufficient degree of certainty, could have made a claim, and still can, under section 2 of the SMRDA for compensation for damage for the pre-trial detention in the course of the terminated criminal proceedings against him. In such case, the compensation due under that provision would be indissociable from any compensation he might be entitled to under Article 5 § 5 of the Convention as a consequence of his deprivation of liberty being contrary to paragraphs 1 or 4 thereof (see, *mutatis mutandis*, *N.C.*, cited above, § 57 and *Staykov v.* ***Bulgaria***, no. 49438/99, § 108, 12 October 2006).

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

IV. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

97. Lastly, the applicant complained under Article 6 of the Convention regarding the alleged unfairness of the criminal proceedings against him. He complained under Article 6 § 3 (c) of the Convention that he was denied the right to meet and confer with his attorney on the day of his arrest, 26 June 2000, and that she was not allowed to be present during two questioning sessions conducted by the police. The applicant also complained under Article 6 § 3 (d) of the Convention that he was not informed of nor invited to participate in the questioning of two witnesses conducted by the police while he was in detention. He made similar complaints in respect of the alleged unfairness of the proceedings before the domestic courts in hearing his appeals against his detention.

The relevant part of Article 6 of the Convention provides.

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (c) to defend himself ... through legal assistance of his own choosing...;
>
> (d) to examine or have examined witnesses against him...;"

98. The Court observes that the criminal proceedings against the applicant were terminated on 19 August 2002 (see paragraph 17 above). Thus, it finds that the applicant can no longer claim to be a victim of a violation, under Article 34 of the Convention, of his right to a fair trial in connection with these criminal proceedings (see *Osmanov and Husseinov v.* ***Bulgaria*** (dec.), no. 54178/00 and 59901/00, 4 September 2003; *X. v. the United Kingdom*, no. 8083/77, Commission decision of 13 March 1980, Decisions and Reports 19, p. 223 and *Eğinlioğlu v. Turkey*, no. 31312/96, Commission decision of 21 October 1998).

99. It follows that his complaints under Article 6 of the Convention in respect of the alleged unfairness of the criminal proceedings against him are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

100. The remainder of his complaints, raised under Article 6 of the Convention but relating to the examination of his first appeal against his detention, have already been examined in the context of Article 5 § 4 of the Convention (see paragraphs 82-91 above).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

101. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

102. The applicant claimed 12,000 euros (EUR) as compensation for the alleged violations of his rights under the Convention.

103. The Government did not submit comments on the applicant's claims for damage.

104. Having regard to the circumstances of the present case and the fact that a violation was found only in respect of Article 13 in conjunction with Article 3 of the Convention (see paragraph 68 above), the Court, deciding on an equitable basis, awards EUR 500 under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

105. The applicant also claimed EUR 4,480 for 56 hours of legal work by his lawyer in the proceedings before the Court at an hourly rate of EUR 80. He submitted a legal fees agreement between him and his lawyer.

106. The Government did not submit comments on the applicant's claims for costs and expenses.

107. The Court reiterates that according to its case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the instant case, the Court considers the number of hours claimed excessive given that a number of the applicant's complaints were either declared inadmissible or no violation of the Convention was established (see paragraphs 62, 81, 91, 96 and 99 above). Thus, it considers that a significant reduction is necessary on both accounts. Having regard to all relevant factors, the Court considers it reasonable to award the sum of EUR 500 in respect of costs and expenses, plus any tax that may be chargeable on that amount.

C. Default interest

108. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously admissible the applicant's complaints under Articles 3 and 13 of the Convention that he was subjected to inhuman or degrading treatment as a result of being detained at the Slivnitsa Investigation detention facility and that he lacked an effective remedy in that respect;

2. *Declares* the remainder of the application inadmissible;

3. *Holds* by four votes to three that there has been no violation of Article 3 of the Convention;

4. *Holds* by four votes to three that there has been a violation of Article 13 in conjunction with Article 3 of the Convention;

5. *Holds* unanimously
   (a) that the respondent State is to pay to the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable on the date of settlement :
      (i) EUR 500 (five hundred euros) in respect of non-pecuniary damage;
      (ii) EUR 500 (five hundred euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK Peer LORENZEN
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:
(a) dissenting opinion of Mr P. Lorenzen, Mr K. Jungwiert and Mrs R. Jaeger;
(b) dissenting opinion of Mrs S. Botoucharova and Mr R. Maruste.

P.L.
C.W.

JOINT PARTIALLY DISSENTING OPINION OF JUDGES LORENZEN, JUNGWIERT AND JAEGER

We share the conclusions in the judgment in all respects, except that we are not able to agree with the majority that there has been no violation of Article 3 of the Convention.

In the present case the Court has found it established that the applicant for 23 days was held in a cell with an area of 6 square meters below street level and occupied by one to four other detainees. For at least 10 days there were five detainees in the cell thus leaving them a living space of only 1,22 square metres each, cf. § 47 of the judgment. Furthermore for all 23 days the detainees had in turn to use one bed rack with the same lice-ridden covers in order to sleep – to the extent sleep was at all possible while other detainees followed a different daytime rhythm. In our opinion neither the length of the detention nor the fact that the applicant´s physical or mental health apparently was not affected can justify that he was detained in such degrading and inhuman conditions. Accordingly there has been a violation of Article 3 of the Convention.

JOINT PARTIALLY DISSENTING OPINION OF JUDGES BOTOUCHAROVA AND MARUSTE

We agreed with the majority that there was no violation of Article 3 of the Convention on account of the applicant's detention at the Slivnitsa Investigation detention facility. However, our approach on the related applicability and, accordingly, the finding of a violation of Article 13 in conjunction with Article 3 of the Convention deviated from that of the majority for the following reason.

The Court has frequently stated in its case-law that Article 13 of the Convention applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see, for example,*Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52; *Voyager Limited v. Turkey* (dec.), no. 35045/97, 4 September 2001; and *Ivison v. the United Kingdom* (dec.), no. 39030/97, 16 April 2002).

In view of the Court's finding in this case that the treatment complained of did not go beyond the threshold of severity under Article 3 of the Convention and that there was no violation of that article, we considered that the applicant did not have an "arguable claim" for the purposes of Article 13 of the Convention and that the latter provision was therefore inapplicable (see, *mutatis mutandis*, *Halford v. the United Kingdom*, judgment of 25 June 1997, *Reports* 1997-III, p. 1022, § 70 and *Riener v.* ***Bulgaria***, no. 46343/99, § 159, 23 May 2006).

Thus, we considered that the applicant's complaint under Article 13 in conjunction with Article 3 of the Convention should have been declared incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and that it should have been rejected.