FOURTH SECTION

CASE OF VARBANOV v. BULGARIA

(Application no. 31365/96)

JUDGMENT

STRASBOURG

5 October 2000

In the case of Varbanov v. Bulgaria,

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

Mr G. RESS, *President*,
Mr A. PASTOR RIDRUEJO,
Mr L. CAFLISCH,
Mr J. MAKARCZYK,
Mr V. BUTKEVYCH,
Mr M. PELLONPÄÄ,
Mrs S. BOTOUCHAROVA, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 14 September 2000,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 September 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 31365/96) against the Republic of Bulgaria lodged with the Commission under former Article 25 by a Bulgarian national, Mr Dimitar **Varbanov**("the applicant"), on 10 January 1996.

2. The applicant, who was granted legal aid before the Court, was represented by Mr Y. Grozev, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Mrs V. Djidjeva, co-Agent, of the Ministry of Justice. Having originally been designated before the Commission by the initials D.V., the applicant subsequently did not object to the disclosure of his name.

3. The applicant alleged that his confinement in a psychiatric clinic was unlawful and that it was not possible to appeal to a court in this respect.

4. The application was declared partly admissible by the Commission on 16 April 1998. In its report of 21 April 1999 (former Article 31 of the Convention) [*Note by the Registry*. The report is obtainable from the Registry.], it expressed the unanimous opinion that there had been violations of Article 5 § 1 and Article 5 § 4.

5. On 20 September 1999 a panel of the Grand Chamber determined that the case should be decided by one of the Sections of the Court (Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court).

6. The application was allocated to the Fourth Section (Rule 52 § 1). Within that Section, the Chamber which would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a Bulgarian national born in 1930 and living in Sofia. He is an economist, now retired.

9. On 6 October 1993 a Mr Z. lodged with the District Prosecutor's Office (Районна прокуратура) in Sofia a complaint against the applicant, stating that he was mentally ill and dangerous. The applicant and Mr Z. had been involved in disputes related to their joint business activity which had been the object of five sets of judicial proceedings between them. The applicant had apparently threatened Mr Z., stating in a letter to him that, *inter alia*, the only possible method of getting his money back was "the axe", and that "a dog deserves a dog's death". Mr Z., for his part, threatened the applicant with punishment according to medieval laws.

10. Following the receipt of Mr Z.'s complaint, the District Prosecutor's Office opened an inquiry. The purpose of the inquiry was, initially, to establish whether there were grounds to institute criminal proceedings against the applicant for having threatened to kill someone. On 14 October 1993 the prosecutor transmitted the file to the local police department with instructions to investigate Mr Z.'s complaint and to serve the applicant with a warning that he should cease his unlawful behaviour. On 20 October 1993, after hearing the applicant, a police officer drew up a report in which he stated, *inter alia*, that the applicant had repeated his threats against Mr Z., and that he appeared to have mental problems and was likely to carry out his threats. The police officer also heard a neighbour of the applicant who stated that he was a troublemaker.

11. The parties have submitted to the Court documents in respect of the applicant's mental health. A certificate issued on 18 October 1993 by a doctor at the Sofia City Psychiatric Clinic (Градски психиатричен диспансер) established that the applicant, who had requested a psychiatric examination declaring that he needed to have his capacity to make a will certified, was mentally healthy. In their report of 9 November 1995, the medical experts who examined the applicant during his confinement in a psychiatric hospital (see paragraph 26 below) concluded that he had a paranoiac psychosis, that he was aggressive and posed a threat to others. In a later certificate, issued

on 4 March 1996, another doctor who had examined the applicant found that he was mentally healthy. The applicant did not have a history of psychiatric problems.

12. In February 1994 the District Prosecutor's Office instructed the local police department to inquire whether it was necessary to request, from the competent court, the applicant's compulsory psychiatric treatment under section 36 of the Public Health Act (Закон за народното здраве).

13. According to the applicant's version of the facts, in October 1993 and again in April 1994 he submitted to the prosecution authorities a copy of the certificate of 18 October 1993 which established that he was mentally healthy (see paragraph 11 above) and another document to that effect. He alleged that he had gone to the Sofia City Psychiatric Clinic on two occasions requesting to be examined, but that had been refused.

14. As it transpires from the summary of facts contained in the medical report of 9 November 1995 (see paragraph 26 below), in the course of the prosecutor's inquiry the applicant was invited on 9 May and again on 5 September 1994 by the director of the Sofia City Psychiatric Clinic to come for a psychiatric examination. It appears that the applicant received these invitations. He sent letters in reply stating, *inter alia*, that he would not undergo an examination unless an international commission were set up, and described the hospital as “corrupt” and as a “department of the State security police”.

15. On 27 January 1995 a prosecutor from the District Prosecutor's Office ordered that the applicant should be brought by force to a psychiatric hospital, and be kept there for twenty days to undergo a psychiatric examination. This was necessary in view of the prosecutor's intention to submit to the competent court a request for the applicant's committal for compulsory psychiatric treatment. The order also stated that it was issued pursuant to section 36 of the Public Health Act, section 22 of Guidelines no. 295/85 of the Chief Public Prosecutor's Office (Указание на Главна прокуратура) and section 4(2) of Instruction no. 1/81 of the Ministry of Public Health (инструкция на Министерство на народното здраве). It was based on the material collected in the course of the inquiry (see paragraphs 10-14 above).

16. On 30 January 1995 the prosecutor's file was sent to the psychiatric clinic in Sofia, with a copy to the local police. On 3 May 1995 the District Prosecutor's Office asked the police to explain their failure to enforce the order of 27 January 1995. On 16 August 1995 the police returned the file to the District Prosecutor's Office with the explanation that the applicant had not allowed access to his home. On 23 August 1995 the District Prosecutor's Office again transmitted the file to the police and insisted on the enforcement of the order of 27 January 1995.

17. On 31 August 1995, on the basis of the prosecutor's order of 27 January 1995, the applicant was taken from his home by the police and brought to a psychiatric hospital.

The applicant underwent psychiatric examinations. He was given sedatives. The doctors also interviewed his wife, asking her questions about his past.

18. On 4 September 1995 the applicant was diagnosed as suffering from pneumonia. A treatment with antibiotics was applied.

19. On 5 September 1995 the applicant's wife submitted a complaint to the Sofia City Prosecutor's Office (Градска прокуратура). She stated, *inter alia*, that the manner in which her husband was treated was inhuman, that she had not been given a copy of the prosecutor's order and that she had not been allowed to visit her husband in the hospital until 2 September 1995. She asked the prosecutor to release the applicant from the psychiatric clinic.

20. On 15 September 1995 the applicant was transferred to a general hospital in a critical condition because of the developing pneumonia. In the following days his health improved.

21. It appears that during the first few days after his transfer to the general hospital the applicant remained under the control of a psychiatrist. He was instructed not to leave the room where he had been placed and was tied to his bed during the night. The applicant stated, and the Government did not dispute, that this situation lasted until 24 September 1995, when his health started to improve.

22. On 18 September 1995 the psychiatrists who were in charge of conducting the applicant's compulsory examination at the psychiatric hospital informed the District Prosecutor's Office about the applicant's transfer and requested an extension until 20 October 1995 of "the time-limit for the forensic psychiatric report". The request was granted orally by telephone. It appears that the prosecutor did not make any formal order terminating the compulsory stay of the applicant at the psychiatric clinic.

23. On 11 October 1995 a regional prosecutor wrote to the applicant's wife in relation to her complaint of 5 September 1995. The letter stated only that her husband had been transferred to a general hospital and that, therefore, the district prosecutor would be given additional time to deal with his inquiry.

24. On 16 October 1995 the applicant was discharged from the general hospital and went home as "no psychiatric treatment was necessary at [that] moment", according to a psychiatrist who had examined him.

25. In November 1995 and later again the applicant complained in respect of the events of August-September 1995 to the prosecution authorities stating, *inter alia*, that the district prosecutor had acted unlawfully. The complaints were examined by the Sofia City Prosecutor's Office and then by the Chief Public Prosecutor's Office, which replied

by letters of 1 February and 12 June 1996 respectively that the district prosecutor had complied with the applicable procedure.

The applicant also sent numerous letters to the Minister of Health, to the courts and to other institutions complaining that he had been ill-treated and that the doctors and the prosecutors wanted to kill him. He received answers from the public-health authorities reciting the sequence of events and assuring him that his suspicions were unfounded.

26. In the continuing inquiry of the district prosecutor, three medical experts, who had examined the applicant at the time when he was at the psychiatric hospital, delivered a report dated 9 November 1995 in which they recommended compulsory treatment because, *inter alia*, he did not understand his condition, refused any form of voluntary treatment and was extremely aggressive.

27. In January 1996 the district prosecutor submitted a request to the Sofia District Court (Районен съд) for an order committing the applicant for compulsory psychiatric treatment under section 36(3) of the Public Health Act. On 30 April 1996, after a hearing, the court dismissed the request. The applicant's and the prosecutor's ensuing appeals were rejected as being out of time.

II. RELEVANT DOMESTIC LAW

28. According to section 36(3) to (6) read in conjunction with section 59(2), section 61 and section 62(1) of the Public Health Act, a mentally ill person can be committed for compulsory psychiatric treatment by a decision of a district court.

Such judicial proceedings are instituted by a district prosecutor who is under the obligation to undertake a prior inquiry, including a psychiatric examination, in order to assess the need for instituting proceedings. The prosecutor therefore would normally invite the person concerned to undergo an examination in the framework of his inquiry.

The Public Health Act, as in force at the relevant time, did not contain any provision expressly authorising a prosecutor to order a person to be brought by force to a hospital and detained there for the purpose of such a

psychiatric examination. Under section 62(2), a prosecutor could issue an order for a compulsory examination, but only in respect of alcoholics or drug addicts.

Certain powers were given to the prosecutor where the person's state of health required emergency measures. In such a situation the chief medical officer of a hospital could order a person's temporary compulsory treatment. The doctor had to inform immediately the competent prosecutor, who had to institute proceedings before the competent court (section 36(5) of the Act and section 70 of the Act's implementing regulations). According to Section 70(2) of the Act's implementing regulations, if the prosecutor refused to institute judicial proceedings, the chief medical officer had to release the patient immediately.

29. The relevant law did not provide for an appeal to a court where persons were detained for an examination in the framework of a district prosecutor's inquiry. Section 105(4) of the Public Health Act, read in conjunction with the Administrative Procedure Act (Закон за административното производство), provided for a judicial appeal, but only against orders for compulsory treatment of persons suffering from a contagious disease (section 36(2)) and against "[other orders] of the public-health authorities", not of the prosecution authorities.

30. Instruction No. 1/81 of the Ministry of Public Health is a piece of delegated legislation. It is based on section 2 of the supplementary provisions to the Public Health Act, which stipulates that the Minister of Public Health shall issue regulations and instructions for the implementation of the Public Health Act. The instruction is published in the Official Gazette.

Section 4(2) of the instruction, in its relevant part, provides as follows:

> "... the [forensic psychiatric] examination shall be effected by the health-care authorities with the consent of the person concerned. Where the person concerned does not consent, the health-care authorities shall promptly request a written order and assistance from a prosecutor or a court for the [person's] examination without admission to a hospital, or for the [person's] temporary committal to a psychiatric clinic for the purpose of effecting a forensic psychiatric examination."

31. Guidelines no. 295/85 of the Chief Public Prosecutor's Office is an internal document for prosecutors in their work in cases of compulsory medical treatment. It has not been published.

Sections 16 et seq. concern the steps to be taken where there has been information that a person may be liable to compulsory psychiatric or other treatment. These provisions deal with compulsory examinations and treatment of persons of unsound mind, alcoholics and drug addicts, without distinguishing between these three categories (in contrast to the provisions of the Public Health Act, where separate rules exist).

According to the guidelines, following the receipt of a complaint or other information the prosecutor has to conduct an inquiry and, if there are clear indications that a psychiatric problem is involved, to invite the person concerned for a psychiatric examination. Section 21(2) provides as follows:

> "In case the person concerned does not appear [for the examination] within the time-limit indicated to him, the prosecutor shall order him to be brought by force by the police (section 62(2) of the Public Health Act)."

Section 22 of the guidelines provides as follows:

> "Upon the proposal of the chief medical officer of the psychiatric clinic the prosecutor may, on the basis of the medical documentation provided, authorise in writing the temporary internment of mentally ill persons in a specialised hospital, for a psychiatric examination (section 70 of the Public Health Act's implementing regulations). The prosecutor shall then promptly submit a request for compulsory treatment."

32. Certain amendments to the Public Health Act were introduced in February 1997. These amendments, in paragraphs 2 to 4 of section 61, provide that a prosecutor, in the framework of his inquiry, can order the confinement in a psychiatric hospital for up to thirty days (up to three months in exceptional cases), for the purpose of a medical examination, of a person who has refused to undergo such an examination voluntarily. However, no provision allowing judicial review of the prosecutor's order was introduced.

The Code of Criminal Procedure, by virtue of an amendment in force since 1 January 2000, introduced a judicial procedure for the confinement in a psychiatric clinic of a person against whom criminal proceedings have been brought. This procedure, however, does not concern persons who have been confined in a clinic for a psychiatric examination pursuant to a prosecutor's order under section 61 of the Public Health Act.

THE LAW

I. THE COURT'S ASSESSMENT OF THE FACTS

33. The applicant argued that the Commission's findings as regards certain facts had been based on circumstantial evidence. In particular, the applicant considered that since the Government had not submitted copies of documents establishing that he had received invitations to appear voluntarily for a psychiatric examination, the Court should not uphold the Commission's finding in this respect.

34. The Court reiterates its settled case-law that under the Convention system prior to the entry into force of Protocol No. 11, the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see, as a recent authority, *İlhan v. Turkey* [GC], no. 22277/93, § 47, ECHR 2000-VII).

35. The Court takes into account the applicant's statements but does not consider that they cast doubt on the Commission's conclusions of fact. These conclusions are supported

by documentary evidence, such as a report by psychiatrists dated 9 November 1995 reciting the facts and reproducing passages from letters sent by the applicant (see paragraph 14 above). The Commission approached its task of assessing the evidence with the requisite caution, giving detailed consideration to the elements which supported the applicant's claims and those which cast doubt on their credibility. The Court does not find that the criticisms made by the applicant raise any matter of substance which might warrant the exercise of its own powers of verifying the facts. In these circumstances, the Court accepts the facts as established by the Commission and supplemented by the additional evidence submitted to the Court (see paragraphs 9-27 above).

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

36. The Government submitted that the application should be rejected as being an abuse of the right of petition, within the meaning of Article 35 § 3 of the Convention, regard being had to the offensive remarks made by the applicant against the Agent of the Government.

While the use of offensive language in proceedings before the Court is undoubtedly inappropriate, the Court considers that, except in extraordinary cases, an application may only be rejected as abusive if it was knowingly based on untrue facts (see the Akdivar and Others v. Turkey judgment of 16 September 1996,*Reports of Judgments and Decisions* 1996-IV, p. 1206, §§ 53-54; *I.S. v. Bulgaria* (dec.), no. 32438/96, 6 April 2000, unreported; Aslan v. Turkey, application no. 22497/93, Commission decision of 20 February 1995, Decisions and Reports (DR) 80-A, p. 138; and Assenov and Others v. Bulgaria, application no. 24760/94, Commission decision of 27 June 1996, DR 86-A, pp. 54, 68). The Court does not consider that such is the case, the applicant's complaints that his rights under the Convention were violated being based on real facts some of which are, indeed, undisputed by the Government.

The Government's preliminary objection is therefore dismissed.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

37. The applicant complained that he was deprived of his liberty unlawfully and in breach of Article 5 § 1 of the Convention, the relevant parts of which provide:

> "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:
>
> ...
>
> (e) the lawful detention of persons ... of unsound mind ..."

A. ARGUMENTS BEFORE THE COURT

38. The applicant submitted that at the relevant time the applicable domestic law did not empower prosecutors to detain for the purpose of a medical examination persons believed to be of unsound mind. However, the order for the applicant's detention was issued by a prosecutor and was based on an unpublished internal instruction which did not have the status of a legal rule.

In the applicant's submission, even if the prosecutor did have the power to order detention, the standard of lawfulness would not have been met, as he had never received proper notification. He maintained that he had never been informed of the need to undergo an examination and of the prosecutor's order for his detention. The relevant general administrative and civil law required that any such notification had to be signed by the person notified or, where this was not possible, by a witness declaring why this was not possible.

39. The applicant further argued that the relevant domestic law did not provide guarantees against arbitrary deprivation of liberty as it did not set out a clear procedure and substantive criteria for a detention with the purpose of conducting a psychiatric examination.

In the applicant's view the major deficiency, which allegedly had not been remedied by the 1997 amendments to the Public Health Act, was that such detention was not made conditional on medical evidence. No evaluation by a psychiatrist was made. The relevant law, even that currently in force, did not oblige the prosecutor to seek a medical opinion as to the mental health of the person concerned and as to the need for detention. Finally, the applicable procedure allegedly did not ensure proper notification prior to a compulsory examination.

40. The Government submitted that sections 36(3), 59(2) and 61 of the Public Health Act established a procedure whereby the confinement of a person of unsound mind might be sought. The first stage of this procedure was an inquiry by a prosecutor who had to establish whether or not there existed information indicating that the person concerned might be of unsound mind and whether or not that person posed a threat.

Such an inquiry did take place in the applicant's case. It was conducted by a prosecutor and police officers and led to the conclusion that the applicant demonstrated a threatening behaviour and that a medical examination was necessary. The applicant was then repeatedly invited to come for an examination.

41. The Government further submitted that the authorities should be afforded a certain margin of appreciation in the assessment of the medical condition of a person believed to be of unsound mind and in respect of the need for a compulsory examination. Indeed, in the applicant's case his examination had confirmed the opinion that he should be placed in a psychiatric hospital, as evidenced by the medical report of 9 November 1995.

42. The Commission considered that the applicant was unlawfully deprived of his liberty between 31 August 1995 and an unspecified date after 15 September 1995, as the relevant domestic law at the material time did not empower prosecutors to order confinement in a psychiatric clinic. In view of this finding, the Commission considered it unnecessary to examine whether the other requirements of Article 5 § 1 (e) of the Convention had been met.

B. THE COURT'S ASSESSMENT

43. It is common ground between the parties that the applicant's compulsory confinement in a psychiatric hospital constituted a “deprivation of liberty”. It commenced on 31 August 1995. The Commission found that it lasted until several days after 15 September 1995. Before the Court, the applicant clarified that he was under control and

was tied to his bed at night until 24 September 1995. The Government did not dispute this statement.

The Court finds, therefore, that the applicant's detention lasted twenty-five days, between 31 August and 24 September 1995.

44. The Government maintained that the applicant's deprivation of liberty fell under paragraph 1 (e) of Article 5 of the Convention. No other provision was relied on to justify it.

45. The Court recalls its established case-law according to which an individual cannot be considered to be of "unsound mind" and deprived of his liberty unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see the Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, pp. 17-18, § 39, and the Johnson v. the United Kingdom judgment of 24 October 1997, *Reports*1997-VII, pp. 2409-10, § 60).

46. The Court further reiterates that a necessary element of the "lawfulness" of the detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness. The detention of an individual is such a serious measure that it is only justified where other, less severe measures, have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. The deprivation of liberty must be shown to have been necessary in the circumstances (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III).

47. The Court considers that no deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5 § 1 (e) of the Convention if it has been ordered without seeking the opinion of a medical expert. Any other approach falls short of the required protection against arbitrariness, inherent in Article 5 of the Convention.

The particular form and procedure in this respect may vary depending on the circumstances. It may be acceptable, in urgent cases or where a person is arrested because of his violent behaviour, that such an opinion be obtained immediately after the arrest. In all other cases a prior consultation is necessary. Where no other possibility exists, for instance due to a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind (see the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46).

Furthermore, the medical assessment must be based on the actual state of mental health of the person concerned and not solely on past events. A medical opinion cannot be seen as sufficient to justify deprivation of liberty if a significant period of time has elapsed.

48. In the present case the applicant was detained pursuant to a prosecutor's order which had been issued without consulting a medical expert. It is true that the purpose of the applicant's detention was precisely to obtain a medical opinion, in order to assess the need for instituting judicial proceedings with a view to his psychiatric internment.

The Court is of the opinion, however, that a prior appraisal by a psychiatrist, at least on the basis of the available documentary evidence, was possible and indispensable. There was no claim that the case involved an emergency. The applicant did not have a

history of mental illness and had apparently presented a medical opinion to the effect that he was mentally healthy. In these circumstances, the Court cannot accept that in the absence of an assessment by a psychiatrist the views of a prosecutor and a police officer on the applicant's mental health, which were moreover based on evidence dating from 1993 and 1994, sufficed to justify an order for his arrest, let alone his detention for twenty-five days in August and September 1995.

It is also true that when he was arrested the applicant was taken to a psychiatric clinic where he was seen by doctors.

However, there is no indication that an opinion as to whether or not the applicant needed to be detained for an examination was sought from the doctors who admitted him to the psychiatric hospital on 31 August 1995. The applicant's detention for an initial period of twenty days, later prolonged, had already been decided by a prosecutor on 27 January 1995, without the involvement of a medical expert.

It follows that the applicant was not reliably shown to be of unsound mind.

49. The Court therefore finds that the applicant's detention was not "the lawful detention ...of [a person] of unsound mind" within the meaning of Article 5 § 1 (e) as it was ordered without seeking a medical opinion.

50. Furthermore, the Court observes, like the Commission, that the Public Health Act, as in force at the relevant time, did not contain any provision empowering prosecutors to commit a person for compulsory confinement to a psychiatric clinic for the purpose of effecting a psychiatric examination.

Before the Court, the Government relied on section 59(2) and section 61(1) of the Act, according to which a prosecutor must conduct an inquiry and arrange for the psychiatric examination of the person concerned before submitting to the competent court a request for his psychiatric internment. However, these provisions did not mention any competence of the prosecutor to order the detention of the individual concerned with the aim of securing his examination. Instruction no. 1/81 of the Minister of Public Health, which implied such a competence, did not lay down any rules in this respect and thus lacked the requisite clarity.

Moreover, the applicable law, as in force at the relevant time and even after its amendment in 1997, does not provide for the seeking of a medical opinion as a precondition to ordering detention with a view to compulsory psychiatric examination and thus falls short of the required standard of protection against arbitrariness.

51. These shortcomings were not remedied by the fact that internal Guidelines no. 295/85 of the Chief Public Prosecutor's Office contained provisions regarding compulsory psychiatric examinations. The guidelines were an unpublished document without formal legal force.

In this respect, the Court reiterates that the expressions "in accordance with the law" and "in accordance with a procedure prescribed by law" require that the impugned measure should have a basis in domestic law and also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Amann v. Switzerland* [GC], no. 27798/95, § 50, ECHR 2000-II, and the Amuur v. France judgment of 25 June 1996, *Reports* 1996-III, pp. 850-51, § 50).

52. Finally, as the Commission rightly noted, the fact that no decision terminating the applicant's detention was issued is another indication of the ambiguous legal procedure and the lack of certainty as regards his deprivation of liberty.

53. The Court thus finds a violation of Article 5 § 1 of the Convention on account of the fact that the applicant's deprivation of liberty was not justified under sub-paragraph (e) of this provision and had no basis in domestic law which, moreover, does not provide the required protection against arbitrariness as it does not require the seeking of a medical opinion.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

54. The applicant complained that, in breach of Article 5 § 4 of the Convention, he was denied the right to have the lawfulness of his detention reviewed by a court. This provision reads:

> "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."

A. ARGUMENTS BEFORE THE COURT

55. The applicant stated that the prosecutor who had ordered his detention did not have the characteristic features of a "court" and did not conduct any proceedings of a judicial nature. In particular, the applicant had no opportunity to present his position or challenge evidence. Neither did the applicant have access to a court subsequently, after his detention had been ordered.

56. The Government submitted that what mattered was the nature and competence of the body reviewing the lawfulness of the detention and not its name. In the applicant's case, his detention was subject to review by a district and a regional prosecutor. The applicant could also appeal to the Chief Public Prosecutor but failed to do so.

The Government admitted that the relevant law did not provide for an appeal to a court in cases of detention ordered in the framework of an inquiry prior to the institution of proceedings for psychiatric internment. That was due to the fact that between 1992 and 1998 opinions were split in Bulgaria on the question of prosecutors' status. However, since the Court's judgment in the case of Assenov and Others v. Bulgaria (judgment of 28 October 1998, *Reports* 1998-VIII) there had been several legislative amendments in 1999 designed to bring the law into line with the Convention requirements and the Court's case-law. Therefore, there had been a sincere effort in this respect on the part of the Bulgarian authorities. On this basis, and considering that the purpose of the Convention was to exercise pressure on States with a view to bringing their legislation into line with it, the Government urged the Court to reject the complaint under Article 5 § 4 of the Convention.

57. The Commission found that it had not been open to the applicant to appeal to a court in order to challenge the lawfulness of his deprivation of liberty.

B. THE COURT'S ASSESSMENT

58. The Court recalls its established case-law according to which everyone who is deprived of his liberty is entitled to a supervision of the detention's lawfulness by a court. The Convention requirement that an act of deprivation of liberty be amenable to

independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals and their personal security (see the Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1185, § 123).

In some cases the judicial supervision may be incorporated in the decision ordering detention if it is taken by a body which constitutes a "court" within the meaning of Article 5 § 4 of the Convention. In order to constitute such a "court", an authority must be independent from the executive and from the parties. It must also provide the fundamental guarantees of judicial procedure applied in matters of deprivation of liberty.

If the procedure of the competent body ordering the detention does not provide such guarantees, the State must make available effective recourse to a second authority which does provide all the guarantees of judicial procedure. The person concerned should have access to a court and the opportunity to be heard either in person or through some form of representation (see the De Wilde, Ooms and Versyp v. Belgium judgment of 18 June 1971, Series A no. 12, pp. 39-41, §§ 73-76, and the Winterwerp judgment cited above, pp. 24-25, §§ 60-61).

59. It is undisputed by the Government that Bulgarian law at the relevant time did not provide for an appeal to a court against detention ordered by a prosecutor in the framework of an inquiry with a view to instituting proceedings for psychiatric internment. The Court takes note of the unquestionably sincere efforts made by the Bulgarian authorities to bring domestic legislation into line with the Convention. This observation, however, can in no way serve as a ground for rejecting the applicant's complaint, which concerns actual events affecting his Convention rights. The accuracy of the Government's statement that the law has been brought into line with the Convention through legislative amendments adopted in 1999, which is disputed by the applicant, cannot be assessed in the context of the present case. The Court must limit its examination to the particular circumstances of the case.

60. The Court notes in this respect that the applicant's detention was ordered by a district prosecutor, who subsequently became a party to proceedings against him, seeking his psychiatric internment (see paragraphs 15 and 27 above). The district prosecutor's order was subject to appeal solely to higher prosecutors.

It cannot be considered, therefore, that the remedy required by Article 5 § 4 of the Convention was available to the applicant. That provision guarantees to every arrested or detained person the right to appeal to a court. The necessary supervision of lawfulness was thus neither incorporated in the initial decision for the applicant's detention nor ensured through the existing possibilities to appeal.

61. The Court therefore finds that there has been a violation of Article 5 § 4 of the Convention in that the applicant was deprived of his right to have the lawfulness of his detention reviewed by a court.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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

63. The applicant claimed 130,360 United States dollars (USD) in respect of pecuniary damage. This included USD 120,000 in lost income – USD 1,000 per month for a period of ten years – as the applicant was allegedly prevented through the events complained of from accepting a business offer, a further USD 10,000 in expenses for treatment in a sanatorium and USD 360 in medication against pneumonia. Some of the above claims were supported by copies of business correspondence, invoices from a pharmacy and several apparently irrelevant documents.

64. The applicant also claimed 40,000 French francs (FRF) in compensation for the moral and physical damage he suffered as a result of his detention.

The applicant argued that the feeling of helplessness and fear generated by the lack of legal basis and of any possibility of obtaining a judicial review of his detention should be taken into account. The fact that he was detained in a psychiatric clinic where he was treated as an insane person was a particularly grave encroachment on his human dignity and was the source of humiliation and pain. He was given sedatives and was tied to his bed at night. He was detained incommunicado for three days, no visitor having been allowed to see him until the third day of his detention. When he developed pneumonia, he was referred for specialised treatment after a long delay which threatened his life.

65. The Agent of the Government submitted that the applicant was diagnosed as mentally ill and that the alleged feelings of fear and helplessness were in fact characteristic of his medical condition. Furthermore, in the opinion of the Agent, the exorbitant amounts claimed by the applicant were "the fruit of his mental disorder".

The Government also presented a detailed analysis of all documents submitted by the applicant in support of his claim for pecuniary damage, characterised some of them as forgeries and stated that one of them concerned what the Agent of the Government described as the applicant's "heroic communist past" rather than matters relevant to the case.

The Government finally argued that the standard of living in Bulgaria should be taken into account and urged the Court to reject the claims for just satisfaction.

66. The Court considers, the gratuitous statements of the Agent of the Government notwithstanding, that the applicant has not shown a direct causal link between the violations of the Convention found in the present case and the alleged pecuniary damage. In particular, the fact that the applicant had received a business offer is not conclusive evidence of lost income. In respect of the medical expenses claimed, the Court recalls that the Commission declared inadmissible the applicant's complaints that the doctors wanted to kill him and that they damaged his health (see the Commission's admissibility decision of 16 April 1998).

67. As for non-pecuniary damage, the Court considers that the applicant must have endured pain and suffering as a result of his unlawful detention, which lasted twenty-five days, and the impossibility of obtaining a judicial control, which undoubtedly led to a feeling of helplessness in the hands of the authorities. The fact that the applicant was

detained in a psychiatric clinic although he had not reliably been shown to be of unsound mind is a further aggravating circumstance.

Having regard to its case-law (see the Lukanov v. Bulgaria judgment of 20 March 1997, *Reports* 1997-II; the Sakık and Others v. Turkey judgment of 26 November 1997, *Reports* 1997-VII; the Demir and Others v. Turkey judgment of 23 September 1998, *Reports* 1998-VI; *Baranowski v. Poland*, no. 28358/95, ECHR 2000-III; and *Witold Litwa*, cited above) and making its assessment on an equitable basis, the Court awards 4,000 levs (BGN) in respect of non-pecuniary damage.

B. COSTS AND EXPENSES

68. The applicant claimed FRF 240 in postal expenses and FRF 1,300 for translation of his written observations submitted in the proceedings before the Commission (the equivalent of about BGN 540). The applicant presented copies of invoices and postal receipts. He did not claim any amount in respect of the proceedings before the Court, for which he had received legal aid.

69. The Government stated that the documents submitted by the applicant did not prove that he had actually incurred the expenses claimed. In any event, the amount of legal aid paid by the Council of Europe should be deducted.

70. The Court notes that the applicant's claims relate solely to the proceedings before the Commission whereas the legal aid received by him, in the amount of FRF 4,100, only concerned the proceedings before the Court. Therefore, no deduction can be made.

The Court observes, however, that in the course of the proceedings before the Commission the applicant made numerous uninvited submissions and considers that he cannot claim translation and postal expenses in respect of all of them. Deciding on an equitable basis, the Court awards BGN 300.

C. DEFAULT INTEREST

71. According to the information available to the Court, the statutory rate of interest applicable in Bulgaria at the date of adoption of the present judgment is 13.85% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts:

(i) for non-pecuniary damage, BGN 4,000 (four thousand levs);

(ii) for costs and expenses, BGN 300 (three hundred levs), together with any value-added tax that may be chargeable;

(b) that simple interest at an annual rate of 13.85% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 October 2000.

Vincent BERGER Georg RESS
Registrar President