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EGMR Nr. 38822/97 - Urteil vom 9. Januar 2003 (Shishkov v. Bulgarien)

Recht auf Freiheit und Sicherheit (zur Wahrnehmung richterlicher Aufgaben ermächtigte Person; Unabhängigkeit; Unparteilichkeit; Nikolova); Recht auf Freiheit und Sicherheit (Anspruch auf ein Urteil innerhalb angemessener Zeit oder auf Haftentlassung); Recht auf Freiheit und Sicherheit (Haftprüfung; habeas corpus; faires Verfahren; rechtliches Gehör; Waffengleichheit; Recht auf Akteneinsicht; Recht auf Zugang zum Gericht: Fristregelungen bei der richterlichen Überprüfung; Verhältnismäßigkeit; Berücksichtigung der praktischen Lage des Untersuchungshaftgefangenen); Freiheit der Person.

Art. 5 Abs. 1 lit. c EMRK; Art. 5 Abs. 3 Satz 1 EMRK; Art. 5 Abs. 4 EMRK; Art. 6 EMRK; Art. 103 Abs. 1 GG; Art. 2 Abs. 1 GG; Art. 20 Abs. 3 GG; § 112 StPO; § 117 StPO; § 147 StPO

Leitsätze des Bearbeiters

1. Eine Haftprüfung im Sinne des Art. 5 Abs. 4 EMRK muss die Anforderungen eines gerichtlichen Verfahrens erfüllen. Sie muss rechtliches Gehör gewähren und stets die Waffengleichheit zwischen den Strafverfolgungsbehörden und dem Inhaftierten wahren. Bei einer Anwendung des Art. 5 Abs. 1 lit. c EMRK ist eine Anhörung erforderlich. Die nach Art. 5 Abs. 4 EMRK geführten Verfahren müssen - soweit dies im Rahmen einer laufenden Untersuchung möglich ist - im größtmöglichen Umfang die Grundanforderungen eines fairen Verfahrens erfüllen.

2. Waffengleichheit gemäß Art. 5 Abs. 4 EMRK ist dann nicht gewahrt, wenn dem Verteidiger die Einsicht in diejenigen Dokumente der Untersuchungsakten verweigert wird, die für eine effektive Überprüfung der Rechtmäßigkeit der Untersuchungshaft im Sinne der EMRK wesentlich sind. Dabei ist das Konzept der Rechtmäßigkeit der Inhaftierung im Sinne der EMRK nicht auf die Einhaltung der prozeduralen Erfordernisse des nationalen Rechts beschränkt: Es betrifft auch den grundlegenden hinreichenden Tatverdacht nach der EMRK, die Legitimität des mit der Inhaftierung verfolgten Zwecks und die Begründung für die fortdauernde Inhaftierung gemäß Art. 5 Abs. 3 EMRK.

3. Das Vorliegen eines Tatverdachtes ist eine conditio sine qua non rechtmäßiger Untersuchungshaft, genügt jedoch nach einer gewissen Inhaftierungsdauer nicht mehr aus, um eine Inhaftierung zu rechtfertigen. In solchen Fällen muss der Gerichtshof prüfen, ob andere von den nationalen Behörden aufgeführte Gründe die weitere Freiheitsentziehung rechtfertigen. Sind solche Gründe stichhaltig und ausreichend, muss sich der Gerichtshof vergewissern, dass die zuständigen nationalen Behörden die gebotene besondere Sorgfalt bei der Verfahrensführung aufgewendet haben.

4. Die Begründung der fortdauernden Untersuchungshaft kann nicht allein auf einer an der Schwere des Delikts ansetzenden Vermutung beruhen, selbst wenn die Möglichkeit zur Darlegung des Ausschlusses einer abstrakten Gefahr der Flucht, der Wiederholung oder der Verdunkelung besteht. Vielmehr muss eine Begründung auf der Grundlage einer konkreten Fallanalyse hinsichtlich der möglichen Gefahren der Flucht oder der Wiederholung erfolgen.

5. Die Verletzung des Art. 5 Abs. 3 EMRK kann auch bei vergleichsweise kurzen Inhaftierungszeiträumen festgestellt werden (hier: sieben Monate und drei Wochen). Art. 5 Abs. 3 EMRK kann nicht so ausgelegt werden als toleriere er eine unbegründete Untersuchungshaft solange, wie sie nicht ein bestimmtes zeitliches Minimum überschreitet. Die zuständigen Stellen müssen jede einzelne Phase der Inhaftierung überzeugend begründen, unbeschadet der Frage, wie kurz diese Phase gewesen ist.

THE FACTS

9. The applicant was born in 1970 and lives in Rakovski, in the region of Plovdiv. 2

A. The criminal proceedings against the applicant 3

10. On 22 August 1997 the applicant was arrested on suspicion of having stolen from a Ms S. gold jewellery and money worth 20,110,448 Bulgarian levs ("BGL"). In view of the value of the stolen objects and money, the offence with which the applicant was charged constituted a "serious" offence, within the meaning of the Penal Code. 4

According to the indictment drawn up later, the applicant, who had been employed by a private security company to keep Ms S.'s house , had taken advantage of her and her family's departure on holiday to steal the above valuables on 2 August 1997. On the same day he had taken some of the jewellery and money to his sister's home. Approximately ten days later, having learned that Ms S. had discovered the theft, the applicant had travelled to the nearby city of Plovdiv to sell some of the jewellery before returning home. On 19 August 1997 the applicant and his family (his wife and their two month-old child) had visited the applicant's mother in the town of Perushtiza. There the applicant had given his mother the remaining money. 5

11. On the day of his arrest and on being questioned by an assistant investigator the following day, 23 August 1997, the applicant admitted the theft and directed the police to the persons who had bought some of the stolen jewellery from him. The majority of the valuables were recovered by the police the same day. The applicant's mother returned the money she had been given by her son. 6

12. The period between 23 August and 10 October 1997 was taken up by procedural acts. No new evidence was collected during that period. The applicant was not interrogated. 7

13. On 26 August 1997 the assistant investigator transmitted the file to the District Prosecutor's Office inviting it to reclassify the proceedings, which had begun as a summary investigation (ÿÿÿÿÿÿÿÿ), into an ordinary investigation (ÿÿÿÿÿÿÿÿÿ). On 5 September 1997 the District Prosecutor's Office transmitted the case file to the Regional Prosecutor's Office, as it considered that the proceedings came within the latter's competence. By a decision dated 10 September 1997 a prosecutor from the Regional Prosecutor's Office found that the case fell to be dealt with by the District Prosecutor's Office and gave instructions for its return. On 12 September 1997 the case file was transmitted to the District Prosecutor's Office. 8

14. By a letter of 19 September 1997 the applicant's lawyer complained to the Regional Prosecutor's Office of the delays in the proceedings and stated that he had been unable to obtain detailed information about the accusation and had been refused access to the case file. He also requested the removal of the district prosecutor. 9

On 25 September 1997 that request was transmitted with the case file to the Regional Prosecutor's Office. On 1 October 1997 it was dismissed and the case file was sent back to the District Prosecutor's Office. 10

15. On 6 October 1997 the District Prosecutor's Office decided to reclassify the proceedings as an ordinary investigation and not a summary investigation. On 8 October 1997 the case was assigned to an investigator with instructions to treat it as urgent in view of the fact that the accused was remanded in custody. 11

16. Between 10 October 1997 and 8 December 1997 the investigator questioned the applicant twice, summoned three witnesses, requested information from the National Bank about the exchange rates of certain currencies, appointed an expert to assess the value of the stolen objects, and brought charges against the applicant's sister, Ms K., who had allegedly aided the applicant in selling the stolen objects. 12

17. The period after 8 December 1997 was taken up by procedural steps and efforts to clarify the exact number, weight, quality and value of certain missing pieces of jewellery, the difficulty being that there were discrepancies between the descriptions given by the applicant and by the owner. 13

18. On 21 January 1998 the investigator put an additional question to the expert. 14

19. On 30 January 1998 the investigator reformulated the charges against the applicant, notified him accordingly and questioned him briefly. On 5 February 1998 the investigator concluded his work on the case and transmitted the file to the District Prosecutor's Office. 15

20. On 26 February 1998 the District Prosecutor's Office referred the case back to the investigator, instructing him to 16

appoint another expert to assess the value of the jewellery and to amend the charges. On 23 March 1998 the investigator appointed an expert. On 27 March 1998 the investigator amended the charges against the applicant and his sister, notified them accordingly and questioned them briefly.

21. On 23 March 1998 the investigator requested an extension of time in which to complete the investigation. The request, which was submitted through the District Prosecutor's Office, was transmitted to the Regional Prosecutor's Office on 30 March 1998. It appears that the case file was attached. The request was granted and the case file returned on an unspecified date at the beginning of April 1998. 17

22. On 14 May 1998 an indictment was submitted to the District Court. On 27 July 1998 the District Court sent the case back to the prosecutor for further investigation. 18

On 19 August 1998 the prosecutor, considering that the value of the stolen objects was lower than that initially indicated, terminated the criminal proceedings as regards the excess and lodged a fresh indictment. The District Court listed the case for hearing on 19 December 1998. The parties have not informed the Court of any further developments. 19

B. The applicant's detention pending trial 20

23. The applicant was arrested on 22 August 1997. On 23 August 1997 he was brought before an assistant investigator who charged him and decided that he should be remanded in custody. The detention order, which was made on the basis that the applicant was charged with a serious offence, stated that there existed a danger of the applicant's absconding or committing offences, without providing reasons. It was either authorised in advance or approved on the same day by a prosecutor. 21

On 25 August 1997 the applicant appointed a lawyer to represent him. 22

1. The first appeal against detention 23

24. On 3 September 1997 the applicant's lawyer prepared an appeal to the Plovdiv District Court against his client's detention pending trial. The appeal was submitted through the District Prosecutor's Office, as required by Article 152a § 2 of the Code of Criminal Procedure. 24

There is a dispute between the parties as to the date on which the appeal was actually submitted to the District Prosecutor's Office. The applicant maintains that the appeal was handed over to the duty prosecutor on 3 September 1997 who, in accordance with the usual practice, transmitted it to the clerical staff without registering it himself. According to the Government, the date on which the appeal was registered, 8 September 1997, should be considered as the date of its submission, there being no proof that it had been submitted earlier. 25

25. On 15 September 1997, having established that his appeal against the applicant's detention had not arrived at the District Court, the applicant's lawyer submitted another copy thereof directly to the District Court. 26

26. On 16 September 1997 the District Prosecutor's Office transmitted the applicant's appeal against his detention to the District Court. On the same day a judge at the District Court listed the case for hearing on 19 September 1997. The applicant's lawyer was summoned by telephone on the same day. 27

27. The District Court held a hearing on 19 September 1997 in the presence of the applicant, his lawyer and a prosecutor. 28

The prosecutor stated that the appeal should be rejected on formal grounds as it had been submitted after the expiry of the seven-day time-limit under Article 152a § 1 of the Code of Criminal Procedure. 29

The applicant's lawyer explained that he had been refused access to the case file, which had prevented him from preparing the appeal on time. 30

28. By a decision of 19 September 1997 the District Court rejected the appeal. Noting that the appeal was dated 3 September 1997 whereas the decision to detain the applicant had been taken and notified to him on 23 August 1997, and observing that the applicant had authorised a lawyer to represent him on 25 August 1997, the court found that the appeal had been submitted after the expiry of the relevant seven-day time-limit and was inadmissible. 31

The District Court further stated that there had been "no change of circumstances" within the meaning of Article 152a § 4 of the Code of Criminal Procedure (see paragraph 40 below). 32

2. The second appeal against detention 33

29. On an unspecified date between 2 and 11 February 1998 the applicant's lawyer submitted through the District Prosecutor's Office a second appeal against his client's detention pending trial. He stated *inter alia* that the applicant had admitted the theft, had directed the police to the stolen objects and had been co-operative. Also, there was no danger of his absconding because he had a wife and a young child, and no danger of his committing offences because he had no previous convictions and had shown remorse for his acts. The lawyer further stated that the relevant facts had already been established and that the applicant was not responsible for the prosecution's difficulties in determining the exact value of the jewellery, such that there was no justification for his continuing detention. 34

30. The lawyer, who had been appointed by the applicant in October 1997 to replace his previous lawyer, did not indicate his address and telephone number on the appeal papers. The parties have not clarified whether this information appeared on other documents in the case file. 35

31. On 11 February 1998 the appeal was transmitted to the District Court. By an order made on Friday, 13 February 1998 the Court listed the matter for hearing on Monday, 16 February 1998 at 9.00 a.m., and summoned the applicant in person and the prosecutor. The applicant was summoned through the prison authorities. 36

32. On 16 February 1998 the District Court heard the applicant and the prosecutor. The applicant's lawyer was not present. The applicant stated that he had admitted the offence, he had a seven-month old child and wanted to preserve his family. He explained that at the time of the theft he had been suffering from depression due to financial problems. 37

The District Court refused to release the applicant. It noted that the charges against him concerned a serious wilful offence punishable by a period of three to fifteen years' imprisonment and that Article 152 § 1 of the Code of Criminal Proceedings required that persons accused of offences of that category be remanded in custody. Furthermore, the investigation was still pending and there, therefore, existed a danger of his absconding or seeking to pervert the course of justice. The fact that the applicant had made a full confession did not affect in any way the question whether he should be remanded in custody. The court further stated that the applicant's argument concerning his family could not serve as a ground for his release and added that he should have thought about his family before committing the offence. 38

3. The third appeal against detention and the applicant's release 39

33. On 1 April 1998 the applicant submitted through the District Prosecutor's Office a third appeal against his detention pending trial. On 8 April 1998 the District Prosecutor's Office transmitted the appeal to the District Court. 40

34. The District Court heard the appeal on 13 April 1998 in the presence of the applicant and his lawyer. The prosecutor stated that the applicant should be released. 41

The District Court decided to release the applicant on bail. It noted that he had a permanent address, had not obstructed the investigation, and did not have a criminal record. The District Court further stated that the investigator had expressed the opinion that the applicant's detention pending trial "had produced its effects". Furthermore, there was no danger of his perverting the course of justice because the investigation had been concluded and no danger of absconding in view of his family situation. 42

35. The applicant gave a recognizance and was released on an unspecified date in April 1998. 43

4. Correspondence in 1998 between the courts and the Bar Association in Plovdiv regarding access to case files 44

36. The applicant produced copies of correspondence in January and March 1998 from the presidents of the Plovdiv District Court and of the Plovdiv Regional Court to the local Bar Association, apparently in reaction to complaints by lawyers of an existing practice of barring access to case files in cases concerning appeals against pre-trial detention. 45

The president of the District Court acknowledged that the complaints were well-founded and stated, *inter alia*, that, "[r]egrettably, District Court judges rely on the hitherto prevailing practice and do not share my opinion ..." 46

The president of the Regional Court informed the Bar Association that the matter had been discussed at length and that the judges had agreed that, contrary to the opinion of the Chief Public Prosecutor's Office and the Regional Prosecutor's Office in Plovdiv, there were no legal grounds for refusing access to case files in appeals against detention proceedings. 47

II. RELEVANT DOMESTIC LAW AND PRACTICE 48

A. Arrest and detention pending trial 49

37. At the relevant time and until the reform of 1 January 2000 an arrested person was brought before an investigator who decided whether or not the accused should be remanded in custody. The investigator's decision was subject to approval by a prosecutor. 50

The role of investigators and prosecutors under Bulgarian law has been summarised in paragraphs 25-29 of the Court's *Nikolova v. Bulgaria* judgment ([GC], no. 31195/96, ECHR 1999-II). 51

38. The legal grounds for detention pending trial were set out in paragraphs 1 and 2 of Article 152 of the Code of Criminal Procedure, which, as worded at the material time, provided as follows: 52

"(1) Detention pending trial shall be ordered [in cases where the charges concern] a serious wilful offence. 53

(2) In cases falling under paragraph 1 [detention pending trial] may be dispensed with if there is no danger of the accused's absconding, obstructing the investigation, or committing further offences." 54

According to Article 93 § 7 of the Penal Code a "serious" offence is one punishable by more than five years' imprisonment. 55

39. The Supreme Court's practice at the relevant time (which has since become obsolete as a result of the amendments in force since 1 January 2000) was to construe Article 152 § 1 of the Code of Criminal Procedure as requiring that a person charged with a serious wilful offence had to be remanded in custody. An exception was only possible, in accordance with Article 152 § 2, where it was clear and beyond doubt that any danger of absconding or reoffending was objectively excluded, for example, if the accused was seriously ill, elderly, or already detained on other grounds, such as serving a sentence (Decision no. 1 of 4 May 1992, case no. 1/92, II Chamber, Bulletin 1992/93, p. 172; Decision no. 4 of 21 February 1995, case no. 76/95, II Chamber; Decision no. 78 of 6 November 1995, case no. 768/95, II Chamber; Decision no. 24, case no. 268/95, I Chamber, Bulletin 1995, p. 149). 56

B. Appeals against detention pending trial 57

40. Article 152a of the Code of Criminal Procedure, as in force at the relevant time, provided as follows: 58

"(1) The detained person shall be provided immediately with a possibility to file an appeal to a judge at the competent court[1] against the [order for his detention pending trial], not later than seven days after [the detention order]. The judge shall summon the parties and decide at a hearing in open court not later than three days following the receipt of the appeal at the court. 59

(2) The appeal shall be lodged with the body that ordered the detention. On the day it is lodged, the appeal, accompanied by the [detention order] and all materials in the case, shall be transmitted to the court. 60

(3) The court shall deliver a decision which is not subject to appeal. The court shall either quash the detention order and impose another measure of control [of the accused] or dismiss the appeal. 61

(4) In the event of a change of circumstances the detained person may lodge a fresh appeal to the court against the [detention order]." 62

41. According to the Supreme Court's practice at the relevant time, it was not open to the courts, when examining appeals against detention pending trial, to assess whether there existed sufficient evidence to support the charges against the detainee. The courts must only examine the lawfulness of the detention order (Decision no. 24 of 23 May 1995, case no. 268/95, I Chamber, Bulletin 1995, p. 149). 63

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 1 (c) AND 3 OF THE CONVENTION 64

42. The applicant complained that upon his arrest he had not been brought before a judge or other officer exercising judicial power and that he had been deprived of his liberty without justification from the outset and for an unreasonably lengthy period. He relied on Article 5 §§ 1 and 3 of the Convention which provide, insofar as relevant: 65

"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: 66

... 67

(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... 68

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." 69

A. The parties' submissions 70

43. The applicant stated that upon his arrest he had only been heard by an assistant investigator and that in any event assistant investigators, investigators and prosecutors could not be regarded as independent judicial officers. He referred to the case of *Assenov and Others v. Bulgaria* (judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII). 71

44. He submitted that a careful analysis of the relevant facts by the domestic authorities would have led them to conclude that there was no danger of him absconding or committing offences. He was married and had a child who was two months old at the time of the arrest. He did not have a criminal record, he had a job and was of a good character. When arrested he had admitted the theft and had actively assisted the police in recovering the stolen jewellery. Furthermore, the authorities had failed to take into account the fact that, though in possession of a considerable sum of money, the applicant had not attempted to abscond after learning that the theft had been discovered. The authorities' formalistic approach had been the consequence of Article 152 §§ 1 and 2 of the Code of Criminal Procedure and the Supreme Court's practice, which were incompatible with the Convention. 72

45. The applicant invited the Court to compare the reasons given in the District Court's decision of 13 April 1998 ordering his release on bail with those in that court's earlier decision of 16 February 1998 refusing bail. On 13 April 1998 the District Court had ordered the applicant's release on bail because: i) he had a permanent address; ii) he had not obstructed the investigation; iii) he did not have a criminal record; iv) he had a wife and a young child; and v) the preliminary investigation had been completed. The applicant stated that all but the last of those relevant facts had remained unchanged since the date of his arrest. The investigation had been practically completed after the initial interviews. However, the applicant had remained in detention. In his view, in reality, as evidenced by certain remarks contained in the District Court's decisions, his detention pending trial had been seen as a form of punishment. 73

46. The applicant also stated that the length of his detention pending trial was attributable to the authorities. Analysing the Government's arguments in this respect, he pointed out that the stolen objects had been retrieved and the applicant questioned within the first two days following his arrest (on 22 and 23 August 1997). Thereafter there had been a period of complete inactivity until October 1997, as the authorities had hesitated about the legal classification of the offence and, as a result, about the competence of the District Prosecutor's Office to deal with the matter. Furthermore, it appeared that the case file had been with the expert appointed to assess the value of the stolen jewellery for three months. 74

47. The Government submitted that the assistant investigator who ordered the applicant's detention was an "officer authorised by law to exercise judicial power" because he was independent of the executive and the parties to the proceedings. He was dependent on the prosecutor who supervised his work. However, under Bulgarian law, investigators and prosecutors formed part of the judicial branch of government. Furthermore, the assistant investigator had examined all arguments militating for or against detention. The fact that his decision had been subject to approval 75

by an investigator and a prosecutor had no impact on his independence.

48. As regards the lawfulness of the applicant's detention and the justification for it, the Government stated that there had been reasonable grounds for suspecting the applicant of an offence and that the possibility of his absconding or committing offences had not been excluded, as required by Article 152 §§ 1 and 2 of the Code of Criminal Procedure and the Supreme Court's practice at the relevant time. Under those provisions, in cases of "serious offences", there was a presumption that the accused might, as a result of being charged, abscond or commit an offence. Therefore, detention pending trial had been the rule in such cases. A derogation, as provided for under Article 152 § 2 of the Code, had only been possible in circumstances in which even the remotest danger of the accused's absconding, obstructing justice, or committing an offence could be eliminated on the ground, for example, of his or her being seriously ill, elderly, or in custody for other reasons. 76

49. The Government also noted that, in its decision of 16 February 1998, the District Court had examined all the arguments and found that there were no circumstances excluding all danger of the applicant's absconding, obstructing justice or committing offences. In the Government's view, the reasons given to justify the applicant's detention had therefore been relevant and sufficient, as required by the Convention and the Court's case-law. 77

50. The Government further submitted that criminal proceedings could be expedited provided it does not affect their effectiveness and fairness. In the applicant's case the Bulgarian authorities had proceeded with due diligence and with reasonable expedition. In particular, stolen objects had had to be retrieved from four people. The investigator had questioned sixteen witnesses, interrogated the applicant and his sister on nine occasions, and ordered three consecutive expert reports on the value of the stolen jewellery. That had been necessary in view of discrepancies in the testimony of several witnesses about the type, quality and weight of the gold jewellery. Furthermore, the case file had had to be transmitted on several occasions between the District Prosecutor's Office, the Regional Prosecutor's Office and the District Court due to hesitation on the exact legal classification of the offence and because of the applicant's appeals and complaints. 78

B. The Court's assessment 79

51. The Court proposes to examine the applicant's complaints in the order in which the procedural steps on his arrest and detention were taken. 80

1. Alleged violation of the right to be brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention. 81

52. The Court recalls that in the above mentioned *Assenov and Others* and *Nikolova* judgments, which concerned the system of detention pending trial as it existed in Bulgaria until 1 January 2000 (see paragraph 37 above), it found that neither investigators before whom accused persons were brought, nor prosecutors who approved detention orders, could be considered to be "officer[s] authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention (see, as another recent authority, *H.B. v Switzerland*, no. 26899/95, 5 April 2001, unreported). 82

53. The present case also concerns detention pending trial before 1 January 2000. The applicant was brought before an assistant investigator who did not have power to make a binding decision to detain him. In any event, neither the assistant investigator nor the prosecutor who authorised the detention were sufficiently independent and impartial for the purposes of Article 5 § 3, in view of the practical role they played in the prosecution and their potential participation as a party to the criminal proceedings. The Court refers to its analysis of the relevant domestic law contained in its *Nikolova* judgment (see §§ 28, 29 and 45-53 of that judgment). 83

54. It follows that there has been a violation of the applicant's right to be brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention. 84

2. Alleged violation of Article 5 § 1 of the Convention 85

55. The applicant submitted that his detention did not fall under Article 5 § 1(c) of the Convention as there had been no danger of him absconding or committing an offence. 86

The Government considered that the applicant's detention had been lawful and necessary throughout. 87

56. It is undisputed that at the time of the applicant's arrest there were reasonable grounds for suspecting him of having 88

stolen money and jewellery of not inconsiderable value and that the arrest was effected in accordance with domestic law. Further, there has been no allegation of arbitrariness.

Therefore, the applicant's detention fell within paragraph 1 (c) of Article 5 of the Convention and was lawful. It follows that there has been no violation of Article 5 § 1. 89

3. Alleged violation of the right to trial within a reasonable time or to release pending trial in accordance with Article 5 § 3 90

57. The applicant was arrested on 22 August 1997. On 13 April 1998 his third appeal against detention was allowed. He gave a recognizance and was released on an unspecified date in April 1998. The relevant period is therefore approximately seven months and three weeks. 91

58. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see *Labita v. Italy* [GC], no. 26772/95, §§ 152 and 153, ECHR 2000-IV). 92

59. In the case of *Ilijkov v. Bulgaria* (no. 33977/97, 26 July 2001, unreported) , the Court observed that the authorities had applied law and practice establishing a presumption that detention pending trial was always necessary in cases where the sentence faced went beyond a certain threshold of severity. The presumption was only rebuttable in very exceptional circumstances where even a hypothetical possibility of absconding, reoffending or collusion was excluded, due to serious illness or other exceptional factors. It was moreover incumbent on the detained person to prove the existence of such exceptional circumstances, failing which he was bound to remain in detention pending trial throughout the proceedings. The above principles were based on Article 152 §§ 1 and 2 of the Code of Criminal Procedure, as worded at the material time, and the Supreme Court's practice at that stage. 93

60. The Court observes that at the time of the applicant's detention those provisions were still in force and the same practice prevailed, as the Government have confirmed (see paragraphs 38, 39 and 48 above). The Court must nevertheless examine whether those provisions and practice, which were clearly incompatible with Article 5 § 3 of the Convention (see *Ilijkov*, cited above, §§ 84-87), were actually applied in the instant case. 94

61. The competent authorities' decisions on the applicant's detention pending trial until 13 April 1998 were based in substance on the fact that he had been charged with a serious offence within the meaning of the relevant law and that the investigation was pending (see paragraphs 23 and 32 above). 95

62. There were, however, other factors that were highly relevant when it came to determining whether a danger of absconding, reoffending or collusion existed: the charges concerned a non-violent offence, the applicant had not attempted to abscond after learning that the theft was under investigation, he did not have a criminal record, he had a wife and a two-month old child and had returned the stolen money and the available jewellery (see paragraphs 10 and 11 above). Against that background, the applicant's explanation that he had acted on impulse and would not therefore commit an offence if released was arguable and at very least warranted examination. Furthermore, most of the relevant circumstances had been established at the beginning of the investigation. The fact that thereafter the investigators' efforts had concentrated on assessing the quantity and value of the stolen jewellery clearly meant that there was little or even no danger of collusion (see paragraphs 11 and 17 - 21 above). 96

63. The District Court eventually recognised the relevance of the above facts and ordered the applicant's release on 13 April 1998 (see paragraph 34 above). 97

64. However, those facts had obtained long before that date. They constituted obvious and compelling reasons for the authorities to consider releasing the applicant well before 13 April 1998, but were disregarded by the assistant investigator and the prosecutor, who ordered the applicant's detention pending trial in August 1997 and by the District Court, which refused to release him on 16 February 1998. Moreover, in its decision of 16 February 1998 the District Court dismissed some of the most important facts as irrelevant (see paragraphs 10, 11, 23, 28, 29 and 32 above). That was apparently as a result of Article 152 §§ 1 and 2 of the Code of Criminal Procedure and the relevant practice at the time. The authorities relied solely on a statutory presumption based on the gravity of the charges which shifted to the accused the burden of proving that there was not even a hypothetical danger of absconding, reoffending or collusion (see paragraph 48 above). 98

65. The Court thus considers that, as in the *Ilijkov* case, the applicable law and the authorities' approach resulted in them failing to consider concrete facts that were relevant to the determination whether there was a danger of the applicant's absconding or committing offences. They thus prolonged his detention on grounds that cannot be regarded as sufficient. The applicant's detention pending trial for a period lasting seven months and three weeks was not, therefore, justified. It follows that it is not necessary to examine whether the authorities displayed the special diligence required in the handling of criminal proceedings against remand prisoners. 99

66. The Court is not unmindful of the fact that the majority of length-of-detention cases decided in its judgments concern longer periods of deprivation of liberty and that against that background seven months and three weeks may be regarded as a relatively short period in detention. Article 5 § 3 of the Convention, however, cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain minimum period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. That has not happened in this case. 100

67. The Court thus finds that there has been a violation of the applicant's right under Article 5 § 3 of the Convention to trial within a reasonable time or to release pending trial. 101

II. ALLEGED VIOLATIONS OF ARTICLE 5 § 4 OF THE CONVENTION 102

68. The applicant complained that his lawyer did not have access to the case file, that his first appeal against detention was not dealt with promptly and was not examined on the merits and that his second appeal against detention was examined in the absence of his lawyer and was not dealt with speedily. 103

Article 5 § 4 of the Convention provides: 104

"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." 105

A. The parties' submissions 106

69. The applicant stated that the usual practice was for lawyers and accused persons to be refused access to the case file during the preliminary investigation, allegedly to ensure that information obtained in the investigation remained confidential. The applicant's lawyer had made unsuccessful attempts to see the case file and had complained in writing. Referring to the reality of a lawyer's everyday work, the applicant objected to the Government's insistence on the presentation of duly registered written requests as proof of his lawyer's attempts to gain access to the case file. The fact that neither the authority to act which the applicant had given to his lawyer on 25 August 1997 nor his first appeal against detention bore any reference to the file number of the investigation demonstrated, in his submission, that even that information had been inaccessible. 107

70. Further, the applicant submitted that Article 5 § 4 of the Convention required not only that the person detained be able to "take proceedings" but also that the lawfulness of his or her detention "be decided" in those proceedings. However, the District Court had rejected his first appeal, thus neglecting its duty to examine whether his continuing detention had been lawful. The District Court had considered that the relevant law imposed a seven-day time-limit for the lodging of an appeal against detention. In the applicant's view, that provision should have been interpreted as requiring the authorities to secure, within seven days, an opportunity for the person detained to appeal. By construing that provision as it did, as a limitation on the right of prisoners to challenge the lawfulness of their detention, the District Court had adopted an approach that ran foul of the guarantees of Article 5 § 4. 108

In particular, the applicant maintained that after the District Court's decision of 19 September 1997 he could not submit a new appeal against his detention unless there were a change of circumstances. In practice, as a result of Article 152 § 1 of the Code of Criminal Procedure, which established the principle that anyone charged with a "serious" offence should be detained, a second appeal would only have been possible and likely to succeed if the legal classification of the charges was modified. 109

71. The applicant also complained that his first appeal against detention had not been examined speedily. The appeal had been handed by his lawyer on 3 September 1997 to the duty prosecutor who, in accordance with usual practice, had handed it to the clerical staff. They had registered it on 8 September 1997. It was not until 16 September 1997, however, that the Prosecutor's Office had transmitted the appeal to the competent court, which had listed it for hearing 110

on 19 September 1997.

72. As regards the examination of his second appeal against detention, the applicant submitted that his lawyer had not been summoned and that he had not had sufficient time to contact him: the hearing had been listed for 9.00 a.m. on a Monday, with the applicant, who was in prison, being informed on the previous Friday. He had not requested an adjournment as he had been eager to secure his release. 111

73. Addressing the applicant's complaint that he had been denied access to the case file, the Government stated that it should be dismissed as unproven in the absence of copies of registered written requests for such access. 112

74. The Government further maintained that the decision of the District Court to reject the appeal as being out of time had been in conformity with Article 152a § 1 of the Code of Criminal Procedure. Following the rejection of his appeal, it had been open to the applicant to submit a fresh appeal whenever there was a change of circumstances. The Government stated, without referring to judicial practice, that the very fact that the detention had continued could qualify as a "change of circumstances". Furthermore, the applicant could have relied on the direct applicability of the Convention in Bulgarian law to appeal. The Government concluded that the applicant could have submitted a second appeal against his detention immediately after the rejection of his first appeal, but had failed to do so. 113

75. The Government also considered that the applicant's first appeal against detention had been dealt with promptly. It had been submitted on 8 September 1997, at which point the case file had been with the Regional Prosecutor's Office for a decision on the legal classification of the charges. The case file had been returned to the District Prosecutor's Office on 12 September 1997 and on 16 September 1997 the appeal had been transmitted to the District Court, which had immediately listed the case for hearing on 19 September 1997. 114

76. As regards the applicant's second appeal against detention, the Government maintained that it had been examined promptly and that the only reason the applicant's lawyer had not been summoned was that he had failed to indicate his address and telephone number. The District Court had summoned the applicant who could have contacted his lawyer. Furthermore, the applicant had not requested an adjournment of the hearing to allow his lawyer to attend. 115

B. The Court' assessment 116

1. Access to the case file 117

(a) General principles 118

77. 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. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required. In view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial. 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, in the sense of the Convention, of his client's detention. The concept of lawfulness of detention is not limited to compliance with the procedural requirements set out in domestic law but also concerns the reasonableness of the suspicion grounding the arrest, the legitimacy of the purpose pursued by the arrest and the justification of the ensuing detention. 119

The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer (see, among other authorities, *Lamy v. Belgium*, judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29, *Nikolova,* cited above, § 58, and *Garcia Alva v. Germany*, no. 23541/94, 13 February 2001, unreported, §§ 39-43). 120

(b) Application of those principles to the present case 121

78. In the present case the Government did not claim that the applicant's lawyer had seen the case file but stated that there was insufficient proof of his having attempted to do so. 122

79. The Court observes that at the relevant time it was the Plovdiv District Court's prevailing practice to refuse access to case files in appeals against detention pending trial (see paragraph 36 above). On 19 September 1997 the applicant's lawyer filed written complaints insisting that he should be allowed to consult the case file, which he repeated orally at the hearing before the District Court (see paragraphs 14 and 27 above). On the basis of the above the Court finds it established that the applicant's lawyer was refused access to the case file at least up to and including 19 September 1997, the day on which the first appeal against detention was heard. 123

80. The Plovdiv District Court's practice refusing access appears to have concerned the full case file. The applicant's lawyer was thus unable to study any of the documents that were essential for determining the lawfulness of his client's detention, including, in this particular case, those relevant to questions of admissibility, such as whether or not there had been a "change of circumstances" since the applicant's arrest (see paragraph 40 above). At the same time the prosecutor, who supervised the investigation, had authorised the making of the detention order of 23 August 1997 and opposed the appeal against it, had the advantage of full knowledge of the file. The resulting situation was incompatible with the equality-of-arms requirement of Article 5 § 4 of the Convention. 124

81. The Court finds, therefore, that there has been a violation of Article 5 § 4 of the Convention in that the applicant's lawyer was refused access to the case file. 125

2. The rejection of the applicant's first appeal against detention 126

82. The Court considers that it is not necessary to determine the correct interpretation of the seven-day period under Article 152a of the Code of Criminal Procedure or to decide whether the applicant submitted his first appeal against detention on 3 or 8 September 1997. It need only note that Article 152a was construed by the competent authorities as laying down a time-limit for the submission of appeals and that as of 3 September 1997 that time-limit had expired. 127

Since the first appeal against detention was thus out of time, the Court considers that the complaint that it was not examined speedily does not require separate examination. 128

83. The essence of the applicant's complaint lies instead in his criticism of the seven-day time-limit and the manner in which it was applied in his case. 129

84. The Court has held in the context of Article 6 § 1 of the Convention, including its criminal limb, that the right of access to a court by its very nature calls for regulation by the State and may be subject to limitations. Nevertheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will violate the Convention if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Golder v. the United Kingdom* , judgment of 21 February 1975, Series A no. 18, pp. 18-20, §§ 38-40, *Levages Prestations Services v. France*, judgment of 23 October 1996, *Reports* 1996-V, p. 1543, § 40, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports* 1997-VIII; *Edificaciones March Galego S.A. v. Spain*, judgment of 19 February 1998, *Reports* 1998-I, p. 290, § 34; *Khalfaoui v. France*, no. 34791/97, §§ 35 and 36, ECHR 1999-IX; *Krombach v. France,* no. 29731/96, ECHR 2001-II). Time-limits are in principle legitimate limitations on the right to a court under Article 6 § 1 of the Convention but their particularly strict interpretation in disregard of relevant practical circumstances may result in a violation of that provision (see *Miragall Escolano and Others v. Spain*, no. 38366/97, §§ 33-39, ECHR 2000-I). 130

85. The Court considers that Article 5 § 4 of the Convention, which also enshrines a "right to a court", cannot be read as providing for an absolute right incompatible with any procedural limitations. Nonetheless, the underlying purpose of Article 5, the protection of the individual's liberty and security, and the significance of its safeguards, including the right under paragraph 4, for the protection of the individual's life and physical integrity (see *Kurt v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, p. 1185, § 123) require by implication that procedural limitations on the right of a person deprived of his liberty to challenge the lawfulness of his continuing detention before a court must be subject to a particularly strict scrutiny. The practical realities and specific circumstances of the detained person's position must be taken into consideration (see *ÿonka v. Belgium*, no. 51564/99, §§ 53-55, ECHR 2002-I). 131

86. In the present case, it is true that the applicant was legally represented from the third day after his arrest and could in any event have submitted an appeal in time without the assistance of a lawyer. The Court observes, however, that his lawyer was not provided access to the case file which undoubtedly hampered the preparation of an appeal in time. 132

87. Furthermore, the Court notes that when his first appeal against detention came up for examination by the District Court on 19 September 1997, the applicant's deprivation of liberty - which had already lasted for nearly a month -, had not yet been reviewed by an independent judicial officer. That was the consequence of the defective system of arrest and detention that remained in force in Bulgaria until 1 January 2000, which violated the first limb of Article 5 § 3 of the Convention (see paragraphs 52-54 above). The rejection of the applicant's appeal on 19 September 1997 thus prolonged the continuing violation of Article 5 § 3 of the Convention. Nonetheless, the Court must also examine the impugned decision under paragraph 4 of Article 5 as the guarantee afforded by that provision is of a different order from, and additional to, that provided by paragraph 3 (see *de Jong, Baljet and van den Brink v. the Netherlands*, judgment of 22 May 1984, Series A no. 77, pp. 25-26, § 57). 133

88. Paragraph 4 enshrines a procedural safeguard against, *inter alia*, continuation of detention which, albeit initially lawfully ordered, may have later become unlawful and unjustified. In particular, the rationale underlying the requirements of speediness and periodic judicial review at reasonable intervals within the meaning of Article 5 § 4 and the Court's case-law is that a detainee should not run the risk of remaining in detention long after the moment when his deprivation of liberty has become unjustified (see, as regards detention falling under paragraph 1 (c) of Article 5, *Bezicheri v. Italy*, judgment of 25 October 1989, Series A no. 164, Series A no. 114 and, as regards other types of deprivation of liberty, *Weeks v. the United Kingdom*, judgment of 2 March 1987, *Musial v. Poland* [GC], no. 24557/94, ECHR 1999-II, and *Stafford v. the United Kingdom* [GC], no 46295/99, ECHR 2002-IV). 134

89. In the present case, following the rejection of his first appeal on 19 September 1997 the applicant could have tried to submit a new appeal arguing a "change of circumstances" . However, the precise meaning of the "change of circumstances" requirement set out in Article 152a § 4 of the Code of Criminal Procedure was unclear. It appears that there was no established practice. The District Court's decision was not reasoned (see paragraphs 28, 40, 72 and 76 above). The relevant law and practice and the decision of the District Court of 19 September 1997 thus left unclear what the consequences of the rejection of the first appeal for being out of time were. The applicant had no way of knowing how much longer he had to remain in custody before he could obtain a judicial examination of the lawfulness of his detention. In the instant case, that issue was not examined until February 1998, approximately five months later. It is not possible to speculate whether an earlier second appeal would have been examined. 135

90. Having regard to all the relevant facts and, in particular, the lack of clarity in domestic law and practice as to the effect of the seven-day time-limit, the Court finds that the exercise of the applicant's right under Article 5 § 4 of the Convention has been unduly impaired. It follows that there has been a violation of Article 5 § 4 of the Convention on account of the rejection of the applicant's first appeal against detention. 136

3. Remaining complaints under Article 5 § 4 137

91. The applicant complained that his lawyer had not been summoned for the examination of the second appeal against detention and that that appeal had not been dealt with speedily. 138

92. The Court observes that the applicant's lawyer has not substantiated the date on which he filed the second appeal against his client's detention and that he did not indicate his address and telephone number in the appeal papers. In these circumstances the above complaints are unfounded. 139

93. It follows that there has been no violation of Article 5 § 4 in respect of the examination of the applicant's second appeal against detention. 140

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION 141

… 142

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 3 of the Convention in that upon his arrest the applicant was not brought before a judge or other officer exercising judicial power; 143

2. *Holds* that there has been no violation of Article 5 § 1 of the Convention; 144

3. *Holds* that there has been a violation of Article 5 § 3 of the Convention in respect of the length and lack of justification for the applicant's detention pending trial; 145

4. *Holds* that there has been a violation of Article 5 § 4 of the Convention in that the applicant's lawyer was refused access to the case file; 146

5. *Holds* that there has been a violation of Article 5 § 4 of the Convention in respect of the rejection of the applicant's first appeal against detention; 147

6. *Holds* that there has been no violation of Article 5 § 4 of the Convention in respect of the examination of the applicant's second appeal against detention; 148

7. *Holds* 149

(a) that the respondent State is to pay 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 the national currency of the respondent State at a rate applicable at the date of settlement: 150

(i) EUR 1,500 (one thousand and five hundred euros) in respect of non-pecuniary damage; 151

(ii) EUR 2,000 (two thousand euros) in respect of costs and expenses; 152

(iii) any tax that may be chargeable on the above amounts; 153

(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; 154

8. *Dismisses* the remainder of the applicant's claim for just satisfaction. 155

… 156

[1.] An amendment which entered into force on 24 October 1997 replaced the words "a judge at the competent court" by the words "the competent first instance court".