CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

CASE OF DEMEBUKOV v. BULGARIA

(Application no. 68020/01)

JUDGMENT

STRASBOURG

28 February 2008

FINAL

07/07/2008

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

In the case of Demebukov v. Bulgaria,

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

Peer Lorenzen, *President,*
Snejana Botoucharova,
Karel Jungwiert,
Rait Maruste,
Javier Borrego Borrego,
Renate Jaeger,
Mark Villiger, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 29 January 2008,

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

PROCEDURE

1. The case originated in an application (no. 68020/01) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Georgi Borisov Demebukov ("the applicant") who was born in 1947 and lives in Plovdiv, on 5 October 2000.

2. The applicant was represented by Ms I. Loulcheva, a lawyer practising in Sofia.

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

4. The applicant alleged that he had been denied a fair trial as a result of having been tried in *absentia* and then having been refused a reopening of the proceedings once he had found out about the judgment against him.

5. On 13 October 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The preliminary investigation

6. The applicant owned a house in the village of Brod where he resided at the time of the events.

7. On 18 September 1997 the cables supplying the village with electricity were stolen.

8. On 2 October 1997 a preliminary investigation was opened against the applicant and two other individuals for the theft of the electricity cables.

9. On 15 October 1997 the applicant, assisted by a lawyer, was charged with the theft of the electricity cables and a restriction was imposed on him not to leave the village of Brod without the authorisation of the public prosecutor's office.

10. The preliminary investigation was concluded on an unspecified date and the case was forwarded to the public prosecutor's office. On an unspecified date the case was remitted for further investigation.

11. On 16 January 1998 the charges against the applicant were amended; he was once again assisted by a lawyer.

12. The results of the preliminary investigation were presented to the applicant and his lawyer on 30 January 1998.

13. On an unspecified date the applicant left the village of Brod without authorisation from the public prosecutor's office. He claimed to have moved to live at an address in Plovdiv which was registered with the police and where he received his pension.

B. The court proceedings

14. On an unspecified date the public prosecutor's office entered an indictment against the applicant and his two accomplices with the Dimitrovgrad District Court for the theft of the electricity cables.

15. A copy of the indictment was sent to the applicant's address in the village of Brod, apparently by registered post with return receipt. The indictment and the receipt were returned to the District Court in their entirety and without an indication whether they had been served.

16. The first hearing before the District Court was scheduled for 22 September 1998, but was postponed, for undisclosed reasons, to 15 October 1998.

17. A summons to the first hearing was sent to the applicant's address in the village of Brod, which was returned without any indication whether it had been served. In an accompanying letter, the mayor of the village of Brod informed the District Court that the applicant was not registered as living in the village, that he had not resided there for several months and that he had moved to the city of Plovdiv.

18. At the hearing on 15 October 1998 the District Court established that the applicant had not been duly summoned because he had not received the summons. Nevertheless, at the request of the public prosecutor's office, the court decided to examine the case in his absence as it found that this would not impede the proceedings, and assigned a court-appointed lawyer to represent the applicant.

19. The second hearing was conducted on 24 November 1998; the applicant was summoned to it through his court-appointed lawyer.

20. In a judgment of 24 November 1998 the District Court found the applicant and his accomplices guilty as charged. The applicant was sentenced to three years' imprisonment.

21. No appeal was lodged against the judgment, so it became final on 28 December 1998.

22. The applicant was arrested on 9 February 1999 to serve the prison sentence, which he did until 27 April 2001.

C. The request that the case be reopened

23. On an unspecified date in 2000 the applicant requested the Supreme Court of Cassation to reopen the criminal proceedings against him. He relied on Article 362a of the Code of Criminal Procedure 1974 ("CCP": see Relevant domestic law below) and claimed that he had not been aware of the criminal trial against him. The applicant argued that even though he had been aware of the preliminary investigation against him he could not be expected to constantly follow the subsequent development of the proceedings against him. Moreover, as he had not received the indictment entered against him by the public prosecutor's office, he had been unaware that formal court proceedings had been initiated against him. The applicant also argued that once the authorities had established that he was no longer residing in the village of Brod they should have attempted to find him at his other address in Plovdiv, where they would have found him without difficulty.

24. In a judgment of 4 May 2000 the Supreme Court of Cassation dismissed the applicant's request to reopen the case. It found that the applicant had been aware of the criminal proceedings against him because he had been present, together with his lawyer, when he had been initially charged on 15 October 1997, when the charges had been amended on 16 January 1998 and also when the results of the preliminary investigation

had been presented on 30 January 1998. Moreover, he had violated the restriction order imposed on him not to leave the village of Brod without the authorisation of the public prosecutor's office and had moved to another address without informing the said authorities. Thus, the court found that the applicant had wilfully made himself unavailable to participate in the criminal proceedings against him and had lost the right to seek their reopening.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. The CCP, revoked in 2006, allowed trial *in absentia* in certain limited instances. It provided in Article 268 § 3, as in force at the relevant time, the following:

> "When it would not hamper the ascertaining of the truth, the case can be examined in the absence of the accused if:
>
> 1. [he] was not found at the address he had given or had changed it without informing the competent authorities;
>
> 2. [he] was duly summoned and had not indicated a good cause for his failure to appear."

26. When an accused was tried *in absentia*, there was a statutory requirement that he be represented by an *ex officio* counsel (Article 70 § 1 (6) of the CCP).

27. Until 1 January 2000 Bulgarian law did not provide for the reopening of criminal cases heard *in absentia*. Thereafter reopening became possible in cases where the convicted person was unaware of the criminal proceedings against him or her and had submitted a request for a reopening within a year of learning of the conviction (Article 362a of the CCP). The request was examined by the Supreme Court of Cassation (Article 363 of the CCP), which could quash the conviction and either order a rehearing of the case (Article 364 § 1 of the CCP) or discontinue or suspend the criminal proceedings (Article 364 § 2 of the CCP).

28. The Bulgarian courts' prevailing practice has been summarised in the Court's judgment in the case of *Kounov v. Bulgaria* (no. 24379/02, §§ 31-33, 23 May 2006).

29. In further judgments, the Supreme Court of Cassation stated that a convicted person cannot claim not to have been aware of the criminal proceedings against him if he had been charged with the offence in question in the course of the preliminary investigation and had had a restriction placed on him not to leave his place of residence without the authorisation of the public prosecutor's office (решение № 348 от 26.06.2000 г. по н.д. № 258/2000 г., II н.о. на ВКС; решение № 651 от 05.01.2001 г. по н.д. № 609/2000 г., II н.о. на ВКС). Moreover, it considered that it was

irrelevant whether in such instances the convicted person was actually seeking to evade justice or had simply moved to another address without having duly informed the competent authorities where he could be summoned (решение № 182 от 18.04.2001 г. по н.д. № 99/2001 г., II н.о. на ВКС).

30. The new Code of Criminal Procedure 2006 provides for the reopening of criminal cases heard *in absentia* in cases where the convicted person was unaware of the criminal proceedings against him or her, including of the conviction, and had submitted a request for a reopening of the case within six months of learning of the conviction (Article 423 § 1).

31. In the first reported case under the new rule, the Supreme Court of Cassation restated its understanding that the possibility for reopening of criminal cases heard *in absentia* aimed to restore the right of the convicted person to participate personally in the criminal proceedings, which he or she had previously been denied for reasons outside his or her control. In particular, its aim was not to be of benefit to convicted persons who had known of the criminal proceedings against them, but had belatedly learnt of their conviction because they had absconded or had avoided participating in the court proceedings (решение № 882 от 07.11.2006 г. по н.д. № 331/2006 г., I н.о. на ВКС).

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

32. The applicant complained, relying on Article 6 § 3 (b), (c) and (d) of the Convention, that he had been denied a fair trial as a result of having been tried in *absentia* and then having been being refused a reopening of the proceedings once he had found out about the judgment against him. He contended that he had learnt of the conviction only on 9 February 1999 when he had been arrested to serve the sentence of imprisonment.

The relevant parts of Article 6 of the Convention provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

A. The parties' submissions

1. The Government

33. The Government noted, at the outset, the extensive domestic case-law regarding requests for reopening of criminal proceedings conducted in *absentia* (see Relevant domestic law and practice above).

34. They also argued that it had not been possible to summon the applicant at the address he had given in the village of Brod because he had moved to another address in violation of the restriction not to leave the village without the authorisation of the public prosecutor's office, which was the most lenient restriction on his freedom of movement that could have been imposed on him. Thus, through his wilful conduct the applicant had knowingly deprived himself of the opportunity to be informed of the continuation of the criminal proceedings against him.

35. The Government further claimed that when he moved to Plovdiv the applicant had changed addresses every couple of months. They referred to the documentary evidence presented before the Supreme Court of Cassation, but not to the Court, in the procedure regarding the request for reopening, which indicated that the applicant had resided at one address from July to 19 August 1998 and at a different address thereafter. The Government claimed, therefore, that the applicant cannot be considered to have had a permanent place of residence in the town of Plovdiv where the domestic authorities could have summoned him to attend the trial stage of the criminal proceedings.

36. In conclusion, the Government considered the application inadmissible and unsubstantiated, and that it should be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicant

37. The applicant considered that the Government had failed to refute or disprove the substance of his complaint that he had been denied a fair trial. He noted that the Government had confirmed that he had never been served with the indictment entered against him or with any summons to appear before the District Court. The applicant considered therefore that his right to be personally present at the trial stage of the criminal proceedings had been

infringed by the domestic court which had examined the case in his absence. Moreover, it had failed to request the competent authorities to undertake a search for him and to look for him at his address in Plovdiv.

38. The applicant also claimed that the Government had not disputed the fact that he had not been aware that the criminal proceedings had proceeded to the trial stage. He argued in this respect, that the trial stage was the principal phase of the criminal proceedings and that being present during the preliminary investigation and knowledgeable of the charges brought against you did not entail or presuppose knowledge of a possible subsequent trial. The applicant claimed that it had not been possible for him to have followed the development of the case once it had been forwarded to the public prosecutor's office and that it had not been certain that it would definitively result in a trial, because it could, for example, have been remitted for further investigation, terminated or suspended.

39. The applicant further argued that Article 362a of the CCP provided for reopening of criminal cases heard *in absentia* in all instances where the convicted person had not been aware of any one of the stages of the proceedings in question. However, the Supreme Court of Cassation in its judgment of 4 May 2000 had found that he should be considered to have been informed of the whole criminal proceedings against him as a result of having been personally informed of the opening of the criminal proceedings against him and the charges that had been brought against him. The court did not recognise however that the District Court had failed to serve him with the indictment or the summons to appear before it and had not taken any action to find him at his address in Plovdiv.

40. In respect of the practice of the domestic courts cited by the Government, the applicant considered the decisions erroneous as they had failed to recognise the principal place of the trial stage of the criminal proceedings and to uphold the right of convicted persons to be personally present during the said phase. Moreover, he considered this to have been rectified by the Bulgarian legislator in the Code of Criminal Procedure 2006, which provides for the reopening of criminal cases heard in *absentia* where the convicted person was unaware either of the criminal proceedings or of the conviction against him or her (see Relevant domestic law and practice above).

B. Admissibility

41. The Court notes that when on 9 February 1999 the applicant learnt of his conviction he had no available domestic remedy, but that following the introduction of a remedy he requested a reopening within the statutory one-year deadline of having learned of the said conviction. The judgment in those proceedings was delivered on 4 May 2000 and the applicant introduced his application on 5 October 2000. In view of the aforesaid, the

Court has difficulties to accept that the applicant's complaint regarding the fairness of the criminal proceedings conducted *in absentia* has been submitted on time (see *Adah v. Turkey*, no. 38187/97, § 195, 31 March 2005). On the other hand, the matter is intrinsically linked to and at the heart of the assessment whether the Supreme Court of Cassation's refusal to grant him a retrial amounted to a denial of justice. Accordingly, the Court decides to join to the merits the question whether the six-month rule under Article 35 of the Convention has been complied with in respect of the applicant's complaint regarding the alleged unfairness of the proceedings conducted *in absentia*.

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

C. Merits

43. As the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, the Court will examine the complaint under both provisions taken together (see *Medenica v. Switzerland*, no. 20491/92, § 53, ECHR 2001-VI, and *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I).

1. *General principles concerning trial* in absentia

(a) Right to take part in the hearing and to obtain a new trial

44. Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 14, § 27; *Belziuk v. Poland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 570, § 37; and *Sejdovic v. Italy* [GC], no. 56581/00, § 81, ECHR 2006-...).

45. Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear

and to defend himself (see *Colozza*, cited above, p. 15, § 29; *Somogyi v. Italy*, no. 67972/01, § 66, ECHR 2004-IV; and *Sejdovic*, cited above, § 82) or that he intended to escape trial (see *Medenica*, cited above, § 55).

46. The Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved. In particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial (see *Somogyi*, § 67, and *Sejdovic*, § 83, both cited above).

(b) Waiver of the right to appear at the trial

47. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance; furthermore, it must not run counter to any important public interest (see *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66; *Sejdovic*, cited above, § 86 and *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, pp. 13-14, § 31).

48. The Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a "fugitive" (*latitante*), which was founded on a presumption with an insufficient factual basis, that he had waived his right to appear at the trial and defend himself (see *Colozza*, cited above, pp. 14-15, § 28). It has also had occasion to point out that before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003 and *Sejdovic*, cited above, § 87).

49. Furthermore, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure* (see *Colozza*, cited above, pp. 15-16, § 30). At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control (see *Medenica*, § 57 and *Sejdovic*, § 88, both cited above).

(c) Representation by counsel of defendants tried *in absentia*

50. Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrimol*, cited above, p. 14, § 34).

51. At the same time, it is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses. The legislature must accordingly be able to discourage unjustified absences, provided that any sanctions used are not disproportionate in the circumstances of the case and the defendant is not deprived of his right to be defended by counsel (see *Krombach v. France*, no. 29731/96, §§ 84, 89 and 90, ECHR 2001-II; *Van Geyseghem*, cited above, § 34; and *Sejdovic*, cited above, § 92).

52. It is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence is given the opportunity to do so (see *Van Geyseghem*, § 33, and *Sejdovic*, § 93, both cited above).

2. Application of these principles to the present case

53. In the instant case the Court notes that the applicant had been present and had been assisted by a lawyer of his own choosing when he had been initially charged with the theft of the electricity cables on 15 October 1997, when the charges had been amended on 16 January 1998 and also when the results of the preliminary investigation had been presented to him on 30 January 1998. Thus, the Court finds that the applicant was in possession of sufficient knowledge of the criminal proceedings against him and his accomplices, that they were progressing rather rapidly as the case file had been forwarded to the public prosecutor's office and, accordingly, that it was probable that he would be indicted and brought to trial.

54. Separately, when the applicant had been charged on 15 October 1997 the authorities had placed a restriction on his movements. This entailed that he should not leave the village of Brod without an authorisation from the public prosecutor's office. However, in violation of the imposed restriction and without informing the prosecuting authorities of his new address, the applicant changed his place of residence. The Court notes that there is no indication or claim that the applicant had good cause in violating the restriction order or that he had moved for reasons beyond his control. Moreover, he changed his residence relatively soon after having been presented with the results of the preliminary investigation on 30 January 1998 because he appears to have been residing in Plovdiv from July 1998 onwards at the latest (see paragraph 35 above). The Court notes

that there is disagreement between the parties as to whether the applicant had moved to live at his permanent address in the town of Plovdiv which had been registered with the police or had changed residence more than once (ibid.). In so far as the parties failed to provide documentary evidence in support of their respective claims, the Court considers that it should not give any particular weight to either of their assertions.

55. Consequently, even though the authorities had been unable to serve the applicant with the indictment against him and the summons to attend the hearings before the District Court, the latter decided to examine the case against the applicant and his accomplices in the absence of the former as it found that this would not impede the proceedings. It then assigned a court-appointed lawyer to defend the applicant and proceeded to examine the case. The District Court found the accused guilty as charged and sentenced the applicant to three years' imprisonment.

56. Subsequently, the Supreme Court of Cassation refused to reopen the criminal proceedings conducted in the absence of the applicant because it found that he had known about them and had, by violating the restriction placed on his movement and changing his place of residence without informing the public prosecutor's office, wilfully made himself unavailable to participate in the proceedings against him and had therefore lost the right to seek their reopening.

57. In the light of the circumstances taken as a whole, the Court likewise considers that through his actions the applicant had brought about a situation that made him unavailable to be informed of and to participate in, at the trial stage, the criminal proceedings against him. It refers in particular to the order restricting his freedom of movement, the most lenient restriction on his liberty which the authorities could have imposed in order to guarantee his appearance in court, and the violation of the same by the applicant soon after having been informed of the results of the preliminary investigation. Moreover, up to that stage of the proceedings he had been assisted by a lawyer of his own choosing and should reasonably have foreseen what the consequences of his conduct would be.

58. In the light of the foregoing, the Court considers that, regard being had to the margin of appreciation allowed to the Bulgarian authorities, the applicant's conviction in *absentia* and the refusal to grant him a retrial at which he would be present did not amount to a denial of justice.

59. Consequently, there has been no violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (b), (c) and (d) of the Convention.

In view of the above, the Court does not consider it necessary to decide on whether the six-month rule under Article 35 of the Convention has been complied with in respect of the applicant's complaint regarding the alleged unfairness of the proceedings conducted *in absentia*.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the question whether the six-month rule under Article 35 of the Convention has been complied with in respect of the applicant's complaint regarding the alleged unfairness of the proceedings conducted *in absentia* and, after considering the merits, does not consider it necessary to decide it;

2. *Declares* the application admissible;

3. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 28 February 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President