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CASE ZHELEZOV V. BULGARIA (application № 70560/13, judgement from 22.06.2021)

The execution of the judgement in the case *Zhelezov* is followed independently by the Department for the Execution of Judgements of the ECHR and is classified as a standard procedure.

VIOLATION ESTABLISHED BY THE COURT

The Court established that there has been a violation of Article 6, § 3 (a) and (b) together with Article 6, § 1 of the Convention – the applicant hadn't been duly and sufficiently informed about the nature of and the reasons for the charges against him, he hadn't been given enough time and opportunities to prepare his defense and he hadn't received a just hearing of the criminal charges brought against him.

REASONINGS OF THE COURT

Facts of the case

The applicant was accused of sexually assaulting (performing an act for the purpose of arousing or satisfying sexual desire, without intercourse) and later also of raping the victim. The applicant was initially tried for both crimes. But the Regional Court – Omurtag repealed the court proceedings and returned the case in its pretrial phase due to ambiguities and contradictions in the indictment. With the new indictment the applicant was brought before the courts only for committing rape under article 152, § 1 of the Criminal code. The Regional Court – Omurtag found the applicant guilty of raping the victim after rendering her helpless and sentenced him for the crime he was accused of. The guilty verdict was upheld by the District Court – Turgovishte and entered into force. The applicant filed a request for the reopening of the criminal case before the Supreme Court of Cassation. With a final judgement the Supreme Court of Cassation reopened the case and decided on its merits – it held that it was not proven that the applicant had had sexual intercourse with the victim and that rape had been committed. It held that it was not necessary for the case to be returned to the lower court instances for the gathering of new evidence and, on the grounds of article 354, § 2 (2) of the Criminal Procedure Code, amended the verdict by giving another legal qualification to the deed and found the applicant guilty of

committing another less heavily punishable crime – sexual assault (performing an act for the purpose of arousing or satisfying sexual desire, without intercourse) under article 150 of the Criminal Code. This was reasoned with the argument that the difference between the two crimes was only in the nature of the sexual contact.

Findings of the Court

The Court pointed out that Article 6, § 3 a and b of the Convention guarantees the right of the accused to be informed of the reasons for the charges against him/her, which includes the facts, on which the alleged commission of the crime is based, as well as their legal qualification. The rights under Article 6, § 3 (a) and (b) of the Convention are linked, as the right of the accused to be informed about the reasons for the charges against him/her has to be considered in the light of his/her right to duly prepare and exercise his/her defense.

In the specific case the applicant was charged with and tried before the courts for committing rape. The indictment, which determined the factual and legal basis of the charges, plays a central role in the criminal proceedings. During the court proceedings the applicant was defending himself against the accusations set forth in the indictment. The Court held that there had been no reasons for the applicant to expect that there was a possibility, much less a clear one, for the Supreme Court of Cassation to find him guilty of committing a sexual assault (performing an act for the purpose of arousing or satisfying sexual desire, without intercourse). The efforts of the parties in the court proceedings had been aimed at proving or disproving the fact that there had been a sexual intercourse and the prosecution had never aimed to prove any other violation of the physical integrity of the victim. According to the Bulgarian law sexual assault (performing an act for the purpose of arousing or satisfying sexual desire, without intercourse) and rape are separate and independent crimes with separate legal qualifications and they differ in the facts, which have to be proven in order to result in a guilty verdict. For this reason, the Court held that, by executing its powers, the Supreme Court of Cassation had undoubtedly changed the facts, upon which it had held its judgement, and therefore it had been necessary to provide the applicant with a genuine opportunity to exercise his right of defense effectively and in reasonable time. The Court emphasizes on the fact that the authorities have the obligation to pay particular attention when they inform the accused about the charges against him/her. When changing the charges the Supreme Court of Cassation did not take any additional actions – it did not postpone the court hearings for additional pleadings, nor did it give a chance for the parties to present an additional written statement. Decisive for the case was the fact that the national legislation does not include specific regulations, which guarantee that the accused has a chance to defend himself in the case of such amendment of the charges.

ANOTHER JUDGEMENTS AGAINST BULGARIA IN WHICH THE COURT FOUND THE SAME VIOLATION OF ARTICLE 6 OF THE CONVENTION

Zhelezov v. Bulgaria is not the first judgement against Bulgaria, with which such a violation is found. The judgement in *Penev v. Bulgaria* (app. 20494/04, judgement from 07.01.2010, which became final on 07.04.2010) is basically identical. In it the Court finds a violation because the Supreme Court of Cassation changed the charges against the applicant and found him guilty of another crime, which differed from the charges both in facts and in legal qualification (he was found guilty under Article 220 of the Criminal code instead of under Article 282 of the Criminal code). The elements of the alternative crime had never been discussed during the court proceedings and the applicant found about the requalification upon receiving the final judgement. The European Court finds a violation of the right of the applicant to be informed about the facts, on which the charges are based, as well as about their legal qualification. The Supreme Court of Cassation didn't give the applicant a chance to defend himself against the new charges, by, for example, asking for the presentation of written arguments or postponing the court hearing for the presentation of additional verbal arguments. Because he wasn't informed about the nature of and the reasons for the charges against him and he wasn't given adequate time and place for the preparation of his defense, the applicant didn't receive a fair trial. According to the Court, the lack of regulation in the national legislation aranging a clear requirement for the defendant to be allowed to defend himself against the changed allegations has been essential in the matter.

Basically identical is also the judgement in the case *D.M.T. and D.K.I. v. Bulgaria* (app. 29476/06, judgement from 24.07.2012, which became final on 24.10.2012). Again, a violation is found, because the Supreme Court of Cassation changed the charges against the applicant and found him guilty for committing a crime, different in facts and legal qualifications from the initial charges (for a crime under Article 211 in relation to 210 in relation to 209 in relation to 18 (1) of the Criminal code – attempted fraud, instead of under article 301 of the Criminal code - bribe). The requalification was made with the final judgement of the high court and the applicant was never informed about the new charges against him. The Court points out, that because of the decisive role of the indictment for the criminal proceedings, Article 6, § 3 (a) recognizes the right of the accused to be informed in detail of the factual basis on which he/she was being accused as well as of the legal qualification of his/her alleged acts. In the aspect of criminal proceedings, the complete and accurate information about the charges against a defendant and therefore about the legal qualification, which the court can assume against him, is a fundamental condition for the fairness of the trial. It is pointed out that, if the national law gives the courts, hearing the trial on its merits, the right to requalify the charges, with which they have been presented in accordance

with the law, they have to make sure that the defendants have the possibility to exercise their right of defense in that relation in a specific and effective way. Based on the specifics of the case the Court holds, that the defense strategy of the applicant was connected to the charges, for which he was brought to court, he hasn`t been able to anticipate the requalification, he hasn`t been informed at any point by the Supreme Court of Cassation about the change of the qualification and he didn't have the chance to lead a conscious debate about it, and it can be assumed that his defense arguments in relation to the new charges would have been different from the ones deliberated before the court.

INFORMATION ABOUT THE VIOLATION

The reasons for the violation are rooted in the way in which the national court executed its powers to amend the verdict and to apply a law for a less heavily punishable crime. The violation was committed by the Supreme Court of Cassation.

STAGE OF JUDGEMENT EXECUTION

The Bulgarian government has sent to the Department for the Execution of Judgements of the ECHR an Action Plan from 25 May 2022, followed by two amendments from 30 June 2023 and 15 September 2023.

They include the individual measures taken – all the costs and expenses, awarded to the applicant, have been paid. The applicant requested a re-opening of the re-opening criminal proceedings (during which he had been sentenced based on new facts and legal qualifications), the re-opening proceedings were re-opened, the judgement of the Supreme Court of Cassation was revoked and the case was sent to Appellate Court – Varna for another ruling on the applicant's initial request for re-opening of the criminal proceedings against him (submitted in 2012). The Appellate Court denied the applicant's initial request for re-trial and held that with the revocation of the judgement of the Supreme Court of Cassation, the verdict, that this judgement amended, resumed its validity and with it the applicant was found guilty for the crime, with which he had been charged initially.

They also include the general measures taken – the judgement of the Court was translated and published on the website of the Ministry of Justice. It was sent to the Prosecution of Republic of Bulgaria, to Regional Court – Omurtag and District court – Turgovishte, as well as to the Supreme Court of Cassation. It is not clear why the judgement was not sent to all other Bulgarian courts.

In the first Action Plan it was also pointed out that an examination of the relevant practice of the Supreme Court of Cassation was being carried out and if any worries arose, a proposition

would be sent to the National Institute of Justice to include the matter in the relevant current magistrate trainings, but that the government considers this to be an isolated instance of a violation stemming from the incorrect application of the law and the right of defense, upheld in the Criminal Procedure Code.

The amendment of the Plan from 15 September 2023 contains a summary of the examination of the relevant practice of the Supreme Court of Cassation. Three judgements of the Supreme Court of Cassation are cited, with which the corresponding criminal cases had been re-opened and the court gave instructions to the lower instance courts to examine the question of the possible applicability of a legal qualification for a less heavily punishable crime in relation to the established facts. Based on the cited practice the government repeated the conclusion that the *Zhelezov* case was an exception and the violation was stemming from the incorrect application of the law and the right of defense, upheld in the Criminal Procedure Code. There is no information given on the matter of whether the government plans to send a proposition to the National Institute of Justice to include the judgement in the initial or further trainings of judges. There are no other general measures planned and the closure of the execution procedure is proposed.

POSSIBLE ACTIONS FOR THE EFFECTIVE EXECUTION OF THE *ZHELEZOV* JUDGEMENT

The general measures, undertaken by the government for the execution of the judgement, are vastly insufficient and won't lead to the avoidance of future similar violations of Article 6 of the Convention. The summary analysis of the Supreme Court of Cassation practice is irrelevant because it doesn't actually concern cases similar to *Zhelezov*. This becomes clear with the examination of the content of the three judgements, cited in the Plan amendment. They were all held during re-opening procedures. In all three cases the Supreme Court of Cassation re-opened the criminal proceedings and gave instructions to the lower courts to examine the question of whether the facts, based on which the defendant had been charged and tried, correspond to a legal qualification for a less heavily punishable crime. None of the cases has raised the problem of the court changing both facts and legal qualification of the initial charges (which is the action that led to the violation, found in the *Zhelezov* judgement). With each of the three judgements, cited by the government, the judgement of the lower instance, that has already entered into force, was revoked on different grounds – because of a violation of the right of a last word of the defendant; because of a wrong estimate of the legal nature of the document, when this estimate can lead to the requalification of the crime to a one that is less heavily punishable; because previous convictions of the defendant were wrongfully taken into account, despite the fact that he had been convicted when he was underaged and therefore those convictions were irrelevant by

law, and without them he was supposed to be convicted for a less heavily punishable crime. There was no summary shown of any relevant court practice.

Furthermore, there's a realistic possibility for an irreparable violation as the one in *Zhelezov* to be made by courts different from the Supreme Court of Cassation. According to Art. 346 in relation with 337 § 1 of the Criminal Procedure Code, cases, which fall under the jurisdiction of the Regional Court as a first instance and the District Court as a second instance, do not fall under the jurisdiction of the Supreme Court of Cassation, unless the verdict differs between the two instances. The case won't have the Supreme Court of Cassation as a third instance, if the second instance court amends the first instance verdict and applies a law for the same, equally punishable or less heavily punishable crime. The verdicts of the second instance, which are new and with which the defendant is found guilty for the first time, but with which the applied legal qualification led to the application of Article 78a of the Criminal Code - the criminal liability is replaced with an administrative one, also fall out of the scope of the Supreme Court of Cassation. All second instance judgements in cases of private criminal proceedings (in relation to insults, defamation, minor injury etc.) fall out of the scope of the Supreme Court of Cassation. In all those cases a court of lower instance can breach Article 6 of the Convention by amending the charges both in facts and in qualification. And if the breach is made by the second instance court, it will be made with the final judgement, putting an end to the proceedings.

In order to avoid future violations of Article 6, § 1 and 3 of the Convention, it is both necessary for the Criminal Procedure Code to be amended in relation to the prerogatives of the courts to change the qualification of the charges and for the courts to strictly apply the procedural regulations in the light of the Convention when executing their power to adjudicate.

When adjudicating, the courts have to strictly comply with the procedural rules as well as the consistent practice that affirms them, according to which the court has the discretion to change the legal qualification of the crime and to apply a law for an equally punishable or for a less heavily punishable crime only if this derives from the existence of such factual charge in the factual part of the indictment. The facts, accepted in the guilty verdicts as true and relevant, have to stay unchanged or only insignificantly changed in comparison with the factual framework, given by the indictment.

In the same time, whenever, based on the factual framework given by the indictment, there are grounds for the amendment of the applicable material law by changing the legal qualifications of the crime to an equally punishable or a less heavily punishable crime, the defendant has to be given the chance to defend himself/herself against the new qualification effectively and in reasonable time. Such an amendment of the legal qualification can't be made with an act that can't be appealed and enters into force immediately.

This is reaffirmed in the practice of the Supreme Court of Cassation, held in accordance with the judgement in *Penev v. Bulgaria*. This court`s practice upholds the legal regulation, according to which the requalification of a crime to a less heavily punishable one is only allowed when the factual circumstances, related to the new qualification, were specified in the indictment and were established by the first instance court and because of that the amendment of the qualification would not make them new facts, they wouldn't be a surprise for the accused and he/she would have the chance to defend himself/herself against them. Irrespective of that, the Supreme Court of Cassation held that, if it exercises its powers under Article 354, § 2 (2) of the Criminal Procedure Law and allows the application of another – even if it is a less heavy material law, this would constitute an infringement of Art. 6, § 3 (a) of the Convention, because, even though the defendant was able to defend himself/herself against the factual reasons of the charges, he was deprived of the possibility to defend himself/herself against the nature – the new legal qualification, which the Supreme Court of Cassation finds applicable under the relevant facts (Judgement 623/04 January 2011, criminal case 646/2010 of the Supreme Court of Cassation, III criminal division). The right of receiving the necessary information requires that the defendant receives information for the less heavily punishable legal qualification, because only in that way he can exercise his/her right of defense properly (Judgement 223/11 February 2020, criminal case 1013/2019, Criminal Court of Cassation, I criminal division). The question of the defendant's criminal liability cannot be decided by the Court of cassation, because he/she has to be given the chance to defend himself/herself against the less heavily punishable legal qualification, that follows from the corresponding factual accusation in the factual part of the indictment (Judgement 314/20 June 2011, criminal case 1651/2011 of the Supreme Court of Cassation, I criminal division).

Some of the court practice cited above is also cited in § 16 of the Judgement on *Zhelezov*, with which the Court highlighted the positive practice of the Supreme Court of Cassation in those cases where it applied Article 6, § 3 of the Convention directly and returned the case to the second instance court for a re-trial in order to comply with the requirements for the fairness of the trial and to provide an effective right of defense to the accused.

It also has to be kept in mind that the actions, given by the Court in its judgements as examples for what the national courts can do to provide the defendant with the possibility to defend himself/herself against the new qualification are inapplicable to the Bulgarian criminal procedure. As the Court has already stated, the Bulgarian law does not have explicit regulations in that respect. It is not possible for the court to assume during the court hearing that there is a reason for the applicability of a qualification for an equally punishable or for a less heavily punishable crime and as a result to give the parties instructions to plead or present written

defenses in that relation. Because with such actions the court would inevitably demonstrate a predetermined conviction for the defendant's guilt, which will deem the court panel partial and biased and create grounds for the panel's recusal.

In order to avoid the reoccurrence of similar violations of Article 6, § 1 and 3 (a) and (b) of the Convention, an amendment to the Criminal Procedure Code has to be made. This will harmonize the court practice in accordance with the Court's judgements and will eliminate the need for the Supreme Court of Cassation to explicitly justify its refusal to apply Article 354, § 2 (2) of the Criminal Procedure Code and apply the Convention directly because the national law contradicts it. The regulations in the Criminal Procedure Code, which give the Supreme Court of Cassation the power to amend the verdict and to apply a new legal qualification for an equally punishable or for a less heavily punishable crime, have to be changed. Instead, the Supreme Court of Cassation has to be given the power to revoke the verdict and return the case to the lower instance courts for a retrial, when it considers that there are reasons for the application of a legal qualification for an equally or for a less heavily punishable crime. This is the only way for the court to guarantee in every case that the accused received a reasonable chance to effectively defend himself/herself against the charges.

Identical changes have to be made in the regulations concerning the powers of the second instance courts (Art. 337, § 1 (2) of the Criminal Procedure Code) because now the Criminal Procedure Code allows many cases, in which the judgement of the second instance court is final and is not subject to cassation control (the judgements of the District courts as a second instance; all verdicts and judgements of the District or the Appellate court, with which Article 78a of the Criminal Code is applied; all second instance verdicts and judgements in private criminal cases).

A problem in this context can also arise in relation to the limited powers of the second instance courts (Article 335, § 3 of the Criminal Procedure Code) and of the Supreme Court of Cassation (Article 354, § 5 of the Criminal Procedure Code) to revoke the lower instance court's judgement and to return the case for a retrial – the second instance court is allowed to do this only once and the Supreme Court of Cassation – twice, irrespective of the grounds. Those restrictions entered into force with the amendment of the Criminal Procedure Court from 2011, with which was given the possibility for a convicted person to request the reopening of the case against him/her under Article 422, § 1 (5) of the Criminal Procedure Code on the grounds that the final judgement suffered from serious defects that were grounds for cassation control and it was (1) held by the Supreme Court of Cassation and a qualification for an equally punishable or a less heavily punishable crime was applied; (2) held by the Supreme Court of Cassation, after it heard the case for the third time and acted as an instance on both factual and legal merits, or (3) the judgement was not examined by the Supreme Court of Cassation.

The legislator's motives, with which those amendments in the Criminal Procedure Code were made, state that the possibility for the reopening of the criminal proceedings under Article 422, § 1 (5) of the Criminal Procedure Code are intended to prevent further violations of the Convention similar to the one in *Penev.* Afterwords those amendments were presented by the Bulgarian government to the Committee of Ministers during the procedure for the execution of the *Penev* judgement. However, those amendments only create a partial and insufficient regime of defense, which cannot guarantee that another such violation of the Convention won't occur. Firstly, those regulations provide an extraordinary remedy in case the convicted considers his/her rights have been infringed. They do not aim to prevent the infringement of happening altogether. Secondly, in cases when the criminal proceedings end with the judgement of the second instance entering into force, the created regulation treats the convicted persons differently and unreasonably limits the access of some of them to the higher instance control. Which control is tantamount for the effectiveness of their defense. Those regulations do not give to people, who were convicted in private criminal proceedings or if the conviction ended with the application of Article 78a of the Criminal Code and their criminal liability was replaced with an administrative one, the right to request a re-opening of the criminal proceedings. Until the Bulgarian legislator undertakes legal amendments in the regulations concerning the Supreme Court of Cassation's powers during the still ongoing proceedings and for the reevaluation of the powers of the second instance courts in relation to changing the legal qualification of the crime to an equally the right to request a re-opening to people or a less heavily punishable crime, the existing guarantees will be insufficient to ensure to all accused the fairness of the trial against them in the light of their right to be thoroughly informed about the facts and qualifications of the charges against them and to effectively defend themselves. The current law regulations can't ensure the effective execution of the *Jhelezov* judgement, nor to effectively prevent the possibility of new violations of the Convention, identical to the ones in *Zhelezov, Penev* and *D.M.T. and D.K.I.* It must be noted that there might already be applications from Bulgarian citizens in cases pending before the Court, in which identical violations have been claimed. To amend the powers of the second instance courts and of the Supreme Court of Cassation would be a much more effective approach. This has been proven by the judgements of the Supreme Court of Cassation, with which Article 6 of the Convention was applied directly, because the return of the case for a retrial to the lower instance court eliminated all possibilities for an infringement of the accused's right of defense in relation to a requalification of the crime. Such a universal approach would lead to faster and more effective trial proceedings. Instead, with its current regulations, the Criminal Procedure Code allows the court to adopt an unlawful act – an act, violating the Convention. And the excuse is that the person, convicted with such an unlawful act, could (but only in some cases) request the

re-opening of the criminal proceedings against him/her, the revocation of this unlawful act and the correction of the violation committed. Instead of tolerating the adoption of unlawful verdicts/ judgements with the partial possibility of their revocation, the law has to guarantee that such acts can't be adopted at all. Precisely such law is necessary for the execution of the government's obligations not only before the Committee of Ministers, but before Bulgarian citizens.

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