FIFTH SECTION

CASE OF RAZA v. BULGARIA

*(Application no. **31465/08**)*

JUDGMENT

STRASBOURG

11 February 2010

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 Raza v. Bulgaria,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 19 January 2010,

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

PROCEDURE

1. The case originated in an application (núm. 31465/08) 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 Pakistani national, Mr Ali Raza, and a Bulgarian national, Mrs Zoya Georgieva Raza ("the applicants"), on 28 June 2008.

2. The applicants were represented by Ms D. Daskalova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Dimova, of the Ministry of Justice.

3. The applicants alleged that Mr Raza's expulsion would amount to an unlawful and disproportionate interference with their family life, and that they did not have effective remedies in that respect. They also complained that Mr Raza's detention pending deportation had been unlawful and unjustified, and had not been subject to speedy judicial review.

4. On 2 July 2008 the President of the Fifth Section decided to grant priority to the application under Rule 41 of the Rules of Court. On 17 November 2008 he decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

5. Following receipt of the parties' observations, on 10 September 2009 the President of the Fifth Section decided, under Rule 54 § 2 (a) of the Rules of Court, that the Government should be invited to produce a copy of the Supreme Administrative Court's judgment of 17 January 2008 (see paragraph 24 below) and to specify what materials that court had had before it when making that judgment. In as much as the domestic proceedings in Mr Raza's case were classified, the Government's attention was drawn to the possibility to request, under Rule 33 § 2 of the Rules of Court, that public access to the documents they were asked to provide be restricted. The Government did not reply to the Court's letter.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1969 and 1975 respectively and live in Sofia.

A. Background

7. Mr Raza left Pakistan in 1998, allegedly to flee from religious persecution. For a short time he remained in Iran and in Turkey, and later that year arrived in Bulgaria. Initially he sought asylum. However, after he married Mrs Raza on 20 February 2000, he withdrew his asylum claim and was granted a temporary residence permit on the strength of his marriage. In 2003 he was granted a permanent residence permit. He learned Bulgarian and started a small business, distributing electronic devices. He has not travelled out of Bulgaria since he first arrived there and has never been charged with any offence.

B. The order for Mr Raza's expulsion and his ensuing detention

8. On 6 December 2005 the head of the Ministry of Internal Affairs' National Security Service made an order for Mr Raza's expulsion. He also barred him from entering or residing in Bulgaria for a period of ten years, "in view of the reasons set out in proposal no. M-2922/24.11.2005 and the fact that his presence in the country present[ed] a serious threat to national security". The order relied on section 42 of the 1998 Aliens Act. No factual grounds were given, in accordance with section 46(3) of the Act. The order further provided that the first applicant was to be detained until it could be enforced, in line with section 44(6) of the Act. Finally, it stated that it was subject to appeal to the Minister of Internal Affairs, but not subject to judicial review, in keeping with section 46(2)(3) of the Act, and that it was immediately enforceable, in accordance with section 44(4)(3) of the Act (see paragraphs 31, 33 and 38 below).

9. Mr Raza was not served a copy of the order and learnt about it on 18 January 2006, after being placed in detention (see paragraph 10 below).

10. On 30 December 2005 the head of the Ministry of Internal Affairs' Migration Directorate issued an order under section 44(6) and (8) of the 1998 Aliens Act (see paragraphs 38 and 39 below) to place Mr Raza in a special detention facility pending enforcement of the expulsion order. The order relied on the need to have him sent back to his country of origin. It said that it was subject to appeal before the Minister of Internal Affairs and to judicial review by the Sofia City Court. Mr Raza was arrested on the same day.

11. After it was found that Mr Raza did not have a valid passport, on 24 January 2006 the Ministry of Internal Affairs requested the consular department of the Ministry of Foreign Affairs to contact the closest embassy of Pakistan – the one in Bucharest, Romania – with a view to obtaining a passport or other travel documents. Further requests were made on 1 and 30 March 2006, 10 October 2007 and 3 June 2008, without success. It is unclear whether the consular department of the Ministry of Foreign Affairs forwarded those requests to the Pakistani embassy.

12. On 18 July 2006 the detention facility where Mr Raza was being kept was closed down and he was transferred to another facility.

13. On 11 July 2007 Mr Raza applied for release. On 28 December 2007 the head of the Migration Directorate turned down his request.

14. On 15 July 2008 the head of the Migration Directorate decided to release Mr Raza. He also stayed the enforcement of the order for his expulsion, citing technical difficulties, and placed him under an obligation to report daily to his local police station.

15. On 8 August 2008 Mr Raza asked the head of the National Security Agency to re-consider the order for his expulsion. On 4 September 2008 his request was turned down, on the ground that the order was final.

16. Mr Raza is currently awaiting expulsion, which is apparently being blocked solely by the fact that he does not have the necessary documents to re-enter Pakistan.

C. The legal challenges to Mr Raza's expulsion

1. The appeal to the Minister of Internal Affairs

17. On 4 January 2006 Mr Raza appealed to the Minister of Internal Affairs against the order for his expulsion (see paragraph 8 above). He argued that it was unlawful, because he resided legally in Bulgaria, lived with his wife and had never committed any offence. On 21 February 2006 the Minister rejected the appeal, saying that there existed information that Mr Raza had been involved in human trafficking. He went on to specify that in cases of expulsion on national security or public order grounds it was not open to the administrative authorities to take into account extraneous considerations; if the necessary prerequisites were in place, the authorities were bound to take the measure in question.

2. The judicial review proceedings

18. On an unspecified date in early 2006 Mr Raza sought judicial review of the expulsion order by the Sofia City Court. He additionally asked the court to stay the order's enforcement. He asserted, *inter alia*, that he had been married to a Bulgarian national for a number of years and had never engaged in any unlawful activities. He also pointed out that he had never been served a copy of the order for his expulsion and was not aware of the grounds for such a measure. He asked the court to request the immigration authorities to produce the materials which had led to the order.

19. In a decision of 7 December 2006 the court found the application admissible, holding that the bar to judicial review set out in section 46(2) of the 1998 Aliens Act (see paragraph 33 below) was contrary to the Convention and was thus to be disregarded. It relied on this Court's judgment in the case of *Al-Nashif v. Bulgaria* (no. 50963/99, 20 June 2002). It turned down the request for a stay of the order's enforcement, observing that its immediate enforcement was mandated by statute – section 44(4)(3) of the 1998 Aliens Act (see paragraph 31 below). In those circumstances, the courts were not competent to stay the enforcement, as this would amount to a judicial revision of a statute. In any event, Mr Raza had not put forward any arguments capable of persuading the court that the order should be stayed.

20. Mr Raza did not appeal against the court's refusal to stay the enforcement of the expulsion order.

21. The court held a non-public hearing on 17 May 2007. It admitted in evidence the administrative case file with the materials leading to the expulsion order, allowed Mr Raza to inspect them, and gave him leave to adduce evidence in support of his allegations.

22. In view of amendments to the 1998 Aliens Act making expulsion orders subject to review by the Supreme Administrative Court (see paragraph 35 below), on 6 July 2007 the Sofia City Court transferred the case to the Supreme Administrative Court.

23. The Supreme Administrative Court heard the case on 22 November 2007. Mr Raza, who was legally represented, did not adduce evidence. He argued that the order was unlawful, as it did not specify the grounds for expelling him, and said that he would develop his arguments in pleadings that he would file later. Counsel for the authorities argued that the order was well-founded, as could be seen from the adduced evidence. The public prosecutor, who took part in the proceedings *ex officio*, argued that since the law specifically provided that no reasons were to be given for expulsion orders, the court was not competent to review the substantive lawfulness of the order, but only whether the procedure had been followed.

24. In a final judgment of 17 January 2008 the Supreme Administrative Court dismissed Mr Raza's application. According to the applicants, apart from a short declaration that Mr Raza's expulsion would not breach Article 8 of the Convention, the court did not engage in any analysis of the proportionality of that measure. Nor did it scrutinise the facts underlying the decision to expel Mr Raza, or have before it the full text of the proposal for his expulsion, but merely a short excerpt from it, drawn up by the authorities specifically for the purposes of the judicial review proceedings.

25. The applicants were not able to provide a copy of the Supreme Administrative Court's judgment because the case is classified and neither they nor their counsel are allowed to make copies of any of the materials in the case file, including that judgment. Despite a specific request by the Court, the Government did not provide a copy of that judgment either, or specify what materials the Supreme Administrative Court had had before it when making it (see paragraph 5 above).

D. The legal challenge to Mr Raza's detention

26. On an unspecified date in early 2006 Mr Raza sought judicial review of the order for his placement in a detention facility (see paragraph 10 above). On 22 May 2007 the Sofia City Court allowed his application and quashed the order. It found that the order was subject to review despite the express wording of section 46(2) of the 1998 Aliens Act (see paragraph 33 below) because that provision was contrary to Article 13 of the Convention. It also found that it had been made by a competent authority and in line with the applicable legal provisions. However, it went on to say that Mr Raza's detention for such a long period had become unjustified, the authorities having been unable to deport him for more than a year. There was no indication that the immigration authorities had taken any measures in that respect except asking for the cooperation of the Ministry of Foreign Affairs.

27. Following an appeal by the Ministry of Internal Affairs, on 6 June 2008 (реш. № 6854 от 6 юни 2008 г. по адм. д. № 9478/2007 г., ВАС, III о.) the Supreme Administrative Court annulled that judgment and discontinued the proceedings. It held that the order for Mr Raza's placement in a detention facility was subordinate to the order for his expulsion and had been made within the framework of the expulsion proceedings, for the sole reason that the expulsion could not be carried out forthwith. It was therefore not subject to judicial review by itself.

E. The legal challenge to the refusal to release Mr Raza

28. On 16 January 2008 the applicants sought judicial review of the decision of 28 December 2007 turning down Mr Raza's application for release (see paragraph 13 above). On 7 May 2008 the Sofia Administrative Court declared Mrs Raza's application inadmissible, because she was not directly affected by the order, but found Mr Raza's

application admissible and well-founded. It noted that the immigration authorities had sent three letters to the consular department of the Ministry of Foreign Affairs with requests for assistance in the process of securing a travel document for Mr Raza, but that no reply had been received. It went on to say that, in view of the difficulties in carrying out the expulsion, the authorities should have re-considered whether or not Mr Raza's detention continued to be justified. In situations where they had discretion, the authorities had to assess whether or not the impugned measures interfered disproportionately with the individual's rights and, whenever possible, opt for the option that was less onerous for the individual, in line with the principle of proportionality. The exercise of such discretion was subject to judicial review. Instead of keeping Mr Raza in custody, the authorities could have placed him under an obligation to report daily to his local police station. In choosing between those alternatives, they had to take account of the length of the detention. If it exceeded six months, it became an arbitrary deprivation of liberty, contrary to Article 5 § 1 (f) of the Convention. The inordinate amount of time spent by Mr Raza in custody, owing to the lack of effective measures for his expulsion, had negated the lawfulness of his deprivation of liberty. As the authorities had not taken those matters into account, they had made an unlawful decision. The court therefore quashed the refusal to release Mr Raza and instructed the authorities to re-consider the matter in line with its reasoning.

29. The Director of the National Police Service appealed. On 26 May 2009 the Supreme Administrative Court declared the appeal inadmissible (опр. № 6873 от 26 май 2009 г. по адм. д. № 10138/ 2008 г., ВАС, III о.). It held that the Director did not have standing to appeal, as the proceedings before the lower court had unfolded between the applicants and the immigration authorities. Moreover, since Mr Raza had meanwhile been released (see paragraph 14 above), the issues raised in the appeal were no longer relevant.

II. RELEVANT DOMESTIC LAW

A. Expulsion on national security grounds

30. Article 27 § 1 of the 1991 Constitution provides that aliens who are lawfully resident in the country cannot be expelled from it except under conditions and in a manner prescribed by law.

31. Section 42(1) of the 1998 Aliens Act provides that an alien must be expelled when his or her presence in the country creates a serious threat to national security or public order. Under section 42(2), expulsion must be accompanied by withdrawal of the alien's residence permit and the imposition of a ban on entering the country. Expulsion orders are immediately enforceable (section 44(4)(1) and (3)).

32. If deportation cannot be effected immediately or needs to be postponed for legal or technical reasons, the enforcement of the expulsion order may be stayed until the relevant obstacles have been overcome (section 44b(1)).

33. Section 46(2), as in force until March 2007, provided that orders for the expulsion of aliens on national security grounds were not subject to judicial review. Under section 46(3), those orders do not indicate the factual grounds for imposing the measure.

34. Following this Court's judgment in the case of *Al-Nashif v. Bulgaria* (no. 50963/99, 20 June 2002), in which it found the above provisions contrary to Article 8 and Article 13 of the Convention, the Supreme Administrative Court changed its case-

law. In a number of judgments and decisions delivered in 2003-06 it held, by reference to *Al-Nashif*, that the ban on judicial review in section 46(2) was to be disregarded as it contravened the Convention, and that expulsion orders relying on national security considerations were amenable to judicial review (реш. № 4332 от 8 май 2003 по адм. д. № 11004/2002 г.; реш. № 4473 от 12 май 2003 г. по адм. д. № 3408/2003 г.; опр. № 706 от 29 януари 2004 г. по адм. д. № 11313/2003 г.; опр. № 4883 от 28 май 2004 г. по адм. д. № 3572/ 2004 г.; опр. № 8910 от 1 ноември 2004 г. по адм. д. № 7722/2004 г.; опр. № 3146 от 11 април 2005 по адм. д. № 10378/2004 г.; опр. № 3148 от 11 април 2005 по адм. д. № 10379/2004 г.; опр. № 4675 от 25 май 2005 г. по адм. д. № 1560/2005 г.; опр. № 8131 от 18 юли 2006 г. по адм. д. № 6837/2006 г.).

35. In April 2007 section 46(2) was amended and at present provides that expulsion orders may be challenged before the Supreme Administrative Court, whose judgment is final.

36. In May 2009 the Act underwent a reshuffle intended to bring it into line with the requirements of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. The new version of section 44(2) provides that when ordering expulsion or similar measures the authorities must take into account the length of time an alien has remained in Bulgaria, his or her family status, and the existence of any family, cultural and social ties with the country of origin. It is not yet clear whether those factors should also be considered upon the expulsion of an individual on national security grounds.

B. Detention pending deportation

37. Section 44(5) of the 1998 Act provides that if there are impediments to a deportee's leaving Bulgaria or entering the destination country, he or she is placed under an obligation to report daily to his or her local police station.

38. Under section 44(6), as in force until May 2009, aliens could, if necessary, be placed in special detention facilities pending the removal of the obstacles to their deportation. In the reform of May 2009 (see paragraph 36 above) that provision was amended to provide that detention was possible if an alien's identity was unknown, if he or she hindered the enforcement of the expulsion order, or if he or she presented a risk of absconding.

39. Under section 44(8) (after May 2009 section 44(10)), deportees are placed in detention facilities pursuant to special orders, which have to specify the need for such placement and its legal grounds and be accompanied by copies of the orders under section 44(6).

40. Under the new section 44(8), also added in May 2009, detention may be maintained as long as the conditions laid down in subsection 6 are in place, but not longer than six months. Exceptionally, if a deportee refuses to cooperate with the authorities, or there are delays in the obtaining of the necessary travel documents, or the deportee presents a national security or public order risk, detention may be prolonged for a further twelve months.

41. Under section 46(1), as in force at the material time, as a rule, orders under the Act were subject to appeal before the higher administrative authority and to judicial review. While in its earlier case-law the Supreme Administrative Court consistently found that placement orders under section 44(6) and (8) were amenable to judicial review (реш. № 2048 от 8 март 2005 г. по адм. д. № 7396/2004 г., ВАС, V о.; реш.

№ 8364 от 27 септември 2005 г. по адм. д. № 4302/2005 г., ВАС, V о.; реш. № 1181 от 1 февруари 2006 г. по адм. д. № 1612/2005 г., ВАС, V о.; реш. № 5262 от 17 май 2006 г. по адм. д. № 9590/2005 г., ВАС, V о.; реш. № 13108 от 27 декември 2006 г. по адм. д. № 7687/2006 г., ВАС, V о.; реш. № 199 от 8 януари 2007 г. по адм. д. № 6122/2006 г., ВАС, V о.; реш. № 9742 от 16 октомври 2007 г. на ВАС по адм. д. № 2996/2007 г., III о.; реш. № 12844 от 17 декември 2007 г. по адм. д. № 4761/2007 г., ВАС, III о.; реш. № 10833 от 6 ноември 2007 г. по адм. д. № 3154/ 2007 г., ВАС, III о.; реш. № 6876 от 9 юни 2008 г. по адм. д. № 10226/2007 г., ВАС, III о.), in a couple of judgments given at about the same time as that in Mr Raza's case it ruled that such orders were not subject to judicial review because they were subordinate to the expulsion orders (реш. № 8117 от 2 юли 2008 г. по адм. д. № 4959/2007 г., ВАС, III о., реш. № 8750 от 15 юли 2008 г. по адм. д. № 1599/2008 г., ВАС, III о.). In view of those discrepancies, the Chief Prosecutor asked the Plenary Meeting of that court to issue an interpretative decision on the question. However, in view of intervening legislative changes which settled the matter (see paragraph 42 below), on 16 July 2009 the Plenary Meeting decided not to issue such a decision (опр. № 3 от 16 юли 2009 г. по т. д. № 5/2008).

42. In the reform of May 2009 (see paragraph 36 above) a new section 46a was added, making special provision for judicial review of orders for the detention of deportees. Deportees may now seek judicial review of such orders by the competent administrative court within three days of them being issued (subsection 1). The application for judicial review does not stay their enforcement (ibid.). The court must examine the application at a public hearing and rule, by means of a final judgment, not later than one month after the proceedings were instituted (subsection 2). In addition, every six months the head of any facility where deportees are being detained must present to the court a list of all individuals who have remained there for more than six months due to problems with their removal from the country (subsection 3). The court must then rule, on its own motion and by means of a final decision, on their continued detention or release (subsection 4). When the court sets aside the detention order, or orders a deportee's release, he or she must be set free immediately (subsection 5). The Supreme Administrative Court is already applying those provisions (опр. № 7964 от 16 юни 2009 г. по адм. д. № 7823/2009 г., ВАС, VII о., опр. № 10801 от 18 септември 2009 г. по адм. д. № 9652/2009 г., ВАС, VII о.)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

43. The applicants complained under Article 8 of the Convention that the order for Mr Raza's expulsion amounted to an unjustified interference with their right to respect for their family life.

44. Article 8 provides, in so far as relevant:

> "1. Everyone has the right to respect for his ... family life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

45. The Government submitted that in examining Mr Raza's application for judicial review the Supreme Administrative Court had fully and objectively analysed the factual and legal grounds for the expulsion order, and had given convincing reasons why the interference with the applicants' rights under Article 8 of the Convention was justified in the circumstances. Its decision was well-founded and lawful.

46. The applicants submitted that no evidence of criminal activities of Mr Raza had been adduced in the domestic proceedings. The national courts had not genuinely examined whether or not he had engaged in such activities, and had not assessed whether his expulsion was necessary in a democratic society.

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

48. It has not been disputed, and the Court finds no reason to doubt, that at the time when the authorities ordered his expulsion Mr Raza had a genuine family life in Bulgaria (see paragraph 7 above). Therefore, the enforcement of the order for his expulsion will amount to an interference by a public authority with the exercise of the applicants' right to respect for their family life, as guaranteed by Article 8 § 1 (see *Beldjoudi v. France*, 26 March 1992, § 67, Series A no. 234-A).

49. Such interference will be in breach of Article 8 unless it is "in accordance with the law", pursues a legitimate aim or aims under paragraph 2, and is "necessary in a democratic society" for achieving those aims.

50. In the recent case of *C.G. and Others* the Court, after analysing in detail the courts' approach to a situation which was almost identical to that in the present case, found that despite being able to seek judicial review of the expulsion order against him, the first applicant in that case did not enjoy the minimum degree of protection against arbitrariness. It reached that conclusion for two main reasons. First, the courts allowed the executive to stretch the notion of national security beyond its natural meaning. Secondly, the courts did not examine whether the executive was able to demonstrate the existence of specific facts serving as a basis for its assessments that the applicant presented a national security risk, and instead rested their rulings solely on uncorroborated averments of the Ministry of Internal Affairs. On that basis, the Court found that the interference with the applicants' family life was not "in accordance with the law" (see *C.G. and Others v. Bulgaria*, no. 1365/07, §§ 42-47 and 49, 24 April 2008).

51. According to the applicants' allegations, in the present case the Supreme Administrative Court adopted the same stance as in *C.G. and Others* – it did not properly scrutinise the facts grounding the decision to expel Mr Raza and had regard merely to a document specifically drawn up by the authorities for the purposes of the judicial review proceedings (see paragraph 24 above). The applicants were unable to support those allegations with proof, as the domestic proceedings were classified and they were not allowed to make copies of the documents in the case file (see paragraph 25 above). In these circumstances, and considering that the Supreme Administrative Court's reasoning was crucial for the determination of the point raised by the applicants, on 10 September 2009 the Court asked the Government to produce a copy of that court's judgment of 17 January 2008 and to specify what materials that court had had before it when making that judgment. In as much as the domestic proceedings were classified, the Government's attention was drawn to the possibility, under Rule 33 § 2 of the Rules of Court, to request that public access to the documents they were asked to provide be restricted (see *Imakayeva v. Russia*, no. 7615/02, § 123, ECHR 2006-XIII (extracts)). The Government did not reply to the Court's letter (see paragraph 5 above),

thus failing to provide any justification for their refusal to provide the document and information requested by the Court.

52. Where an application contains a complaint concerning the manner in which a domestic court has approached and determined a case, and where, as in the instant case, a copy of that court's judgment and related information is specifically requested from the Government, the Court considers it incumbent on the respondent State to furnish the relevant documentation (see, *mutatis mutandis*, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 138, 24 February 2005). Accordingly, and in application of Rule 44C § 1 of its Rules, the Court finds that it can draw inferences from the Government's conduct in that respect (ibid., § 139; see also *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 77, 5 April 2005, and *Imakayeva*, cited above, § 124).

53. The Court recognises that the use of confidential material may prove unavoidable where national security is at stake (see *Chahal v. the United Kingdom*, 15 November 1996, § 131 *in limine*, *Reports of Judgments and Decisions* 1996-V). It may therefore sometimes be necessary to classify some or all of the materials used in proceedings touching upon such matters and even parts of the decisions rendered in them (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 205, 209, 210 and 215, ECHR 2009-...). However, the complete concealment from the public of the entirety of a judicial decision in such proceedings cannot be regarded as warranted. The publicity of judicial decisions aims to ensure scrutiny of the judiciary by the public and constitutes a basic safeguard against arbitrariness. Indeed, even in indisputable national security cases, such as those relating to terrorist activities, the authorities of countries which have already suffered and are currently at risk of terrorist attacks have chosen to keep secret only those parts of their decisions whose disclosure would compromise national security or the safety of others (ibid., §§ 29-69, 93 and 215), thus illustrating that there exist techniques which can accommodate legitimate security concerns without fully negating fundamental procedural guarantees such as the publicity of judicial decisions. Moreover, in the absence of information about the facts under consideration before the national courts and the manner in which they examined the case, the Court is not persuaded that it concerned genuine national security issues. Indeed, the only known allegation against Mr Raza was that "there existed information that [he] had been involved in human trafficking" (see paragraph 17 above). Failing further particulars about the threat to national security which the applicant allegedly posed, the Court is bound to conclude that the situation was identical to that in *C.G. and Others*, where the Bulgarian authorities had stretched the – admittedly wide – notion of national security beyond its natural meaning (see *C.G. and Others*, cited above, § 43).

54. The Court further notes the applicants' assertion that when deciding the case the Supreme Administrative Court did not have before it the full text of the proposal for Mr Raza's expulsion, but merely a short excerpt from it, drawn up by the authorities specifically for the purposes of the judicial review proceedings (see paragraph 24 above). As noted above, despite a specific question the Government did not disclose what materials that court had had before it when making its judgment. The Court therefore concludes, on the basis of its inference (see paragraph 52 above), that the Supreme Administrative Court did not have access to the full facts grounding the authorities' assertion that Mr Raza presented a national security risk, which prevented it from conducting a meaningful examination of the case. It is moreover questionable – and by not presenting the requested information the Government failed to dispel the doubts in that respect – whether that court considered itself competent to carry out a proper examination of that assertion, given that in *C.G. and Others* it had confined itself to a purely formal review of an identical expulsion decision and had rested its ruling

solely on uncorroborated information tendered by the Ministry of Internal Affairs (see *C.G. and Others*, cited above, § 47, and *Lupsa v. Romania*, no. 10337/04, § 41, ECHR 2006-VII).

55. In view of the above considerations, the Court concludes that Mr Raza, despite having the formal possibility of seeking judicial review of the decision to expel him, did not enjoy the minimum degree of protection against arbitrariness on the part of the authorities. The resulting interference with his right to respect for his family life would therefore not be in accordance with a "law" satisfying the requirements of the Convention (see *C.G. and Others*, cited above, § 49). In view of that conclusion, the Court is not required to determine whether the order for Mr Raza's expulsion pursued a legitimate aim and whether it was proportionate to the aim pursued.

56. The Court finds that the decision to expel Mr Raza, if put into effect, would violate Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

57. The applicants complained under Article 13 of the Convention that they did not have at their disposal effective domestic remedies in respect of their complaint under Article 8.

58. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

59. The parties' observations have been summarised in paragraphs 45 and 46 above.

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

61. The Court is furthermore satisfied that the applicants' complaint was arguable and that Article 13 is applicable.

62. In *C.G. and Others* the Court found that the proceedings for judicial review of an expulsion order citing national security grounds were deficient in two respects. First, they did not involve a meaningful scrutiny of the executive's allegations. Secondly, the courts did not assess whether the interference with the applicants' rights answered a pressing social need and was proportionate to any legitimate aim pursued (see *C.G. and Others*, cited above, §§ 59-64).

63. In the instant case, the Court already found, on the basis of the inferences which it was entitled to draw from the Government's conduct, that the Supreme Administrative Court was not shown to have carried out a proper examination of the executive's assertion that Mr Raza presented a national security risk. For the same reasons, the Court finds that the Government did not establish that the Supreme Administrative Court engaged in a meaningful analysis of the proportionality of Mr Raza's expulsion. The Court concludes that the judicial review proceedings in the present case did not comply with the requirements of Article 13, for the same reasons as in *C.G. and Others*. No other remedy has been suggested by the Government.

64. There has therefore been a violation of Article 13 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

65. Mr Raza alleged that his detention pending deportation had been in breach of Article 5 § 1 (f) of the Convention on account of its excessive length and because it had

been based on legal provisions which failed to provide sufficient safeguards against arbitrariness.

66. He further complained under Article 5 § 4 of the Convention that he had been unable to obtain a speedy judicial review of his detention.

67. Article 5 provides, in so far as relevant:

> "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:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. ..."

68. The Government submitted that Mr Raza's placement in a detention facility pending his deportation had complied with all substantive and procedural rules. The length of his deprivation of liberty was due to the need to secure a document allowing him to travel abroad. The Bulgarian immigration authorities had made numerous requests in this regard to the embassy of Pakistan, to no avail.

69. The applicants submitted that Mr Raza's deprivation of liberty was unlawful because it had lasted an unreasonably long time. At the material time Bulgarian law, in breach of the applicable European standards, did not limit the duration of detention pending deportation. Save for sending several letters to the Pakistani embassy, the authorities had done nothing to expedite Mr Raza's expulsion. Given that he had a family, a place to live and financial means to support himself, and could be kept under police supervision, there had been no need to keep him in custody for so long.

70. The Court considers that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

A. Article 5 § 1

71. It is not in dispute that Mr Raza's deprivation of liberty fell within the ambit of Article 5 § 1 (f), as he was detained for the purpose of being deported from Bulgaria.

72. Article 5 § 1 (f) does not require that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing (see, as a recent authority, *A. and Others v. the United Kingdom*, cited above, § 164 *in limine*). All that is required under it is that "action is being taken with a view to deportation". It is therefore immaterial whether the underlying decision to expel can be justified under national or Convention law (see *Chahal*, cited above, § 112; *Slivenko v. Latvia* [GC], no. 48321/99, § 146, ECHR 2003-X; and *Sadaykov v. Bulgaria*, no. 75157/01, § 21, 22 May 2008). However, any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible (see *Chahal*, § 113, and *A. and Others v. the United Kingdom*, § 164 *in limine*, both cited above). In other words, the length of the detention for this purpose should not exceed that reasonably required (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 74 *in fine*, ECHR 2008-...).

73. In the instant case, Mr Raza remained in custody between 30 December 2005 and 15 July 2008, that is, more than two and a half years (see paragraphs 10 and 14 above). Throughout this period his deportation was apparently blocked solely by the lack of a travel document allowing him to re-enter Pakistan. It is true that the Bulgarian authorities could not compel the issuing of such document, but there is no indication that they pursued the matter vigorously or endeavoured entering into negotiations with the Pakistani authorities with a view to expediting its delivery (see, *mutatis mutandis*, *A. and Others v. the United Kingdom*, cited above, § 167). Indeed, both the Sofia City Court and the Sofia Administrative Court, which examined that point in detail, specifically found that the authorities were not doing enough in that respect (see paragraphs 26 and 28 above). Nor does it appear that any consideration was given to the possibility of sending the applicant to another State willing to accept him.

74. It is true Mr Raza did not spend such a long time in detention as the applicants in certain other cases, such as *Chahal* (cited above). However, Mr Chahal's deportation was blocked, throughout the entire period under consideration, by the fact that proceedings were being actively and diligently pursued with a view to determining whether it would be lawful and compatible with the Convention to proceed with his deportation (see *Chahal*, cited above, §§ 115-17, as well as, *mutatis mutandis*, *Eid v. Italy* (dec.), no. 53490/99, 22 January 2002, and *Bogdanovski v. Italy*, no. 72177/01, §§ 60-64, 14 December 2006). By contrast, the delay in the present case was not at all due to the need to wait for the courts to determine the legal challenge brought by Mr Raza against his deportation. Indeed, his request for a stay of the enforcement of the expulsion order was denied as early as 7 December 2006 (see paragraph 19 above), and the Government conceded that the only reason for the delay was the failure to secure the necessary travel documents from the Pakistani authorities (see paragraph 68 above). It should also be observed that after his release on 15 July 2008 Mr Raza was placed under an obligation to report to his local police station at regular intervals (see paragraph 14 above). This shows that the authorities had at their disposal measures other than the applicant's protracted detention to secure the enforcement of the order for his expulsion. Lastly, the Court notes that after the events in issue in the present case Bulgarian law was changed, in line with the recent European Union Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, and now provides that in situations akin to Mr Raza's, where deportation is blocked by the failure of a third country to deliver the necessary travel documents, detention cannot exceed eighteen months (see paragraphs 36 and 40 above). Mr Raza's detention was markedly longer.

75. In view of the foregoing, the Court concludes that the grounds for Mr Raza's detention – action taken with a view to his deportation – did not remain valid for the whole period of his detention due to the authorities' failure to conduct the proceedings with due diligence. There has therefore been a violation of Article 5 § 1 of the Convention.

B. Article 5 § 4

76. Under Article 5 § 4, all persons deprived of their liberty are entitled to a review of the lawfulness of their detention by a court. The Convention requirement that a deprivation of liberty be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 to provide safeguards against arbitrariness (see *Chahal*, §§ 126-33; *Al-Nashif*, § 92; and *Sadaykov*, § 32, all cited above). For this reason, Article 5 § 4 stipulates that a remedy must be made

available during a person's detention to allow him or her to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release (see, as a recent authority, *Sadaykov*, cited above, § 32).

77. In the instant case, Mr Raza was able to challenge the order for his detention and even obtain a ruling that this detention was unlawful. However, that ruling was annulled on appeal, because the Supreme Administrative Court held, in clear deviation from its earlier case-law, that orders for the detention of deportees were not amenable to judicial review (see paragraphs 26, 27 and 41 above). As a result, the applicant was not able to obtain a final and binding judicial determination of the lawfulness of his detention. Moreover, those proceedings, lasting as they did more than two years, were far from speedy.

78. It remains to be ascertained whether the applicant had at his disposal other effective and speedy remedies for challenging the lawfulness of his detention (see *Kadem v. Malta*, no. 55263/00, § 45, 9 January 2003). On that point, the Court observes that on 16 January 2008 he brought another legal challenge to his deprivation of liberty. However, it took the Sofia Administrative Court almost four months to determine that challenge, and its judgment became final more than a year later, when Mr Raza had already been released (see paragraphs 28 and 29 above). There is nothing to indicate that any challenge brought earlier would have been determined in a speedier fashion.

79. In view of the foregoing, the Court concludes that Mr Raza did not have an opportunity of having the lawfulness of his detention reviewed speedily by a court. There has therefore been a violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

80. Mr Raza complained under Article 6 § 1 of the Convention that he had been unable to obtain a judicial ruling as to the lawfulness of the order for his detention and that the proceedings for judicial review of that order had lasted too long. He also complained that he had been unable meaningfully to challenge the order for his expulsion, which in reality amounted to the determination of a criminal charge against him.

81. Article 6 § 1 provides, in so far as relevant:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

82. According to the Court's settled case-law, decisions regarding the entry, stay and deportation of aliens do not concern the determination of their civil rights or obligations or of a criminal charge against them (see *C.G. and Others v. Bulgaria* (dec.), no. 1365/07, 13 March 2007, with further references). Article 6 was therefore not applicable to the proceedings in which Mr Raza was trying to challenge his expulsion.

83. Nor does Article 6 apply to proceedings in which detainees try to challenge their deprivation of liberty; these are to be examined solely by reference to Article 5 § 4, which is the *lex specialis* in such situations (see *Reinprecht v. Austria*, no. 67175/01, §§ 47-55, ECHR 2005-XII). Therefore, the proceedings in which Mr Raza challenged his detention, and which have already been scrutinised under the latter provision, cannot be examined for their compatibility with the requirements of Article 6.

84. It follows that these complaints are incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. Article 41 of the Convention provides:

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

A. Damage

86. The two applicants claimed 60,000 euros (EUR) in respect of the non-pecuniary damage flowing from the breaches of Article 8 and Article 13. Mr Raza also claimed EUR 30,000 in respect of the non-pecuniary damage suffered on account of the breach of Article 5 § 1, and EUR 20,000 in respect of the non-pecuniary damage flowing from the breach of Article 5 § 4.

87. The Government submitted that those amounts were exorbitant. In their view, any award should compensate the actual damage suffered and not exceed the awards made in similar cases.

88. The Court observes that no breach of Article 8 has as yet occurred. Nevertheless, the Court having found that the decision to expel Mr Raza would, if implemented, give rise to a breach of that provision, Article 41 must be taken as applying to the facts of the case. That said, the Court considers that its finding regarding Article 8 of itself amounts to adequate just satisfaction for the purposes of Article 41 (see *Beldjoudi v. France*, 26 March 1992, §§ 84 and 86, Series A no. 234-A, and, *mutatis mutandis*, *Soering v. the United Kingdom*, 7 July 1989, §§ 126 and 127, Series A no. 161, and *Chahal*, cited above, § 158). The same goes for the Court's related finding regarding Article 13 (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 79, ECHR 2007-V). Conversely, the Court considers that the distress and frustration suffered by Mr Raza as a result of his detention and the impossibility of obtaining speedy judicial review thereof cannot wholly be compensated by the finding of violation (see *Quinn v. France*, 22 March 1995, § 64, Series A no. 311, and *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 72, 6 November 2008). Having regard to the awards made in similar cases, and ruling on an equitable basis, as required under Article 41, the Court decides to award Mr Raza EUR 5,500, plus any tax that may be chargeable.

B. Costs and expenses

89. The applicants sought the reimbursement of EUR 1,800 incurred in lawyers' fees for the proceedings before the Court, and of EUR 88 for postage. They submitted a fee agreement with their legal representative, a time sheet and invoices.

90. The Government disputed the applicants' claims.

91. According to the Court's case-law, applicants are entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,200, plus any tax that may be chargeable to the applicants.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the interference with the applicants' family life and the alleged lack of effective remedies in that respect, as well as the complaints concerning Mr Raza's detention and the alleged lack of speedy judicial review thereof admissible and the remainder of the application inadmissible;

2. *Holds* that, should the decision to expel Mr Raza be implemented, there would be a violation of Article 8;

3. *Holds* that there has been a violation of Article 13 of the Convention;

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

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

6. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
      (i) to Mr Raza, EUR 5,500 (five thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) jointly to both applicants, EUR 1,200 (one thousand two hundred euros), plus any tax that may be chargeable to them, in respect of costs and expenses;
   (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;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 11 February 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Peer Lorenzen
Registrar President

RAZA v. BULGARIA JUDGMENT