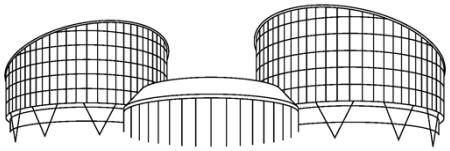

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF PENDOV v. BULGARIA

(Application no. 44229/11)

JUDGMENT

Art 1 P1 • Control of the use of property • Unnecessary prolonged retention of the applicant's computer server in the context of criminal proceedings against third parties • Authorities' failure to examine the server and copy relevant information • Importance of the server for the applicant's professional activity
Art 10 • Freedom of expression • Limited functionality of applicant's cultural website due to unnecessary prolonged retention of his computer server

STRASBOURG

26 March 2020

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 Pendov v. Bulgaria,

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

Síofra O'Leary, *President,*
Gabriele Kucsko-Stadlmayer,
André Potocki,
Yonko Grozev,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having regard to:

the application 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 Lazar Milkov Pendov ("the applicant"), on 1 July 2011;

the decision to give notice to the Bulgarian Government ("the Government") of the complaints concerning the search and seizure of the applicant's property, the seizure of his correspondence and other personal material and the closure of his website, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 3 March 2020,

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

INTRODUCTION

The applicant complained, relying on Articles 6, 7, 8 and 10 of the Convention and Article 1 of Protocol No. 1, of the seizure and retention by the prosecution authorities of a computer server owned by him, in the context of criminal proceedings against third parties. The retention of the server and the information contained in it also led to the limited functionality for a significant period of time of a website run by the applicant and hosted on that server.

THE FACTS

1. The applicant was born in 1986 and lives in Plovdiv. He was represented by Mr M. Ekimdzhiev and Ms K. Boncheva, lawyers practising in Plovdiv.

2. The Bulgarian Government ("the Government") were represented by their Agent, Ms I. Stancheva-Chinova of the Ministry of Justice.

3. In 2010 a publishing house complained to the police that a book published by it had been made available on the Internet, in breach of

copyright – allegedly an offence under Article 172a of the Criminal Code (see paragraph 18 below). The ensuing investigation showed that the site which had uploaded the book was partially hosted on a server owned by the applicant. The investigation also established the premises where the server at issue was being kept.

4. At that time the server hosted a number of other websites as well, including one dedicated to Japanese anime culture owned and administered by the applicant.

5. Following an application by the police, on 18 June 2010 a judge at the Sofia District Court issued a search warrant authorising the search of the premises where the applicant's server was being kept. She considered that there were sufficient grounds to believe that such a search would yield evidence relevant for the investigation.

6. The search was carried out on 21 June 2010 by the police in Sofia. The officers seized and removed the applicant's server. The applicant was not present, and the person who was principally using the premises and was present explained that the applicant's server mainly hosted his anime site.

7. The applicant was not given copies of the search warrant issued in the case or of the record of search and seizure. On 23 June 2010 he was interviewed by the police.

8. On 23 July 2010 the applicant submitted to the Sofia district public prosecutor's office a request for the return of his server, under Article 111 of the Code of Criminal Procedure (see paragraph 20 below). He pointed out that the information necessary for the criminal investigation of the third parties involved could be copied and the server could be returned to him, and explained that the server also hosted several other sites, including his own. That site had stopped functioning owing to the seizure, and some of the services it offered, such as its chat service, could not be restored without the data contained on the server. The applicant considered that the closure of his site had "discredited" him in the eyes of the users and his colleagues. He also pointed out that he had invested a lot of personal effort and financial resources in it. He stated that the site had previously been visited by between 500 and 600 users per day.

9. On 10 August 2010 the applicant submitted to the Sofia district public prosecutor's office a further request for the return of his property, explaining additionally that personal correspondence of the users of his site had been stored on the server and that the seizure of that correspondence should not have been permitted. The server also contained "objects of copyright". The applicant stated that the unavailability of his site had caused him "significant damage", including of a financial nature. He considered it unjust that he had had to suffer such "harsh consequences", seeing that there had been no complaints with regard to his own site.

10. On 16 October 2010 the applicant wrote to the Chief Public Prosecutor's Office. He complained about the seizure of his server, which

he considered unlawful, and pointed out that the server had not been returned to him, even though it was not being examined by experts (see below). He explained once again that the server hosted other sites as well as his own site, and that it also contained the correspondence of that site's users. He stated that he had incurred significant losses, including from the retention of a software product he had been developing. On 27 October 2010 he stated additionally that the server contained his and other people's "objects of copyright". In a further letter dated 18 January 2011 and addressed to the Chief Public Prosecutor's Office the applicant pointed out, without further explanations, that the authorities' actions had breached his rights to private life and correspondence guaranteed under Article 8 of the Convention.

11. In the meantime, on 29 June 2010 a police investigator commissioned an expert report to establish whether the applicant's server had hosted the site under investigation. She stated that, in the event that relevant information was found, the expert was to copy it on a storage device.

12. However, since it transpired that criminal proceedings with regard to the same facts had already been opened by the prosecution authorities in another town, Troyan, the expert examination was not carried out and on 6 August 2010 the proceedings in Sofia were discontinued. The decision ordering the discontinuation stated that the Troyan district public prosecutor's office was to be informed that physical evidence relevant to the case was being kept in Sofia.

13. After the applicant wrote to the Chief Public Prosecutor's Office in October 2010 (see paragraph 10 above), that body made enquiries. On 2 November 2010 the Sofia district public prosecutor's office informed it of the discontinuation of the proceedings which had been opened in Sofia and of the placement of the physical evidence at the disposal of the Troyan district public prosecutor's office. The Troyan office, in a letter of 14 January 2011, stated that it had no information on the whereabouts of the evidence at issue.

14. In a letter dated 10 January 2011 the Chief Public Prosecutor's Office asked the two district offices to establish where the physical evidence was being kept and, if it was not necessary for the investigation, to release it.

15. The evidence was released following a decision of the Sofia district public prosecutor's office of 2 February 2011.

16. The applicant's server was returned to him on 8 February 2011.

17. The applicant's own website, which at that time had been operating for more than four years, stopped functioning after the seizure of his server on 21 June 2010. On 23 June 2010, using another server, the applicant managed to publish on the site a statement urging the prosecution authorities to correct the "mistake" they had made. On 27 July 2010, again

using another server which he described as having "very limited capacity", he activated a "minimal" version of the site, mostly with the aim of explaining to its users what had happened. This version was created on the basis of "partial old archives" and, according to the applicant, had "severely limited and extremely insufficient" functionality: in particular, its forum, chat service and image-hosting service were completely unavailable. The website was only restored to full functionality after the server had been returned to the applicant. However, according to him, it never returned to its previous popularity. Currently, the website is active, but "infrequently visited". After being unavailable for some time, its chat service is no longer in use.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Criminal Code and the Code of Criminal Procedure

18. Under Article 172a of the Criminal Code, the unauthorised copying and distribution of an object of copyright is punishable by up to five years of imprisonment and a fine.

19. The relevant provisions of the Code of Criminal Procedure concerning search and seizure in the context of criminal proceedings have been summarised in *Posevini v. Bulgaria* (no. 63638/14, §§ 25-31, 19 January 2017).

20. In addition, Article 111 of the Code of Criminal Procedure provides that physical evidence must be retained until the end of the criminal proceedings. It can be released earlier to authorised persons where this would not hinder the establishment of the facts.

B. Liability of the police and the prosecution authorities for the unjustified retention of evidence

21. In December 2011 the Supreme Court of Cassation allowed a tort claim in relation to the excessively lengthy retention of a motor car seized in a criminal case. It held that the retention of seized items beyond the time-limits for completing a criminal investigation was unnecessary and gave rise to liability for the police and the prosecution authorities (*Решение № 465 от 20.12.2011 г. по гр. д. № 1794/2010 г., ВКС, IV г. о.*).

22. A similar claim was allowed in an August 2011 judgment (which became final in May 2012) of the Sofia Court of Appeal. The domestic court held that the two-year retention of several computers seized as evidence had interfered disproportionately with the claimant's right to property (*Решение № 1478 от 12.08.2011 г. по гр. д. № 1330/2011 г., САС*).

23. In subsequent cases the civil courts examined other similar claims (see *Решение № 425 от 07.03.2013 г. по в. гр. д. № 4636/2012 г., САС*; *Решение № 8620 от 28.11.2016 г. по в. гр. д. № 7650/2016 г., СГС*; *Решение № 4525 от 22.06.2017 г. по гр. д. № 1890/2015 г., СГС; Решение № 419 от 14.12.2017 г. по в. гр. д. № 1435/2017 г., ОС-Стара Загора*; *Решение № 852 от 15.04.2019 г. по гр. д. № 6637/2018 г., РС-Бургас*).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 1 OF PROTOCOL NO. 1 AND ARTICLES 8 AND 10 OF THE CONVENTION

24. The applicant complained, relying on Article 6 and Article 7 of the Convention and Article 1 of Protocol No. 1, of the seizure and retention of his server by the prosecution authorities. He complained in addition, under Article 8 of the Convention, of the seizure and retention of his correspondence and of other personal materials contained on the server, and, under Article 10, of the effects of the seizure and retention on the functioning of his website.

25. The Court is of the view that the complaints fall to be examined under Article 1 of Protocol No. 1 to the Convention and Articles 8 and 10 of the Convention. Those provisions read as follows:

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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."

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Arguments of the parties

1. The Government

26. The Government argued that the applicant had failed to exhaust the available domestic remedies. They contended that after the discontinuation of the criminal proceedings in Sofia it had been possible for him to seek from the prosecution authorities in Troyan the release of the physical evidence under Article 111 of the Code of Criminal Procedure. Additionally, the applicant had been able to bring a tort action against the prosecution authorities in relation to the allegedly unjustified retention of his property. In support of that latter argument the Government submitted the court judgments referred to in paragraphs 21-22 above. Lastly, the Government argued that the applicant had never raised the complaint under Article 8 of the Convention before the national authorities.

27. The Government pointed out that the applicant's server had been kept by the prosecution authorities for several months only and that its delayed release had been due to the applicant's "inadequate actions". Furthermore, the server had not been subject to any examination and had been returned to the applicant in a good state.

28. As concerns the complaint under Article 10 of the Convention, the Government pointed out that the authorities had not intended to shut down the applicant's website. Moreover, the temporary unavailability of that website had not amounted to a disproportionate interference with the applicant's right to freedom of speech. The Government contended that that unavailability had been of a very short duration, seeing that on 23 June 2010, two days after the server's seizure, the applicant had activated what they considered a "back-up version" of the site. Whether or not that version had been fully functional depended on the applicant's diligence and professionalism, as it had been in his interest, given that it was the standard practice, to maintain a back-up. Additionally, it was significant that the website had not represented a means of participation in an important public

debate, nor had the applicant been a journalist, a whistle-blower or another person needing enhanced protection. Lastly, no administrative, criminal or other sanctions had been imposed on him, and he had in no way been held liable for the contents of his website.

2. The applicant

29. The applicant pointed out that he had sought the release of his server under Article 111 of the Code of Criminal Procedure, but the prosecution authorities in Sofia had not taken a decision on the matter. It had thus been useless for him to make any further request under that provision. He had instead complained to the Chief Public Prosecutor's Office, and had obtained the release of his property. The applicant also contested the Government's argument that he could have brought a tort action against the prosecution authorities. He pointed out that at the time of the relevant events that remedy had not been available to him. Lastly, the applicant disputed the Government's argument that he had not raised his complaint under Article 8 of the Convention before the national authorities.

30. The applicant pointed out that his server, seized by the prosecution authorities in the context of a criminal investigation, had not been shown to be necessary for that investigation. It had never been examined by an expert, nor used for anything else. Moreover, it had been possible to copy any relevant information contained on it.

31. As concerns Article 10 of the Convention, the applicant argued that the temporary unavailability of his website as a result of the seizure of his server had not served any of the legitimate aims enumerated in paragraph 2 of that Article. The website had been an expression of his interests in art, and it had not served any "immoral or antisocial" purpose. The interference with the applicant's Article 10 rights had been an unnecessary side-effect of the seizure of his server, with no justification. Lastly, the applicant contended that he had not been obliged to take precautions against any encroachment upon his digital property, by maintaining a full back-up of his site.

B. The Court's assessment

1. Admissibility

(a) Complaints related to the search and seizure

32. In as much as the applicant complained of the alleged unlawfulness of the search and seizure itself (see paragraph 24 above), the Court notes that this was an instantaneous act (see *Delev v. Bulgaria* (dec.), no. 1116/03, 19 November 2013, § 34 with further references). In the absence of an effective remedy under Bulgarian law in respect of the search and seizure, as established by the Court (see *Posevini*, cited above, §§ 84-86), the

six-month time-limit under Article 35 § 1 of the Convention started thus to run on the date when it was carried out – 21 June 2010 (see paragraph 6 above). The application having been lodged on 1 July 2011, this part of it has been introduced out of time. It must therefore be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

(b) Complaint under Article 8 of the Convention

33. The Government argued that the applicant had failed to raise at the domestic level his complaint under Article 8 of the Convention (see paragraph 26 above *in fine*).

34. The Court agrees with this argument. It observes that in his communication with the prosecution authorities following the seizure of his server the applicant complained merely about the retention of correspondence of the users of his site which had been stored on the server and of unspecified "objects of copyright" (see paragraphs 9-10 above). While on one occasion he referred to Article 8 of the Convention (see paragraph 10 above *in fine*), he did this in a general manner and did not explain what the interference with his rights under that provision was. Accordingly, the Court cannot conclude that the applicant raised at the domestic level the question of his own rights to private life and to correspondence in a clear manner, so as to allow the authorities to put right the alleged violation of these rights. The applicant spoke more specifically about a software product he had been developing (see paragraph 10 above), but this aspect of the complaint is more relevantly dealt with under Article 1 of Protocol No. 1 and will be addressed in the analysis under that head (see paragraph 46 below).

35. Accordingly, the complaint under Article 8 must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

(c) Remaining complaints

36. As regards the remaining complaints – under Article 1 of Protocol No. 1 and under Article 10 of the Convention concerning the retention of the applicant's property after its seizure – the Court must examine the further objections of non-exhaustion of domestic remedies raised by the Government (see paragraph 26 above).

37. The Government argued, firstly, that after the discontinuation of the criminal proceedings in Sofia the applicant should have sought the return of his server from the prosecution authorities in Troyan, as he had been entitled to, in principle, under Article 111 of the Code of Criminal Procedure. However, the Government have not shown that the authorities in Troyan ever received the physical evidence seized in Sofia and that they were therefore able to take a decision on its release. In January 2011 the

Troyan district public prosecutor's office stated that it was not aware of the whereabouts of the evidence (see paragraph 13 above), and that evidence was eventually released by the Sofia district public prosecutor's office (see paragraph 15 above). Accordingly, the Court does not consider that a request under Article 111 of the Code of Criminal Procedure addressed to the prosecution authorities in Troyan could have brought about the prompt return of the applicant's server. The applicant did not therefore fail to exhaust a domestic remedy which could have been effective in the circumstances.

38. As to their argument that the applicant should have brought a tort action against the prosecution authorities to seek compensation for the allegedly lengthy retention of his property, the Government relied on two judgments of the domestic courts in which similar actions had been allowed (see paragraphs 21-22 and 26 above). The first of these judgments was given by the Supreme Court of Cassation in December 2011, and the second one was given by the Sofia Court of Appeal in August 2011 and became final in May 2012. After that the national courts examined other similar actions (see paragraph 23 above).

39. Under the Court's case-law, the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it (see, among other authorities, *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V, and *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, no. 44460/16, § 136, 7 June 2018). While the Court has departed from this rule on previous occasions (see, for example, *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 87-88, ECHR 2010, and *Balakchiev and Others v. Bulgaria* (dec.), § 83, no. 65187/10, 18 June 2013), it sees no justification for doing so in the case at hand. Even though, as of about mid-2012, a tort action against the prosecution authorities for unjustified retention of physical evidence appears to have been an available and, in principle, an effective remedy, the present application was submitted on 1 July 2011. This means that the complaints under examination cannot be rejected for non-exhaustion of domestic remedies.

40. The Court accordingly dismisses the above objections raised by the Government.

41. Lastly, the Court notes that the complaints under examination are neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds listed in Article 35. They must therefore be declared admissible.

2. Merits

(a) Article 1 of Protocol No. 1

42. Article 1 of Protocol No. 1 does not prohibit the retention of physical evidence in the context of an ongoing criminal investigation. Still, such a measure, which relates to the control of use of property (see *Raimondo v. Italy*, 22 February 1994, § 29, Series A no. 281-A), must comply with the requirements of Article 1 of Protocol No. 1. It must thus be provided for by law and pursue a legitimate aim. The authorities' actions must also strike a fair balance between the general interest and the individual right to property (see, for example, *Borzhonov v. Russia*, no. 18274/04, 22 January 2009, §§ 57-59 with further references).

43. In the case at hand, the applicant's server was retained by the prosecution authorities on the strength of Article 111 of the Code of Criminal Procedure (see paragraph 20 above). The retention thus had a basis in domestic law. Since it was established that the server had partially hosted a website suspected of a copyright violation – an offence under the Criminal Code (see paragraph 18 above) – the Court considers in addition that the retention pursued the legitimate aims of prevention of disorder or crime and protection of the rights of others.

44. The salient question is therefore whether the measure was proportionate. In analysing that question, the Court will take into account the length of the retention of the applicant's property, its necessity, its consequences for the applicant, as well as the conduct of the relevant authorities (see *Petyo Petkov v. Bulgaria*, no. 32130/03, § 105, 7 January 2010).

45. The applicant's server was seized on 21 June 2010 and retained until 8 February 2011, that is to say for about seven and a half months. This was done in the context of a criminal investigation against third parties, and not against the applicant. During the period at issue the server was in no way used for the purposes of the investigation: it was not the object of any expert or other examination (see paragraph 12 above) and was merely retained until the applicant obtained its release. Moreover, it has not been shown that any information which could be relevant for the investigation could not have been simply copied; in fact, in her decision of 29 June 2010 to commission an expert examination the investigator in charge of the case ordered such copying (see paragraph 11 above).

46. The server appears to have been used by the applicant for professional activities – it hosted several sites, including the applicant's own site, and the applicant stored his work (the software product he had been working on – see paragraph 10 above) on it. Already at the domestic level he stated that the retention of the server had caused him "significant damage" (see paragraph 9 above).

47. During the period of retention the applicant made persistent efforts to obtain the release of his property – he made requests under Article 111 of the Code of Criminal Procedure, addressed the Chief Public Prosecutor's Office, provided explanations (see paragraphs 8-10 above). While the Government considered some of his actions "inadequate" (see paragraph 27 above), the Court does not agree. It has already observed that after the discontinuation of the criminal proceedings in Sofia there was no point in the applicant resorting again to the remedy under Article 111 of the Code of Criminal Procedure (see paragraph 37 above). In these circumstances his addressing the Chief Public Prosecutor's Office does appear appropriate; it seems in fact that it was exactly the enquires made by this body following the applicant's complaints which prompted the Sofia district public prosecutor's office to react to the situation and take a decision on the release of the evidence (see paragraphs 13-15 above).

48. As to the conduct of the relevant authorities, the Court observes that an expert examination was initially commissioned by a police investigator soon after the seizure of the applicant's server (see paragraph 11 above). While such an examination was never carried out, the Sofia district public prosecutor's office acted promptly also when discontinuing its proceedings once it became clear that proceedings concerning the same facts were pending in Troyan (see paragraph 12 above).

49. However, even though the discontinuation decision stated that the physical evidence in Sofia would be placed at the disposal of the Troyan district public prosecutor's office (see paragraph 12 above), neither that office, nor the one in Sofia, took any further action aimed at the examination or the release of the evidence, until the intervention of the Chief Public Prosecutor's Office provoked by the applicant's complaints. As noted above, the evidence – including the applicant's server – was merely retained, with the Troyan district public prosecutor's office not even being aware of its whereabouts (see paragraph 13 above).

50. The above considerations – the fact that the applicant's server was never examined for the purposes of the criminal investigation which was not directed against the applicant, but against third parties, the possibility of copying the necessary information, the importance of the server for the applicant's professional activity, as well as the partial inactivity of the district public prosecutor's office in Sofia – mean that the retention of the applicant's server between 21 June 2010 and 8 February 2011 was disproportionate. The national authorities thus failed to strike the requisite fair balance between the legitimate aim pursued in the case and the applicant's rights under violation of Article 1 of Protocol No. 1.

51. Accordingly, there has been a violation of that provision.

(b) Article 10 of the Convention

(i) On the nature of the interference with the applicant's rights

52. The Court has held that "[i]n the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general" (see *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, § 27, ECHR 2009, and *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 48, ECHR 2012).

53. The Court has also held that Article 10 guarantees freedom of expression to "everyone". It makes no distinction according to the nature of the aim pursued. Furthermore, it applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information (see *Ahmet Yıldırım*, cited above, § 50 with further references).

54. Turning to the case at hand, the Court observes that the applicant's website dedicated to Japanese anime culture constituted a means of exercising his freedom of expression.

55. After the authorities seized the applicant's server and the information contained on it on 21 June 2010, the website, hosted on that server, was unavailable for a certain time. The Government claimed that only two days after the seizure the applicant had activated what they called a "back-up version" (see paragraph 28 above). However, from the information available to the Court it appears that the applicant only published a statement urging the prosecution authorities to release his server (see paragraph 17 above). According to the applicant, about a month later, on 27 July 2010, he uploaded what he called a "minimal" version of the site, in which in particular the forum, chat service and the image-hosting service remained completely unavailable (ibid.).

56. The Court notes that the applicant has not provided evidence as to the parts of the website that he was able to restore. Still, his statement that after 21 June 2010 he was able to restart only a significantly restricted version is supported by the complaints that he raised before the domestic authorities (see paragraphs 8-9 above). While the lack of details on the reduced functionality of the applicant's website could in principle be taken into account when assessing the damage suffered (see paragraph 73 below), the Court is satisfied, for the purpose of its analysis as to the existence of an interference with the applicant's Article 10 rights, that the retention of the server continued to impede the applicant's freedom of expression until it was eventually returned to him.

57. The interference with the applicant's freedom of expression was the result of the retention of both his hardware – the server – and the data held

on it. Even assuming that the recovery of the data would have allowed the full recovery of the website, the Court does not see on what basis the applicant would have been obliged to keep a full back-up of the data on his server at any moment.

58. Lastly, the Court points out that the limited functionality of the applicant's website between June 2010 and February 2011 was due to the actions of the prosecution authorities, which retained for a prolonged period the server hosting that website. While these measures were not directed against the website at issue, which had not been the subject of any investigation, nor were there any allegations that it had breached the law, the authorities' measures did lead to the actual restrictions discussed above.

59. The Court thus concludes that in the case there was an interference by a public authority with the applicant's right to freedom of expression (see, *mutatis mutandis*, *Ahmet Yıldırım*, cited above, § 55). That interference consisted of the retention of the applicant's server and the information contained on it by the prosecution authorities, which led to the initial unavailability of the applicant's website, followed by the site's heavily limited functionality for several months.

(ii) Whether that interference was justified

60. The interference described above will constitute a breach of Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in Article 10 § 2 and was "necessary in a democratic society" to achieve those aims.

61. Concerning the first and second of these requirements, namely that the interference had to be "prescribed by law" and pursue a legitimate aim, the Court refers to its analysis under Article 1 of Protocol No. 1, where it found that the retention of the applicant's server, seized as evidence in criminal proceedings, had had a valid legal basis in Article 111 of the Code of Criminal Procedure, and that it served the legitimate aims of prevention of disorder and crime and the protection of the rights of others (see paragraph 43 above). Since the interference with the applicant's rights under Article 10 of the Convention stemmed from the same facts – the retention of his server by the prosecution authorities – that interference was also "prescribed by law" and pursued the same legitimate aims in the general interest. It should be additionally noted that the applicant has not contested that a website suspected of breaching copyright had been partially hosted on his server.

62. The salient question therefore is whether the interference was proportionate to the legitimate aims defined above.

63. In examining that question, the Court will once again draw upon its analysis under Article 1 of Protocol No. 1. It found under the heading of that Article that the interference by the public authorities with the applicant's rights, specifically the prolonged retention of his server as

evidence in criminal proceedings against third parties, had been unnecessary, because the server had never been examined for the purposes of the investigation. In addition, it had been possible to copy the relevant information and return the server, and the prosecution authorities had not acted with the necessary diligence, despite the applicant petitioning them on numerous occasions (see paragraphs 45-50 above).

64. As concerns its present analysis, the Court observes once again that the applicant's server, retained by the prosecution authorities in Sofia for seven and a half months, was never used for the purposes of the criminal investigation, which was not directed against the applicant or his website, and was merely kept until the applicant obtained its return. It is also significant that, while the applicant stated on numerous occasions that the server had also hosted his own website, that many of that website's features had stopped working and could not be restored, and that the site had been relatively popular and its unavailability was causing him financial damage (see paragraphs 8-10 above), the prosecution authorities remained inactive for a lengthy period of time. In particular, the Sofia district public prosecutor's office where the server was being retained only assessed the necessity of this retention and took a decision to release the server after being instructed to do so by the Chief Public Prosecutor's Office (see paragraphs 14-15 and 49 above).

65. The Government pointed out that no criminal, administrative or other sanctions had been imposed on the applicant, nor had he been held liable for the contents of his website (see paragraph 28 above). The Court observes that, while it appears that the applicant did host on his server a website suspected of publishing contents in breach of copyright, at no point did the domestic authorities suggest that he bore any responsibility for the alleged copyright violations. As the interference with the applicant's freedom of expression was the result of actions taken by the authorities when collecting evidence against third persons, the Court does not see how the fact that no sanctions were imposed on him could be relevant for the proportionality analysis.

66. The Government pointed out also that the applicant had not been a journalist, a whistle-blower or another person needing enhanced protection (see paragraph 28 above). It is true that the expression engaged in by him was artistic, and as such did not enjoy the high level of protection attributed to political speech (see *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236, and *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999-IV). Nevertheless, in the circumstances of the present case, as discussed above, this consideration is insufficient to tip the balance in favour of the Government. The Court points out once again that the retention of the applicant's server in criminal proceedings proved to be unnecessary for the purposes of the investigation and that for some period of time the prosecution authorities made no effort to remedy the effects of their actions

on the applicant's freedom of expression, despite having been informed of those effects on many occasions.

67. The above means that the interference with the applicant's right to freedom of expression as defined above was not a measure proportionate to the legitimate aims served. It was not thus "necessary in a democratic society" as required under Article 10 of the Convention.

68. There has accordingly been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed 7,000 Bulgarian levs (BGN), the equivalent of approximately 3,580 euros (EUR), plus interest, in respect of pecuniary damage, in compensation for "destroyed online resources" and for the impossibility to use his server while it was being retained by the prosecution authorities. In support of this claim he submitted a statement about the number of users visiting his website before the seizure of his server. The applicant claimed another EUR 15,000 in respect of non-pecuniary damage.

71. The Government contested the claims. They considered the claim concerning pecuniary damage "arbitrary" and "unproven".

72. Under Rule 60 § 2 of the Rules of Court any claim made under Article 41 of the Convention must be submitted together with the relevant supporting documents. The applicant, however, has not submitted any documents capable of proving the pecuniary damage he had allegedly suffered. In particular, his statement about the number of visitors to his website is insufficient to establish such damage. Accordingly, the Court rejects this claim (see, among other authorities, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 157, ECHR 2015 (extracts)).

73. In respect of non-pecuniary damage, the Court, in view of the circumstances of the case, in particular the nature of the interference with the applicant's rights under Article 10 of the Convention, and deciding in equity, awards the applicant EUR 5,200.

B. Costs and expenses

74. The applicant also claimed EUR 3,140.42 for the costs and expenses incurred for his legal representation before the Court and for translation. In

support of this claim he presented a contract for legal representation, an invoice showing that he had paid his representatives EUR 1,200, a time sheet and a contract for translation. The applicant requested that any award made under this head, apart from the EUR 1,200 already paid by him, be transferred directly to his legal representatives, Mr Ekimdzhiev and Ms Boncheva.

75. The Government contested the claim, considering it excessive.

76. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the circumstances of the case and in particular the fact that a part of the application has been declared inadmissible, the Court considers it reasonable to award the sum of EUR 1,800 covering costs under all heads. As requested by the applicant, EUR 1,200 is to be paid to him, and the remainder directly to his legal representatives.

C. Default interest

77. The Court considers it appropriate that the default interest rate 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 under Article 1 of Protocol No. 1 and Article 10 of the Convention concerning the retention of the applicant's property admissible and the remainder of the application inadmissible;

2. Holds that there has been a violation of Article 1 of Protocol No. 1;

3. *Holds* that there has been a violation of Article 10 of the Convention;

4. *Holds*,
   (a) that the respondent State is to pay the applicant, 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) EUR 5,200 (five thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,800 (one thousand eight hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, EUR 1,200 (one thousand two hundred euros) of

which are to be paid to the applicant, and the remainder directly to his legal representatives;

(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;

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

Done in English, and notified in writing on 26 March 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Síofra O'Leary
President