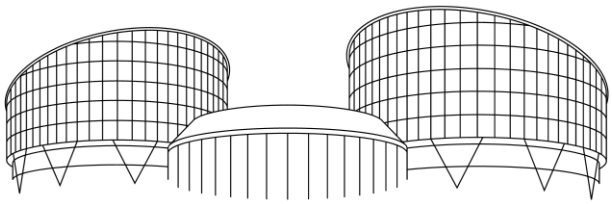

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF M. AND OTHERS v. BULGARIA

(Application no. 41416/08)

JUDGMENT

STRASBOURG

26 July 2011

FINAL

26/10/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M. and Others v. Bulgaria**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*
and Lawrence Early, *Registrar,*

Having deliberated in private on 5 July 2011,

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

PROCEDURE

1. The case originated in an application (no. 41416/08) 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 four individuals – Mr M., a national of Afghanistan, his wife, Ms P., a national of Armenia, and their two minor children ("the applicants") – on 29 August 2008. The President of the Chamber decided not to have the applicants' names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Mr Y. Grozev and Ms N. Dobreva, lawyers 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, in particular, that Mr M.'s deportation would violate Articles 3 and 8, that he had been detained in violation of Article 5 § 1, that there had been a violation of his right under Article 5 § 4 to take proceedings concerning the lawfulness of his detention and that Article 13 had been violated since the applicants had not had an effective remedy.

4. On 1 September 2008 the President of the Fifth Section decided to indicate to the Bulgarian Government, under Rule 39 of the Rules of Court, that the first applicant should not be deported to Afghanistan pending the examination of the case and until further notice. The President also decided to give notice of the application to the Government and to grant priority to the application under Rule 41. It was further decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1 of the Convention).

5. The application was later transferred to the Fourth Section of the Court, following the recomposition of the Court's Sections on 1 February 2011.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background

6. The first applicant, who was born in 1974 and is a citizen of Afghanistan, left Afghanistan on an unspecified date and entered Bulgaria in 1998.

7. On an unspecified date the first applicant unsuccessfully sought asylum in Bulgaria. The terms of his application, the reasons for the refusal and the relevant dates have not been substantiated by the first applicant.

8. Since 1999 the first applicant has attended the Bulgarian Church of God, a Baptist Church in Sofia. In 2001 he was baptised.

9. The first applicant has two children born in Bulgaria in 2003 and 2005 (the third and fourth applicants). Their mother (the second applicant), born in 1982, whom the first applicant married in 2004, is an Armenian national who has had a permanent residence permit in Bulgaria since an unspecified date. According to the first and second applicants, their first child, born in 2003, has no citizenship and their second child, born in 2005, is a national of Afghanistan.

10. In August 2003 the first applicant submitted a second application for asylum. By a decision of 17 March 2004 he was granted refugee status in Bulgaria on the ground that he risked persecution in Afghanistan on account of his conversion from Islam to Christianity. The short decision stated in its relevant part that according to information from the United Nations High Commissioner for Refugees, conversion to Christianity was "punishable by death in all Afghanistan". No further details were stated.

B. The orders of 6 December 2005 and 12 October 2006

11. On 6 December 2005 the Director of the National Security Service, at that time a department of the Ministry of the Interior, issued an order withdrawing Mr M.'s residence permit, ordering his expulsion and imposing a ten-year ban on his re-entering Bulgaria on the ground that he was a "serious threat to national security". Factual grounds were not indicated.

The Director relied on an internal document of 24 November 2005 which stated that the first applicant was involved in trafficking of migrants, mainly citizens of Afghanistan, through Turkey and Bulgaria to Serbia, Montenegro, Greece and Hungary. The Director considered that this activity was as such a threat to national security. Also, it could be used for the transit of terrorists and thus discredit Bulgaria internationally.

12. The deportation order of 6 December 2005 did not specify the country to which the first applicant should be deported. It appears that there was no legal requirement to do so and that in practice deportation orders did not indicate the country of destination.

13. The order of 6 December 2005 also stated that the first applicant should be detained pending expulsion.

14. On 12 October 2006 another government agency, the Migration Directorate of the national police, issued an order for the first applicant's detention pending expulsion. The relationship between that order and the order of 6 December 2005, which also required Mr M.'s detention, has not been clarified.

15. According to the order of 12 October 2006, Mr M.'s detention was necessary since he posed a serious threat to national security, and also in view of the fact that there was no (direct) transport connection between Bulgaria and the first applicant's country of origin, which prevented the immediate execution of the measure against him.

16. The orders of 6 December 2005 and 12 October 2006 were both immediately enforceable.

17. On 18 October 2006 the first applicant was arrested and detained at the Centre for Interim Detention of Aliens. He remained there until his release on 3 July 2009 (see paragraph 43 below).

C. Evidence regarding the authorities' efforts to enforce the deportation order

18. The first applicant has not been deported.

19. According to a statement by the Director of Migration, prepared for the present proceedings and submitted in 2009, Mr M.'s deportation was impeded by the fact that he did not have a document valid for international travel, the "lack of transport connections" and his refusal to cooperate. The Director further explained, without providing details, that several possible destinations for his expulsion had been considered and that unsuccessful attempts had been made to remove the obstacles to the execution of the deportation order.

20. At least until April 2007, the first applicant did in fact have a document valid for international travel. He possessed a special refugee passport, issued by the Bulgarian authorities on 16 December 2004, which was valid for international travel until 6 April 2007. The existence of this

document, including its number and date of issue, was mentioned in the deportation and detention order of 6 December 2005. It is unclear whether the first applicant presented his refugee passport to the authorities or concealed it, as suggested by the Government.

21. In February 2007 the Migration Directorate of the police wrote to the Embassy of Afghanistan in Sofia requesting that an identity document be issued to Mr M. It reiterated the request in September 2008 and January 2009. By letter of 30 January 2009 the Embassy of Afghanistan informed the Migration Directorate that it was unable to issue the first applicant with a passport since he had expressly stated at a meeting with Embassy representatives that he did not want to have a passport issued and did not want to return to Afghanistan. In those circumstances, the Embassy would not participate in the first applicant's forced expulsion.

22. In a letter of 14 October 2008 to the first applicant's representative, in reply to his request for release, the Director of the National Security Agency stated that Mr M.'s detention continued to be necessary despite the Court's interim measures decision (see paragraph 4 above). That was so because:

> "[I]n accordance with the document from the [Court], the [first applicant] should not be deported to Afghanistan. In execution of the expulsion order, he may be deported either to his country of origin or to a third country, where there is no danger for his life and health. The fact that the [deportation] order has not been enforced is the result of the obstinate conduct of [Mr M.] manifested by his frustrating and hampering his deportation from Bulgaria."

D. Proceedings concerning the deportation and detention order of 6 December 2005

23. On 20 October 2006 the first applicant appealed to the Sofia City Court against the order of 6 December 2005 of the National Security Service and requested a stay of enforcement pending the determination of his appeal. In these proceedings he was legally represented.

24. He argued, *inter alia*, that mere suppositions, not facts, had served as the basis for the impugned measures, there being no evidence of unlawful activities and no criminal proceedings having been brought against him. He also submitted that the expulsion order was in breach of the prohibition to deport a person to a country where his life was under threat. The first applicant further argued that his expulsion interfered with his right to respect for his family life. He also challenged the order for his detention.

25. The defendant, the National Security Service, submitted a copy of the internal document of 24 November 2005 which had served as the basis for the expulsion order (see paragraph 11 above). It also filed submissions, maintaining, *inter alia*, that the impugned order did not contravene section 44a of the Aliens Act.

26. On an unspecified date Mr M.'s representative wrote to the Migration Directorate insisting that the deportation order should be revoked in view of Mr M.'s refugee status in Bulgaria.

27. By letter of 1 February 2007 the Director of Migration replied that the order was lawful. He stated, *inter alia*:

> "In accordance with section 67(3) of the Refugees and Asylum Act, execution of the [deportation order] should not be suspended where there are grounds to believe that the alien seeking or having obtained protection imperils national security.
>
> In accordance with Article 33 of the United Nations Convention relating to the Status of Refugees, 'no Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.
>
> The benefit of this provision cannot, however, be claimed by a refugee about whom there are grounds to believe that he imperils the national security of the country where he is ..."

28. In October 2007, as a result of legislative amendments, the examination of the first applicant's appeal against the order of 6 December 2005 fell within the competence of the Supreme Administrative Court.

29. On 30 October 2007 a three-member panel of the Supreme Administrative Court refused the first applicant's request for a stay of enforcement. The court devoted no attention to his allegations about the risk of ill-treatment in Afghanistan and his request to stay the execution of the deportation order but stated merely that the alleged interference with family life did not warrant a stay of enforcement of the order for his detention. That decision was amenable to appeal before a five-member panel of the Supreme Administrative Court. It is unclear whether the first applicant appealed.

30. By a judgment of 9 June 2008 the Supreme Administrative Court dismissed the first applicant's appeal against his expulsion and detention.

31. The court noted that an internal Ministry of the Interior document dated 24 November 2005 and submitted by the defendant stated that Mr M. had acted in a way that presented a threat to national security. The court did not accept the first applicant's arguments that it should engage in detailed examination of the evidence allegedly supporting the view of the Ministry that he posed a threat to Bulgaria's national security. It stated:

> "[The document of 24 November 2005] must be regarded as an official certification which contains data collected by the National Security Service in the exercise of its functions. It has been issued in accordance with section 33 of the Protection of Classified Information Act. It contains evidence and data which have been assessed by the relevant administrative authority as sufficient grounds for ordering [Mr M.'s deportation] for having engaged in unlawful activities threatening national security... It follows that the impugned order is lawful."

32. The court rejected the first applicant's argument that the deportation order should be revoked since he lived in Bulgaria by virtue of his refugee status. The court stated that the domestic provisions regulating deportation did not provide for discretion and their interpretation could not vary on the basis of such factors as residence status.

33. The court further noted that Mr M. had been granted refugee status on the basis of his allegation that he had converted from Islam to Christianity and was afraid of persecution in Afghanistan. The court observed that there existed evidence of a danger to the first applicant's health and life in relation to his conversion. It found, however, that this danger did not stem from the Afghan State and that the applicant had not provided evidence that the authorities would be unable to protect him. Therefore, section 44a of the Aliens Act, which reflected the guarantees of Articles 2, 3 and 5 of the Convention, did not apply.

34. As regards the order for the first applicant's detention, the Supreme Administrative Court found that it was not amenable to judicial review as it concerned a measure undertaken in the execution of the expulsion order and not a separate administrative decision.

E. Proceedings concerning the detention order of 12 October 2006

35. On 26 October 2006 the first applicant appealed to the Sofia City Court against the detention order of 12 October 2006 issued by the Migration Directorate.

36. In these proceedings, on 21 December 2006 the Sofia City Court refused the first applicant's request for a stay of enforcement of the detention order. It found, *inter alia*, that there was no evidence that its immediate enforcement would cause irreparable harm. The refusal was upheld by the Supreme Administrative Court on 13 March 2007.

37. In the proceedings on the merits, the first applicant argued that his lengthy detention was unlawful and in breach of Article 5 § 1 of the Convention and that it disproportionately affected his family life.

38. By a judgment of 2 April 2009 the Sofia City Court found that the order of 12 October 2006 for the first applicant's detention had been signed by an unauthorised official and declared it null and void. The court held, however, that it did not have the power to order the first applicant's release. No appeal was lodged against that judgment. It became final on 2 June 2009.

F. Amendments to the Aliens Act, the first applicant's release and other relevant developments

39. On 15 May 2009 the Aliens Act was amended with the aim of incorporating into Bulgarian law 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.

40. Under the new section 46a of the Aliens Act, the director of the detention centre for aliens is required to submit to the relevant court a list of persons who have been detained for more than six months and the court must decide of its own motion on their continued detention or release.

41. In accordance with this new procedure, the situation of a number of aliens, including the first applicant, was reviewed by the Sofia Administrative Court in a decision of 12 June 2009. The decision was presented to the first applicant to read but he was not given a copy of it.

42. On 30 June 2009 the Director of the Migration Directorate of the national police, referring to the decision of the Sofia Administrative Court of 12 June 2009, issued an order which revoked the order of 12 October 2006 for the first applicant's detention and imposed on him the obligation to report daily to the local police station. The judgment of the Sofia City Court of 2 April 2009 (see paragraph 38 above) was not mentioned.

43. The order of 30 June 2009 was served on the applicant on 3 July 2009 and he was released on the same day.

44. By a decision of 5 October 2009 the third and fourth applicants were granted refugee status in Bulgaria. The grounds for that decision have not been communicated to the Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

45. The relevant domestic law and practice are set out in detail in the Court's judgment in the case of *Raza v. Bulgaria* (no. 31465/08, §§ 30-42, 11 February 2010). The following additional provisions of domestic law are relevant.

46. Under section 46(3) of the Aliens Act, deportation orders issued on national security grounds do not indicate the factual grounds for imposing the measure.

47. Under section 44a of the Aliens Act, deportation orders may not be executed by way of deportation to a country where there exists a risk to the person's life or a risk of ill-treatment.

48. A similar prohibition is spelled out in section 4(3) of the Refugees and Asylum Act, in respect of persons who have obtained protection under the Act or have entered Bulgaria to seek such protection. Section 4(4) provides, however, that the right not to be returned to a country where the person concerned risks ill-treatment or death cannot be invoked by aliens, including refugees, about whom there are grounds to believe that they imperil national security. There is no reported case-law under section 4(4).

49. Under section 67(2) of the Refugees and Asylum Act, where the person to be deported has been granted refugee status, the deportation

decision is to be annulled. In accordance with section 67(3) of the Act, however, the above does not apply where there are grounds to believe that the person concerned imperils national security or that, having been convicted of a serious criminal offence, he or she may pose a threat to public order. There is no reported case-law under section 67(3).

50. It follows from sections 42(1), 44(4)(3) and 46(4) of the Aliens Act that deportation orders issued on national security grounds are immediately enforceable and that the lodging of a judicial appeal does not suspend their enforcement. Enforcement may be postponed only by a decision of the relevant administrative body in the event of legal or technical obstacles hindering immediate execution (section 44b(1)).

51. In accordance with Article 166 § 2 of the Administrative Procedure Code, in pending appeal proceedings the interested party may request a stay of execution of an administrative decision on grounds of, *inter alia*, risk of significant or irreparable harm. In some of its decisions the Supreme Administrative Court has held that this does not apply with regard to deportation orders issued on national security grounds. That was so because immediate enforcement was provided for *ex lege*, in the Aliens Act, and the courts did not have the power to impose a stay of enforcement (see опред. № 1147.от 27.01.2009г. на ВАС по адм.д. № 393/2009г., where a request for a stay of deportation on the ground that the person concerned was seriously ill was refused).

52. In an interpretative decision of 8 September 2009 the Supreme Administrative Court revised its approach and stated that Article 166 § 2 of the Administrative Procedure Code applied even where the immediate enforceability of administrative decisions was provided for *ex lege*, with the exception of instances where the law did not provide for any judicial review. There is no reported case-law confirming that the interpretative decision also concerned the stay of enforcement of deportation orders on national security grounds.

53. Under section 48 of the Regulations for the implementation of the Aliens Act, in cases where deportation orders are enforced through removal by air, the person concerned shall be escorted by officers of the aliens' control services to his country of citizenship or another country of his choice to which he may be admitted.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

54. The first applicant complained that his detention had been in violation of Article 5 § 1. This provision reads, in so far as relevant:

> "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 against whom action is being taken with a view to deportation ..."

A. Admissibility

55. The Government submitted that the above complaint was manifestly ill-founded. The first applicant disagreed.

56. The Court considers that the complaint under Article 5 § 1 is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

57. The first applicant submitted that throughout the duration of his detention the authorities had done "absolutely nothing" to implement the deportation order, the obstacles to his expulsion having all been obvious before 12 October 2006, the date of the detention order. In those circumstances the first applicant submitted that his detention did not fall under paragraph 1 (f) of Article 5. It was in any event unnecessarily and excessively lengthy.

58. In the first applicant's view, his detention was furthermore unlawful as being contrary to domestic and international law, which prohibited deportation of refugees and, therefore, their detention pending deportation. Moreover, his continued detention for more than one month after 2 June 2009, when the judgment declaring null and void the order of 12 October 2006 had entered into force, had been wholly unlawful.

59. The first applicant also averred that the relevant domestic law did not meet the Convention standards of quality of the law since detention

pending deportation was left to the discretion of the police without regard to the individual's personal and family situation.

60. The Government submitted that the first applicant's detention had been ordered in accordance with the law with a view to his deportation, in keeping with all procedural and substantive legal requirements. The length of the detention had been the result of difficulties in securing an identity document for Mr M. and the possibility of his admission to a safe third country. The first applicant had refused to cooperate in this respect, failing to present his refugee passport and thus contributing to the length of his detention. The lawfulness of his detention had been confirmed by the Supreme Administrative Court.

2. The Court's assessment

61. Article 5 § 1 (f), which permits the State to control the liberty of aliens in the immigration context, does not demand that detention be reasonably considered necessary, for example, to prevent the individual from committing an offence or fleeing. Any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) (see *Chahal v. the United Kingdom*, 15 November 1996, § 113, *Reports of Judgments and Decisions* 1996-V; *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, ECHR 2009-...; *Tabesh v. Greece*, no. 8256/07, §§ 56 and 57, 26 November 2009; and *Raza*, cited above, § 72).

62. The deprivation of liberty must also be in conformity with the substantive and procedural rules of national law and in keeping with the purpose of protecting the individual from arbitrariness. The notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008-...). To avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (see *A. and Others v. the United Kingdom*, cited above, § 164).

63. In the present case, in so far as the first applicant submitted that his detention had been unlawful since Bulgarian and international law prohibited deportation of refugees, the Court, while considering that Mr M.'s refugee status may be relevant in the analysis as to whether "action [was] taken with a view to deportation" when he was detained, refers to its established case-law according to which under Article 5 § 1 (f) it is

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).

64. The Court further notes that by the judgment of the Sofia City Court of 2 April 2009, which became final on 2 June 2009, the order of 12 October 2006 for the first applicant's detention was declared null and void as it had been issued by an unauthorised official (see paragraph 38 above). The Court observes, however, that the order of 6 December 2005, which concerned not only the first applicant's deportation but also his detention pending deportation, was never revoked (see paragraph 13, 23, 24 and 34 above). It is also noteworthy that the first applicant never argued that the effect of the judgment of 2 April 2009 was to deprive his detention of any legal basis retrospectively (see paragraph 57 above).

65. The Court will therefore proceed on the assumption that Mr M.'s deprivation of liberty was based on a valid legal act.

66. The salient issue in the present case is whether it can be said that "action [was] taken with a view to deportation" throughout the duration of the first applicant's detention and, consequently, whether it was justified under Article 5 § 1(f).

67. The first applicant was deprived of his liberty for two years and eight and a half months (18 October 2006 to 3 July 2009).

68. As in the similar recent case of *Raza* (cited above), where the Court found a violation of Article 5 § 1, the length of the first applicant's detention was not related to the proceedings he instituted against the deportation order since it was immediately enforceable at any time, regardless of whether judicial proceedings were pending. This remained valid throughout the relevant period as the first applicant's request for a stay of execution was refused (see paragraphs 16, 29, 51 and 52 above). The above distinguishes the present case from the situation that obtained in, for example, *Chahal* (cited above) and *Kolompar v. Belgium* (24 September 1992, § 40, Series A no. 235-C).

69. The evidence concerning the exact reasons for the fact that the deportation order has not been enforced is not unequivocal. Its assessment is further frustrated by the fact that the deportation order did not specify the destination country, as this was not required under domestic law. Section 48 of the Regulations to the Aliens Act does not appear to clarify the matter sufficiently – it concerns technical issues, such as escorting the deportee, and, in any event, does not require that the destination country must be identified in a binding legal act. The Court considers that this legal regime and practice may be seen as problematic with regard to the requirement of legal certainty, inherent in all Convention provisions. Where deprivation of liberty is concerned, legal certainty must be strictly complied with in respect of each and every element relevant to the justification of the detention under

domestic and Convention law. In cases of aliens detained with a view to deportation, lack of clarity as to the destination country could hamper effective control of the authorities' diligence in handling the deportation.

70. The Court observes that the only obstacle to immediate deportation mentioned in the detention order of 12 October 2006 was the absence of direct flights from Bulgaria to Afghanistan (see paragraph 15 above). Before the Court, the Government referred to difficulties in providing Mr M. with an identity document and the lack of cooperation on his part. On the basis of the material submitted to it, the Court is unable to arrive at safe conclusions on the questions whether it was possible to deport Mr M. using a refugee passport, whether he refused to surrender his refugee passport valid until 6 April 2007 and whether it was possible to issue him with a new one (see paragraphs 19, 20 and 22 above).

71. It observes, however, that the first applicant's deportation was ordered on 6 December 2005 and that the first effort on the part of the Bulgarian authorities to secure an identity document for his deportation was made in February 2007, when a letter was sent to the Afghan Embassy (see paragraphs 11-22 above). Furthermore, as the letter of February 2007 apparently remained unanswered, it cannot be considered that the Bulgarian authorities pursued the matter with diligence, seeing that their request was not reiterated until September 2008, a year and seven months later (see paragraph 21 above). During all that time Mr M. was in detention. Thus, the Court considers that the respondent Government have failed to establish that they took active and diligent steps to overcome the alleged difficulties concerning Mr M.'s identity papers.

72. As to the absence of direct flights to Afghanistan, the Court finds, similarly, that it has not been shown that any effort was made to resolve the ensuing difficulty, which, moreover, was apparently known even before the first applicant's arrest (see paragraph 15 above).

73. It is true that after August 2008, when the Court adopted interim measures under Rule 39 of the Rules of Court, there was a legal obstacle to Mr M.'s deportation to Afghanistan. Where there are obstacles to deportation to a given country but other destinations are in principle possible, detention pending active efforts by the authorities to organise removal to a third country may fall within the scope of Article 5 § 1 (f) (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, §§ 74 and 75, ECHR 2007-V).

74. However, apart from their own statements for the purposes of the proceedings before the Court, the Government have not provided evidence of any effort having been made to secure the first applicant's admission to a third country.

75. In view of the foregoing, the Court concludes that the grounds for Mr M.'s detention – action taken with a view to his deportation – did not remain valid for the whole period of his detention and that the authorities

failed to conduct the proceedings with due diligence. Under Article 5 § 1 (f), the authorities were not entitled to keep Mr M. in detention where no meaningful "action with a view to deportation" was under way and actively pursued.

76. The Court observes, in addition, that although Mr M.'s deprivation of liberty was based on a valid legal act (see paragraphs 63 and 64 above), the existence of two separate orders for his detention, issued by two different departments of the Ministry of the Interior, appears to have been the source of uncertainty. In particular, the legal significance of the existence of two orders is unclear. Also, the duplication resulted in a situation where there were two independent sets of judicial proceedings concerning the lawfulness of Mr M.'s detention and no clarity as to whether the judicial decision repealing one of the detention orders actually affected the first applicant's situation (see paragraphs 13, 14 and 23-28 above). Moreover, even after 2 June 2009, when the judgment revoking one of the two orders entered into force, the Director of the Migration Directorate of the national police continued referring to it as if it were valid, in disregard of the domestic court's final ruling (see paragraphs 38 and 42 above). The situation described above was incompatible with the Contracting States' duty under Article 5 of the Convention to secure a high level of legal certainty in matters concerning deprivation of liberty (see *Tabesh*, cited above, § 52).

77. On the basis of its conclusions in the two preceding paragraphs (see, for a similar approach, *Louled Massoud v. Malta*, no. 24340/08, §§ 66 and 67, 27 July 2010), the Court finds that there has been a violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

78. The first applicant complained that his right to judicial review of the lawfulness of his detention had been violated. He relied on Article 5 § 4, which reads as follows:

> "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."

A. Admissibility

79. The Court finds that the complaint under Article 5 § 4 is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

80. The first applicant submitted that in the proceedings against the order of 6 December 2005 he was denied judicial review of his detention and that the review provided in the proceedings against the order of 12 October 2006 did not meet the speediness requirement.

81. The Government submitted in reply that the domestic court had provided a full judicial review of the impugned measures against the first applicant.

82. The Court observes that, since two different governmental bodies had issued two separate orders for his detention, in October 2006 the first applicant sought judicial review of its lawfulness by appealing in separate proceedings against each of those two orders. In the first set of proceedings, the Supreme Administrative Court, applying the same defective approach that was criticised in the case of *Raza* (cited above, §§ 41 and 77), refused to examine the appeal. In the second set of proceedings, it was not until 2 April 2009, almost two and a half years later, that the first applicant obtained a judicial decision establishing that one of the orders for his detention had been signed by an unauthorised officer (see paragraphs 34 and 38 above). It has not been alleged that other avenues to obtain judicial review of the lawfulness of his detention were open to Mr M.

83. The situation described above discloses a serious failing on the part of the respondent State to secure, in the period prior to the legislative reform of May 2009 (see *Raza*, cited above, § 42), the enjoyment of the Convention right to take proceedings by which the lawfulness of detention falling under paragraph 1 (f) of Article 5 is decided speedily by a court. The Court reiterates that the Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness (see *Al-Nashif and Others v. Bulgaria*, no. 50963/99, § 92, 20 June 2002).

84. There has therefore been a violation of Article 5 § 4.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

85. All the applicants complained that the deportation order against Mr M. and his detention were in violation of their right to respect for their private and family life. They relied on Article 8, which reads, in so far as relevant:

> "1. Everyone has the right to respect for his private and 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."

A. Admissibility

86. The Government submitted that the first applicant would not be deported to Afghanistan and that therefore he could not claim to be the victim of a violation of Article 8. The applicants contended in reply, *inter alia*, that their complaint under Article 8 did not concern the destination of Mr M.'s deportation but the very fact that the family would be separated if the deportation order was enforced.

87. The Court notes that the order for Mr M.'s deportation is final and enforceable. The Government have not disputed the applicants' position that its enforcement would seriously affect their private and family life even if Mr M. were deported to a country other than Afghanistan and, moreover, have not provided any convincing argument that there was a realistic possibility of deporting Mr M. to a third country where the family could establish a family life (see paragraph 74 above). The Court thus finds that the Government's objection is unsubstantiated and dismisses it.

88. It further finds that the complaint under Article 8 is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

89. The applicants alleged two separate violations of Article 8. The first concerned Mr M.'s detention, which in their view interfered in an arbitrary and disproportionate manner with their right to respect for their private and family life. The second concerned Mr M.'s deportation, which was arbitrary. The applicants averred that there was no evidence of any involvement of Mr M. in organising illegal border crossings and that in any event such activities could not be reasonably interpreted as a threat to national security. The applicants also claimed that domestic law did not require that evidence of the alleged unlawful activities be presented to and examined by an independent authority.

90. The Government stated that the factual and legal grounds for Mr M.'s expulsion had been impartially and thoroughly examined by the Supreme Administrative Court. That court had delivered well-reasoned judgments and had had regard to the applicants' Convention rights.

2. The Court's assessment

91. As to the first alleged violation of Article 8, the Court, having found that Mr M.'s detention was contrary to Article 5 § 1 of the Convention (see paragraph 77 above), considers that no separate issue arises under Article 8.

92. As to the second limb of the applicants' complaint, the Court must examine whether the order for Mr M.'s expulsion, if enforced, would violate that provision.

93. In the present case the respondent Government have not disputed that the applicants had established a genuine "family life" in Bulgaria, within the meaning of Article 8, and that Mr M.'s deportation, if effected, would constitute interference by the State authorities with the applicants' right to respect for their family life. In these circumstances, and having regard to the relevant facts and the manner in which the Government have argued the case (see paragraphs 6-11, 86 and 90 above), the Court finds no reason to hold otherwise (see also *Raza*, cited above, § 48).

94. Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of that provision as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned.

95. The first of these requirements, namely that any interference be "in accordance with the law", does not merely dictate that the interference should have a basis in domestic law, but also relates to the quality of that law, requiring it to be compatible with the rule of law. The law must, moreover, afford a degree of legal protection against arbitrary interference by the authorities (see, among many other authorities, *Kaushal and Others v. Bulgaria*, no. 1537/08, § 26, 2 September 2010).

96. The Court observes that in a number of cases against Bulgaria it has found that deportations ordered on alleged national security grounds did not meet the Convention standard of lawfulness as the relevant law, procedures and practice did not offer even a minimum degree of protection against arbitrariness (see *Al-Nashif and Others, cited above*; *Musa and Others v. Bulgaria*, no. 61259/00, 11 January 2007; *Hasan v. Bulgaria*, no. 54323/00, 14 June 2007; *Bashir and Others v. Bulgaria*, no. 65028/01, 14 June 2007; *C.G. and Others v. Bulgaria*, no. 1365/07, 24 April 2008; *Raza*, cited above; and *Kaushal and Others*, cited above).

97. The last-mentioned three judgments (*C.G. and Others*, *Raza* and *Kaushal and Others*) concerned the same domestic legislation and practice as the present case. In particular, in *C.G. and Others* the Court found that, first, the domestic courts had allowed the executive to stretch the notion of national security beyond its natural meaning, and, secondly, those courts had not examined whether the executive was able to demonstrate the existence of specific facts serving as a basis for its assessment that the

applicant presented a national security risk, and instead based its rulings solely on uncorroborated statements by the Ministry of the Interior. On that basis, the Court found that the interference with the applicants' family life was not "in accordance with the law" (ibid., §§ 42-47 and 49).

98. In the present case the deportation order against Mr M. was based on a declaratory statement, contained in an internal document of the National Security Service of the Ministry of the Interior, according to which he was involved in trafficking of migrants and therefore represented a national security threat. This document, which has not been submitted to the Court, apparently did not mention the factual grounds and the evidence on which the declaration was based. As in the other similar cases against Bulgaria, it has not been alleged that Mr M. has ever been charged with related offences. Thus, the deportation order was issued on the basis of a purely internal assessment of undisclosed information. Furthermore, just as it did in the other cases cited above, the Supreme Administrative Court dismissed the appeal against the deportation order, considering itself bound by the above-mentioned declaratory statement. The court held that the governmental agency which had issued the statement had some sort of certification power, which had to be respected unconditionally. The court thus refused to inquire whether the allegations against Mr M. had any objective basis (see paragraphs 11, 24, 25 and 31 above).

99. In the Court's view, the above practice of the Bulgarian Supreme Administrative Court fails to take into consideration the nature of the issue before it – an alleged interference by the executive with a fundamental human right.

100. The Court reiterates that the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural adjustments related to the use of classified information (see *Al-Nashif*, cited above, §§ 123-24). The body in question must also be competent to examine whether the measures taken pursue a legitimate aim and are proportionate.

101. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention (ibid.).

102. In the present case the Supreme Administrative Court failed to provide meaningful independent scrutiny of the deportation order against Mr M. It applied a formalistic approach and left a governmental agency full

and uncontrolled discretion to "certify" blankly, with reference to little more than its own general statements, that an alien was a threat to national security and must be deported. As such "certifications" were based on undisclosed internal information and were held to be beyond any meaningful judicial scrutiny, there was no safeguard against arbitrariness.

103. Therefore, the applicants did not enjoy the minimum degree of protection against arbitrariness inherent in the concept of lawfulness within the meaning of the Convention. If the deportation order of 6 December 2005 is enforced, the resulting interference with the applicants' family life would not be "in accordance with the law", as required by Article 8 § 2 of the Convention.

104. In view of this conclusion, the Court is not required to examine the remaining issues, which concern the existence of a legitimate aim and proportionality.

105. It follows that there would be a violation of Article 8 of the Convention in the event of the deportation order of 6 December 2005 being enforced.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

106. The first applicant complained that in the event of his deportation to Afghanistan the Bulgarian authorities would expose him to a high risk of inhuman treatment and that his life would be in immediate danger. In his initial application the first applicant relied on Articles 2 and 3 of the Convention. In subsequent submissions he stated that this complaint concerned Article 3 of the Convention.

107. The Court considers that the above complaint falls to be examined under Article 3, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

108. The Government submitted that the first applicant could not claim to be the victim of the alleged violation of the Convention since the authorities had never intended and did not intend to deport him to Afghanistan. The authorities were conscious of the requirements of the Convention and other international instruments and would not expose Mr M. to any risk, however slight, of inhuman treatment.

109. In particular, the Government noted that the deportation order against the first applicant did not specify the country of destination. The order would be executed only if the Bulgarian authorities succeeded in

obtaining identity papers for him and securing his admission to a safe third country, taking into account, moreover, Mr M.'s destination preferences.

110. The first applicant submitted in reply that the understanding that he would be deported to his country of origin, Afghanistan, was implicit in all actions by the authorities and in their communications with him. That was clear in particular from the letter of 1 February 2007 from the Director of Migration (see paragraph 27 above). Also, in the judicial proceedings the first applicant had built his defence on the existence of a risk of ill-treatment in Afghanistan and the Supreme Administrative Court had dealt with those arguments, clearly interpreting the deportation order to mean that he would be deported to Afghanistan.

111. Moreover, the statement that the first applicant would be deported to a third country had been made for the first time before the Court. In reality, there was nothing under domestic law to prevent the first applicant's deportation to Afghanistan.

112. The first applicant further submitted that if deported to Afghanistan he would most likely be subjected to treatment contrary to Article 3 and his life would be in immediate danger. He referred to reports about the treatment in Afghanistan of persons who had converted from Islam to another religion. He also submitted that the danger in question had been acknowledged by the Bulgarian authorities and that, in accordance with the Court's case-law, the allegation that he posed a threat to Bulgaria's national security was irrelevant in the context of Article 3, which prohibited ill-treatment in absolute terms.

B. The Court's assessment

113. The Court considers that the complaint under Article 3 is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

114. For the reasons set out below, the Court considers it unnecessary to deal with the question whether or not the Government's assurances, not reflected in any binding legal act (compare *Boutagni v. France*, no. 42360/08, § 48, 18 November 2010), can be seen as removing the risk of Mr M. being returned to Afghanistan.

115. The Court refers to its finding above that the enforcement of the deportation order of 6 December 2005 would violate the applicants' right under Article 8 to respect for their private and family life on the particular ground that the order against Mr M. was issued and reviewed in a manner which did not secure the minimum safeguards against arbitrariness and it did not, therefore, meet the Convention standards of lawfulness (see paragraphs 103-105 above).

116. There is no reason to doubt that the respondent Government would comply with the present judgment and would not act in violation of the Convention by deporting Mr M. on the basis of a deficient order.

117. In these circumstances, there is no need to examine whether Mr M.'s deportation would also violate another Convention provision (see *Hilal v. the United Kingdom*, no. 45276/99, § 71, ECHR 2001-II; *Daoudi v. France*, no. 19576/08, § 78, 3 December 2009; and *N. v. Finland*, no. 38885/02, § 173, 26 July 2005) and it is no longer necessary to maintain the measures taken under Rule 39 of the Rules of Court. In the event of a new deportation order being issued against Mr M., it will be open to him to submit a new application and to request interim measures under Rule 39 of the Rules of Court (see *Boutagni*, cited above, § 48).

118. The Court finds, therefore, that it is not necessary to examine the complaint under Article 3 and discontinues the application of the measures indicated under Rule 39 of the Rules of Court.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

119. Lastly, the applicants complained that they did not have an effective remedy in relation to the alleged violations of their rights under Articles 3 and 8 of the Convention. Article 13 reads:

> "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."

A. Admissibility

120. The Court finds that the applicants' complaints under Articles 3 and 8 are arguable and that therefore Article 13 is applicable.

121. It further finds that the complaint under Article 13 is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

122. The applicants alleged that the proceedings available to Mr M. under Bulgarian law did not secure adequate protection against violations of Articles 3 and 8. That was so because, *inter alia*, the Supreme Administrative Court provided only a limited and formalistic review of the grounds underlying the deportation order, accepting without evidence the statements of the National Security Service. Furthermore, the court had

failed to consider the proportionality of the impugned measure which interfered with all the applicants' family life.

123. The Government stated that the factual and legal grounds for Mr M.'s expulsion had been impartially and thoroughly examined by the Supreme Administrative Court. That court had delivered a well-reasoned judgment and had had regard to the applicants' Convention rights.

124. In previous similar cases against Bulgaria (see *C.G. and Others*, *Raza*, and *Kaushal and Others*, all cited above), with regard to complaints under Article 13 in conjunction with Article 8, the Court found that proceedings for judicial review of an expulsion order citing national security grounds were deficient in two respects. Firstly, they did not involve meaningful scrutiny of the executive's allegations. Secondly, the courts did not assess whether the interference with the applicants' rights met a pressing social need and was proportionate to any legitimate aim pursued (see *C.G. and Others*, cited above, §§ 59-64).

125. In the present case, similarly, the Court has already found that the Supreme Administrative Court did not carry out a proper examination of the executive's assertion that Mr M. presented a national security risk (see paragraphs 97-104 above). The Court also notes that, as in the cases cited above, the Supreme Administrative Court devoted no attention to questions of proportionality, apparently treating them as irrelevant (see paragraphs 24 and 30-34 above). It follows that the judicial review proceedings in the present case did not secure to the applicants the effective domestic remedy which Article 13 requires in respect of their complaint that Mr M.'s deportation would interfere arbitrarily and disproportionately with their private and family life.

126. The failure of the Supreme Administrative Court to carry out a proper examination of the executive's assertion that Mr M. presented a national security risk, as established above, also undermined the effectiveness of this remedy with regard to the requirements of Article 13 in conjunction with Article 3.

127. In addition, in this context, the Court finds disturbing the approach of the Supreme Administrative Court on the question whether or not the alleged risks of ill-treatment and death in the event of Mr M.'s deportation to Afghanistan rendered the deportation order unlawful. In particular, while it apparently acknowledged the existence of such risks, the court placed on the first applicant the burden of proving that they stemmed from the Afghan authorities and that those authorities would not guarantee his safety (see paragraph 33 above). This approach appears deficient on two levels. First, it seems to place excessive reliance on the question whether the ill-treatment risked in the receiving State would emanate from State or non-State sources, whereas, in accordance with the Court's established case-law, this issue, albeit relevant, cannot be decisive (see, among others, *N. v. Finland*, no. 38885/02, §§ 163-165, 26 July 2005, and *Salah Sheekh*

v. the Netherlands, no. 1948/04, §§ 137-149, ECHR 2007-I). Second, by dealing with such a serious issue summarily and by placing on the first applicant, without any explanation, the burden of proving negative facts, such as the lack of State guarantees in Afghanistan, the court practically deprived Mr M. of a meaningful examination of his claim under Article 3. The Court reiterates in this connection that in view of the importance which it attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires independent and rigorous scrutiny by a national authority of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 293, 21 January 2011, with further references).

128. Finally, the Court notes with concern that yet another aspect of the requirements of Article 13 in conjunction with Article 3 was not complied with by the Bulgarian authorities. It observes that under Bulgarian law, whenever the executive chooses to mention national security as the grounds for a deportation order, appeals against such an order have no suspensive effect, even if an irreversible risk of death or ill-treatment in the receiving State is claimed (see paragraphs 16 and 50 above). Moreover, at least until September 2009, the Supreme Administrative Court held that under Bulgarian law there was no possibility of staying the enforcement of a deportation order issued on national security grounds (see paragraphs 51 and 52 above). In the present case, it appears that the first applicant's request for a stay of his deportation pending the judicial review proceedings was left practically unexamined (see paragraph 29 above). Before the Court's decision to apply Rule 39 of the Rules of Court, Mr M. could have been deported to Afghanistan at any moment and without a prior independent examination of his claim that such deportation would expose him to a serious risk to his life or physical integrity. While this did not happen (apparently, partly for reasons beyond the Bulgarian authorities' control and partly because of delays in their actions (see paragraphs 69-75 above)), the issue to be examined is whether or not the available domestic remedies met the requirement of effectiveness under Article 13 and the Court's case-law. Those requirements take the form of a guarantee and cannot be deemed to have been satisfied by a *de facto* arrangement (see *Gebremedhin [Gaberamadhien]*, cited above, § 66).

129. The Court reiterates that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform

to their obligations under this provision (see *Čonka v. Belgium*, no. 51564/99, § 79, ECHR 2002-I, and *Salah Sheekh*, cited above, § 153). In the context of deportation, the domestic remedy for examination of allegations about serious risks of ill-treatment contrary to Article 3 in the destination country must have automatic suspensive effect (see *Gebremedhin [Gaberamadhien]*, cited above, §§ 58 and 66, and *M.S.S. v. Belgium and Greece* [GC], cited above, § 293). As the prohibition provided by Article 3 against torture and inhuman or degrading treatment is of an absolute character, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees (see *Saadi v. Italy* [GC], no. 37201/06, § 138, ECHR 2008-...). By choosing to rely on national security in a deportation order the authorities cannot do away with effective remedies (see *Al-Nashif*, cited above, § 137).

130. In the light of the above-cited case-law, the Court considers that where there is an arguable claim about a substantial risk of death or ill-treatment there can be no justification for a legal regime under which – as here – suspensive effect is denied as a matter of principle to appeals against a certain category of deportation orders. It finds that the Bulgarian law and practice in relation to stays of enforcement of deportation orders issued on purported national security grounds are incompatible with Article 13 as they do not guarantee automatic suspension of enforcement and do not secure a substantive, rigorous and independent examination of claims under Article 3 of the Convention prior to deportation.

131. All the serious deficiencies noted above lead the Court to the conclusion that the judicial review performed by the Supreme Administrative Court in the present case did not constitute an effective remedy within the meaning of Article 13 in relation to the applicants' complaints under Articles 3 and 8.

132. It has not been suggested by the Government that any other remedies existed in Bulgarian law.

133. There has therefore been a violation of Article 13.

VI. APPLICATION OF ARTICLE 46 OF THE CONVENTION

134. The Court finds it appropriate to consider the present case under Article 46 of the Convention, which reads as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

135. The Court reiterates that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order. Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it (see *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I).

136. Contracting States' duty in international law to comply with the requirements of the Convention may require action to be taken by any State authority, including the legislature (see, as a recent example, *Viaşu v. Romania*, no. 75951/01, 9 December 2008).

137. The Court observes that it has already delivered judgments against Bulgaria, where violations of Articles 5, 8 and 13 of the Convention, similar at least to a certain extent to those found in the present case, have been established (see *Al-Nashif and Others*, no. 50963/99, 20 June 2002; *Musa and Others*, no. 61259/00, 11 January 2007; *Hasan*, no. 54323/00, 14 June 2007; *Bashir and Others*, no. 65028/01, 14 June 2007; *C.G. and Others*, no. 1365/07, 24 April 2008; *Sadaykov*, no. 75157/01, 22 May 2008; *Raza*, no. 31465/08, 11 February 2010; *Kaushal and Others*, no. 1537/08, 2 September 2010 and *Baltaji*, no. 12919/04, 12 July 2011 (not final). A number of other similar cases against Bulgaria are pending before the Court. In view of the above, it appears necessary to assist the respondent Government in the execution of their duty under Article 46 of the Convention in the present case.

138. In particular, in view of its findings in the present case, the Court expresses the view that the general measures in execution of this judgment should include such amendments to the Aliens Act or other Bulgarian legislation and such change of judicial practice in Bulgaria so as to ensure that: (i) even where national security is invoked as grounds of a deportation order, the factual basis and reasons for the conclusion that the alien must be deported should be subject to a thorough judicial scrutiny, if need be with appropriate procedural adjustments related to use of classified information; (ii) the court examining an appeal against deportation should balance the legitimate aim pursued by the deportation order against the fundamental human rights of the affected individuals, including their right to respect for their family life; (iii) the destination country should always be indicated in a legally binding act and a change of destination should be amenable to appeal; (iv) where an arguable claim about a substantial risk of death or ill-treatment in the destination country is made in an appeal against deportation, that appeal should have automatic suspensive effect until the

examination of the claim; and (v) claims about serious risk of death or ill-treatment in the destination country should be examined rigorously by the courts.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

139. 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

140. The applicants claimed 120,000 euros (EUR) in respect of non-pecuniary damage for the violations of Article 5 and EUR 6,000 for the violation of Article 8. They did not formulate claims in relation to their other complaints.

141. The Government submitted that the finding of a violation would constitute sufficient just satisfaction. They argued, *inter alia*, that Mr M. was responsible for the length of his detention pending deportation as he had refused to cooperate and had not presented to the authorities an identity document valid for international travel.

142. The Court considers that the first applicant must have suffered distress as a result of the fact that his detention pending deportation was not justified throughout its duration and that he could not obtain a speedy review of its lawfulness. Making an assessment on an equitable basis, the Court awards him EUR 12,000 in respect of non-pecuniary damage for the violations of Article 5 in the present case.

143. As regards Article 8, the Court notes that its conclusion under that provision does not concern a violation that has already occurred and considers, therefore, that the finding of a violation constitutes sufficient just satisfaction (see *Daoudi*, cited above, § 82, and *Raza*, cited above, § 88, with further references).

B. Costs and expenses

144. The applicants also claimed EUR 3,000 for legal fees in the proceedings before the Court. They submitted a legal fees agreement between them and their lawyer and a time sheet, according to which their lawyer had charged them for 37.5 hours of work at the hourly rate of EUR 80. The applicants requested that any award made in respect of costs

and expenses should be payable directly into the bank account of their legal representative, Mr Y. Grozev.

145. The Government submitted that the number of hours and the hourly rate claimed were excessive.

146. 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 have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to allow the claim for costs and expenses in full.

C. Default interest

147. 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 application admissible;

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

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

4. *Holds* that no separate issue arises under Article 8 in relation to Mr M.'s detention;

5. *Holds* that there would be a violation of the applicants' rights under Article 8 of the Convention in the event of the deportation order of 6 December 2005 being enforced;

6. *Holds* that there is no need to examine the complaint under Article 3 of the Convention;

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

8. *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) EUR 12,000 (twelve thousand euros) to the first applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,000 (three thousand euros) to all the applicants, plus any tax that may be chargeable to them, in respect of costs and expenses, this sum being payable directly into the bank account of the applicants' legal representative, Mr. Y. Grozev;

(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;

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

Done in English, and notified in writing on 26 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President