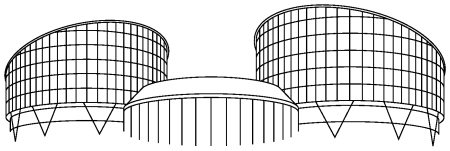

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF S.F. AND OTHERS v. BULGARIA

(Application no. 8138/16)

JUDGMENT

STRASBOURG

7 December 2017

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 S.F. and Others v. Bulgaria,

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

Angelika Nußberger, *President*,
Nona Tsotsoria,
André Potocki,
Yonko Grozev,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov, *judges*,
and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 14 November 2017,

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

PROCEDURE

1. The case originated in an application (no. 8138/16) 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 five Iraqi nationals, Mr S.F., Mrs W.O., Mr Y.F., Mr S.F. and Mr A.F. ("the applicants"), on 8 February 2016. The President of the Section acceded to the applicants' request for their names not to be disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Ms K. Povlakic, a lawyer acting on behalf of the non-governmental organisation Legal Aid Service for Exiles (*Service d'Aide Juridique aux Exilé-e-s* – hereinafter "the SAJE") based in Lausanne, Switzerland. The President of the Section, acting of her own motion, gave Ms Povlakic leave to represent the applicants under Rule 36 § 4 (a) *in fine*. The Bulgarian Government ("the Government") were represented by their Agents, Ms D. Dramova and Ms I. Stancheva-Chinova of the Ministry of Justice.

3. The first and second applicants alleged on behalf of their children, the third, fourth and fifth applicants, that the conditions in which they had been kept in immigration detention had been inhuman and degrading.

4. On 20 September 2016 the Court gave the Government notice of the complaint concerning the conditions of the third, fourth and fifth applicants' immigration detention and declared the remainder of the application inadmissible under Rule 54 § 3.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The five applicants are Iraqi nationals. They now live in Switzerland, where they were granted asylum in July 2017 (see paragraph 31 below). The first and second applicants, Mr S.F. and Mrs W.O., born respectively in 1975 and 1978, are spouses. The other three applicants, Mr Y.F., Mr S.F. and Mr A.F., born respectively in 1999, 2004 and 2014, are their sons.

A. The applicants' interception and arrest

6. On 14 August 2015 the applicants, who had fled from Iraq, covertly crossed the Turkish-Bulgarian border. They were travelling with four other families. From there, they took taxis which drove them to the outskirts of Sofia, where they slept under the open sky for two nights. On 17 August 2015, they hired other taxis to drive them to the Bulgarian-Serbian border, somewhere around the town of Bregovo. Shortly before the border, the applicants switched cars, getting into a Toyota sports utility vehicle, which was supposed to take them through a wooded area to the border itself. They intended to cross that border covertly as well, and from there continue towards Western Europe.

7. At that time, the second applicant was three months pregnant.

8. According to media reports, over the last few years the above-mentioned route has been a popular one for migrants trying to cross Bulgaria covertly on their way to Western Europe. According to a report submitted by the Government, in August 2015 the Bulgarian border police intercepted 350 adult migrants and 132 minor migrants near Bregovo and took them into custody.

9. In the late afternoon of 17 August 2015 the applicants were driven in the Toyota towards the Bulgarian-Serbian border near the village of Rabrovo, which is about fifteen kilometres south of Bregovo, twenty-five kilometres west of the town of Vidin, and about two kilometres from the border. It was also transporting the four other families; together with the applicants, it carried a total of eighteen passengers, eight of whom were minors.

10. At about 5 p.m., when the Toyota was just a few metres away from the border, two officers of the Bulgarian border police intercepted it. The driver fled. One of the officers gave chase, while the other ordered all the passengers to step out of the vehicle. The first officer could not catch up with the driver and came back. According to the applicants, he was apparently annoyed about his inability to detain the driver and hit one of the passengers. The applicants submitted that they had been afraid that he might hit them as well.

11. Half an hour later, two more officers came to the scene; subsequently, a bus, with a driver and a photographer, also arrived. According to the applicants, the officers insulted the arrestees, called them "mice" (the applicants did not specify in what language), and made insulting gestures. They ordered the applicants and the other passengers to get into the bus and drove them to the Bregovo Border Police Department's detention facility in Vidin. According to the applicants, the drive took about an hour. According to the Government, the drive could not have taken less than three hours. The preparation of the documents relating to the applicants' arrest then took another hour, and the written declarations that they had been acquainted with their rights were stamped as having been signed at 9 p.m. The applicants could not have therefore been placed in their cell earlier than 10 p.m.

B. The applicants' detention in Vidin

12. Upon their arrival at the border police's detention facility in Vidin, the applicants were searched. According to them, all their effects – including travelling bags, mobile telephones, money, food, and even the fifth applicant's nappies, baby bottle and milk – were taken away from them, except for a mobile telephone belonging to the third or the fourth applicant, which they managed to conceal. According to a search report submitted by the Government, when searching the second applicant the authorities seized from her four mobile telephones, SIM cards, a USB flash drive, two digital video disks and cash. The Government also pointed out that in a video submitted by the applicants (see paragraph 15 below), travel bags and personal effects were visible inside their cell.

13. After the search, the arrestees were split into two groups. The applicants and another family were put in one cell, and the others in an adjoining one. In the application form, the applicants stated that both cells were on the detention facility's second floor.

14. According to the applicants, the cell was hot and its window could not be opened.

15. The applicants also submitted a video, which according to them had been shot with the mobile telephone that they had managed to conceal during the search (see paragraph 12 above). It shows that the cell was at ground level, about 4 by 4 metres, with a large double window (secured on the inside by a mesh grille), an open door, and a padlocked metal grille on the door. In the video the cell looks run-down, with dilapidated walls, paint coming off the ceiling in flakes, and a dirty floor partly covered with dirty (and in places damp) cardboard sheets. The furniture consists of two old and dilapidated bunk beds and a single bed, with four or five bare soiled mattresses. Two of the mattresses are on the floor, one is on the single bed, and one is on the bottom bunk of one of the bunk beds. A single

crumpled-up bed sheet lies on one of the mattresses on the floor. Personal effects, such as a small shoulder bag, training shoes and some litter, are strewn about. Other random objects – food remains, empty plastic bottles, rubbish and a torn blanket – are piled up in a corner. The third and fourth applicants can be seen sitting on one of the bunk beds, whereas the fifth applicant (the toddler) can at first be seen sitting on the floor beside the door and then being picked up and carried around by the first applicant. Apart from the five applicants, three other people can be seen in the cell: a middle-aged woman lying on the single bed, a boy (perhaps two or three years old), and the man shooting the video.

16. The video was submitted by the applicants on a digital video disk containing two video files. One is in .mpg format and bears a time stamp according to which it was last modified at 5.36 p.m. on 17 September 2015; and the other is in .mp4 format and bears a time stamp according to which it was last modified at 3.27 p.m. on 15 December 2015. The footage in both files is identical, except that: (a) the faces of the applicants in the first one have been pixelated (whereas in the second they have not); (b) the running time of the first video is one minute and twenty-one seconds (whereas that of the second is one minute and thirty-two seconds, as it continues for another ten seconds); and (c) in the first file the footage is horizontal whereas in the second it is rotated to the right at a ninety-degree angle. The footage in the first file has a definition of 1,280 by 720 pixels and is at twenty-four frames per second, whereas that in the second file has a definition of 1,920 by 1,080 pixels and is at twenty-nine frames per second.

17. The applicants explained that the above-mentioned dates and times corresponded with when they had copied the video files in Switzerland, and that they had in fact recorded the original video on 18 August 2015, at about noon. Since they had taken the SIM cards out of the mobile telephone several times in the course of their journey and then re-inserted them, the telephone had not indicated the correct time and date, making it impossible to pinpoint the exact date and time when the video had been recorded.

18. In a letter to the Government Agent, an official from the Migration Directorate of the Ministry of Internal Affairs in Sofia, having compared the video footage with the photographs in the applicants' migration files, stated that he could confirm that the applicants were indeed the people featured in the video.

19. According to the Government, the border police's detention facility in Vidin was equipped in accordance with the relevant regulations. They did not provide further details in that respect.

20. According to the applicants, after being put in the cell, they were not given anything to eat or drink, or allowed to go to the toilet. Since there was no toilet or a bucket in the cell, they had to urinate onto the floor. The Government did not comment on that point.

21. About four hours later, at about 10 p.m., officers came and took the first applicant to another building in order to take his picture and to digitally fingerprint him. After that, the officers took out the second applicant for fingerprinting. After the fingerprinting procedure, the officers left the applicants in the cell for the night.

22. Between 10.30 a.m. and 11 a.m. and between 11 a.m. and 11.30 a.m. the next day, 18 August 2015, a border police investigator interviewed respectively the first and the second applicants. The interviews were conducted in English and translated into Bulgarian with the help of an interpreter.

23. According to the applicants, after the interview the second applicant asked the guards to give her back her bag, so that she could prepare a baby bottle for her toddler (the fifth applicant), and the guards did so. The Government did not comment on that point.

24. After that, the guards took the applicants one by one out of the cell to go to the toilet.

25. According to the applicants, later that day, a ten-month-old child in the adjoining cell touched an electrical wire and suffered an electric shock. That caused panic among the detainees, and the guards allowed all of them out of their cells. An ambulance was called. When hearing that the applicants had not had anything to eat or drink since their arrest, the nurse who came with the ambulance argued with the guards and took the second applicant and her youngest child, the fifth applicant, to a hospital in Vidin, where the second applicant was examined by a gynaecologist between 8.05 p.m. and 8.35 p.m., and the fifth applicant was examined by a paediatrician between 8.20 p.m. and 8.40 p.m. Two or three hours later they were taken back to the detention facility.

26. According to the applicants, at that point the guards told them that they would give them food if they paid for it; the guards then took money from their bags and gave them two loaves of bread, a yoghurt, four bottles of Coca-Cola, one kilogram of tomatoes, one kilogram of cucumbers, one kilogram of bananas, and a small piece of paté. According to the Government, the applicants were provided with food and water, in accordance with the relevant regulations. In support of their assertion, the Government submitted a table setting out the prescribed daily rations for adult and minor detained migrants and a report, drawn up by the head of the Bregovo Border Police Department on 1 September 2015, which listed the names of all migrants – including the applicants – which had been detained in the Department's detention facility in Vidin during the month of August 2015 and provided with food there.

27. Then, at about 10 p.m. or 11 p.m., the applicants were put back in the cell. According to them, they were allowed to go to the toilet before that, but had not been able to do so during the night. The Government did not comment on that point.

28. The next day, 19 August 2015, the applicants were served with orders for the first and second applicants' removal from Bulgaria and for their detention pending removal, all issued the previous day. It does not appear that separate orders were issued with respect to the third, fourth and fifth applicants, who were mentioned as accompanied minors in the orders for the first and second applicants' detention (see paragraph 33 below).

C. Ensuing developments

29. According to the applicants, at about midday on 19 August 2015 they were given back their belongings and driven to an immigration detention facility in Sofia. According to the Government, that happened much earlier that day, at about 6 a.m. or 7 a.m., since the relevant records showed that the applicants had been placed in the detention facility in Sofia at 2.45 p.m., and the normal travel time between the two facilities was about six or seven hours.

30. On 24 August 2015 the applicants sought international protection in Bulgaria. Their applications were registered by the State Agency for Refugees on 31 August 2015, and they were released from the immigration detention facility in Sofia and settled in an open facility for the accommodation of asylum-seekers. On 23 September 2015 those proceedings were, however, discontinued because the applicants had vanished from the facility.

31. In the meantime, the applicants made their way to Switzerland, where they likewise sought international protection on 8 September 2015. On 8 January 2016 the Swiss authorities decided not to examine their applications but rather to transfer them back to Bulgaria under Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ("the Dublin III Regulation"), which also applies to Switzerland (see *A.S. v. Switzerland*, no. 39350/13, §§ 12-13, 30 June 2015). Following legal challenges by the applicants, on 7 July 2016 the Swiss authorities varied their own decision and proceeded with the examination of the applications. Just over a year later, on 27 July 2017, the applicants were granted asylum in Switzerland.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention of aliens who have crossed the border illegally

32. Under section 102(1)(10) of the Ministry of Internal Affairs Act 2014, the border police may detain aliens who have not complied with

the border crossing regime in pre-trial detention facilities or special immigration detention facilities.

B. Detention of minor aliens

33. Under section 44(9) of the Aliens Act 1998, as amended in 2013, accompanied minor aliens may exceptionally be detained, pending their removal, for a period of three months, but the detention facilities in which they are placed must have special premises adapted to their age and needs. Unaccompanied minor aliens may not be detained in detention facilities for aliens.

C. Damages for poor conditions of detention

34. By section 1(1) of the State and Municipalities Liability for Damage Act 1988, the State is liable for damage suffered by individuals or legal persons as a result of unlawful decisions, actions or omissions undertaken by State or municipal authorities or civil servants in the course of or in connection with administrative action.

35. Between 2003 and 2017, convicts and pre-trial detainees routinely claimed damages under this provision with respect to the conditions of their detention (see *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, §§ 127-31, 27 January 2015).

36. By contrast, there is only one reported case relating to conditions in detention facilities for aliens. It was brought in 2010 by a Turkish national kept in an immigration detention facility in Sofia for thirteen days in 2009. The Sofia City Administrative Court found the claim admissible but unproven (see реш. № 2847 от 10.06.2011 г. по адм. д. № 6036/2010 г., АдмС-София-град). The Supreme Administrative Court upheld the judgment on the same basis (see реш. № 14967 от 16.11.2011 г. по адм. д. № 9889/2011 г., ВАС, III о.).

37. Following the Court's pilot judgment in *Neshkov and Others* (cited above), in October 2016 the Government introduced in Parliament a bill to amend the Execution of Punishments and Pre-trial Detention Act 2009 and create two dedicated preventive and compensatory remedies in respect of inhuman or degrading conditions of detention in correctional and pre-trial detention facilities. The bill was enacted and came into force on 7 February 2017 (see *Atanasov and Apostolov v. Bulgaria* (dec.), nos. 65540/16 and 22368/17, §§ 12-28, 27 June 2017).

D. Claims for damages against the State Agency for Refugees in relation to the allegedly slow processing of applications for international protection

38. In several cases aliens kept in immigration detention brought claims under section 1(1) of the 1988 Act (see paragraph 34 above) against the State Agency for Refugees, alleging that their detention had been unduly prolonged because the Agency had failed to process their applications for international protection in a timely manner. In one such case, in determining the quantum of the award of non-pecuniary damages, the Sofia City Administrative Court held, by reference to this Court's case-law, that it should not be too strict in requiring detained asylum-seekers to prove that they had suffered mentally as a result of their unduly prolonged decision (see реш. № 4059 от 17.06.2013 г. по адм. д. № 3527/2013 г., АдмС-София-град). Its judgment was, however, reversed on appeal by the Supreme Administrative Court, which held, *inter alia*, that it had erred in doing so. On that point, it had to abide by the domestic rules of procedure, which required full proof in that respect and could not be disregarded simply because this Court had in some cases found their application unduly formalistic (see реш. № 75 от 05.01.2015 г. по адм. д. № 10659/2013 г., ВАС, III о.). That judgment was fully in line with all other judgments of the Supreme Administrative Court in similar cases against the State Agency for Refugees in which the court likewise insisted on the submission of specific proof of non-pecuniary damage (see реш. № 8294 от 18.06.2014 г. по адм. д. № 876/2014 г., ВАС, III о.; реш. № 9035 от 30.06.2014 г. по адм. д. № 2577/2014 г., ВАС, III о.; реш. № 11766 от 07.10.2014 г. по адм. д. № 2575/2014 г., ВАС, III о.; and реш. № 2454 от 09.03.2015 г. по адм. д. № 6512/2014 г., ВАС, III о.).

III. RELEVANT STATISTICAL DATA

39. According to data published by Eurostat, in 2014 672,215 third-country nationals were found to be illegally present on the territory of Member States of the European Union. The numbers for 2015 and 2016 were respectively 2,154,675 people and 983,860 people.

40. The respective numbers for Greece and Hungary, States which sit, respectively, on the south-eastern border of the European Union and on the south-eastern border of the main Schengen Area, were as follows. For Greece, they were 73,670 people in 2014, 911,470 people in 2015, and 204,820 people in 2016. For Hungary, they were 56,170 people in 2014, 424,055 people in 2015, and 41,560 people in 2016.

41. For Bulgaria, the respective numbers were 12,870 people in 2014, 20,810 people in 2015, and 14,125 people in 2016.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

42. The applicants alleged that the conditions of their immigration detention had subjected the three minors – the third, fourth and fifth applicants – to inhuman and degrading treatment. They relied on Article 3 of the Convention, which provides:

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

A. Scope of the complaint

43. The Government submitted that the applicants had not complained in relation to the conditions in the immigration detention facility in Sofia, and that their complaint only concerned the conditions in the border police's detention facility in Vidin.

44. The applicants replied that their complaint concerned the time from about 5 p.m. on 17 August 2015, when they had been arrested, until about 11 a.m. on 19 August 2015, when they had left the border police's detention facility in Vidin.

45. In the light of the parties' submissions, the Court finds that the complaint only concerns the conditions in the border police's detention facility in Vidin.

B. Admissibility

1. Exhaustion of domestic remedies

(a) The parties' submissions

46. The Government submitted that aliens held in immigration detention could obtain damages under section 1(1) of the 1988 Act (see paragraph 34 above) with respect to the conditions of that detention. That remedy was capable of offering sufficient redress to those no longer in custody. The Government were, however, not aware of any such claims. Detained aliens preferred to claim damages with respect to alleged delays in the processing by the State Agency for Refugees of their applications for international protection. The Government quoted extensively the first-instance judgment mentioned in paragraph 38 above, and on that basis argued that it was clear that a claim relating to the conditions in which the third, fourth and fifth applicant had been kept would have been examined in line with Convention standards. Another argument in that respect was that following the case of *Neshkov and Others v. Bulgaria* (nos. 36925/10 and 5 others, 27 January

2015), the Bulgarian courts' case-law had evolved, affording a greater efficacy to the remedy specified under section 1(1) of the 1988 Act. The applicants, who had had access to interpreters and lawyers from a non-governmental organisation during their stay in the immigration detention facility in Sofia, had been in practice capable of resorting to that remedy. Yet, they had not done so.

47. The applicants did not comment on that point.

(b) The Court's assessment

48. It is not in doubt that the applicants could have brought a claim for damages under section 1(1) of the 1988 Act (see paragraph 34 above) in relation to the conditions in which the three minors – the third, fourth and fifth applicants – had been kept in the border police's detention facility in Vidin. The practical difficulties owing to their being foreigners who do not speak Bulgarian does not exempt them from the requirement of Article 35 § 1 of the Convention to exhaust domestic remedies (see *Choban v. Bulgaria* (dec.), no. 48737/99, 23 June 2005; *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 101, ECHR 2010; and *Djalti v. Bulgaria*, no. 31206/05, § 75, 12 March 2013).

49. Nor is it open to question that, after the end of the applicants' detention – which came more than five months before they lodged their application (see paragraphs 1 and 30 above) – the damages which they could have obtained as a result of such a claim would have amounted to adequate redress for their grievance (see *A.F. v. Greece*, no. 53709/11, §§ 53-54, 13 June 2013; *Housein v. Greece*, no. 71825/11, §§ 55-56, 24 October 2013; *de los Santos and de la Cruz v. Greece*, nos. 2134/12 and 2161/12, §§ 32-33, 26 June 2014; and *Mohamad v. Greece*, no. 70586/11, § 50, 11 December 2014).

50. The only point at issue is whether such a claim would have been reasonably likely to succeed at the time when the applicants lodged their application – February 2016 (see paragraph 1 above).

51. Since about 2003, claims under section 1(1) of the 1988 Act have been the usual way in Bulgaria to seek damages with respect to poor conditions in correctional and pre-trial detention facilities (see *Neshkov and Others*, cited above, §§ 127-31). In several decisions and judgments given in 2008-10, the Court found that they were an effective *ex post facto* remedy with respect to complaints under Article 3 of the Convention in such cases (ibid., § 192, with further references).

52. Inasmuch as section 1(1) of the 1988 Act lays down a general rule governing the liability of the authorities in relation to administrative action, there is no reason why it could not also apply with respect to conditions in immigration detention facilities (compare, *mutatis mutandis*, the statutory provisions at issue in *A.F. v. Greece*, §§ 55-61; *Housein*, §§ 57-62; and *de los Santos and de la Cruz*, §§ 34-36, all cited above; also contrast the

provisions at issue in *Rahimi v. Greece*, no. 8687/08, § 76, 5 April 2011). However, with one exception in 2010-11 – a case in which the claim, though admitted for examination, failed on its facts (see paragraph 36 above) – aliens kept in immigration detention in Bulgaria do not appear to have resorted to claims under that provision to seek redress for poor conditions of detention. Even so, in 2013 the Court noted that, although the Bulgarian courts' case-law regarding conditions of detention under that provision had initially developed in relation to correctional and pre-trial detention facilities, it had, as demonstrated by that case, also been applied in relation to immigration detention facilities. The Court went on to say that if there was doubt regarding whether a remedy was likely to succeed, it had to be attempted, and on that basis concluded that by not bringing such a claim an alien aggrieved by the conditions in which he had been kept in an immigration detention facility in Sofia had failed to exhaust domestic remedies (see *Djalti*, cited above, §§ 73, 74 and 76).

53. However, in 2015, in the light of information that – owing to the way in which the Bulgarian administrative courts approached conditions-of-detention claims lodged by convicts and pre-trial detainees under section 1(1) of the 1988 Act – that remedy was not operating well in practice, the Court found that it was not effective or offering a reasonable prospect of success in such cases (see *Neshkov and Others*, cited above, §§ 194-206). It went on to hold that Bulgaria had to make available effective compensatory and preventive remedies in respect of allegedly inhuman and degrading conditions in correctional and pre-trial detention facilities (ibid., §§ 279-89).

54. As a result, at the proposal of the Government, in early 2017 the Bulgarian Parliament amended the Execution of Punishments and Pre-Trial Detention Act 2009, introducing preventive and compensatory remedies specifically designed to provide redress in respect of inhuman or degrading conditions in correctional and pre-trial detention facilities (see paragraph 37 above). In June 2017 the Court held that those remedies could be seen as effective (see *Atanasov and Apostolov v. Bulgaria* (dec.), nos. 65540/16 and 22368/17, §§ 44-68, 27 June 2017).

55. The question now facing the Court is whether its findings in *Neshkov and Others* (cited above, §§ 130-36, 194-206), which highlighted emerging problems in the operation of the remedy under section 1(1) of the 1988 Act, should prompt it to revisit its earlier ruling in *Djalti* (cited above, §§ 73, 74 and 76) and hold that, at the time when the applicants lodged this application – February 2016 (see paragraph 1 above) – a claim for damages under that provision was not a remedy offering a reasonable prospect of success with respect to aliens complaining of the conditions of their immigration detention.

56. It appears that, since the Court's judgment in the case of *Djalti* (cited above) in 2013, no aliens have brought such claims. There is thus no direct evidence on the point – a state of affairs for which the Government cannot be blamed (see *Mahamed Jama v. Malta*, no. 10290/13, § 63, 26 November 2015; *Moxamed Ismaaciil and Abdirahman Warsame v. Malta*, nos. 52160/13 and 52165/13, § 48, 12 January 2016; and *Abdi Mahamud v. Malta*, no. 56796/13, § 52, 3 May 2016). There are, however, three reasons which, in this case, compel the conclusion that in February 2016 such a claim would not have been reasonably likely to succeed.

57. First, some of the issues noted in *Neshkov and Others* (cited above, §§ 194-206) – (a) that in such cases the Bulgarian administrative courts applied the rule that the burden of proof lies on the party making an allegation in a very strict way; (b) that they often did not take into account the general prohibition on inhuman or degrading treatment but only had regard to the concrete statutory or regulatory provisions governing conditions of detention; and (c) that they often failed to recognise that inhuman or degrading conditions of detention must be presumed to cause non-pecuniary damage – are not exclusive to cases relating to conditions in correctional and pre-trial detention facilities; they can also affect cases concerning conditions in immigration detention facilities.

58. Secondly, the Government's assertion that the evolution of the Bulgarian administrative courts' case-law in conditions-of-detention cases between the Court's judgment in *Neshkov and Others* (cited above) in January 2015 and February 2016 had again rendered the remedy under section 1(1) of the 1988 Act effective is – quite apart from its not being supported by any examples – hard to reconcile with their opting in October 2016 to propose the introduction of a dedicated remedy in that respect, which was put in place by way of a special legislative amendment (see paragraph 37 above).

59. Lastly, the example whereby the Government sought to substantiate their assertion that the Bulgarian administrative courts generally examined claims by aliens under section 1(1) of the 1988 Act in relation to their immigration detention in a manner that was in line with Convention standards does not stand up to scrutiny. It cannot be overlooked that the first-instance judgment cited by them had been quashed on appeal, with the Supreme Administrative Court, in line with its settled case-law on the point, criticising the lower court for having disregarded the strictures of domestic evidentiary rules by reference to rulings of this Court (see paragraph 38 above, and contrast, *mutatis mutandis*, *Posevini v. Bulgaria*, no. 63638/14, § 55, 19 January 2017).

60. The Government's objection cannot therefore be allowed.

2. Alleged abuse of the right of individual application

(a) The parties' submissions

61. The Government submitted that the applicants – by failing to mention in their application to the Court the applications for international protection which they had made in Bulgaria, or to inform the Court of the unfolding of the proceedings pursuant to their applications for international protection in Switzerland – had attempted to mislead the Court and had thus abused their right to an individual application. It could be presumed that they had used their application to the Court to support their legal challenges against the Swiss authorities' decision to transfer them back to Bulgaria.

62. The applicants did not make submissions in respect of that point.

(b) The Court's assessment

63. The submission by applicants of incomplete information may amount to "an abuse of the right of individual application" within the meaning of Article 35 § 3 (a) of the Convention, especially if the information concerns the core of the case or essential evidence, and the failure to disclose it has not been sufficiently explained. A failure on the applicant's part to bring to the Court's attention important developments taking place during the proceedings may also constitute such abuse (see *S.A.S. v. France* [GC], no. 43835/11, § 67, 1 July 2014, and *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014, with further references).

64. In this case, the only relevant complaint was under Article 3 of the Convention in respect of Bulgaria of the conditions of the third, fourth and fifth applicants' detention. In their application, they gave a detailed description of the facts relating to that complaint. The information about their applications for international protection in Bulgaria and Switzerland and the way in which these had been dealt with (see paragraphs 30 and 31 above) does not relate to it. That information would have been relevant if the applicants had also complained in respect of Bulgaria of their possible removal to their country of origin, or in respect of Switzerland of the Swiss authorities' intention to transfer them back to Bulgaria under the Dublin III Regulation. But they did not (contrast *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 362-68, ECHR 2011; *Tarakhel v. Switzerland* [GC], no. 29217/12, §§ 53-122, ECHR 2014 (extracts); and *A.S. v. Switzerland*, no. 39350/13, §§ 15-38, 30 June 2015). Their alleged failure to keep the Court fully apprised of those developments does not therefore raise an issue under Article 35 § 3 (a) of the Convention.

65. Even if the applicants applied to the Court not just in order to vindicate their rights under Article 3 of the Convention but also with a view to using the proceedings to bolster their applications for international protection in Switzerland, that does not mean that their application was abusive (see, *mutatis mutandis*, *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 45, Series A no. 310; *Foti and Others v. Italy*, nos. 7604/76 and 3 others, Commission decision of 11 May 1978, Decisions and Reports (DR) c14, p. 140, at p. 143; and *McFeeley and Others v. the United Kingdom*, no. 8317/78, Commission decision of 15 May 1980 DR 20, p. 44, at p. 70). The term "abuse of [a] right", as used in Article 35 § 3 (a) of the Convention, must be understood in its ordinary meaning – namely, the harmful exercise of a right by its holder in a manner inconsistent with the purpose for which it has been granted (see *S.A.S. v. France*, cited above, § 66, which cites *Miroļubovs and Others v. Latvia*, no. 798/05, § 62, 15 September 2009). There is nothing to suggest that the applicants have sought to deflect the proceedings before the Court towards an end inconsistent with their real purpose.

66. There are therefore no grounds to find the application abusive under Article 35 § 3 (a) of the Convention.

3. Conclusion as to the admissibility of the complaint

67. The Government submitted that since the applicants had been treated in a manner fully in line with the applicable rules and since the authorities had taken into account their heightened vulnerability, the complaint was manifestly ill-founded.

68. The applicants maintained their allegations.

69. The Court cannot agree with the Government that the complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on other grounds. It must therefore be declared admissible.

C. Merits

1. The video evidence submitted by the applicants

(a) The parties' submissions

70. The Government argued that the video submitted by the applicants, which would not be admissible in domestic proceedings, could not serve as proper evidence in these proceedings either. It was impossible to establish the precise date and time when it had been shot, and its quality was very poor. It had obviously been created with a view to being used as evidence, and it was well known that video footage could easily be manipulated. One could not hear Bulgarian being spoken on it, see any objects featuring the

Cyrillic script, or be certain that the premises featuring in it were in fact those of the border police's detention facility in Vidin. Indeed, it was unclear whether it had even been shot in Bulgaria.

71. The applicants gave explanations about the circumstances in which they had recorded and then copied the video (see paragraph 17 above).

(b) The Court's assessment

72. According to its settled case-law, the Court is free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it (see *Ireland v. the United Kingdom*, 18 January 1978, § 210, Series A no. 25, and *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 208, ECHR 2013). It is not bound by procedural barriers to the admissibility of evidence, and adopts the conclusions supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII, and, in relation specifically to the detention of minors migrants, *Rahimi*, cited above, § 64). These points reflect the well-established principle of international law that international courts are not bound by domestic evidentiary rules (see, in relation specifically to the Court, *Al Nashiri v. Poland*, no. 28761/11, § 23, 24 July 2014, and *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 21, 24 July 2014).

73. Indeed, the Court has already relied on video evidence, not only in other contexts (see, for example, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, §§ 10, 91 and 176, ECHR 2000-VIII; *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 9, 139 and 185, ECHR 2011 (extracts); and *Sargsyan v. Azerbaijan* [GC], no. 40167/06, §§ 11, 56, 61, 70 and 133, ECHR 2015), but also specifically with a view to establishing the conditions of detention of minor migrants (see *Mahmundi and Others v. Greece*, no. 14902/10, §§ 60 and 64, 31 July 2012). It has even asked respondent Governments to provide video evidence in cases concerning conditions of detention (see *Alimov v. Turkey*, no. 14344/13, § 76, 6 September 2016), and has drawn inferences from their failure to do so (see *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, §§ 172 and 175, 1 July 2010) or from the applicants' failure to rebut photographic evidence submitted by the respondent Government in cases relating to conditions of immigration detention (see *Tehrani and Others v. Turkey*, nos. 32940/08 and 2 others, § 89, 13 April 2010, and *Erkenov v. Turkey*, no. 18152/11, § 38, 6 September 2016). It therefore finds that it can take into account the video evidence submitted by the applicants in this case.

74. As regards the reliability of that evidence, it should be noted that the two video files submitted by the applicants bore time stamps which dated from not long after the time of their detention in Bulgaria (see paragraph 16 above). In view of the applicants' explanations on that point (see

paragraph 17 above), and since it is well known that electronic files can be automatically re-dated when copied from one device to another, the Court finds that the time stamps on the two video files do not throw doubt on their authenticity. The footage is, for its part, sufficiently clear, and there are no signs that it has been manipulated. Indeed, the Bulgarian authorities confirmed that the people featuring on it were the applicants (see paragraph 18 above). It is true that there are no elements in the video – such as text written in Cyrillic or words spoken in Bulgarian – which could enable the Court positively to ascertain that it was recorded inside the border police's detention facility in Vidin where the applicants were held. At the same time, there are no elements which suggest otherwise. In these circumstances, the mere expression of misapprehensions by the Government on that point cannot cause the Court to doubt that the video depicts, as asserted by the applicants, that facility. Although it was open to the Government to submit visual material – such as photographs or a video recording of the premises where the applicants had been kept according to official records – or other evidence casting doubt in that respect, they did not back their assertions with such evidence (see paragraph 19 above). According to the Court's case-law, when applicants produce prima facie credible accounts or evidence that the conditions in which they were detained were inhuman or degrading, it is for the respondent Government to come up with explanations or evidence which can cast doubt in that respect, failing which the Court may find the applicants' allegations proven (see, among other authorities, *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 122-23, 10 January 2012).

75. The Court will therefore take into account the video submitted by the applicants in establishing the conditions of their detention.

2. Examination of the merits of the complaint

(a) The parties' submissions

76. The Government submitted that neither the conditions in the border police's detention facility in Vidin nor the manner in which the applicants had been provided there with food and drink had been in breach of Article 3 of the Convention, especially in view of the presence of both their parents and the limited amount of time which they had spent there – especially the fifth applicant, who had been out of the facility for several hours when taken to a hospital in Vidin on 18 August 2015. There was no requirement under Bulgarian law to detain minor migrants in specially adapted facilities.

77. The applicants maintained their allegations regarding the conditions in the border police's detention facility in Vidin, and submitted that they matched the findings of a number of monitoring reports about the conditions in which migrants were being detained in Bulgaria. They pointed out that owing to such problems some States had in the past refused to send asylum-seekers back to Bulgaria under the Dublin Regulations.

(b) The Court's assessment

(i) Relevant principles and case-law

78. The general principles applicable to the treatment of people held in immigration detention were recently set out in detail in *Khlaifia and Others v. Italy* ([GC], no. 16483/12, §§ 158-67, ECHR 2016 (extracts)), and there is no need to repeat them here.

79. It should, however, be noted that the immigration detention of minors, whether accompanied or not, raises particular issues in that regard, since, as recognised by the Court, children, whether accompanied or not, are extremely vulnerable and have specific needs (see, as a recent authority, *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, § 103, 22 November 2016). Indeed, the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant. Article 22 § 1 of the 1989 Convention on the Rights of the Child (1577 UNTS 3) encourages States to take appropriate measures to ensure that children seeking refugee status, whether or not accompanied by their parents or others, receive appropriate protection and humanitarian assistance (see *Popov v. France*, nos. 39472/07 and 39474/07, § 91, 19 January 2012). In recent years, the Court has in several cases examined the conditions in which accompanied minors had been kept in immigration detention.

80. The applicants in *Muskhadzhiyeva and Others v. Belgium* (no. 41442/07, 19 January 2010) had been respectively seven months, three and a half years, five years and seven years old, and had been detained for one month. Noting their age, the length of their detention, the fact that the detention facility had not been adapted for minors, and the medical evidence that they had undergone serious psychological problems while in custody, the Court found a breach of Article 3 (ibid., §§ 57-63).

81. The applicants in *Kanagaratnam v. Belgium* (no. 15297/09, 13 December 2011) had been respectively thirteen, eleven, and eight years old, and had been detained for about four months. The Court noted that they had been older than those in the above-mentioned case and that there was no medical evidence of mental distress having been experienced by them in custody. Even so, noting that (a) the detention facility had not been adapted to minors, (b) the applicants had been particularly vulnerable owing to the fact that before arriving in Belgium, they had been separated from their

father on account of his arrest in Sri Lanka and had fled the civil war there, (c) their mother, although with them in the facility, had been unable to take proper care of them, and (d) their detention had lasted a much longer period of time than that in the case of *Muskhadzhiyeva and Others* (cited above), the Court found a breach of Article 3 (ibid., §§ 64-69).

82. The applicants in *Popov v. France* (nos. 39472/07 and 39474/07, 19 January 2012) had been respectively five months and three years old, and had been detained for fifteen days. Although designated for receiving families, the detention facility had been, according to several reports and domestic judicial decisions, not properly suited for that purpose, both in terms of material conditions and in terms of the lack of privacy and the hostile psychological environment prevailing there. That led the Court to find that, (a) despite the lack of medical evidence to that effect, the applicants, who had been very young, had suffered stress and anxiety, and that (b) in spite of the relatively short period of detention, there had been a breach of Article 3 (ibid., §§ 92-103).

83. The applicants in five recent cases against France – *R.M. and Others v. France* (no. 33201/11, 12 July 2016), *A.B. and Others v. France* (no. 11593/12, 12 July 2016), *A.M. and Others v. France* (no. 24587/12, 12 July 2016), *R.K. and Others v. France* (no. 68264/14, 12 July 2016) and *R.C. and V.C. v. France* (no. 76491/14, 12 July 2016) – had been between four months and four years old, and had been detained for periods ranging between seven and eighteen days. The Court noted that unlike the detention facility at issue in *Popov* (cited above), the material conditions in the two detention facilities concerned in those five cases had not been problematic. They had been adapted for families that had been kept apart from other detainees and provided with specially fitted rooms and child-care materials. However, one of the facilities had been situated right next to the runways of an airport, and so had exposed the applicants to particularly high noise levels. In the other facility, the internal yard had been separated from the zone for male detainees by only a net, and the noise levels had also been significant. That had affected the children considerably. Another source of anxiety had been the constraints inherent in a place of detention and the conditions in which the facilities had been organised. Although over a short period of time those factors had not been sufficient to attain the threshold of severity engaging Article 3 of the Convention, over a longer period their effects would necessarily have affected a young child to the point of exceeding that threshold. Since the periods of detention had been, in the Court's view, long enough in all five cases, it found breaches of Article 3 in each of them (see *R.M. and Others v. France*, §§ 72-76; *A.B. and Others v. France*, §§ 111-15; *A.M. and Others v. France*, §§ 48-53; *R.K. and Others v. France*, §§ 68-72; and *R.C. and V.C. v. France*, §§ 36-40, all cited above).

(ii) Application in this case

84. In this case, the period under consideration was, according to the Government's calculations, about thirty-two hours. According to the applicants' calculations, it was about forty-one hours (see paragraphs 11 and 29 above). Whichever of the two versions is taken as correct, it is clear that this amount of time was considerably shorter than the periods at issue in the cases mentioned in the previous paragraphs. However, the conditions in the border police's detention facility in Vidin, as described by the applicants (without being contradicted by the Government), and as revealed by the video submitted by them, were considerably worse than those in all those cases. The cell in which the applicants were kept, though relatively well ventilated and lit, was extremely run-down, with paint peeling off the walls and ceiling, dirty and worn out bunk beds, mattresses and bed linen, and litter and damp cardboard on the floor (see paragraph 15 above). It can hardly be said that those were suitable conditions in which to keep a sixteen-year old, an eleven-year old, and especially a one-and-a-half-year old, even for such a short period of time.

85. To this should be added the limited possibilities for accessing the toilet, which – as asserted by the applicants and as revealed by the video which they submitted (see paragraphs 15, 20, 24 and 27 above) – forced them to urinate onto the floor of the cell in which they were kept. Since the Government did not dispute that assertion or submit any evidence to disprove it, it must be regarded as proven.

86. The Court has many times held, in relation to prisons and pre-trial detention facilities, that subjecting a detainee to the humiliation of having to relieve himself or herself in a bucket in the presence of other inmates can have no justification, except in specific situations where allowing visits to the sanitary facilities would pose a concrete and serious safety risk (see the cases cited in *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, § 211, ECHR 2014 (extracts)). That must be seen as equally, if not more, applicable to detained minor migrants.

87. The final element to be taken into account is the authorities' alleged failure to provide the applicants with food and drink for more than twenty-four hours after taking them into custody (see paragraphs 20, 25 and 26 above, and see, also as regards the adequate provision of food to people in detention, *Kadiķis v. Latvia (no. 2)*, no. 62393/00, § 55, 4 May 2006; *Stepuleac v. Moldova*, no. 8207/06, § 55, 6 November 2007; and *Korneykova and Korneykov v. Ukraine*, no. 56660/12, § 141, 24 March 2016). The applicants' allegations in that respect must likewise be seen as proven, given that the Government only stated that they had been provided with quantities of food amounting to the prescribed daily rations, without commenting on the specific allegations about the serious delay in the provision of food and the manner in which it had in fact been provided (see paragraph 26 above).

88. Nor did the Government dispute the allegation that the second applicant had only been given access to the baby bottle and the milk of the toddler (the fifth applicant) about nineteen hours after they had been taken into custody (see paragraph 23 above). The small shoulder bag which can be seen in the video submitted by the applicants (see paragraph 15 above) does not appear to contain such items. In any event, a facility in which a one-and-a-half-year-old child is kept in custody, even for a brief period of time, must be suitably equipped for that purpose, which does not appear to have been the case with the border police's detention facility in Vidin.

89. The combination of the above-mentioned factors must have affected considerably the third, fourth and fifth applicants, both physically and psychologically, and must have had particularly nefarious effects on the fifth applicant in view of his very young age. Those effects were hardly offset by the few hours that he spent in the hospital in Vidin in the afternoon and evening of 18 August 2015 (see paragraph 25 above).

90. By keeping those three applicants in such conditions, even for a brief period of time, the Bulgarian authorities subjected them to inhuman and degrading treatment.

91. It is true that in recent years the High Contracting States that sit on the European Union's external borders have had difficulties in coping with the massive influx of migrants (see *M.S.S. v. Belgium and Greece*, cited above, § 223). But a perusal of the relevant statistics shows that although the numbers are not negligible, in recent years Bulgaria has by no means been the worst affected country (see paragraphs 8 and 39-41 above). Indeed, the number of third-country nationals found illegally present on its territory in the course of 2015 was about twenty times lower than in Greece and about forty-four times lower than in Hungary (ibid.). It cannot therefore be said that at the relevant time Bulgaria was facing an emergency of such proportions that it was practically impossible for its authorities to ensure minimally decent conditions in the short-term holding facilities in which they decided to place minor migrants immediately after their interception and arrest (contrast, *mutatis mutandis*, *Khlaifia and Others*, cited above, §§ 178-83).

92. In any event, in view of the absolute character of Article 3 of the Convention, an increasing influx of migrants cannot absolve a High Contracting State of its obligations under that provision, which requires that people deprived of their liberty be guaranteed conditions compatible with respect for their human dignity. A situation of extreme difficulty confronting the authorities is, however, one of the factors in the assessment whether or not there has been a breach of that Article in relation to the conditions in which such people are kept in custody (ibid., §§ 184-85).

93. In view of the above considerations, the Court concludes that there has been a breach of Article 3 of the Convention with respect to the third, fourth and fifth applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. 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

95. The applicants claimed 12,000 euros (EUR) in respect of the distress and humiliation which they had endured as a result of the conditions in which the third, fourth and fifth applicants had been detained. They submitted that those feelings had been exacerbated by their extreme vulnerability at the time.

96. The Government submitted that the claim was exorbitant and surpassed by several times the awards made in previous similar cases in respect of Bulgaria. In their view, the finding of a breach would constitute sufficient just satisfaction in respect of any non-pecuniary damage sustained by the applicants.

97. The Court finds that the third, fourth and fifth applicants must have suffered non-pecuniary damage as a result of the inhuman and degrading conditions in which they were kept in the border police's detention facility in Vidin. Ruling in equity, as required under Article 41 of the Convention, it awards each of them EUR 600, plus any tax that may be chargeable on those sums.

B. Costs and expenses

98. The applicants sought EUR 2,731 (the equivalent, according to them, of 2,995 Swiss francs (CHF)) in respect of the fees of their representative and those of an interpreter from Arabic into French. They explained that the interpreter, who had facilitated their communication with their representative, was employed by the SAJE on a monthly salary; that was why his services had not been billed separately. In support of their claim, the applicants submitted a bill of costs drawn up by their representative. According to that bill the representative had worked a total of twelve and a half hours on the case, at the hourly rate of CHF 200, and the interpreter had worked three hours on the case, at the hourly rate of CHF 65.

99. The Government submitted that the sum claimed in respect of the work done by the applicants' representative was exorbitant, and noted that the applicants had not claimed the reimbursement of other expenses.

100. According to the Court's case-law, applicants are entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Having regard to these principles and the materials in its possession, in this case the Court awards jointly to all applicants a total of EUR 1,000, plus any tax that may be chargeable to them, in respect of all heads of costs.

C. Default interest

101. 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 complaint concerning the conditions of the third, fourth and fifth applicants' detention admissible;

2. *Holds* that there has been a violation of Article 3 of the Convention with respect to the third, fourth and fifth applicants;

3. *Holds*

(a) that the respondent State is to pay, 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 the currency of the respondent State at the rate applicable at the date of settlement:

(i) to each of the third, fourth and fifth applicants, EUR 600 (six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) jointly to all applicants, EUR 1,000 (one thousand euros), plus any tax that may be chargeable to them, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

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

Done in English, and notified in writing on 7 December 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Angelika Nußberger
Deputy Registrar	President