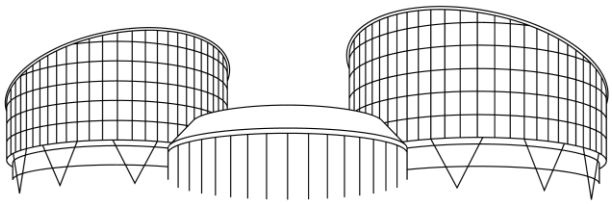

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF PONOMARYOVI v. BULGARIA

(Application no. 5335/05)

JUDGMENT

This version was rectified on 30 August 2011 under Rule 81 of the Rules of Court

STRASBOURG

21 June 2011

FINAL

28/11/2011

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Ponomaryovi v. Bulgaria,

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

Nicolas Bratza, *President*,
Lech Garlicki,
Ljiljana Mijović,
Sverre Erik Jebens,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges*,
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 31 May 2011,

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

PROCEDURE

1. The case originated in an application (no. 5335/05) 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 two Russian nationals, Mr Anatoliy Vladimirovich Ponomaryov and Mr Vitaliy Vladimirovich Ponomaryov ("the applicants"), on 8 February 2005.

2. The applicants were represented by Mr V. Stoyanov, a lawyer practising in Pazardzhik, Bulgaria. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Dimova, of the Ministry of Justice.

3. The Government of the Russian Federation, having been informed of their right to intervene in the case (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court), stated in a letter of 25 December 2007 that they did not wish to avail themselves of that opportunity.

4. The applicants alleged, in particular, that they had been discriminated against as, unlike Bulgarian nationals and certain categories of aliens, they had been required to pay fees in order to pursue their secondary education.

5. By a decision of 18 September 2007, the Court declared the application partly inadmissible. By a decision of 10 February 2009, it struck part of the application out of its list of cases and declared a further part inadmissible and the remainder admissible.

6. The applicants and the Government each filed further observations (Rule 59 § 1).

7. The application was later transferred to the Fourth Section of the Court, following a change in the composition of the Court's Sections on 1 February 2011.

8. On 3 May 2011 the President of the Fourth Section decided not to accede to the applicants' request that their identity not be disclosed to the public (Rule 47 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

9. The first applicant, Mr Anatoliy Ponomaryov, was born on 15 June 1986 in Kustanay, in the Kazakh Soviet Socialist Republic (now the Republic of Kazakhstan). His brother, the second applicant, Mr Vitaliy Ponomaryov, was also born there on 6 June 1988. In 1990 the two moved to Moscow, the Russian Federation, with their mother, Mrs A.P., a Russian national. In 1992 their mother divorced their father, Mr V.P., also a Russian national. The whereabouts of the latter remain unclear; it appears that he might have settled in another country, probably Germany. It also seems that the applicants have not kept any contact with their father since the divorce.

10. On 6 August 1993 the applicants' mother married a Bulgarian national. In 1994 the family settled in Pazardzhik, Bulgaria. The applicants' mother was then granted a permanent residence permit on the basis of her marriage to a Bulgarian national and the applicants were entitled to reside in Bulgaria on the basis of their mother's permit.

11. In 1994 the applicants enrolled in a Bulgarian primary school, and later in secondary schools. Both of them apparently speak fluent Bulgarian.

12. Their mother has been out of work since 1998. Her husband owned a small Internet café business, which was apparently shut down by the authorities in 2005.

13. On 15 June 2004 Mr Anatoliy Ponomaryov turned 18, and accordingly had to obtain an independent permit in order to continue residing in Bulgaria lawfully. In September 2004 he contacted the immigration authorities and was informed that, to obtain a permanent residence permit, he first had to leave Bulgaria, obtain a special visa from a Bulgarian embassy abroad, return to the country and apply for a temporary residence permit; only then could he apply for a permanent residence permit.

14. On 28 September 2004 the consular department of the Ministry of Foreign Affairs informed Mr Anatoliy Ponomaryov that it would not insist on his leaving the country to obtain a special visa and that he could get one

in Bulgaria. The applicant then applied for a permanent residence permit. However, as he was unable to raise the money needed to pay the requisite fees (amounting in total to slightly over 1,300 Bulgarian levs (BGN)), the immigration authorities returned his application on 22 February 2005 without considering it.

15. In October 2005 both applicants, asserting that they had no property or income, asked the Commission for the Remission of Uncollectible State Debts, established by the President of the Republic, to waive the fees in respect of both of them. On 31 May 2006 the Commission rejected their requests, stating that their debts did not appear to be uncollectible.

16. In the meantime, on 17 February and 8 March 2006, the immigration authorities informed the applicants that they had been granted permanent residence permits and invited them to collect them. On 11 May 2006 the applicants paid the requisite fees and obtained documents certifying that they had permanent residence permits. Mr Anatoliy Ponomaryov paid a total amount of BGN 1,375.26 and Mr Vitaliy Ponomaryov a total amount of BGN 1,415.26. They managed to raise the money by taking out a bank loan.

B. Mr Anatoliy Ponomaryov's school fees

17. On 9 February 2005, when Mr Anatoliy Ponomaryov was in the final year of his secondary education, the head of the Regional Education Inspectorate of the Ministry of Education wrote to the head teacher of his school, inquiring whether the applicant had paid the school fees which he owed as an alien without a permanent residence permit and, if not, whether any measures had been taken to collect them. Two and a half months later, on 26 April 2005, the Education Inspectorate in Pazardzhik held a meeting with the head teacher. At that meeting, attended also by representatives of the immigration authorities, a discussion took place as to whether steps should be taken to enforce section 4(3) of the additional provisions of the 1991 National Education Act (see paragraph 32 below) in respect of the applicant.

18. On 28 April 2005 the head teacher ordered the applicant to pay 800 euros (EUR) in fees, failing which he would be barred from attending classes and would not be issued with a certificate for having completed the school year. She relied on a decision of the Minister of Education of 20 July 2004 laying down the fees payable by aliens schooled in Bulgarian educational establishments under the above-mentioned section 4(3).

19. The applicant sought judicial review of the head teacher's order. On 5 July 2005 the Pazardzhik Regional Court partly quashed and partly upheld the order. It found that there was no indication that the applicant had a permanent residence permit. He could therefore pursue his studies only if he paid the requisite fees. However, the fact that he had not paid them did not

mean that he should not be issued with a certificate for having completed the previous school year, given that the amount could still be recovered from him. That part of the order was therefore unlawful.

20. Both the applicant and the head teacher appealed. On 13 June 2006 the Supreme Administrative Court upheld the lower court's judgment (реш. № 6381 от 13 юни 2006 г. по адм. д. № 10496/2005 г., ВАС, V о.). It fully agreed with its reasoning, and added that the fact that in the meantime the first applicant had been granted a permanent residence permit (see paragraph 16 above) meant solely that he could attend a Bulgarian school free of charge in the future. However, as at the relevant time he had not had permanent resident status, he had been obliged to pay the requisite fees. Concerning the issuance of a certificate for completion of the corresponding school year, the lower court's ruling had been correct, as payment of the fees was a precondition for attending classes but failure to pay could not serve as grounds for refusing to award a certificate if the individual concerned had already completed the year.

21. Apparently, the applicant's school did not in practice prevent him from attending classes, but the issuance of his secondary school diploma was delayed by about two years, which in turn delayed his enrolment in university.

C. Proceedings for judicial review of the Minister's decision

22. Separately, Mr Anatoliy Ponomaryov sought review of the Minister's fee-setting decision of 20 July 2004 (see paragraph 18 above). He argued, *inter alia*, that it was discriminatory to require aliens to pay fees to attend Bulgarian schools.

23. On 10 January 2006 a three-member panel of the Supreme Administrative Court dismissed the application (реш. № 349 от 10 януари 2006 г. по адм. д. № 5034/2005 г., ВАС, V о.). It found, *inter alia*, that privileges granted on the basis of nationality were commonplace in many countries. Moreover, Article 14 of the Convention did not expressly prohibit discrimination on such grounds. If envisaged by a statute or an international treaty, the differential treatment of individuals on the basis of their nationality did not amount to discrimination. Moreover, aliens having permanent residence permits did not have to pay school fees. However, the applicant had not shown that he had such a permit.

24. On an appeal by the applicant, a five-member panel of the Supreme Administrative Court upheld the lower court's judgment on 13 June 2006 (реш. № 6391 от 13 юни 2006 г. по адм. д. № 2249/2006 г., ВАС, петчленен с-в), fully concurring with its reasoning.

D. Mr Vitaliy Ponomaryov's school fees

25. On 31 October 2005, when Mr Vitaliy Ponomaryov was in the penultimate year of his secondary education, the head teacher of his school ordered him to pay EUR 1,300 in fees, failing which he would be barred from attending classes and would not be issued with a certificate for having completed the school year.

26. The applicant sought judicial review of this order, arguing, *inter alia*, that it infringed his rights under the Convention. On 4 April 2006 the Pazardzhik Regional Court dismissed his application. It found no indication that the applicant had a permanent residence permit or that a procedure for obtaining such a permit was under way. He could therefore pursue his studies only if he paid the requisite fees. This did not infringe his right to education, as aliens could attend Bulgarian schools provided they paid the requisite fees.

27. The applicant appealed. On 13 December 2006 the Supreme Administrative Court upheld the lower court's judgment (реш. № 12503 от 13 декември 2006 г. по адм. д. № 6371/2006 г., ВАС, V о.). It noted that, since the applicant had in the meantime been granted a permanent residence permit (see paragraph 16 above), he could attend a Bulgarian school free of charge in the future. However, as at the relevant time he had not had permanent resident status, he had been obliged to pay the requisite fees.

28. On 20 March 2007 the head teacher of the applicant's school invited him to pay EUR 1,300 in respect of his schooling during the 2004/05 school year and the same amount in respect of his schooling during the 2005/06 school year.

29. It seems that the applicant was in practice not barred from attending classes throughout the period 2004/06. He submitted that he had been prevented from doing so for certain periods of time, but the court examining a civil claim by his school against him (see paragraph 30 below) found, after reviewing the available evidence in this respect, that he had attended school without interruption during that period.

30. On 6 June 2007 the applicant's school brought a claim against him, seeking payment of the fees due. In a judgment of 18 February 2008, the Pazardzhik District Court allowed the claim and ordered the applicant to pay his school EUR 2,600 plus interest. It found that the applicant owed this amount because at the relevant time he had not had a permanent residence permit entitling him to be schooled free of charge. Following an appeal by the applicant, on 7 May 2008 the Pazardzhik Regional Court quashed the lower court's judgment and dismissed the claim. The school appealed on points of law. On 25 November 2008 the Supreme Court of Cassation accepted the appeal for examination, and in a judgment of 29 April 2010 (реш. № 1012 от 29 април 2010 г. по гр. д. № 3446/2008 г., ВКС, I г. о.), quashed the Pazardzhik Regional Court's judgment and allowed the claim,

ordering the applicant to pay the school the equivalent of EUR 2,600 plus interest (the total sum came to BGN 6,394.45), and BGN 350 for costs. It observed, *inter alia*, that the requirement for certain categories of aliens to pay school fees stemmed directly from the applicable law.

II. RELEVANT DOMESTIC LAW

A. The 1991 Constitution

31. The relevant provisions of the 1991 Constitution read as follows:

Article 26 § 2

"Aliens residing in the Republic of Bulgaria shall have all rights and obligations flowing from this Constitution except those rights and obligations in respect of which the Constitution and the laws require Bulgarian nationality."

Article 53

"1. Everyone shall have the right to education.

2. School education up to the age of 16 years shall be compulsory.

3. Primary and secondary education in State and municipal schools shall be free of charge. Education in higher educational establishments run by the State shall be free of charge under the conditions set out in the law. ..."

B. The 1991 National Education Act

32. Under section 6 of the 1991 National Education Act (*Закон за народната просвета*), education in State and municipal schools is free of charge. Section 4(1) of the additional provisions of the Act allows all aliens to enrol in Bulgarian schools. Their education is also free of charge if they: (a) have a permanent residence permit (section 4(2), as originally enacted in 1991); (b) have been enrolled following a decision of the Council of Ministers or under intergovernmental agreements so providing (the same provision, as amended in 1998); or (c) are of compulsory school age (under 16), and their parents work in Bulgaria and are nationals either of a member State of the European Union or the European Economic Area, or of Switzerland (the same provision, as amended in May 2006; the amendment was intended to implement in Bulgarian law the provisions of Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers, and came into force on the day of Bulgaria's accession to the European Union, namely 1 January 2007). Aliens who do not fall into

any of these categories must pay fees in amounts fixed by the Minister of Education. The proceeds from these fees are to be used exclusively for the needs of the educational establishments where the persons concerned are being schooled (section 4(3), as amended in 1998).

III. RELEVANT INTERNATIONAL LAW

33. The relevant parts of Articles 2 § 1 and 28 § 1 of the 1989 United Nations Convention on the Rights of the Child (ratified by Bulgaria on 3 June 1991) read as follows:

Article 2 § 1

"States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

Article 28 § 1

"States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

..."

34. Article 13 of the International Covenant on Economic, Social and Cultural Rights (ratified by Bulgaria on 21 September 1970) reads as follows:

"1. The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

..."

35. Article 17 of the revised European Social Charter (which Bulgaria ratified on 7 June 2000, accepting sixty-two of its ninety-eight paragraphs, including Article 17 § 2 below) reads, in its relevant parts, as follows:

"With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in cooperation with public and private organisations, to take all appropriate and necessary measures designed:

...

2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools."

IV. RELEVANT COMPARATIVE LAW

36. On the basis of the materials available to the Court in respect of twenty-six member States of the Council of Europe, it appears that in seventeen States (Belgium, Cyprus, the Czech Republic, Estonia, France, Germany, Italy, Latvia, Luxembourg, the Netherlands, Portugal, Russia, Slovenia, Spain, Switzerland, "the former Yugoslav Republic of Macedonia" and the United Kingdom), primary and secondary education is free of charge and accessible to all persons living or residing in the country regardless of their immigration status or that of their parents. Certain categories of aliens are required to pay fees for their primary and secondary schooling in Malta, and only for their upper secondary schooling in

Denmark, Poland and Romania. In five States (Croatia, Monaco, Slovakia, Turkey and Ukraine), certain non-nationals may experience difficulties in enrolling in schools because of their irregular status.

37. The length of compulsory education varies between member States, from eight years at the bottom end of the spectrum to thirteen years at the top end. In eleven States compulsory schooling lasts for eight or nine years, in ten States it lasts for ten or eleven years, and in five States it lasts for twelve or thirteen years. However, it is possible to say that in the great majority of the twenty-six States surveyed, compulsory education encompasses primary and lower secondary education, with the pupil usually finishing compulsory education aged approximately 16. This is generally the case for the first two groups, which together comprise twenty-one States. The number of years differs in each State depending on what age compulsory education begins rather than ends. Upper secondary education is compulsory only in a minority of the States surveyed (Belgium, Luxembourg, Portugal, "the former Yugoslav Republic of Macedonia" and Ukraine).

38. The Spanish Constitutional Court has dealt with the issue of the right to post-compulsory education for non-resident aliens. A Spanish statute governing the rights and freedoms of aliens and their social integration excluded non-resident aliens from the right to post-compulsory education. The Constitutional Court, in judgment no. 236/2007 of 7 November 2007, declared that exclusion unconstitutional since it prevented undocumented or non-resident minors from having access to post-compulsory education. The court held that whether or not the minors were lawfully resident was not a criterion for granting the right to post-compulsory education, which was part of the right to education protected by Article 27 of the Spanish Constitution. It observed that the right to education was not limited to basic education and that it also applied to subsequent, post-compulsory education. The court referred to Article 2 of Protocol No. 1 and to the fact that, in accordance with Article 1 of the Convention, the former applied *ratione personae* to any "person", including non-resident or illegal aliens.

39. In 1982, in the case of *Plyler v. Doe* (457 U.S. 202), in which immigrant children in the State of Texas complained that they had been deprived of the right to free education on account of their undocumented status, the Supreme Court of the United States held, by five votes to four, that the requirement for illegal aliens – as opposed to nationals and lawfully resident aliens – to pay school fees deprived them of the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

V. RELEVANT COUNCIL OF EUROPE MATERIAL

40. In Resolution 1509 (2006), adopted on 27 June 2006 and entitled "Human rights of irregular migrants", the Parliamentary Assembly of the Council of Europe expressed the view that "all children have a right to education, extending to primary school and secondary school levels, in those countries where such schooling is compulsory. Education should reflect their culture and language and they should be entitled to recognition, including through certification, of the standards achieved" (point 13.6).

VI. RELEVANT STATISTICAL DATA

41. Data published by the United Nations Department of Economic and Social Affairs, Population Division[1] shows that in 2010 there were 107,245 immigrants in Bulgaria, accounting for 1.4% of the population. According to the same source, the annual rate of change of the migrant stock in Bulgaria between 2000 and 2010 was 0.6%.

42. Data published by the International Organisation for Migration[2] show that in 2006 in Bulgaria there were 55,684 aliens with permanent residence permits. According to the same source, the number of aliens apprehended as illegally present in the country was as follows: 400 in 2002, 454 in 2003, 877 in 2004 and 1,190 in 2005.

43. According to data published by the National Statistical Institute of Bulgaria[3], the number of students in upper secondary education during the period 2003/10 was as follows: 166,995 during the 2003/04 school year; 170,482 during the 2004/05 school year; 170,462 during the 2005/06 school year; 167,988 during the 2006/07 school year; 163,050 during the 2007/08 school year; 156,978 during the 2008/09 school year; and 148,627 during the 2009/10 school year. The vast majority of them (all but about 3,500 a year) were enrolled in public schools. No data appear to be available as to how many of those students were not Bulgarian nationals or as to their immigration status. By contrast, data exist on the nationality of students in higher education establishments (universities and equivalent). The number of Bulgarian and foreign students in such establishments during the period 2003/10 were as follows: 215,682 Bulgarians and 7,952 foreigners during the 2003/04 school year; 224,530 Bulgarians and 8,300 foreigners during the 2004/05 school year; 229,649 Bulgarians and 8,652 foreigners during the 2005/06 school year; 244,816 Bulgarians and 9,060 foreigners during the 2006/07 school year; 251,000 Bulgarians and 9,110 foreigners during

1. *Trends in International Migrant Stock: The 2008 Revision*, available at http://esa.un.org/migration/.
2. *Migration in Bulgaria, a Country Profile 2008*, available at http://publications.iom.int/bookstore/.
3. Available at http://www.nsi.bg/.

the 2007/08 school year; 260,826 Bulgarians and 9,472 foreigners during the 2008/09 school year; and 273,202 Bulgarians and 10,034 foreigners during the 2009/10 school year.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 1 TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

44. The applicants complained that they had been discriminated against because, unlike Bulgarian nationals and aliens having permanent residence permits, they had been required to pay fees to pursue their secondary education.

45. Since the alleged discriminatory treatment of the applicants lies at the heart of their complaint, the Court considers it appropriate to examine it first under Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 (see, *mutatis mutandis*, *Darby v. Sweden*, 23 October 1990, § 28, Series A no. 187; *Pla and Puncernau v. Andorra*, no. 69498/01, § 42, ECHR 2004-VIII; and *Oršuš and Others v. Croatia* [GC], no. 15766/03, §§ 143-45, ECHR 2010). The relevant parts of these provisions read as follows:

Article 14 of the Convention

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 2 of Protocol No. 1

> "No person shall be denied the right to education. ..."

A. The parties' submissions

46. The applicants submitted that the requirement for them to pay fees for their secondary education had been unjustified. In their view, the manner in which domestic law regulated this matter bred a lack of clarity, led to errors and abuse and had imposed a disproportionate burden on them. It was unclear who was liable to pay the fees: the students, who had no income or property, or their parents. The fees did not pursue any legitimate aim and

failed to strike a proper balance between the interests of the individual and the public interest. In Bulgaria, secondary education was a precondition for any sort of employment, and the lack of such education meant that those concerned would be unable to integrate properly or even ensure their livelihood. Under Article 28 of the United Nations Convention on the Rights of the Child, the State had the duty to assist children in their drive to become fully fledged members of society. By erecting insuperable obstacles to the completion of their secondary education, the State was preventing them from developing in that way. The requirement for the applicants to pay fees had been discriminatory because they had been in an identical situation to the rest of their schoolmates. Under the 1991 Constitution, all individuals residing in Bulgaria had the same rights and obligations regardless of their nationality and status. Lastly, it had to be borne in mind that the applicants had been children at the material time and thus entitled to special protection under the Convention on the Rights of the Child, which was part of domestic law.

47. The Government submitted that the applicants had not been discriminated against in the exercise of their right to education. They referred to the legislative provisions governing the obligation for certain aliens to pay fees for their education and pointed out that at the relevant time the applicants did not fall into any of the exempted categories. The Government further stated that they fully concurred with the reasons given by the Supreme Administrative Court, and asserted that the requirement to pay reasonable amounts for schooling did not amount to discrimination.

B. The Court's assessment

1. *Do the facts of the case fall within the ambit of one or more of the other substantive provisions of the Convention?*

48. Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Rasmussen v. Denmark*, 28 November 1984, § 29, Series A no. 87). The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Article of the Convention or its Protocols, which the State has voluntarily decided to provide (see *Case* "*relating to certain aspects of the laws on the use of languages in education in Belgium*"

(merits), 23 July 1968, pp. 33-34, § 9, Series A no. 6 ("the '*Belgian linguistic*' case"); *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 39 and 40, ECHR 2005-X; *E.B. v. France* [GC], no. 43546/02, § 48, 22 January 2008; *Andrejeva v. Latvia* [GC], no. 55707/00, § 74, ECHR 2009; and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 39, ECHR 2009).

49. It must therefore be determined whether the applicants' situation fell within the scope of Article 2 of Protocol No. 1. On this point, it should firstly be noted that there is little doubt that secondary education is covered by that provision (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 136, ECHR 2005-XI). Secondly, although that provision cannot be interpreted as imposing a duty on the Contracting States to set up or subsidise particular educational establishments, any State doing so will be under an obligation to afford effective access to them (see the "*Belgian linguistic*" case, pp. 30-31, §§ 3 and 4, and *Leyla Şahin*, § 137, both cited above). Put differently, access to educational institutions existing at a given time is an inherent part of the right set out in the first sentence of Article 2 of Protocol No. 1 (see *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 52, Series A no. 23; *Mürsel Eren v. Turkey*, no. 60856/00, § 41, ECHR 2006-II; *İrfan Temel and Others v. Turkey*, no. 36458/02, § 39, 3 March 2009; and *Oršuš and Others*, cited above, § 146). In the instant case, the applicants had enrolled in and attended secondary schools set up and run by the Bulgarian State (see paragraph 11 above). They were later required, by reason of their nationality and immigration status, to pay school fees in order to pursue their secondary education (see paragraphs 17-20, 25-28 and 30 above). It follows that their complaint falls within the scope of Article 2 of Protocol No. 1. This is sufficient to render Article 14 of the Convention applicable.

2. Was there a difference in treatment between the applicants and others placed in an analogous situation?

50. The applicants – secondary school students – were, unlike others in their position, required to pay school fees. This was due exclusively to their nationality and immigration status, because under the 1991 National Education Act only Bulgarian nationals and certain categories of aliens are entitled to primary and secondary education free of charge (see paragraph 32 above). The applicants were thus clearly treated less favourably than others in a relevantly similar situation, on account of a personal characteristic.

3. Did the difference in treatment have an objective and reasonable justification?

51. Discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations; in other words, there is discrimination if the distinction at issue does not pursue a legitimate aim or the means employed to achieve it do not bear a reasonable relationship of proportionality to it (see, among many other authorities, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 175 and 196, ECHR 2007-IV).

52. The States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and its background (see, among other authorities, *Rasmussen*, cited above, § 40). Thus, the States are usually allowed a wide margin of appreciation when it comes to general measures of economic or social strategy (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI; *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, § 36, 10 May 2007; *Burden v. the United Kingdom* [GC], no. 13378/05, § 60 *in fine*, ECHR 2008; *Andrejeva*, cited above, § 83; *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010; *Clift v. the United Kingdom*, no. 7205/07, § 73, 13 July 2010; and *J.M. v. the United Kingdom*, no. 37060/06, § 54, 28 September 2010). On the other hand, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention (see *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports of Judgments and Decisions* 1996-IV; *Koua Poirrez v. France*, no. 40892/98, § 46, ECHR 2003-X; *Luczak v. Poland*, no. 77782/01, § 48, 27 November 2007; *Andrejeva*, cited above, § 87; *Zeïbek v. Greece*, no. 46368/06, § 46 *in fine*, 9 July 2009; *Fawsie v. Greece*, no. 40080/07, § 35, 28 October 2010; and *Saidoun v. Greece*, no. 40083/07, § 37, 28 October 2010).

53. The Court would emphasise at the outset that its task in the present case is not to decide whether and to what extent it is permissible for the States to charge fees for secondary – or, indeed, any – education. It has in the past recognised that the right to education by its very nature calls for regulation by the State, and that this regulation may vary in time and place according to the needs and resources of the community (see the "*Belgian linguistic*" case, cited above, p. 32, § 5; *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 41, Series A no. 48; *Çiftçi v. Turkey* (dec.), no. 71860/01, ECHR 2004-VI; *Mürsel Eren*, cited above, § 44; and *Konrad v. Germany* (dec.), no. 35504/03, ECHR 2006-XIII). The Court must solely determine whether, once a State has voluntarily decided to provide such education free of charge, it may deny that benefit to a distinct group of

people, for the notion of discrimination includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94; *Ünal Tekeli v. Turkey*, no. 29865/96, § 51 *in limine*, ECHR 2004-X; *Zarb Adami v. Malta*, no. 17209/02, § 73, ECHR 2006-VIII; *Kafkaris v. Cyprus* [GC], no. 21906/04, § 161 *in limine*, ECHR 2008; and *J.M. v. the United Kingdom*, cited above, § 45 *in fine*).

54. Having thus clarified the limits of its inquiry, the Court starts by observing that a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of member States of the European Union – some of whom were exempted from school fees when Bulgaria acceded to the Union (see paragraph 32 above) – may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship (see, *mutatis mutandis*, *Moustaquim v. Belgium*, 18 February 1991, § 49 *in fine*, Series A no. 193, and *C. v. Belgium*, 7 August 1996, § 38, *Reports* 1996-III).

55. Although similar arguments apply to a certain extent in the field of education – which is one of the most important public services in a modern State – they cannot be transposed there without qualification. It is true that education is an activity that is complex to organise and expensive to run, whereas the resources that the authorities can devote to it are necessarily finite. It is also true that in deciding how to regulate access to education, and in particular whether or not to charge fees for it and to whom, a State must strike a balance between, on the one hand, the educational needs of those under its jurisdiction and, on the other, its limited capacity to accommodate them. However, the Court cannot overlook the fact that, unlike some other public services (see *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002, and *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-I, regarding health care; *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009; *Carson and Others*, cited above, § 64; *Zeïbek*, cited above, §§ 37-40; and *Zubczewski v. Sweden* (dec.), no. 16149/08, 12 January 2010, regarding pensions; and *Niedzwiecki v. Germany*, no. 58453/00, §§ 24 and 33, 25 October 2005; *Okpisz v. Germany*, no. 59140/00, §§ 18 and 34, 25 October 2005; *Weller v. Hungary*, no. 44399/05, § 36, 31 March 2009; *Fawsie*, cited above, §§ 27-28; and *Saidoun*, cited above, §§ 28-29, regarding child benefits), education is a right that enjoys direct protection under the Convention. It is expressly enshrined in Article 2 of Protocol No. 1 (see the "*Belgian linguistic*" case, cited above, pp. 30-31, § 3). It is

also a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions. Indeed, the Court has already had occasion to point out that "[i]n a democratic society, the right to education ... is indispensable to the furtherance of human rights [and] plays ... a fundamental role" (see *Leyla Şahin*, cited above, § 137). Moreover, in order to achieve pluralism and thus democracy, society has an interest in the integration of minorities (see *Konrad*, cited above).

56. In the Court's view, the State's margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large. Thus, at the university level, which to this day remains optional for many people, higher fees for aliens – and indeed fees in general – seem to be commonplace and can, in the present circumstances, be considered fully justified. The opposite goes for primary schooling, which provides basic literacy and numeracy – as well as integration into and first experiences of society – and is compulsory in most countries (see *Konrad*, cited above).

57. Secondary education, which is in issue in the present case, falls between those two extremes. The distinction is confirmed by the difference of wording between sub-paragraphs (a), (b) and (c) of Article 28 § 1 of the United Nations Convention on the Rights of the Child, the first of which enjoins States to "[m]ake primary education compulsory and available free to all", whereas the second and the third merely call upon them to "[e]ncourage the development of different forms of secondary education ... and take appropriate measures such as the introduction of free education and offering financial assistance in case of need" and to "[m]ake higher education accessible to all on the basis of capacity by every appropriate means" (see paragraph 33 above). It is also confirmed by the differentiation between those three levels of education in the International Covenant on Economic, Social and Cultural Rights (see paragraph 34 above). However, the Court is mindful of the fact that with more and more countries now moving towards what has been described as a "knowledge-based" society, secondary education plays an ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned. Indeed, in a modern society, having no more than basic knowledge and skills constitutes a barrier to successful personal and professional development. It prevents the persons concerned from adjusting to their environment and entails far-reaching consequences for their social and economic well-being.

58. These considerations militate in favour of stricter scrutiny by the Court of the proportionality of the measure affecting the applicants.

59. In assessing that proportionality the Court does not need, in the very specific circumstances of this case, to determine whether the Bulgarian State is entitled to deprive all unlawfully residing aliens of educational benefits – such as free education – which it has agreed to provide to its

nationals and certain limited categories of aliens. It is not the Court's role to consider in the abstract whether national law conforms to the Convention (see, among other authorities, *McCann and Others v. the United Kingdom*, 27 September 1995, § 153, Series A no. 324; *Pham Hoang v. France*, 25 September 1992, § 33, Series A no. 243; *Etxeberria and Others v. Spain*, nos. 35579/03, 35613/03, 35626/03 and 35634/03, § 81, 30 June 2009; and *Romanenko and Others v. Russia*, no. 11751/03, § 39, 8 October 2009). It must confine its attention, as far as possible, to the particular circumstances of the case before it (see, among other authorities, *Wettstein v. Switzerland*, no. 33958/96, § 41, ECHR 2000-XII, and *Sommerfeld v. Germany* [GC], no. 31871/96, § 86, ECHR 2003-VIII). The Court will therefore have regard primarily to the applicants' personal situation.

60. On that point, the Court observes at the outset that the applicants were not in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services, including free schooling (see paragraph 10 above). Even when the applicants found themselves, somewhat inadvertently, in the situation of aliens lacking permanent residence permits (see paragraphs 11 and 13-16 above), the authorities had no substantive objection to their remaining in Bulgaria and apparently never had any serious intention of deporting them (see paragraphs 13 and 14 above and the final admissibility decision in the present case; compare also, *mutatis mutandis*, *Anakomba Yula v. Belgium*, no. 45413/07, § 38, 10 March 2009). Indeed, at the material time the applicants had taken steps to regularise their situation (see paragraphs 13-16 above). Thus, any considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants' case (contrast, *mutatis mutandis*, *15 Foreign Students v. the United Kingdom*, nos. 7671/76 and 14 other applications, Commission decision of 19 May 1977, Decisions and Reports 9, p. 187; *Sorabjee v. the United Kingdom*, no. 23938/94, Commission decision of 23 October 1995, unreported; *Dabhi v. the United Kingdom*, no. 28627/95, Commission decision of 17 January 1997, unreported; and *Vikulov and Others v. Latvia* (dec.), no. 16870/03, 25 March 2004).

61. Nor can it be said that the applicants tried to abuse the Bulgarian educational system (see, *mutatis mutandis*, *Weller*, cited above, § 36). It was not their choice to settle in Bulgaria and pursue their education there; they came to live in the country at a very young age because their mother had married a Bulgarian national (see paragraph 10 above). The applicants could not realistically choose to go to another country and carry on their secondary studies there (see paragraphs 9 and 10 above). Moreover, there is no indication that the applicants, who were fully integrated in Bulgarian society and spoke fluent Bulgarian (see paragraph 11 above), had any special educational needs which would have required additional financing for their schools.

62. However, the authorities did not take any of these matters into account. Indeed, since section 4(3) of the 1991 National Education Act and the fee-setting decision of the Minister of Education issued on 20 July 2004 pursuant to that section (see paragraphs 18 and 32 above) made no provision for requesting exemption from the payment of school fees, it does not seem that the authorities could have done so.

63. The Court, for its part, finds that in the specific circumstances of the present case the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified. There has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1.

64. In view of that conclusion, it is not necessary to examine the complaint under Article 2 of Protocol No. 1 taken alone (see, *mutatis mutandis*, *Darby*, § 35; *Pla and Puncernau*, § 64; and *Oršuš and Others*, § 186, all cited above).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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

66. The applicants claimed, firstly, compensation in respect of pecuniary damage. Mr Anatoliy Ponomaryov sought the reimbursement of 65 euros (EUR)[1] and 1,250 Bulgarian levs (BGN) which he had paid in fees in order to obtain a permanent residence permit, BGN 500 paid as a fine, EUR 800 paid in school fees and BGN 2,500 paid in court fees and for photocopies, postage and the translation of documents. Mr Vitaliy Ponomaryov sought the reimbursement of EUR 65 and BGN 1,250 which he had paid in fees in order to obtain a permanent residence permit, and BGN 10,000 paid in school and court fees and for the translation of documents, plus BGN 2,350 in litigation expenses. The applicants did not submit any documents in support of their claims, stating that they had submitted such documents earlier in the proceedings.

67. The applicants secondly claimed EUR 50,000 each in respect of non-pecuniary damage.

1. The exchange rate between the euro and the Bulgarian lev is fixed by law (section 29(2) of the Bulgarian National Bank Act of 1997 and decision no. 223 of the Bulgarian National Bank of 31 December 1998). One euro (EUR) is equal to 1.95583 Bulgarian levs (BGN).

68. The Government submitted that the sums claimed in respect of pecuniary damage did not relate to the violation found. As to the claims in respect of non-pecuniary damage, they argued that the amounts sought were exorbitant and unjustified. In their view, any award under this head should reflect solely the damage sustained as a result of the violation found by the Court, and should not exceed the usual amounts awarded in such cases.

69. Following the conclusion of the proceedings brought by the school against Mr Vitaliy Ponomaryov to recover the fees owed by him (see paragraph 30 above), the latter claimed an additional BGN 6,744.45 in respect of pecuniary damage, corresponding to the total sum he had been ordered to pay in fees, interest and procedural costs. The Government did not comment on the additional claim.

70. The Court observes that there is no causal relationship between the violation found and the sums paid by the two applicants in fees for obtaining permanent residence permits and by the first applicant as a fine for residing illegally in Bulgaria (see paragraph 16 above and the admissibility decisions in the present case). No award can therefore be made in respect of those sums. As regards the court fees and other expenses, the applicants did not provide a breakdown allowing the Court to determine whether and to what extent they relate to the violation found. In these circumstances, and having regard to the terms of Rule 60 §§ 2 and 3 of its Rules, the Court rejects this part of the claim.

71. As regards the sums allegedly paid by the applicants in school fees, the Court is satisfied that there is a direct causal connection with the violation found in the present case. However, the applicants have not proved to the Court's satisfaction that they were forced to pay or actually paid the sums in question. In these circumstances, the Court does not make any award in respect of them (see, *mutatis mutandis*, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 105, ECHR 2005-II).

72. On the other hand, the Court considers that the applicants suffered a certain amount of frustration on account of the discrimination of which they were victims. However, the amounts claimed by them in this respect appear excessive. Ruling on an equitable basis, as required by Article 41, the Court awards each of them EUR 2,000, plus any tax that may be chargeable.

B. Costs and expenses

73. The applicants sought the reimbursement of EUR 4,000 incurred for their legal representation at the domestic level and before the Court. On the basis of information provided by the applicants' legal representative according to which the applicants have not thus far paid him anything for his legal services, the Court understands the request as meaning that any

amount awarded under this head be paid to the applicants' legal representative, Mr V. Stoyanov[1].

74. The Government disputed the claim as unproven and unrealistic.

75. According to the Court's case-law, applicants are entitled to the reimbursement of their costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. Moreover, legal costs are only recoverable to the extent that they relate to any violation found (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 220, ECHR 2007-IV). In the present case, having regard to the information in its possession and the above criteria, and noting that part of the application was declared inadmissible and another part struck out of the list (see paragraph 5 above), the Court considers it reasonable to award EUR 2,000 to the applicants jointly, plus any tax that may be chargeable to them, to be paid to their legal representative, Mr V. Stoyanov.[2]

C. Default interest

76. 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. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1;

2. *Holds* that it is not necessary to examine the application separately under Article 2 of Protocol No. 1 taken alone;

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 Bulgarian levs at the rate applicable at the date of settlement:

      (i) to the first applicant, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

1. Rectified on 30 August 2011: this sentence was added.
2. Rectified on 30 August 2011: "to be paid to their legal representative, Mr V. Stoyanov" added to the end of the sentence.

(ii) to the second applicant, EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) to both applicants jointly, EUR 2,000 (two thousand euros), plus any tax that may be chargeable to them, in respect of costs and expenses, payable directly to their legal representative, Mr V. Stoyanov;[1]

(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 21 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

1. Rectified on 30 August 2011: the words "payable directly to their legal representative, Mr V. Stoyanov" were added.