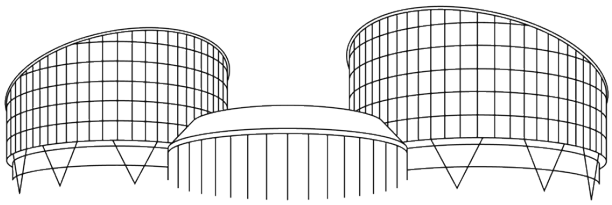

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF FAZLIYSKI v. BULGARIA

(Application no. 40908/05)

JUDGMENT

STRASBOURG

16 April 2013

FINAL

16/07/2013

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

In the case of Fazliyski v. Bulgaria,

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

Ineta Ziemele, *President*,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Krzysztof Wojtyczek,
Faris Vehabović, *judges*,
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 26 March 2013,

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

PROCEDURE

1. The case originated in an application (no. 40908/05) 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 a Bulgarian national, Mr Krasimir Georgiev Fazliyski ("the applicant"), on 10 November 2005.

2. The applicant was represented by Mr P. Petrov, a lawyer practising in Blagoevgrad. The Bulgarian Government ("the Government") were initially represented by their then Agent, Ms N. Nikolova, of the Ministry of Justice. Later on they were represented by their Agent, Ms R. Nikolova, also of the Ministry of Justice.

3. The applicant alleged, in particular, that the judicial review proceedings in which he had challenged his dismissal from his post at the Ministry of Internal Affairs had not been fair – in particular because the Supreme Administrative Court had refused to scrutinise the validity of a psychological assessment which had prompted that dismissal –, and that he had been unable to obtain copies of the judgments in those proceedings because they had not been delivered publicly.

4. On 1 June 2010 the Court decided to declare the application partly inadmissible and to give the Government notice of the complaints concerning the scope of judicial review of the applicant's dismissal from work, the impossibility to obtain copies of the judgments in his case, and the fact that in its final ruling in the applicant's case the Supreme Administrative Court had allegedly disregarded an earlier judgment. The Court also decided to rule on the admissibility and merits of the remainder of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1962 and lives in Sofia.

A. The applicant's post at the Ministry of Internal Affairs

6. In 1995 the applicant was appointed as an inspector at the National Security Service of the Ministry of Internal Affairs. In 2002 he was transferred to the Ministry's National Security Directorate (the Ministry's internal structure had been altered in 1997). At that time he had the rank of major. His duties included counter-intelligence, the recruitment and managing of secret agents, the gathering and dissemination of information from secret sources, secret surveillance, etc.

B. The procedure for the applicant's dismissal from his post

7. In November 2002 a proposal was made for the applicant's disciplinary dismissal. The proposal was prompted by an internal investigation which found indications that the applicant had engaged, aside from his duties at the Ministry, in fish farming, and that he had sought to resolve disputes with the persons employed by him by threatening them with his position. It was felt that these activities were incompatible with the duties of an officer of the National Security Directorate and tarnished the reputation of the service.

8. The proposal was not upheld due to the lack of sufficient evidence.

9. On 6 March 2003 the Director of the National Security Directorate sent a letter to the head of the Ministry's Psychology Institute (see paragraph 33 below). He referred in detail to the above facts and suggested that the applicant be subjected to psychological assessment on the basis of Instruction no. I-37 (see paragraph 32 below).

10. On 19 March 2003 the Director of the National Security Directorate ordered the applicant to present himself for assessment at the Ministry's Psychology Institute.

11. The applicant underwent a psychological assessment on 16 April 2003. It consisted of a psychological test, an interview and a polygraph test.

12. The results of the assessment were available on 9 May 2003. The psychologist who had carried it out described the results of his observations and of the polygraph test, and expressed the opinion that the applicant was mentally unfit to work at the Ministry of Internal Affairs. The document was classified and the applicant was not allowed to see it.

13. On 5 June 2003 the Director of the National Security Directorate proposed to the Minister of Internal Affairs to dismiss the applicant from his post under section 253(1)(5) of the Ministry of Internal Affairs Act 1997 and regulation 251(1)(6) of the Act's implementing regulations (see paragraphs 30 and 31 below). In his proposal he described in detail the attempt to dismiss the applicant on disciplinary grounds and the results of the psychological assessment. The applicant was allowed to have sight of the proposal the same day.

14. In an order of 27 June 2003 the Minister of Internal Affairs dismissed the applicant by reference to the legal provisions mentioned in the proposal.

15. The applicant was acquainted with the order on 13 August 2003 and noted his disagreement with the grounds for issuing it.

C. The judicial review proceedings

16. On 26 August 2003 the applicant sought judicial review of the Minister's order. He argued, *inter alia*, that it had not been duly reasoned and that the psychological assessment on the basis of which it had been issued had not been objective.

17. In the course of the proceedings before the Supreme Administrative Court the Ministry presented a copy of the applicant's psychological assessment. The proceedings as a whole were then classified, apparently because the case file contained a classified document.

18. The applicant was initially represented by two lawyers. The first of them withdrew from the proceedings because he could not obtain the requisite security clearance to be able to have access to the documents in the case file. The second also withdrew because she did not have enough legal experience to be granted rights of audience before the Supreme Administrative Court. The applicant accordingly retained another counsel who had the requisite experience and security clearance.

19. In her written pleadings counsel for the Ministry submitted, *inter alia*, that after the applicant had been found mentally unfit for work, under section 253(1)(5) of the Ministry of Internal Affairs Act 1997 (see paragraph 30 below), the Minister had been bound to dismiss him from his post.

20. A three-member panel of the Supreme Administrative Court heard the case on 4 October 2004. Counsel for the applicant argued, *inter alia*, that the psychological assessment had not been correctly carried out and that its results could not be trusted. Counsel for the Ministry argued, *inter alia*, that the assessment could not be subjected to judicial scrutiny.

21. In a judgment of 11 October 2004 (реш. № 50 от 11 октомври 2004 г. по адм. д. № С-65/2003 г., ВАС, V о.), the three-member panel rejected the applicant's claim, finding that no breaches of the rules of

procedure had occurred in the course of the dismissal procedure. It went on to say that it was not competent to review the results of the psychological assessment carried out by the Ministry's Psychology Institute. Under the terms of regulation 251(1)(6) of the implementing regulations of the Ministry of Internal Affairs Act 1997 (see paragraph 31 below), such assessments amounted to incontrovertible proof of unfitness for work at the Ministry, and the Ministry's Psychology Institute was the only body competent to determine that issue. The panel also found no indication that the dismissal order was not in line with the purpose of the law.

22. The applicant appealed on points of law. He challenged, *inter alia*, the psychological assessment procedure and the independence of the experts who had carried it out. He also contested the three-member panel's ruling that the Ministry's Psychology Institute was the only body competent to carry out such an examination and that the court could not scrutinise the correctness of the Institute's opinion. In an additional memorial filed on 9 March 2005 he pointed out that in a judgment of 8 February 2005 (see paragraph 35 below) another panel of the Supreme Administrative Court had stated that the assessment of mental fitness for work at the Ministry should be amenable to judicial scrutiny.

23. In a final judgment of 17 May 2005 (реш. № 12 от 17 май 2005 г. по адм. д. № С-4/2005 г., ВАС, петчл. с-в), a five-member panel of the Supreme Administrative Court dismissed the appeal. It held, *inter alia*, that the psychological assessment procedure had been duly followed, and that the three-member panel had been correct to find that it could not scrutinise the assessment. Its judgment had been given before the judgment of 8 February 2005 which had partly struck down regulation 251(1)(6) of the implementing regulations of the Ministry of Internal Affairs Act 1997 (see paragraph 35 below) and had been based on the wording of that regulation in force before the judgment of 8 February 2005.

24. As the proceedings were classified, the applicant could not obtain copies of the Supreme Administrative Court's judgments. On 5 December 2005 he asked the court to issue certificates containing the judgments' operative provisions and indications as to the subject matter of the case. The president of the five-member panel which had dealt with the case acceded to the request, and on 7 December 2005 the applicant was issued two certificates, one in relation to the three-member panel's judgment and another in relation to the five-member panel's judgment.

25. In the meantime, on 7 November 2005 the applicant requested the re-opening of the proceedings.

26. In a judgment of 4 April 2006 (реш. № Я-63 от 4 април 2006 г. по адм. д. № С-108/2005 г., ВАС, петчл. с-в) the Supreme Administrative Court rejected the request.

D. The declassification of the Supreme Administrative Court's judgments

27. On 30 August 2006 a commission appointed by the president of the Supreme Administrative Court declassified the minutes of the hearings before the three-member and five-member panels, as well as their judgments. It did so by reference to regulation 50(3)(2) of the Regulations for the implementation of the Protection of Classified Information Act 2002, which provides that the level of classification must be changed if it has been set incorrectly.

II. RELEVANT DOMESTIC LAW

A. The Constitution

28. Article 120 of the Constitution of 1991 provides:

> "1. The courts shall review the lawfulness of the administration's acts and decisions.
>
> 2. Natural and juristic persons shall have the right to seek judicial review of any administrative act or decision which affects them, save as expressly specified by statute."

B. The Ministry of Internal Affairs Act 1997 and the statutory instruments issued under it

29. Section 2(1) of the Ministry of Internal Affairs Act 1997 ("the 1997 Act"), in force until the end of April 2006, provided that the Ministry's activities were subject to "civic control [exercised] through the authorities set out in the Constitution and this Act".

30. Section 253(1)(5) of the Act provided that civil servants employed by the Ministry were to be dismissed from their posts if they were unfit to carry out their duties. Section 253(2) provided that unfitness of work within the meaning of section 253(1)(5) was to be established in the manner laid down in the Act's implementing regulations. The dismissal order was subject to judicial review (section 258).

31. Regulation 251(1) of the Act's implementing regulations, which came into force in September 1998 and were repealed in June 2006, specified that unfitness within the meaning of section 253(1)(5) of the Act could result from: (a) a final conviction and effective sentence of imprisonment; (b) the inability to carry out one's duties effectively, as established by an internal audit; (c) the systematic or repeated commission of disciplinary offences which were not of a level of gravity warranting

disciplinary dismissal; (d) a failure to complete the initial professional qualification course; (e) a failure to submit a conflict-of-interest declaration or an incompatibility established on the basis of such a declaration; (f) mental unfitness for work at the Ministry, as established by the Ministry's Psychology Institute (regulation 251(1)(6)); and (g) a court order preventing the person concerned from holding certain types of employment as a punishment in a criminal case.

32. On 5 March 2001 the Minister of Internal Affairs issued Instruction no. I-37 on "the psychological selection and psychological aspects of the appraisal (re-selection) of the civil servants (officers, sergeants and civilian staff) employed by the Ministry". The instruction was issued under, *inter alia*, regulation 171 of the 1997 Act's implementing regulations, which provided that the mental and physical fitness of the Ministry's staff was to be assessed periodically in a manner laid down by the Minister (this regulation was repealed in April 2003). Section 6 of the Instruction provided that those assessments were to be carried out by the Ministry's Psychology Institute (see paragraph 33 below). By virtue of section 16, the purpose of the psychological assessment of the Ministry's staff was to determine (a) their current mental condition, (b) diminished motivation, behavioural or emotional inadequacy, or general de-adaption leading to low professional effectiveness, or (c) abuse of position for financial gain. In carrying out the assessment of staff suspected of abusing their posts, the Institute's experts could resort to a polygraph test (section 17(3)(a)). Such persons could be subjected to sporadic assessments with a view to protecting the Ministry from "staff members who ha[d] lost their mental or emotional stability or other professional qualities and [could] cause damage to themselves, the [Ministry] or society through actions or omissions" (section 19(1)). The conclusion of the assessment could be "mentally fit for the post", "mentally unfit for the post" or "mentally unfit for work at the Ministry of Internal Affairs" (section 24(3)). The results of the assessment could, *inter alia*, constitute grounds for dismissal under section 253(1)(5) of the 1997 Act and regulation 251(1)(6) of the Act's implementing regulations (section 26(5)). The conclusion that a person was "mentally unfit for work at the Ministry of Internal Affairs" was final and not subject to review (section 27(3)).

33. The Ministry's Psychology Institute was set up by the Government in February 1998 for the purpose of carrying out initial and follow-up psychological examinations of the staff of the Ministry of Internal Affairs, drawing up psychological expert reports, and training the Ministry's staff (point 1 of Decree no. 25 of 2 February 1998 of the Council of Ministers). At the relevant time its structure and activities were governed by Regulations no. I-263 issued by the Minister of Internal Affairs on 13 November 2001 (in May 2010 they were superseded by Regulations no. I-1137). Its director was appointed and dismissed by the Minister.

34. In its early case-law under section 253(1)(5) of the Act and regulation 251(1)(6), the Supreme Administrative Court consistently held that the Institute's assessment of a person's mental fitness for work at the Ministry was not subject to judicial review and could not be contested through any means, and that a conclusion that a person was mentally unfit for work at the Ministry required the Minister to dismiss that person (see реш. № 722 от 28 януари 2002 г. по адм. д. № 8056/2001 г., ВАС, петчл. с-в; реш. № 4441 от 5 септември 2002 г. по адм. д. № 10880/ 2001 г., ВАС, V о.; реш. № 2819 от 25 март 2003 г. по адм. д. № 11276/2002 г., ВАС, V о.; реш. № 11347 от 8 декември 2003 г. по адм. д. № 6483/2003 г., ВАС, V о.; реш. № 1745 от 26 февруари 2004 г. по адм. д. № 9591/2003 г., ВАС, V о.; реш. № 4093 от 5 май 2004 г. по адм. д. № 375/ 2004 г., ВАС, V о.; and реш. № 5890 от 22 юни 2004 г. по адм. д. № 1318/2004 г., ВАС, V о.).

35. In 2004 several persons brought a legal challenge to regulation 251(1)(6) (see paragraph 31 above). In a judgment of 8 February 2005, which came into force on 18 February 2005 following its publication in the State Gazette (реш. № 1219 от 8 февруари 2005 г. по адм. д. № 4773/2004 г., ВАС, петчл. с-в, обн., ДВ, бр. 16 от 18 февруари 2005 г.), a five-member panel of the Supreme Administrative Court partly upheld the challenge and decided to strike out the wording "established by the [Ministry's] Psychology Institute". It noted, *inter alia*, that the Institute was directly subordinate to the Minister, and that its assessments of a person's mental fitness for work at the Ministry were not subject to any form of review. There was therefore no guarantee that in carrying out those assessments the Institute's experts would not commit errors, abuse their powers or deprive those concerned of their rights. That was important because if the Institute's experts assessed a member of staff to be mentally unfit for work at the Ministry, the Minister had no discretion and was bound to dismiss him or her. Although the member of staff concerned could seek judicial review of the Minister's order, such a challenge would be futile because the assessment, which formed the basis of the Minister's order, was not amenable to judicial scrutiny. The court acknowledged that the employment of the Ministry's staff touched upon national security. Nonetheless, it went on to hold that considerations relating to national security had to yield to a person's right under Article 120 of the Constitution (see paragraph 28 above) to judicial review of all administrative decisions affecting his or her rights. The court said that the assessment of a person's mental fitness for work at the Ministry of Internal Affairs should be amenable to "the same control for lawfulness, [namely] by several independent experts and by the court, as in the case of assessing health conditions [for the purpose of granting disability benefits]". Therefore, in as much as it provided that the Ministry's Psychology Institute was the only body authorised to assess mental fitness for work at the

Ministry, regulation 251(1)(6) ran counter to section 2 of the 1997 Act (see paragraph 29 above) and the Health Act 2004. It was in addition contrary to the purpose of the law.

36. Following the delivery of that judgment, a panel of the Supreme Administrative Court held that, as a result of the partial strike-down of regulation 251(1)(6), the Institute's assessments could, even if predating the strike-down, be subjected to judicial scrutiny in proceedings for judicial review of a dismissal order (see реш. № 3483 от 18 април 2005 г. по адм. д. № 9378/2004 г., ВАС, V о.).

37. However, other panels of the court abided by the old case-law, holding that the lawfulness of dismissals which preceded the entry into force of the judgment of 8 February 2005 was to be judged by reference to the wording of regulation 251(1)(6) before its partial strike-down because the strike-down did not have retroactive effect (see реш. № 30 от 18 юли 2005 г. по адм. д. № С-27/2005 г., ВАС, петчл. с-в; реш. № 3949 от 12 април 2006 г. по адм. д. № 9213/2005 г., ВАС, VI о.; реш. № 401 от 10 януари 2006 г. по адм. д. № 5420/2005 г., ВАС, V о.; реш. № 4967 от 11 май 2006 г. по адм. д. № 7006/2005 г., ВАС, VI о.; № Я-9 от 11 януари 2007 г. по адм. д. № 3С-310/2006 г., ВАС, V о.; and № Я-23 от 7 февруари 2007 г. по адм. д. № 5С-312/2006 г., ВАС, петчл. с-в). In one judgment a panel stated that the effect of that judgment had been to make it possible to challenge the Institute's psychological assessment in cases where the dismissal had taken place after the judgment (see реш. № 6251 от 9 юни 2006 г. по адм. д. № 961/2006 г., ВАС, V о.).

38. A panel of the court also held that the order that a member of staff should submit to a psychological assessment was merely a preparatory act and was not itself amenable to judicial review (see реш. № 7102 от 27 юни 2006 г. по адм. д. № 11119/2005 г., ВАС, V о.).

39. In a number of judgments given between May 2005 and 2008 panels of the court found that the psychological assessment procedure had been used to circumvent the rules governing disciplinary liability, and on that basis quashed the dismissal orders (see реш. № 4919 от 30 май 2005 г. по адм. д. № 10069/2004 г., ВАС, V о.; № 5385 от 10 юни 2005 г. по адм. д. № 8856/2004 г., ВАС, V о.; № 7449 от 27 юли 2005 г. по адм. д. № 6496/2004 г., ВАС, V о.; № 7450 от 27 юли 2005 г. по адм. д. № 11291/2004 г., ВАС, V о.; реш. № 10324 от 23 ноември 2005 г. по адм. д. № 9377/2004 г., ВАС, V о.; реш. № 1401 от 7 февруари 2006 г. по адм. д. № 6239/2005 г., ВАС, VI о.; реш. № 5215 от 16 май 2006 г. по адм. д. № 10715/2005 г., ВАС, V о.; реш. № 5216 от 16 май 2006 г. по адм. д. № 10717/2005 г., ВАС, V о.; реш. № 6787 от 21 юни 2006 г. по адм. д. № 11228/2005 г., ВАС, V о.; реш. № 7410 от 4 юли 2006 г. по адм. д. № 2367/2006 г., ВАС, V о.; реш. № 7449 от 5 юли 2006 г. по адм. д. № 12068/2005 г., ВАС, V о.; and реш. № 7505 от 5 юли 2006 г. по адм. д. № 10746/2005 г., ВАС, V о.; and реш. № 2819 от 12 март

2008 г. по адм. д. № 8881/2007 г., ВАС, III о.). In some of those cases the panels also held that, as far as it provided that the psychological assessment could determine whether the member of staff had abused his or her position for financial gain, Instruction no. I-37 (see paragraph 32 above) ran counter to the Act: mental fitness for work was not to be confused with the commission of disciplinary offences (see реш. № 7724 от 11 юли 2006 г. по адм. д. № 3038/2006 г., ВАС, V о., and реш. № 7726 от 11 юли 2006 г. по адм. д. № 772/2006 г., ВАС, V о.).

C. The Ministry of Internal Affairs Act 2006 and the statutory instruments issued under it

40. Section 245(1)(3) of the Ministry of Internal Affairs Act 2006 ("the 2006 Act"), which superseded the 1997 Act in May 2006, provides that a civil servant employed by the Ministry must be dismissed on health grounds if he or she cannot perform his or her duties as a result of a health condition which has led to a permanent disability or as a result of medical contraindications.

41. Section 245(3) (until the end of 2010 section 245(2)) of the 2006 Act provides that the circumstances under section 245(1)(3) are to be determined by a Central Medical Expert Commission, whose assessment may be challenged before the Sofia City Administrative Court. Regulation 259(1) of the Act's implementing regulations, adopted in June 2006, specifies that that Commission is attached to the Medical Institute of the Ministry of Internal Affairs.

42. When dealing with challenges to dismissal orders issued by reference to section 245(1)(3), some panels of the Supreme Administrative Court have stood by the position that the assessment whether a person is fit for work at the Ministry of Internal Affairs was not amenable to judicial scrutiny in proceedings directed against the dismissal order (see реш. № 7170 от 16 юни 2008 г. по адм. д. № 12426/2007 г., ВАС, III о.; реш. № 11138 от 27 октомври 2008 г. по адм. д. № 5095/2008 г., ВАС, III о.; and реш. № 2289 от 19 февруари 2009 г. по адм. д. № 15361/2008 г., ВАС, петчл. с-в). However, another panel examined the validity of such an assessment by reference to the conclusions of medical experts appointed in the course of the judicial review proceedings (see реш. № 8940 от 6 юли 2009 г. по адм. д. № 5836/2009 г., ВАС, петчл. с-в).

43. The administrative courts have on several occasions examined direct challenges to assessments of the above-mentioned Central Medical Expert Commission. In doing so, they have sought the assistance of medical experts, and have taken into account the opinions of those experts (see реш. № 8753 от 1 юли 2009 г. по адм. д. № 5224/2009 г., ВАС, VI о.; реш. № 3468 от 22 юни 2012 г. по адм. д. № 7227/2011 г., АССГ; and реш. № 4214 от 19 юли 2012 г. по адм. д. № 3664/2012 г., АССГ).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

44. The applicant complained under Article 13 of the Convention that the Supreme Administrative Court had refused to scrutinise the validity of the assessment of his mental fitness for work. He also complained under Article 6 § 1 of the Convention that as a result of the classification of the proceedings the Supreme Administrative Court had not delivered its judgments publicly and had not allowed him to make copies of them. Lastly, he complained under Article 6 § 1 of the Convention that when dealing with his case the Supreme Administrative Court had disregarded its own judgment of 8 February 2005.

45. The Court observes that the requirements of Article 13 of the Convention are less strict than, and are in such situations absorbed by, those of Article 6 § 1 (see, among other authorities, *Vasilescu v. Romania*, 22 May 1998, § 43, *Reports of Judgments and Decisions* 1998-III). It therefore considers that the above complaints should be examined solely by reference to the latter provision, which reads, in so far as relevant:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly ..."

A. The parties' submissions

1. The Government

46. The Government submitted that the applicant had enjoyed full access to a court. He had been able to challenge the order for his dismissal, and the Supreme Administrative Court had, within the limits of its competence, ruled on that order's lawfulness. The psychological assessment underpinning the order had not been the subject matter of the judicial review proceedings. It had not been an administrative decision and could not have itself been challenged by way of judicial review. The body which had made the assessment, the Psychology Institute of the Ministry of Internal Affairs, was a specialised body whose tasks included assessing, on the basis of a range of criteria laid down in Instruction no. I-37 of 5 March 2001, the mental fitness of the Ministry's staff. Because of that, its assessments could not be subjected to judicial scrutiny. Once the Institute had assessed a member of staff to be mentally unfit for work, the Minister had no discretion and was bound to dismiss that person. The Supreme Administrative Court had found that in the applicant's case the procedure

governing the manner in which the assessment was to be carried out had been followed, that the Institute had assessed the applicant to be mentally unfit for work, and that as a result the Minister had, by means of a reasoned decision, dismissed the applicant from his post. The Government also drew attention to this Court's statement in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, § 62, ECHR 2007-II) that its conclusion on the applicability of Article 6 of the Convention to proceedings concerning the employment of civil servants was without prejudice to the question as to how the various guarantees of that Article should be applied in such proceedings.

47. The Government further submitted that the Supreme Administrative Court's rulings in the applicant's case had not been inconsistent with its judgment of 8 February 2005. That judgment had not been applicable to the applicant's case because it had been delivered after his dismissal and because, under a general principle of Bulgarian law, it did not have retroactive effect. Moreover, in that judgment the Supreme Administrative Court had confined itself to ruling that the Psychology Institute of the Ministry of Internal Affairs should not be the only body competent to assess the mental fitness of the Ministry's staff. In that connection, the Government pointed out that the applicant had not sought to produce before the Supreme Administrative Court another assessment of his mental fitness for work. It was therefore speculative to contest the conclusions of his assessment.

48. Lastly, the Government submitted that in view of the subject matter of the proceedings it had been necessary to classify them. However, they pointed out that the applicant had been able to read the Supreme Administrative Court's judgments in his case and to obtain certificates setting out the judgments' operative provisions and excerpts of their reasons. He had also been able fully to exercise his rights of appeal. In those circumstances, it could not be said that the classification of the proceedings had deprived him of a fair hearing. On 30 August 2006 the judgments had been declassified.

2. The applicant

49. The applicant submitted that although he had been able to seek judicial review of the order for his dismissal, that review had not been effective because the Supreme Administrative Court had refused to scrutinise the psychological assessment which had prompted the order. In those circumstances, the legal challenge to the order was futile. The applicant pointed out that the assessment had been carried out by experts who were subordinate to the Minister of Internal Affairs, which raised doubts as to their impartiality and objectiveness. On that point, he referred to the reasons given by the Supreme Administrative Court in its judgment of 8 February 2005, and submitted that the panels deciding his case should

have taken those reasons into account. The applicant went on to argue that Instruction no. I-37, which governed the manner in which the assessment was to be carried out, had not been published in the State Gazette and had therefore not entered into force at the relevant time. That meant that the order for his dismissal had been unlawful. Its unlawfulness also stemmed from the fact that the applicant had, in breach of the applicable regulations, been subjected to the psychological assessment while on sick leave. Lastly, he submitted that the Supreme Administrative Court had failed to apply properly the applicable rules of substantive and procedural law.

B. The Court's assessment

1. Admissibility

50. The Court finds that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

(a) Applicability of Article 6 § 1 of the Convention

51. For Article 6 § 1 of the Convention to be applicable under its civil limb, there must be a genuine and serious dispute over a right that can be said, at least on arguable grounds, to be recognised in domestic law. The dispute may relate not only to the actual existence of the right but also to its scope and the manner of its exercise. Moreover, the outcome of the proceedings must be directly decisive for that right (see, among many other authorities, *Efendiyeva v. Azerbaijan*, no. 31556/03, § 39, 25 October 2007).

52. In the present case, it is uncontested that there was a dispute over a right recognised under Bulgarian law – the right not to be unfairly dismissed from one's employment –, that the dispute was genuine and serious, and that the outcome of the proceedings before the Supreme Administrative Court was directly decisive for the right concerned (contrast *Čavajda v. Slovakia*, no. 65416/01, §§ 61-64, 14 October 2008). The fact that the dispute revolved around the question whether the applicant was mentally fit to work at the Ministry of Internal Affairs does not detract from that conclusion (see *Stefan v. the United Kingdom*, no. 29419/95, Commission decision of 9 December 1997, unreported).

53. It remains to be established whether that right can be characterised as "civil" within the meaning of Article 6 § 1 of the Convention. In this connection, it should be noted that the applicant was an officer holding a post at the National Security Directorate of the Ministry of Internal Affairs, and that the dispute that he sought to have resolved in the proceedings he

brought before the Supreme Administrative Court concerned the lawfulness of his dismissal from that post (see paragraphs 6 and 16 above).

54. In its judgment in the case of *Vilho Eskelinen and Others* (cited above, § 62), the Court's Grand Chamber laid down new criteria regarding the applicability of Article 6 § 1 of the Convention to disputes concerning the employment of civil servants. It ruled that this provision applies under its civil limb to all disputes involving civil servants unless (a) the domestic law of the State concerned expressly excludes access to a court for the post or category of staff in question, and (b) that exclusion is justified on objective grounds. If domestic law does not bar access to a court, the Court does not need to go into the second of these criteria (see *Rizhamadze v. Georgia*, no. 2745/03, §§ 27-28, 31 July 2007; *Efendiyeva*, cited above, § 41; and *Romuald Kozłowski v. Poland*, no. 46601/06, § 24, 20 January 2009).

55. In the present case, Bulgarian law expressly allowed judicial review of the dismissal of officers employed by the Ministry of Internal Affairs (see paragraph 30 *in fine* above), and the applicant's legal challenge to his dismissal was in fact examined by the Supreme Administrative Court (see paragraphs 21 and 23 above). It follows that Article 6 § 1 of the Convention, under its civil limb, was applicable to the proceedings before that court (see *Redka v. Ukraine*, no. 17788/02, § 25, 21 June 2007; *Chukhas v. Ukraine*, no. 4078/03, § 20, 12 July 2007; *Blandeau v. France*, no. 9090/06, § 21, 10 July 2008; *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, § 44, 2 July 2009; and *Vanjak v. Croatia*, no. 29889/04, §§ 32-33, 14 January 2010). The fact that the proceedings concerned the applicant's dismissal from his post rather than a question relating to his salary, allowances or similar entitlements does not alter that conclusion (see *Cvetković v. Serbia*, no. 17271/04, § 38, 10 June 2008; *Romuald Kozłowski*, cited above, § 24; and *Bayer v. Germany*, no. 8453/04, §§ 38-39, 16 July 2009).

(b) Compliance with Article 6 § 1 of the Convention

(i) The scope of the Supreme Administrative Court's jurisdiction

56. It should be pointed out at the outset that, according to Article 19 of the Convention, the Court's duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. The Court is not a court of appeal from the national courts (see, as a recent authority, *Yordanova and Toshev v. Bulgaria*, no. 5126/05, § 65, 2 October 2012), and it is not its function to deal with errors of fact or law allegedly committed by those courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among many other authorities, *Csősz v. Hungary*, no. 34418/04, § 33, 29 January 2008). It follows that the Court cannot determine whether the applicant's dismissal

from his post was lawful or whether the Supreme Administrative Court's rulings in relation to that dismissal were correct in terms of Bulgarian law. The Court's task is confined to examining whether the proceedings before the Supreme Administrative Court complied with the requirements of Article 6 § 1 of the Convention.

57. Although in *Vilho Eskelinen and Others* the Court found that this Article is in principle applicable to disputes concerning the employment of civil servants, it went on to say that that conclusion was without prejudice to the question of how the Article's various guarantees – for example, the scope of review required of the national courts – should be applied in such disputes (see *Vilho Eskelinen and Others*, cited above, § 64). One of those guarantees, in cases concerning the determination of civil rights and obligations, is that the "tribunal" dealing with the case must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see *Terra Woningen B.V. v. the Netherlands*, 17 December 1996, *Reports* 1996-VI, § 52; *Chevrol v. France*, no. 49636/99, § 77, ECHR 2003-III; *I.D. v. Bulgaria*, no. 43578/98, § 45, 28 April 2005; *Capital Bank AD v. Bulgaria*, no. 49429/99, § 98, 24 November 2005; *Družstevní záložna Pria and Others v. the Czech Republic*, no. 72034/01, § 107, 31 July 2008; and *Putter v. Bulgaria*, no. 38780/02, § 47, 2 December 2010). The salient question in the present case is whether this requirement applies equally and without qualification to disputes concerning the mental fitness for work of an officer employed at the National Security Directorate of the Ministry of Internal Affairs.

58. In carrying out this examination, the Court will have regard to the fact that in dismissing the applicant from his post the Minister of Internal Affairs was not exercising his discretion. Under the terms of section 253(1)(5) of the 1997 Act and regulation 251(1)(6) of the Act's implementing regulations, as consistently construed by the Supreme Administrative Court (see paragraphs 30, 31, 34 and 35 above), the Minister was bound to dismiss an officer certified by the Ministry's Psychology Institute to be mentally unfit for work at the Ministry. Indeed, the Government confirmed this in their observations (see paragraph 46 above). The present case is not therefore concerned with the intensity with which the domestic courts should scrutinise the exercise of administrative discretion (contrast *Zumtobel v. Austria*, 21 September 1993, § 32, Series A no. 268-A; *Ortenberg v. Austria*, 25 November 1994, §§ 33-34, Series A no. 295-B; *Fischer v. Austria*, 26 April 1995, § 34, Series A no. 312; *Bryan v. the United Kingdom*, 22 November 1995, §§ 44-47, Series A no. 335-A; *Potocka and Others v. Poland*, no. 33776/96, §§ 54-58, ECHR 2001-X; and *Crompton v. the United Kingdom*, no. 42509/05, §§ 77-78, 27 October 2009).

59. The lawfulness – or otherwise – of the applicant's dismissal from his post was entirely predicated on his being certified as being mentally unfit

for work at the Ministry of Internal Affairs. There was nothing inherently wrong with that assessment being carried out by an expert employed by the Ministry's Psychology Institute (see, *mutatis mutandis*, *Stefan*, cited above). Article 6 § 1 of the Convention does not bar the national courts from relying on expert opinions drawn up by specialised bodies to resolve the disputes before them when this is required by the nature of the contentious issues under consideration (see *Csősz*, cited above, § 34). However, the reasoning of the three-member and five-member panels of the Supreme Administrative Court shows that they did not simply take into account the assessment carried out by the Institute, but considered themselves bound by it and refused to scrutinise it in any way (see paragraphs 21 and 23 above, and contrast *Stefan*, cited above). Those rulings were fully in line with the Supreme Administrative Court's case-law predating its judgment of 8 February 2005 in which it partly struck down regulation 251(1)(6) of the implementing regulations of the 1997 Act. In that case-law, that court consistently held that the Institute's assessments were not amenable to judicial scrutiny and could not be contested through any means (see paragraph 34 above). This Court, for its part, finds that in its exclusive reliance on that assessment in the applicant's case the Supreme Administrative Court refused independently to scrutinise a point which was crucial for the determination of the case, and thus deprived itself of jurisdiction to examine the dispute before it (see, *mutatis mutandis*, *I.D. v. Bulgaria*, cited above, § 50).

60. It follows that the conditions laid down in Article 6 § 1 are met only if the Institute's assessment was made in conformity with the requirements of that provision (see, *mutatis mutandis*, *Obermeier v. Austria*, 28 June 1990, § 70, Series A no. 179; *I.D. v. Bulgaria*, cited above, § 51; and *Capital Bank AD*, cited above, § 102). In the Court's judgment, the proceedings before the Institute cannot be regarded as complying with the requirements of that provision. The Institute was an expert body directly subordinate to the Minister of Internal Affairs (see paragraph 33 above), and at the Institute the applicant was merely subjected to a psychological examination whose results were not communicated to him (see paragraphs 11 and 12 above).

61. The Court must therefore examine whether the Institute's assessment was itself subject to direct review by a court (see, *mutatis mutandis*, *Obermeier*, § 70; *I.D. v. Bulgaria*, § 53; and *Capital Bank AD*, § 104, all cited above). That was clearly not the case – the Supreme Administrative Court expressly found that such assessments were not subject to any form of review (see paragraphs 34 and 35 above).

62. No justification has been offered for this situation. It is true that the applicant held the rank of major at the National Security Directorate of the Ministry of Internal Affairs and that his duties related to the gathering and processing of intelligence (see paragraph 6 above). It is also true that this

Court has, albeit in different contexts, held that legitimate national security considerations may justify limitations on the rights enshrined in Article 6 § 1 of the Convention (see *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, 10 July 1998, § 76, *Reports* 1998-IV; *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 61, ECHR 2000-II; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 68, ECHR 2001-IX; *Devenney v. the United Kingdom*, no. 24265/94, § 26, 19 March 2002; and *Dağtekin and Others v. Turkey*, no. 70516/01, § 34, 13 December 2007). However, neither the Supreme Administrative Court in its reasoning nor the Government in their observations sought to justify this denial of access to a court with adequate jurisdiction in terms of either the legitimacy of the aim pursued or its proportionality. It is noteworthy in this connection that in other cases the Supreme Administrative Court held that an assessment of mental fitness for work which prompts the dismissal of an officer employed by the Ministry of Internal Affairs should be amenable to judicial scrutiny even if it touches upon national security, and that in May 2006 the law was changed to provide for direct judicial review of the mental fitness assessments of all members of the Ministry's staff (see paragraphs 35, 36 and 40-43 above and, *mutatis mutandis*, *Mihailov v. Bulgaria*, no. 52367/99, § 38, 21 July 2005).

63. There has therefore been a breach of Article 6 § 1 of the Convention under this head.

(ii) The lack of public pronouncement of the Supreme Administrative Court's judgments

64. The public character of proceedings before the judicial bodies referred to in Article 6 § 1 of the Convention protects litigants against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see *Pretto and Others v. Italy*, 8 December 1983, § 21, Series A no. 71, and *Axen v. Germany*, 8 December 1983, § 25, Series A no. 72). These principles apply to both the public holding of hearings and to the public delivery of judgments, and have the same purpose (see *Werner v. Austria*, 24 November 1997, § 54, *Reports* 1997-VII).

65. It should however be emphasised that, although linked to the overall requirement of fairness, the requirement of Article 6 § 1 that judgment be pronounced publicly is free-standing. Therefore, it cannot be regarded as decisive that the applicant was able to access the judgments in his case in the Supreme Administrative Court's registry and exercise his rights of

appeal. What ultimately matters is whether those judgments were, in some form, made accessible to the public.

66. This requirement may not be regarded as subject to an implied limitation (see *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 90, Series A no. 80). The Court has nonetheless applied it with some flexibility (see *Welke and Białek v. Poland*, no. 15924/05, § 83, 1 March 2011). For instance, the form of publicity given to a "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question, having regard to their entirety, and by reference to the object and purpose of Article 6 § 1 (see *Pretto and Others*, cited above, § 26; *Axen*, cited above, § 31; *Sutter v. Switzerland*, 22 February 1984, § 33 *in fine*, Series A no. 74; *Werner*, cited above, § 55 *in limine*; *B. and P. v. the United Kingdom*, nos. 36337/97 and 35974/97, § 45, ECHR 2001-III; and *Ryakib Biryukov v. Russia*, no. 14810/02, § 32, ECHR 2008). A summary of a number of cases dealing with this issue may be found in paragraphs 33-36 of the Court's judgment in *Ryakib Biryukov* (cited above).

67. In the instant case, as a result of the classification of the proceedings, the judgments of the three-member and five-member panels of the Supreme Administrative Court were not delivered publicly. In addition, the materials in the case file – including those judgments – were not accessible to the public, and the applicant was not able to obtain copies of them (see paragraphs 17 and 24 above). The judgments were declassified on 30 August 2006, more than a year and three months after the close of the proceedings, apparently on the basis that they had been incorrectly classified (see paragraph 27 above).

68. It is not for this Court to determine whether the classification of the applicant's case was or was not correct in terms of Bulgarian law. It simply notes that the Supreme Administrative Court's judgments were not given any form of publicity for a considerable period of time, and that no convincing justification has been put forward for this situation.

69. It should be noted in this connection that in a case concerning an expulsion on national security grounds this Court held that the complete concealment from the public of the entirety of a judicial decision could not be regarded as warranted. It went on to emphasise that the publicity of judicial decisions aimed to ensure scrutiny of the judiciary by the public and constituted a basic safeguard against arbitrariness, and pointed out that even in indisputable national security cases, such as those relating to terrorist activities, some States had opted to classify only those parts of the judicial decisions whose disclosure would compromise national security or the safety of others, thus illustrating that there existed techniques which could accommodate legitimate security concerns without fully negating fundamental procedural guarantees such as the publicity of judicial decisions (see *Raza v. Bulgaria*, no. 31465/08, § 53, 11 February 2010).

70. There has therefore been a breach of Article 6 § 1 of the Convention under this head as well.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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

72. The applicant claimed 121,000 Bulgarian levs (BGN) (61,866.32 euros (EUR)) in respect of pecuniary damage. He submitted that this was the remuneration that he would have received between 13 August 2003 and 30 October 2010 if he had not been unlawfully dismissed from his post. He further claimed EUR 10,000 in respect of the distress, the humiliation and the damage to his reputation which had resulted from his dismissal, as well as the fear that he would be unable to provide for his family.

73. The Government submitted that the claim in respect of pecuniary damage was speculative. It was not certain whether the applicant would continue to have been employed by the Ministry of Internal Affairs throughout the period in respect of which he claimed lost remuneration. Moreover, there did not exist a direct causal link between the breach of the Convention and the alleged damage. The Government further submitted that the claim in respect of non-pecuniary damage was exorbitant. Although the applicant's dismissal from his post had probably given rise to negative emotions, they had been hardly of a degree warranting an award of compensation. The finding of a violation would amount to sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

74. The Court does not discern a sufficient causal link between the breaches of Article 6 § 1 of the Convention found in the present case and the alleged pecuniary damage. It cannot speculate as to what the outcome of the judicial review proceedings might have been if the breach concerning the scope of the Supreme Administrative Court's jurisdiction had not taken place (see, *mutatis mutandis*, *Terra Woningen B.V.*, cited above, § 61; *Findlay v. the United Kingdom*, 25 February 1997, § 85, *Reports* 1997-I; *Chevrol*, cited above, § 89 *in limine*; *Capital Bank AD*, cited above, § 144; and *Harabin v. Slovakia*, no. 58688/11, § 176, 20 November 2012). The same goes for the breach concerning the lack of public delivery of the

Supreme Administrative Court's judgments (see *Werner*, cited above, § 72). No award can therefore be made under this head.

75. Conversely, the Court finds that the applicant has suffered non-pecuniary damage on account of the breaches of Article 6 § 1 of the Convention found in the present case (see *I.D. v. Bulgaria*, cited above, § 59). Consequently, ruling on an equitable basis, the Court awards the applicant EUR 1,500, plus any tax that may be chargeable on this amount.

76. It must in addition be pointed out that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the breach and to redress as far as possible its effects (see, as a recent authority, *Stanev v. Bulgaria* [GC], no. 36760/06, § 254, ECHR 2012). The most appropriate form of redress in cases where an applicant has not had access to a tribunal in breach of Article 6 § 1 of the Convention is, as a rule, to re-open the proceedings in due course and re-examine the case in keeping with all the requirements of a fair trial (see, among other authorities, *Yanakiev v. Bulgaria*, no. 40476/98, § 90, 10 August 2006).

B. Costs and expenses

77. The applicant did not make a claim in respect of costs and expenses.

C. Default interest

78. 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 remainder of the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in that the Supreme Administrative Court refused to scrutinise the assessment of the applicant's mental fitness for work;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention in that the Supreme Administrative Court did not give any form of publicity to its judgments in the applicant's case;

4. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 16 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Ineta Ziemele President