

BACKGROUND

Human Rights and Due Process Violations

The Situation of Foreign Prisoners in Bulgaria: The Kapoustin Case

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**A Legal Analysis prepared by
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EXECUTIVE SUMMARY

Overview

The case of Mr. Michael Kapoustin, a Canadian citizen, is an important high-profile example of broad and systemic abuses occurring in the Republic of Bulgaria with respect to the unlawful treatment of foreign prisoners.

Kapoustin formed a company in Bulgaria in 1993, retaining 75% ownership and 100% control. This was shortly after the fall of communism in East Europe and during a time of greater instability in Bulgaria's social, economic and judicial systems. Kapoustin's business endeavours collapsed under the pressure of these conditions.

He was sentenced on August 16, 2002 to seventeen years in prison for embezzlement of funds from his company – but was not ordered to repay any funds and was acquitted on all fraud charges. The sentence was deemed to commence on February 7, 1996, the day Kapoustin was detained by German authorities on an extradition request from Bulgaria. As such, his sentence will be completed in 2013.

The central issue in this paper is the repeated refusal of Bulgaria to transfer Kapoustin to a Canadian prison in accordance with the aims and mechanisms of the Council of Europe's Convention on the Transfer of Sentenced Persons ("**Council of Europe's Transfer Convention**"). It is the "worst case in Canadian history" of another country refusing to transfer a Canadian to a prison in Canada.¹ The case of Kapoustin is also the longest standing transfer request in Bulgaria.

In October of 2006, the Prosecutor General of the Republic of Bulgaria ("**Prosecutor General**"), who has full authority for such transfers, refused for a second time the application by the Government of Canada to transfer Kapoustin to his home country.

The Government of Canada, through its diplomatic offices and through a special envoy on the Kapoustin matter representing the Prime Minister of Canada, discussed these refusals with the appropriate Bulgarian authorities and attempted to meet the various concerns raised by them. However, these efforts have not succeeded.

The Government of Canada is of the opinion that the Prosecutor General, and by extension, the Republic of Bulgaria, has breached the Council of Europe's Transfer Convention and should invoke Article 23 of that Convention, on an urgent basis, for mediation at the Council of Europe.

This request for mediation is significant on many fronts:

- It is the first time that Canada has submitted such a request for intervention;
- It is only the second time that the mediation clause has been triggered since the Council of Europe's Transfer Convention came into force in 1985;
- Bulgaria, a new entry into the European Union ("**EU**"), has demonstrated wilful disregard for the civil and human rights of not only Kapoustin, but of all foreign prisoners within its territory.

Bulgaria has refused the transfer of Kapoustin and all foreigner prisoners to prisons in their home countries based on a) disparity of sentencing between the respective countries and/or b) outstanding payments or debts levied by the Bulgarian government or private persons against the respective foreign prisoners.

¹ According to Gar Pardy, Retired Director General of Consular Affairs, Government of Canada.

This paper will demonstrate that both of these impediments invoked by Bulgaria are irrelevant to the request for transfer. In addition, the actions by Bulgarian authorities not only constitute a breach of their own laws but also a breach of the laws and norms of the Council of Europe and the EU, of which Bulgaria is a Member State.

The refusal by Bulgaria to comply with transfer requests as per the spirit of the Council of Europe's Transfer Convention is especially egregious because:

Parole - Kapoustin, who is in his 12th year of a 17-year sentence, has been repeatedly and unduly denied parole without plausible explanation. So have all foreign prisoners until very recently, when 20 were released without paying their "fines".²

Maximum Security Prison – Foreign prisoners, regardless of their offences, serve their sentences in Sofia Central Penitentiary ("**SCP**"), a maximum security facility for dangerous repeat offenders. Foreigners are segregated and isolated from the general prison population. However, the foreign violent offenders are not further segregated from the foreign non-violent prisoners, such as Kapoustin. Placing foreign non-violent prisoners in a maximum security facility designed for dangerous repeat offenders is a form of torture against this group of prisoners.

Prison Conditions – Inmates are subjected to degrading and inhumane treatment by prison authorities, with some forced to perform humiliating sexual acts. These acts were recently captured on video and exposed on the internet.³ In addition to this mistreatment under the threat of violence and the deplorable living conditions in the prison, all foreign prisoners, including Kapoustin, do not receive the same level of access as Bulgarian prisoners do to programs designed for re-entry into society.

Singled Out – While Bulgarian authorities have systemically abused the civil and human rights of all foreign prisoners, they have singled out Kapoustin for particularly harsh treatment. The reason for this, as provided informally by Bulgarian authorities, is political. Bulgarian authorities have effectively engineered the reputation of Kapoustin as an "international fraudster". Their propaganda, especially during the early trial proceedings, was so effective that even today Kapoustin is a vilified household name in Bulgaria, the "pharaoh of deception" and "famous swindler"⁴ even though any and all convictions of fraud against him were overturned on appeal. Bulgarian officials have suggested that to transfer Kapoustin out of the country or to release him on parole would cause a public outcry in Bulgaria.

Despite the hardships, Kapoustin remains an ardent advocate for proper access to the judicial system and better conditions for all foreign prisoners. He has launched a series of legal actions against Bulgarian authorities and he has successfully demonstrated that foreign prisoners are discriminated against with respect to parole, prison housing, work credits and other privileges. His actions have attracted EU-wide publicity and the attention of the EU Commissioner responsible for Bulgaria's admission into the EU. His efforts have made him a target. Yet whereas foreign prisoners have recently started to gain parity on prison conditions with Bulgarian prisoners, Kapoustin has not.

² However, without any judicial oversight, they were immediately placed into detention at a refugee facility operated by the Ministry of the Interior before being allowed to leave Bulgaria.

³ See Bulgaria NOVA TV coverage of the prison sex scandal – April 2006.

⁴ The Bulgarian newspaper, Continent, interview of August 1, 1996 with Stefcho Geogiev, Bulgaria's prosecutor in charge of the Kapoustin case.

Summary of Bulgaria's Specific Violations

- Bulgaria has not acted in good faith in the performance of its obligations under the Council of Europe's Transfer Convention, constituting breaches of that convention and possibly of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").
- Bulgaria is unlawfully remanding first-time foreign offenders to a maximum security penitentiary for dangerous repeat offenders.
- Bulgaria is discriminating against prisoners based on their status as foreigners in Bulgaria and further on their property and income status, as evidenced by the continuous refusal by Bulgarian authorities to grant transfers, parole and access to rehabilitation programs to foreign prisoners.
- Bulgaria is subjecting foreign prisoners to inhumane and degrading treatment and conditions, constituting torture under international law.
- Bulgarian authorities continue to act with impunity in their systemic abuse of power relating to the discriminatory and arbitrary creation and application of ordinances and practices contrary to Bulgaria's constitutional and national laws and Bulgaria's legal obligations to the Council of Europe and EU. As a result, foreign prisoners are denied the right to protection under the law.
- While this paper focuses on the conditions of imprisonment for foreigners with final convictions, it should also be noted that the European Court of Human Rights has consistently held that the Bulgarian pre-trial detention system prior to January 1, 2000, in which Kapoustin was caught up between 1996 and 2000, contravened Articles 3 and 5 of the ECHR.⁵ Further, Kapoustin was denied the presumption of innocence under ECHR's Article 6.

Why this Case is Important

Bulgaria as a Member State of the Council of Europe and the EU has agreed to accept the guiding principles of these organizations which are a) democratic government, b) the rule of law, and c) respect for human rights and fundamental freedoms of all persons within their jurisdiction.

Both Bulgaria and Canada have signed and ratified the Council of Europe's Transfer Convention to "further the ends of justice and social rehabilitation of sentenced persons", but Bulgaria seems more intent on punishing Kapoustin and other foreign prisoners than providing the best solution towards achieving the Convention's goal.

The Kapoustin case is not only a glaring example of specific failures of the judicial and correctional systems within Bulgaria, but is also illustrative of broad systemic deficiencies in these systems.

This is an important case not only for Canada, but also for the Council of Europe and the EU as they determine how to integrate transition countries such as Bulgaria without diluting the standards they espouse and strive for.

Other non-Council of Europe and non-EU countries, as they review the performance of Bulgaria, including 43 out of 45 judgements against Bulgaria at the European Court of Human Rights in

⁵ In a line of authority that began with the leading decision in *Assenov and Others v. Bulgaria*, October 28, 1998 with respect to Article 5 and *I.I. v. Bulgaria*, June 9, 2005 and *Kehayov v. Bulgaria*, January 18, 2005 with respect to Article 3.

2006, are increasingly skeptical of the advantages inherent in signing agreements with Member States of the Council of Europe and the EU. In addition, Bulgaria's poor track record on the rule of law has a chilling effect on persons wishing to do business in or travel to Bulgaria.

While Bulgaria has made strides towards democracy, many of the advances are still very much on paper rather than in practice. The unlawful handling of foreign prisoners raises serious doubt as to whether Bulgaria is truly embracing the principles of the Council of Europe and the EU.

UNLAWFUL REFUSAL TO TRANSFER FOREIGN PRISONERS TO THEIR COUNTRIES

Background

The Prosecutor General has twice refused to transfer Kapoustin to Canada. In December of 2002, the Government of Canada made its first request. The Prosecutor General delayed his response to that request for approximately two years and ultimately denied the request for reasons of disparity between the two country's penal systems.

In 2006, the Prime Minister of Canada appointed the Honourable Jason Kenney, Member of Parliament, as Special Envoy on the Kapoustin case ("**Special Envoy**"). The Special Envoy travelled to Bulgaria in 2006 to meet with the current Prosecutor General, Mr. Boris Velchev, who assured the Special Envoy that he would "carefully consider"⁶ a new transfer application, prompting Canada's second request, which was denied conditionally in late October of that year by Mr. Velchev.⁷

Velchev cited two grounds for denying the second transfer application:

1. Kapoustin must pay outstanding debts to a Bulgarian national, and to the Bulgarian Ministry of Finance, totalling approximately \$25,000 US.
2. "Convincing assurances" must be received that Kapoustin will continue to serve the remainder of his punishment in a Canadian prison through the full term of 17 years.

Velchev's notice of refusal also stated that "in the courts of the Republic of Bulgaria a number of civil suits are in proceeding against Mr. Kapoustin from citizens, who think they have been harmed by his actions, and guilty verdicts have been pronounced on their complaints, which may lead to the imposition of new administrative bans for Mr. Kapoustin to leave the borders of the Republic of Bulgaria."

Six months ago, the Special Envoy responded to the obstacles cited by the Prosecutor General and urged Bulgaria to consider once again the application to transfer Kapoustin, stating that otherwise Canada would likely be compelled to request intervention from the Council of Europe by invoking Article 23 of the Council of Europe's Transfer Convention.⁸

The Prosecutor General has not replied to Canada. Bulgaria's entire "directing mind" is aware that the transfer of Kapoustin is a priority for Canada and yet Bulgaria remains defiant in its silence on the matter.

⁶ In a meeting witnessed by Kapoustin's lawyer, September 2006.

⁷ October 2006 letter from the Prosecutor General of the Republic of Bulgaria, addressed to the Minister of Justice of Canada.

⁸ Letter from Canada's Special Envoy to Bulgaria's Prosecutor General, dated December 11, 2006.

The denial of transfer of Kapoustin is not an isolated case. In fact, there is clear evidence that almost all incarcerated foreigners are denied transfer under the Council of Europe's Transfer Convention. The Convention states in Article 3 that a sentenced person may be transferred "if the judgement is final". As of October 26, 2006, 111 foreign prisoners have "effective sentences" meaning they are eligible for transfer and in 2006 only two applicants were successful⁹. It is estimated that 85% of foreign prisoners are eligible for transfer, but are discouraged from doing so for the same reasons Kapoustin's application has been denied.

One has to wonder why Bulgaria became a party to the Council of Europe's Transfer Convention in 1994. Was it Bulgaria's aim to fulfill the stated objectives of the Council of Europe's Transfer Convention? These objectives include:

- to further develop international co-operation in the field of criminal law;
- to further the ends of justice and the social rehabilitation of sentenced persons;
- to permit foreigners who are deprived of their liberty as a result of their commission of a criminal offence the opportunity to serve their sentences within their own society; and,
- that this can best be achieved by having them transferred to their own countries.

Or, was it Bulgaria's aim to use this Council of Europe's Transfer Convention as a way to discourage foreigners from appealing convictions?

Kapoustin abandoned his final appeal to his conviction because he had a reasonable belief that he would be eligible for transfer to his own country's penal system. In fact, the Bulgarian authorities promised Canada that once Kapoustin's conviction was final, his transfer to Canada would be expedited.

That was in 2002 and Kapoustin remains imprisoned in Sofia, Bulgaria to this date.

Breaches of the Council of Europe's Transfer Convention

Article 2.1 - The Council of Europe's Transfer Convention states in Article 2.1 that ***"The Parties undertake to afford each other the widest measure of cooperation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention."*** This clause is the general principle governing the application of the Council of Europe's Transfer Convention and is inspired by Article 1.1 of the European Convention on Mutual Assistance in Criminal Matters. ***"The reference to 'the widest measure of co-operation in respect of the transfer of sentenced persons' is intended to emphasize the convention's underlying philosophy: that it is desirable to enforce sentences in the home country of the person concerned."***¹⁰

Under the Council of Europe's Transfer Convention, transfer requests should be granted automatically except in the most extraordinary of circumstances; otherwise the principles of the Council of Europe's Transfer Convention are moot. On average, 80 to 100 Bulgarians return annually to Bulgaria "being transferred (from) abroad to serve the remaining part of their sentences in Bulgaria."¹¹ In 2006, Bulgaria complied with only two requests from other countries for the transfer of foreign prisoners from Bulgaria.

Bulgaria has not complied with the spirit of Article 2.1. Although the decision to honour a request for transfer lies within the discretion of the Bulgarian authorities, they must act in good faith when

⁹ Daily newspaper Trud, citing Peter Vassilev, head of "Execution of Punishment" Main Directorate, dated October 26, 2006.

¹⁰ Council of Europe's explanatory report on the Transfer Convention.

¹¹ Daily newspaper, Trud, October 26, 2006.

exercising this discretion. The Bulgarian authorities have acted in bad faith by basing their decision on a legally irrelevant consideration of Kapoustin's anticipated treatment in Canada after the proposed transfer. Furthermore, the Prosecutor General's abuse of power to use "coercion" to settle civil debts and refuse transfer is reprehensible and accordingly should be sanctioned.

Article 5.4 - Bulgaria has not complied with Article 5.4 of the Council of Europe's Transfer Convention to inform Canada promptly of its decision with respect to its first transfer application. In fact, the Bulgarian authorities took almost two years to convey to Canada their decision to refuse the application. Furthermore, with respect to the second transfer request, Bulgaria asked for certain assurances in consideration for approving the transfer. Canada communicated those assurances in December 2006 and Bulgaria has not responded.

Breaches of the ECHR

There is reason to believe that the refusal to transfer Kapoustin under the Council of Europe's Transfer Convention is also a breach of the **ECHR**.

Article 3 - Kapoustin has been kept in a maximum security prison in Bulgaria for four years beyond the first request for transfer by the Canadian government. He has been subjected to torture, degrading and inhumane treatment, and kept in a state of punishment within the meaning of Article 3 of the ECHR. He has also been subjected to discrimination as a foreigner, which makes the denial of transfer all the more inhumane and degrading.

Protocol 4, Articles 1 and 2 – Bulgaria is also in breach of Protocol 4, Article 1 entitled "Prohibition of imprisonment for debt" and which states "**No one shall be deprived of his liberty merely on the grounds of inability to fulfil a contractual obligation.**"

Chapter 36 of the Bulgarian Criminal Code provides no legal stipulation for imposing a legal duty on the Prosecutor General to approve the transfer of a foreign prisoner conditional on his family or his Government making payment of or securing in cash a civil law debt. In addition, articles 453 and 454 of Bulgaria's Criminal Code of Procedure deal exclusively with transfer of sentenced persons to foreign countries and the collection of debt does not figure within those procedures.

UNLAWFUL REFUSAL TO PAROLE FOREIGN PRISONERS

Background

In September 2006, 170 foreign prisoners carried out a hunger strike and wrote an open letter published by the Bulgarian newspaper, Novinar Daily, to protest discriminatory practices towards foreign prisoners with respect to parole, leaves and placement in prison hostels. The discriminatory practices included prison wardens intentionally obstructing foreign prisoners from legally accessing the Bulgarian court system once they had served half or more of their sentences. The inmates' hunger strike only ended when the Bulgarian government promised the embassies of these prisoners that they would stop discrimination and arbitrary practices against foreigners.¹²

The right of parole is statutory. Every two months the prison, prosecutor and a representative of the Sofia criminal court must review the case of every inmate who has become eligible for parole. Decisions are first taken by a quasi judicial board composed of prison wardens. Votes are cast in secret and at secret meetings. The identity of board members casting votes is also kept secret. Prisoners are not permitted to petition courts directly, thereby denying them any judicial control

¹² Armenian News Network / Groong, December 5, 2005.

over a possible parole hearing. The court hearing is also closed to the public. Prisoners have no right to appeal on procedural or other grounds; however prosecutors do have the right of appeal.

On November 2, 2006 and for the first time in 10 years, the Ministry of Justice, Sofia Prison Parole Commission and the Sofia City Criminal Court released on parole 20 foreign prisoners serving 10 and 11 year prison sentences for drug related offences, who had less than four years and 11 months remaining on their prison term and who had unpaid fines of up to 200,000.00 leva (100,000.00 Euros).

However, under Article 43, Section 1, Abstract 3 of Bulgaria's Law for Foreigners in Bulgaria, the Ministry of Interior issued, outside of a judicial process, "orders for arrest" against each of these 20 "parolees". They were immediately placed in detention at refugee facilities operated by the Ministry of Interior for four months or until such time as they could pay the amounts owing, provide cash security or succeed in obtaining an order from an administrative court setting aside the order for their arrest. Detention was reduced to three weeks due to a hunger strike by the detained foreign parolees to protest the illegal detention and due to pressure from their countries.

In the same year that the 20 prisoners were released on parole, an additional 20 EU and other foreign citizens eligible for parole were overlooked by the Parole Commission, including Kapoustin, who had served significantly more time in prison.

Breaches of the ECHR

If foreign prisoners cannot obtain transfer to their own country, then they should be able to avail themselves of all the remedies in the Bulgarian penal system, including parole. For their discriminatory, arbitrary and abusive use of the parole system, there is reason to believe that Bulgarian authorities have breached Articles 5, 6, 13, and 14 of the ECHR.

Specific to the detainment of the 20 foreign parolees to refugee camps for unpaid debt, Bulgarian authorities deprived these individuals of their fundamental right to liberty and freedom of movement which is guaranteed in Article 5 and in Protocol 4, Article 2 of the ECHR.

Breach of Due Process

There is no due process with respect to parole in the Bulgarian penal system. The first phase is purely administrative, closed, one-sided and with no independent judicial oversight or right of appeal. Decisions may be completely arbitrary. The second phase is the judicial process and does not provide for or allow prisoners to utilize the services of lawyers and/or translators. It too is closed to the public and only prosecutors have the right to appeal – a right which is rarely exercised.

The recent detention of the 20 foreign parolees is an abusive tactic on many fronts, including the appearance that foreign prisoners are being released on parole, when in fact they are being moved to another facility outside the penal system. This of course skews statistics on paroled foreign prisoners.

Arbitrary and Unlawful Decisions of the Parole Board

In a letter dated March 5, 2007 and written by Kapoustin on behalf of another foreign prisoner to that prisoner's embassy in Bulgaria, he provides empirical data that demonstrates the arbitrary use of power with regard to parole. This arbitrariness appears to be rooted in discrimination against EU prisoners in particular. Bulgarian prisoners are being released on parole with as much as nine years remaining on their sentences, while EU prisoners are being denied parole for virtually the same type of offences and with less time remaining on their sentences.

The interpretive ruling decision No. 7 from May 27, 1975 and issued by Bulgaria's Plenum of Supreme Court judges and binding on Bulgarian courts and administrators clearly identifies that the un-served term of imprisonment or "excessive remainder", the nature of crime or the length of sentence cannot be relied upon to refuse parole.

Furthermore, Kapoustin has for three years attempted to bring these discrepancies to a national court in Bulgaria but "judge rapporteur(s)" continually refuse to send his complaints to trial based on administrative insufficiencies.

UNLAWFUL INSTITUTIONALISED SEGREGATION AND ISOLATION OF FOREIGNERS IN MAXIMUM SECURITY PRISON

Background

The Ministry of Justice has never invoked a security reason for placing foreign first-time and non-violent offenders in segregation and isolation at SCP. These foreigners are denied prison accommodation commensurate with their prison sentence and are denied the possibility of appropriate family contact and work during their imprisonment.

The incarceration of Kapoustin, a foreign first-time and non-violent offender, in a maximum security prison has caused tremendous hardship to him and his family, and in particular on a psychological and emotional level. Due to the restrictive conditions of such a facility and the difficulties for Mrs. Tracy Kapoustin to leave behind or bring her Type 1 Diabetic child into such a prison in a foreign country, Kapoustin did not see his wife and young child for almost eleven years. In March 2007, Kapoustin's new pro-bono defence counsel arranged for a five-day furlough for Kapoustin (with written assurances from Bulgaria to the Canadian government) and arranged for Kapoustin's wife and child to travel to and visit with him in Sofia. When the Kapoustin family arrived in Sofia they were told that the furlough had been cancelled. The officials finally re-instated the furlough once Mrs. Kapoustin involved the Prosecutor General. This incident is another example of the psychological and emotional damage inflicted on Kapoustin by Bulgarian authorities.

Unlawful Application of Bulgarian Law

The Council of Ministers of the Government of Bulgaria approved **Ordinance No. 11/1990** instructing Bulgaria's correctional services to segregate and isolate foreign prisoners collectively apart from the general prison population and for foreigners to be remanded to SCP.

However, **Section 12 of Bulgaria's Execution of Punishments Act 1969** (as amended in 1974 and 1982) provides that: ***offenders be distributed in prisons in Bulgaria according to their sentence and prior criminal record.***

Since 1990, foreigners have been isolated from beneficial social and remedial provisions which are provided for in the Bulgarian Execution of Punishments Act 1969, such as annual leave for good

behaviour, regular close contact with families and regular access to administrative and judicial procedures for reviewing their continued imprisonment.

Successive governments have failed to alter the discriminatory practises stemming from the application of the Ordinance thereby continuing the systemic abuse. The Ordinance was replaced in 1997 by authority of the Bulgarian Council of Ministers and Prosecutor General with **Ordinance 4/1998** (and further amended in March 2001) with the offending provisions in place, and more specifically:

- denying foreigners equal legal rights to be accommodated in penitentiary facilities according to their requirements,
- continuing to allow for forced segregation and isolation,
- foreigners were now given the legal status of offenders having committed crimes against the state such as terrorism or treason with respect to how they would be treated.

Former Bulgarian Deputy Minister of Justice, Mario Dimitrov, suggested that isolation of foreign prisoners in maximum security prison in Sofia benefits foreign prisoners.¹³ In addition Sofia prison officials have attempted to excuse housing of foreigners in SCP for reasons of the Bulgarian government's difficult financial circumstances.¹⁴ Such reasons are unsupported by the evidence and/or irrelevant to the issue of providing adequate accommodation and non-discriminatory treatment for foreign prisoners.

In addition, explanations by Sofia prison officials to consular officials of the Governments of Canada, the United States and Member States of the EU that the placing of their nationals in a maximum security penitentiary is a consequence of national law is legally unsupported. No such Bulgarian national law exists, *only* Ministry of Justice Order LC-4-277/2001.

The Ordinance and its subsequent amendments are in direct contravention of Article 6 of the Bulgarian Constitution (introduced in 1991) which prohibits discrimination according to nationality, race or ethnic origin and Article 26(2) which guarantees equality and protection of the law to foreigners.

Kapoustin filed an appeal against "Order No. LS-04-277 from October 4, 2002 of the Minister of Justice" concerning allocation of inmates in prisons, and his appeal was heard on September 19, 2006 by the Supreme Administrative Court of the Republic of Bulgaria – Fifth Department. On February 19, 2007, the court ruled to **set aside** this order in its part under item 4 where it orders: ***Persons who are not Bulgarian citizens and have no permanent residence in the Country shall serve punishments at the Sofia Prison where they shall be placed isolated from the others as far as accommodation and work is concerned.***

Therefore, institutionalised segregation and isolation of foreigners was decreed unlawful. **Despite this, the segregation of foreigners continues.** The Bulgarian Ministry of Justice is abusing its constitutional powers and continues to act with impunity. Article 12c of the Execution of Punishments Act exists only for the Minister to determine which regions having the three categories of prisons will host foreign citizens and not for the purpose of keeping them at SCP.

¹³ Former deputy Minister Mario Dimitrov, Ministry of Justice Letter _ 94-M-147, dated September 13, 2004.

¹⁴ Mukong v. Cameroon (No. 458/1991) (August 10, 1994), U.N. Doc. CCPR/C/51/D/458/1991. Minimum requirements regarding floor space, sanitary facilities, provision of food, etc., must be observed, "even if economic or budgetary considerations may make compliance with these obligations difficult".

There is no effective remedy for independent judicial review when officials exercise their discretionary powers, thus exacerbating the systemic abuse of process. As a result there are several complaints against Ordinance 4/2001 filed with the Bulgarian Commission for Protection against Discrimination.

Breaches of EU and International Laws and Norms

International law provides clear prohibitions of discriminatory practices. Towards compliance with EU norms, Bulgaria enacted its first Civil and Human Rights Statute in 1991 setting out protective guarantees specifically against discrimination. In 2004 Bulgaria adopted the Protection from Discrimination Act providing due process guidelines for filing discrimination complaints before the courts. Bulgaria's Ministry of Justice Ordinance 4/2001 is not only in contravention of Bulgaria's statutes; it is also in contravention of Bulgaria's legal obligations to the EU.

All prisoners retain their civil and human rights and fundamental freedoms as set out in the following doctrines established under the United Nations:

- Universal Declaration of Human Rights;
- International Covenant on Economic, Social and Cultural Rights;
- International Covenant on Civil and Political Rights; and
- Standard Minimum Rules for the Treatment of Prisoners.

Segregation and isolation within a prison population that is already segregated and isolated from Bulgarian society constitutes in and of itself an additional form of punishment. This punishment is collective in its character when it is only and always applied to a distinct group inside the closed society of a Bulgarian prison. It should be noted that ONLY those prisoners who violate prison rules are PUNISHED by being segregated and isolated from all the rest. Therefore, foreigners are kept under constant punishment, which is also a breach of ECHR's Article 3.

UNLAWFUL PRISON CONDITIONS

Background

When Kapoustin was arrested on February 7, 1996 in Germany, in an attempt to fight extradition, he commenced a hunger strike. On September 2, 1996 Kapoustin was removed from his hospital bed in an unconscious state and relocated, first to a Bulgarian military hospital and then to a Bulgarian police investigation detainment facility where he was placed in solitary confinement until September 1998. Kapoustin was next transferred to SCP.

During his time in the Bulgarian hospital Kapoustin was permitted to meet with Canadian consular representatives only if he agreed to intravenous feedings.

During most of the first year in police detention, Kapoustin was regularly beaten and interrogated for the purpose of extracting information about funds he allegedly transferred out of Bulgaria. He also states that he was repeatedly drugged during these two years.

When Kapoustin was still on trial he was kept at SCP in the ward for prisoners with life sentences or on death row and he was placed in a cell with a prisoner convicted of first degree murder for killing a businessman. He was not placed in the ward designated for foreigners, because he was deemed a security risk. Only after he went on a 43-day hunger strike was he relocated to the ward for foreigners.

It has been reported that SCP is decaying with corroded steel, and plaster and dry wall dust in the air. The building is infested with cockroaches and rats and the food does not meet sanitary standards. The accommodation in the ward for foreign prisoners is shared and not based on any criteria for reducing risk of injury or death to prisoners. On average there are 180 foreigners sharing 11 cells in a facility designed for half that many people. The largest of the cells is 12 square meters. Kapoustin shared a cell with 5 other men. SCP “lacked in-cell toilets so inmates had to use buckets at night.”¹⁵ In the common area for foreigners there were 2 holes in the ground as toilets, no toilet paper, two sinks with cold water only and one shower with no hot water. Prisoners eat their food in their shared cells.

Foreign first-time offenders are provided with harsher conditions than Bulgarian first-time offenders. They are locked in their isolated wards for up to 23 hours a day and are not permitted to work prison jobs. Foreigners are denied access to education, cultural or social activities, annual leave, conjugal visits, and programs for education or employment off prison grounds. With no access to these programs, the likelihood of foreign prisoners becoming productive members in their own families and societies becomes virtually impossible.

Video footage has been made public on the Internet, showing several prisoners being forced to perform humiliating sexual acts. The warden was dismissed in 2006 because of this high-profile scandal, which shared many similarities to that of the Abu Ghraib prison scandal in Iraq. Due to this scandal and the number of complaints filed alleging violations of human rights, on September 10, 2006 the President of the Council of Europe’s Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (“**CPT**”), Dr. Silvia Casale, and four other members of the CPT carried out a twelve-day visit to Bulgaria including a visit to SCP.¹⁶ “Efforts by competent authorities to investigate inmates’ complaints about abuse were obstructed by the fact that prison medical personnel were not instructed to document signs of self-injury, rape and violence.”¹⁷

The Ministry of Justice, responding on May 29, 2006 to a complaint by Kapoustin filed with the Bulgarian Commission for Protection Against Discrimination, declared: “...we can definitely state that foreign citizens live under better conditions as opposed to imprisoned Bulgarian citizens. They are accommodated in a separate section of the Sofia Prison. The premises have been repaired; they have a separate sanitary facility; direct access to natural light and regular airing is possible. Foreign citizens have running warm water available at any time of the day to meet their hygiene needs. In order to secure even better social and living conditions for foreign citizens they will be moved by the end of 2006 from the prison facility to the ‘Kazichene’ prison where construction and repair of the housing facilities are being carried out.”

It is true that coincidental with this response by the Minister of Justice to Kapoustin’s complaint, foreign prisoners were moved to renovated cells at SCP. However, only in late April 2007 and after the favourable judgment in *Kapoustin v. Bulgaria* Minister of Justice did some foreign prisoners move to the “open prison” at Kazichene, while 110 remained isolated and segregated at SCP.

Breach of Bulgarian Law

The overcrowding at SCP is in direct contravention of Article 16(3) of the Bulgarian Ministry of Justice Regulations for the implementation of correctional law.

¹⁵ 2006 IHF Annual Report on Human Rights Violations (Events of 2005).

¹⁶ Council of Europe website, CPT News Flash, Strasbourg, September 28, 2006.

¹⁷ 2006 IHF Annual Report on Human Rights Violations (Events of 2005).

Breach of the ECHR

In 2005, the ECHR ruled on the case of *Kehayov v. Bulgaria*, in which it found that Bulgaria had violated Article 3 of the ECHR. The applicant had been detained in an investigation detention facility “for approximately six months, in a cell measuring 10.5 square meters together with three other detainees, with no possibility for outdoor or out-of-cell activities.”¹⁸ This treatment seems similar to that endured by Kapoustin at SCP and under police detention from September 1996 to August 1998.

The treatment of foreign prisoners at SCP has been inhumane, in contrast with the better treatment afforded to their Bulgarian counterparts. Furthermore, Kapoustin alleges that while he was at an investigation detention facility he was held in solitary confinement and tortured for the purpose of extracting information relating to Bulgaria’s charges.

The Republic of Bulgaria has breached Article 3 of the ECHR: **“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”**

ADVOCACY WORK BY KAPOUSTIN

Kapoustin has been brave in his efforts to organize legal and political challenges on behalf of all foreign prisoners with respect to the abuses detailed throughout this paper. He is aware that should he not continue his pressure the Bulgarian administration will take advantage of the general apathy and do little or nothing to remedy the situation.

Since 2002, Kapoustin and others have launched a series of legal actions against the Bulgarian authorities. In addition to the actions and activity already referenced throughout this paper, in 2006 Kapoustin carried out the following:

- Filed a second complaint with Bulgaria’s Commission for Protection Against Discrimination that the Prosecutor General’s office and the Bulgarian Council of Ministers were legally responsible for the systemic discrimination practiced by the Ministry of Justice. Both respondents denied these allegations and stated that European rules on imprisonment permit discrimination which therefore allows the collective isolation and segregation of foreigners according to their nationality. In March 2007, the Commission reached a decision that agreed with Kapoustin’s allegations that these practices were unlawful. However, the Commission refused to hold the respondents legally accountable and considered Kapoustin’s complaints of persecution to be groundless solely because these government officials and bodies had the right to exercise discretionary powers over him as a person deprived of liberty. As a result Kapoustin has appealed this part of the Commission’s Decision. The Ministry of Justice has appealed the decision relating to the unlawfulness of the practices. The case is now before the Supreme Administrative Court of Bulgaria and awaiting trial.
- On May 22, 2006 and June 20, 2006, Kapoustin filed reports with EU Commissioner Rehn on the practice of “pre-qualifying” EU citizens for parole, conditional on payment of fines.
- On July 24, 2006 Kapoustin filed a petition on behalf of 117 Council of Europe Member State prisoners for a ruling with the Prosecutor General on complaints of:
 1. “unlegislated discriminatory practices of policies of Supreme Cassation Prosecutors and the arbitrariness applied to requests by EU and other Council of Europe governments for the

¹⁸ 2006 IHF Annual Report on Human Rights Violations (Events of 2005).

transfers of their nationals under the European Convention for the Transfer of Sentenced Persons.”

2. “dereliction of duty against Sofia prosecutors attached to the Sofia prison, whose wilful or negligent failures to perform duties and their culpable inefficiencies in performing those duties has resulted in a disproportionate ‘non-citizen’ prison population housed in one group, where 47% of all EU and other foreign citizens imprisoned there are formally and subjectively eligible for parole or probation and 98.3% are first time offenders (as of 01.05.2006) unlawfully required to serve the full term of their imprisonments only at Bulgaria’s maximum security penitentiary facilities for dangerous repeat offenders attached to the city of Sofia.”¹⁹

In response to Kapoustin’s petition, the Chief Prosecutor and Head of the Supreme Cassation Prosecutor Office – Special Section ‘Correctional Services’ rendered a precedent-setting judgement on August 31, 2006, that it was inadmissible and a violation of law for district prosecutors to refuse parole solely on the grounds of unpaid debt.

This is but a sampling of Kapoustin’s efforts to bring about change in the legislative and correctional systems of Bulgaria, undertaken without the benefit of professional legal assistance.

Singled Out

In response to the September 2006 hunger strike and claims filed by Mr. Kapoustin and others, the prison warden and deputy warden together with a representative from the district attorney’s office and the Minister and Deputy Minister of Justice held a meeting with 6 representatives of the strikers selected by Kapoustin but not including Kapoustin. The officials effectively conceded to (i) incompetence on their part; (ii) wrongful denial of parole; and (iii) that unpaid debts would no longer be an obstruction to parole. However, the 6 representatives reported to Kapoustin that the authorities had indicated that these conclusions would not be applied in his case, because it would cause a public outcry if he were to be paroled or transferred back to Canada. Within thirty days of this meeting, the six inmates were paroled along with another 16, but not Kapoustin.

While Kapoustin continues to crusade for better conditions for all foreign prisoners, he is repeatedly denied transfer, parole and better prison conditions. It might be that authorities would have more to fear should he have wider freedoms to expose abuses in the legislative and correctional systems of Bulgaria than he currently exerts through his efforts in a maximum security prison.

Whatever the reasons, Bulgaria continues to deny Kapoustin’s reasonable requests to better his prison conditions, including the very latest refusal on June 1, 2007 to move him to the open/transitional prison. At this facility he would have had the possibility of day passes for work and school off the prison grounds. But he was the only one to be refused among the 27 prisoners “legally qualified” for this transfer. The unofficial reason given to Kapoustin that “you are not ready and neither is Bulgarian ‘society’” certainly supports the notion that the Bulgarian authorities are concerned with any type of release or conditions where he would have access to the outside world. In his own words, Kapoustin asks: “Why is it that I am kept at a maximum security prison for dangerous repeat offenders while Bulgarian murderers, drug dealers, kidnappers and rapists are routinely released on parole after serving half their sentence? And why do they get to be moved to open prisons? What is the ‘real’ difference between me with a 17-year sentence for a white collar crime and having served 12 years, and a murderer with a 20-year sentence having served 11

¹⁹ Complaint filed with the Bulgarian Prosecutor General by Kapoustin dated July 24, 2006.

years and what is the 'truth' behind why the same people who refuse me parole or a move to an open prison will parole the murderer?"

It should be noted that the latest denial for transfer of Kapoustin to the open/transitional prison came just before the resignation of Georgi Petkanov, the Minister of Justice. "Petkanov rejected suggestions he is bowing out ahead of the release of a key European Commission report on Bulgaria's progress in reforming its creaky judiciary."²⁰

BRIEF SUMMARY OF KAPOUSTIN'S CHARGES AND CONVICTION

The company Kapoustin founded in Bulgaria in 1993 was LifeChoice International A.D. Among other things, LifeChoice received monetary investments from members of the public. Investors were offered a high rate of return with extensive written disclosure as to the risks of dealing with LifeChoice. In particular, the disclosure stated that a high return on investments was not guaranteed and could be converted to equity in LifeChoice.

In July 1995, Bulgarian authorities started seizing all of the corporate assets, including the bank accounts of LifeChoice. On October 27, 1995, Bulgarian authorities issued national and international warrants for Mr. Kapoustin's arrest. Bulgarian authorities then proceeded to dismiss some 40 LifeChoice employees and to close the 4 offices of the company and its oil recycling refinery outside of the city of Sofia.

On February 7, 1996, Kapoustin was arrested in Frankfurt, Germany, while en route to Canada. On an extradition request by Bulgarian police, he was taken to Bulgaria on September 2, 1996 and placed in an investigation detention facility.

In January of 1998, Mr. Kapoustin was brought before a judge for the first time. All prior legal proceedings between September 16, 1996 and January 1998 were not presided over by a judge. Police officers and/or prosecutors conducted those proceedings.

In April of 1999, Kapoustin's trial began and continued until March 2001. He was sentenced to 23 years imprisonment. He was convicted of defrauding LifeChoice investors and of embezzling from LifeChoice, in reference to monetary transfers made by LifeChoice to related offshore entities. Kapoustin appealed and was acquitted on all charges.

The Supreme Court set aside the embezzlement acquittal. In July 2002, the Sofia Court of Appeal heard Kapoustin's second appeal relating to the embezzlement charge but he was not permitted to put into evidence proof that part of the monetary transfers were for the purchase of LifeChoice assets and that the cash balance was returned to LifeChoice's bank accounts in Bulgaria.

In the end, the Courts upheld the conviction against Kapoustin of embezzling LifeChoice but overturned the conviction for defrauding LifeChoice investors and reduced the sentence to 17 years.

In overturning the conviction for fraud, the Court pointed out that LifeChoice made full disclosure to the investors and, therefore, did not make any misrepresentations to the public. The Court's detailed findings included that Mr. Kapoustin did not defraud investors and did not establish a

²⁰ See Europe.Net, source: Dnevnik a.m., May 30, 2007.

fraudulent scheme but that he was an unsuccessful businessman that failed in his commercial venture.

The Bulgarian courts ultimately determined that the seizure by Bulgarian authorities of LifeChoice's assets was illegal and that the assets should be returned to LifeChoice. To date the corporate assets have not been returned and are unaccounted for.

CONCLUSION

A letter dated December 7, 2004 from the Bulgarian Helsinki Committee²¹ to Kapoustin made the following observation:

We do agree that the foreign nationals serving sentences in Bulgarian prisons suffer discrimination and their legal status is not equal compared to the Bulgarian prisoners.

It is well documented in the reports of the Bulgarian Helsinki Committee that foreign citizens convicted of crimes in Bulgaria are considered illegal aliens and suffer greater discrimination within Bulgaria's correction institutions to the point of their almost complete elimination from housing, employment and educational opportunities and their grossly inadequate access to healthcare, legal assistance and competent translators while under arrest and in prison.

Kapoustin, while waiting for Bulgaria to grant Canada's request for his transfer, admirably and effectively advocates for improvements in prison conditions. Some foreign prisoners are now starting to see the benefits – but not Kapoustin.

Michael Kapoustin has the right to go home to Canada. It is time for Bulgaria to honour its own laws and the commitments it has made internationally as it seeks increased integration as a full-fledged member of the EU and the Council of Europe.

Canada and other members of the Council of Europe must make it exceptionally clear to Bulgaria that their compliance with the Council of Europe EC Transfer Convention will be viewed as demonstrative in regards to their commitment to judicial reform, and the continued failure to respect this Convention will jeopardize Bulgaria's diplomatic standing.

²¹ The Bulgarian Helsinki Committee is an independent non-governmental organization for the protection of human rights.