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AREAS IN THE CODE OF CRIMINAL PROCEDURE OF REPUBLIC OF MACEDONIA REQUIRING IMPROVEMENTS FOR PURPOSES OF HARMONIZATION WITH THE JURISPRUDENCE OF THE ECtHR WITH REGARDS TO THE APPLICATION OF THE DETENTION MEASURE

Abstract

The ECtHR has so far brought a number of judgments against Macedonia finding violation of Article 5 of the ECHR. Although in most of these cases the violation derives and refers to the imposition, i.e. continuation of detention as a measure securing presence in a criminal proceeding, it should be noted that this is not the case with all judgments of the ECtHR finding violations of Article 5 of the ECHR. Still, this analysis shall focus exclusively on the group of judgments where the ECHR violation derives from circumstances relating to detention as a measure to secure presence in the criminal procedure. Moreover, the issues referring to the detention and the manner in which this measure is imposed and continued, in the light of the jurisprudence of the ECtHR, may also have some issues in common with other articles of the ECHR, such as Article 6 of the ECHR which guarantees the right to fair trial including the presumption of innocence.[1]

Key words: *European Convention on Human Rights, European Court of Human Rights, Detention, Deprivation of liberty, Fair Trail, Presumption of innocence*

I. INTRODUCTION

The European Convention on Human Rights (ECHR) protects the right to freedom and security by its Article 5. Analysed in its integrity, this Article protects as basic human rights the physical liberty of the person and their security against violations by the state. This Article makes precisions of the exceptions when a person may be deprived of their liberty thus unambiguously determining the safeguards which must be ensured by the state in order to legally justify the deprivation of liberty. The European Court of Human Rights (ECtHR) always takes into account the specific situation, the type and duration of the deprivation of liberty, the effectiveness and the manner of applying the specific measure.[2]

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[1] Nevertheless, account must be taken that the scope of Article 5, in particular the fact that the safeguards arising thereof also refer to other types of limitation of the right to liberty, as well as the fact that the ECtHR has found violations of Article 5 of the ECHR of circumstances referring to another type of limitation of the right to liberty, i.e. in case of imposing the measure - internment in a psychiatric hospital (Cf. ***Stojanovski v. Republic of Macedonia*** **A. no. 4922/04, judgment dated 8.10.2009**). The applicants had also alleged violations of Article 6 of the ECHR in the cases of ***Miladinov and others v. Republic of Macedonia***, ***A. no. 46398/09, 50570/09 and 50576/09, judgment dated 24.4.2014***, as well as in the ***Ramkovski v. Republic of Macedonia***, ***A. no. 33566/11, judgment dated 08.02.2018***. Such allegations have been again related to the procedure for imposing, i.e. continuing the detention measure and relate to an alleged violation of the right of presumption of innocence referred to in Article 6 of the ECHR.

[2] *Medvedyev and Others v. France*, Application no. 3394/03, [GC] Judgement of 29 March 2010, para.73

So far, the ECtHR has found violations of Article 5 of the ECHR in a total of 6 judgments against Republic of Macedonia involving multiple applicants:

1. *Miladinov and others v. Republic of Macedonia, A. no. 46398/09, 50570/09 and 50576/09, judgment dated 24.4.2014*
2. *Vasilkovski and others v. Republic of Macedonia, A no. 28169/08 judgment dated 28.10.2010*
3. *Lazoroski v. Republic of Macedonia, A. no. 4922/04 judgment dated 8.10.2009*
4. *Mitreski v. Republic of Macedonia, A no. 11621/09 judgment dated 25.3.2010*
5. *Velinov v. Republic of Macedonia, A. no. 16880/08, judgment dated 19.09.2013*
6. *Ramkovski v. Republic of Macedonia, A. no. 33566/11, judgment dated 08.02.2018*

The application *Gligorovski v. Republic of Macedonia, A. no. 362/11* has also been communicated to the respondent state and it also contained allegations on the violation of Article 5 of the ECHR with regards to circumstances related to the detention measure imposed and prolonged on a number of occasions within the criminal procedure against the applicant, however, the ECtHR did not decide on the justification of the application which ended in the applicant losing interest to conduct the procedure before the ECtHR.

The following text shall analyse the reasons which in the specific cases against RM have brought about violations of the ECHR, as well as the issues arising from the newly filed applications. The following analysis deals with individual issues. Some of them shall be considered as a group because of their affiliation. In each case, the analysis indicates to the need of amending the new Code on Criminal Procedure (CCP) for the purpose of harmonizing it with the ECHR requirements and the way in which the ECtHR interprets the provisions of Article 5 of the ECHR in their jurisprudence.

Furthermore, the jurisprudence of the national courts needs improvement in order to ensure alignment with the ECHR requirements. Particularly so if account is to be taken that the problems detected so far do not always and in full result from inappropriate legal solutions, rather, from inappropriate jurisprudence and application of the legal solutions by the national courts.

The cases where the ECtHR has found violation of the ECHR by a final judgment in relation to the detention measure, as well as those cases which are being currently communicated to the Government of RM and refer to alleged violations of Article 5 of the Convention reveal diverse problems.

II. "COLLECTIVE ORDERS" PRACTICE

First and foremost, issuing collective decisions imposing and prolonging the detention measure instead of issuing individual decisions in line with the personal and individual circumstances of each suspect/defendant. This problem is evident with crimes committed by multiple persons, i.e. in cases of organized crime. Consequently, the same problem prevails with the Court of Appeal in appealed cases. This problem undoubtedly results from the inappropriate jurisprudence, but it is also linked with the relatively short time frames set by the Code of Criminal Procedure (CCP) for the national courts to decide. The decision-making deadlines are unarguably vital to such rights as the right to liberty, and they should remain relatively short—however, given the jurisprudence of the ECtHR, they can be reconsidered with regards to their length so that they are aligned with the ECHR. The training related with

Article 5 of the ECHR at the Academy for Judges and Prosecutors should continue in parallel and with priority given to the pretrial procedure and the public prosecutors.[3]

The problem of the so-called collective detention decisions is mostly related to the general explanations contained in the decisions themselves without the judges entering in the personal and individual circumstances of each defendant/suspect separately. The general phrases used in them, the mere copying of the legislative wording from the CCP, as well as the putting of too much weight only on the potential sentence are the issues making these decisions very similar with the ones of the co-defendants or co-suspects and this ends up with the impression that all decisions are abstract and collective. Their abstraction brings another difficulty in the phase of the appeal by the respective persons as the legislative phrases and the general terminology is almost impossible to contest before the higher instance courts by individual arguments.

III. LACK OF "RELEVANT AND SUFFICIENT" REASONS

The lack of sufficiently explained reasons to impose, and even more so, to prolong the detention measure, as well as the absence of sufficiently explained reasons in the decisions on appeal of the detention decisions add to the problem of the duration of the detention. In this context, account needs to be taken that all of the above mentioned cases before the ECtHR are cases in which the national authorities have acted in line with the CCP. Having in mind that this problem was first pointed by the *Vasilkovski v. RM* case, which had been communicated to the Government of RM while the new CCP was being drafted, the text thereof does make certain legislative amendments which define in more detail the contents of the court decisions deciding the potential deprivation of liberty, the imposition and the prolongation of the detention measure. These have the purpose of addressing the foregoing problem, which is the most evident with the collective deprivation of liberty whereby stereotypical explanations are provided on the justification of the measure, i.e. the legal basis is merely copied on the detention without providing sufficient specific or justified reasons on each basis individually on each suspect/defendant in accordance with their personal and individual characteristics.[4]

It is necessary to further promote the legislative decisions reducing to minimum the possibility of issuing insufficiently justified decisions on detention. The needed improvement should ensure that the court deciding on the motion to detain should be related with the request of the prosecutor both in terms of the reasons, and in terms of the evidence proposed. On the other hand, the defendant should be able to inspect the motion of the prosecutor and the evidence presented with the motion to detain. In any case, the burden to prove the jeopardized presence should be at all times with the prosecutor who needs to explain the reasons for their motion and support them with evidence in the motion. At the same time, in its decision on detention, the court needs to also state their justified reasons in relation to all

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[3] *Vasilkovski and others v. Republic of Macedonia, A no. 28169/08 judgment dated 28.10.2010*; *Gligorovski v. Republic of Macedonia, A. no. 362/11*; *Ramkovski v. Republic of Macedonia, A. no. 33566/11, judgment dated 08.02.2018* and *Miladinov and others v. Republic of Macedonia, A. no. 46398/09, 50570/09 and 50576/09, judgment dated 24.4.2014*

[4] *Vasilkovski and others v. Republic of Macedonia, A no. 28169/08 judgment dated 28.10.2010*; *Gligorovski v. Republic of Macedonia, A. no. 362/11*; *Ramkovski v. Republic of Macedonia, A. no. 33566/11, judgment dated 08.02.2018* and *Miladinov and others v. Republic of Macedonia, A. no. 46398/09, 50570/09 and 50576/09, judgment dated 24.4.2014*. For instance, Article 167 of the new CCP stipulates that the judge is obliged to list all 1) facts and evidence resulting in the reasonable suspicion that the defendant has committed the crime; 2) the justified reasons for each individual basis determining the detention, and 3) the reasons for which the court finds that the aim of the detention cannot be effectuated in any other way other than by the detention measure.

individual invalidated allegations of the prosecutor, which simultaneously go in favour of the suspect/defendant.

III. ABSENCE OF AN ORAL HEARING

Third issue that can be detected is the absence of an oral hearing in the appeal procedure before the criminal panel or the court of appeal when deciding on detention (in particular when it is extended by default each 30 days) as a security measure. This problem derives from the absence of appropriate legislative solutions in the new CCP which would ensure the necessary procedural safeguards of Article 5 paragraph 4 of the ECHR, pointing to the need of supplementing the CCP to fully regulate the procedure before the national courts and the rights of the parties in the procedure in this very narrow segment of the criminal procedure when deciding on the right to liberty. Namely, instead of having a mandatory oral hearing, the current legislation leaves this as an option to the parties. The necessity of holding a public hearing is also imposed by the jurisprudence and positions of the ECtHR stated in a number of other judgments against other member states.[5]

IV. FULL RESPECT OF THE "EQUALITY OF ARMS" PRINCIPLE

An additional issue is the violation of the principle of 'equality of arms' in the procedure to appeal the decision on detention. This problem also exists with decision-making by a criminal panel and with decision-making by the court of appeal. The problem is manifested as a consequence of the absence of a clear legal obligation to submit all files which the public prosecution sends to the court so that that they can be also submitted to the defence on a mandatory basis (e.g. the appeal of the public prosecution requiring a more severe security measure be imposed or the position of the prosecution with regards to the need of extending the detention measure to the defendant/suspect). In this sense, it is recommended to amend the CCP whereby the national legislation would in full, clearly and unambiguously be brought in alignment with the obligations of the state arising from Article 5 paragraph 4 of the ECHR pointing that each party to the proceeding be able to inspect and access each file of the opposing party presented to the court.[6]

V "PRESUMPTION OF INNOCENCE" IN RELATION TO DETENTION ORDERS

The right to be presumed as innocent is guaranteed by Article 6 of the ECHR. However, the violation of this principle could be established in the procedure for imposition of a detention measure. The case of *Miladinovi and Others* saw no violation with regards to these allegations of the ECHR, although the judgment sent a message to the state that 'the detention order should avoid phrases or words indicating that the suspects or defendants are the actual committers of the crimes put on them', whereas the ECtHR in the specific case took to the standing that in the case of *Miladinovi*, there are some "unfortunate phrases and words" used in the decisions to detain. Similar allegations on the violation of the right to presumption of innocence safeguarded by Article 6 of the ECHR are to be also found in the

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[5] *Gligorovski v. Republic of Macedonia, A. no. 362/11, Miladinov and others v. Republic of Macedonia, A. no. 46398/09, 50570/09 and 50576/09, judgment dated 24.4.2014*. Article 169 paragraph 5 of the CCP stipulates that the 'public prosecutor and the defense attorney may seek to be informed of the session of the panel and may present and explain their motions orally. Their failure to attend does not prevent the hearing from taking place.

[6] *Mitreski v. Republic of Macedonia, A no. 11621/09 judgment dated 25.3.2010 and Miladinov and others v. Republic of Macedonia, A. no. 46398/09, 50570/09 and 50576/09, judgment dated 24.4.2014*

application filed by *Velija Ramkovski and others*. For these reasons, and having into account that the national legislation foresees and guarantees the presumption of innocence, the solution to this potential problem should be also seen in the continual education of the national judges. The Academy for judges and public prosecutors should play a very important role which should use the curriculum to provide appropriate training of pre-trial judges in order to avoid wordings pointing to guilt in their detention decisions.

VI. THE PRINCIPLE OF PROMPTNESS BEFORE THE APPELLATE BODY

With regards to the time to decide an appeal against a decision imposing detention, although no violation of the ECHR has been found so far against RM for the untimeliness of deciding on appeal against the decisions related to the detention measure, there are allegations before the ECtHR against Macedonia that the national courts of appeal do not decide in reasonable time. Only in the *Ramkovski and Others* case, the position of the ECtHR is that in the case specifics, the period of 12 days needed by the appellate court to decide on the applicant's appeal on the first instance decision was within the safeguards of Article 5 of the ECHR.

This problem is probably aggravated by the fact that the new CCP only foresees a time frame to decide on appeal by the criminal panel, but fails to stipulate a term for the decision of the court of appeal upon the criminal panel's decision when it acts in capacity of first instance body. Thus, account must be taken that the imposition of strict and precise legal deadlines cannot realistically cover all possible cases, which is actually recognized by the ECtHR in their jurisprudence stating that the reasonableness in acting depends on the specifics of each individual case. In any case, it is necessary for the national courts to act with greater timeliness and to decide in a time which shall not coincide with the time when a decision is to be taken whether to extend the duration of the detention. Therefore, the judges need to be educated and it should be prudently considered whether some intervention should be made in the law.

VII. LACK OF NATIONAL MECHANISM FOR DAMAGE RECOVERY

The lack of a national mechanism for damage indemnity in case of found violation of Article 5 of the ECHR by the Court is also an acute and potential problem giving rise to a number of applications before the ECtHR. Namely, the national legislation does not foresee a basis to seek indemnification when the ECtHR finds violation of Article 5 of the ECHR contrary to the obligation arising from Article 5 paragraph 5 of the Convention. This is a problem seeking amendments to the legislation in order to introduce an appropriate mechanism to indemnify the victims against violations of Article 5 of the Convention.[7]
The victims of the violation of Article 5 of the ECHR should not be only left with the indemnity imposed by the Court in Strasbourg, rather, the national legislation should itself foresee a national mechanism to remedy such circumstances.

VIII. LEVEL OF REASONABLE SUSPICION REQUIRED BY ECHR FOR IMPOSING A DETENTION MEASURE

A potential problem before the ECtHR can also be caused by the noncompliance of the provisions of the new CCP with Article 5 paragraph 1 of the Convention in the segment relating to the level of suspicion requiring the deprivation of liberty of a person in the context of the criminal procedure against them. Namely, pursuant to Article 5 of the Convention and

[7] *Velinov v. Republic of Macedonia, A. no. 16880/08, judgment dated 19.09.2013*

the jurisprudence of the ECHR, each deprivation of liberty must be substantiated by reasonable suspicion of a committed crime. When it comes to the terminology used in the national legislation pertaining to the safeguards for securing the presence (deprivation of liberty without a court order), the terminology used is the one of 'grounds for suspicion', which is lower than the standard of Article 5 paragraph 1 of the ECHR. Hence, it is reasonable to ask the question of compliance of the national legislation with the ECHR in the part related to the level of suspicion necessary with the deprivation of liberty of a specific person.[8]

IX. INSUFFICIENT USE OF THE GUARANTEES TO APPEAR FOR TRAIL APART OF THE DETENTION MEASURE

The insufficient use of the potential of the bail as a measure to secure the presence of persons foreseen in the national procedure is also an area which needs to see some changes for purposes of ensuring a more efficient and more practical application. The cases against the Republic of Macedonia before the ECtHR, except in the case of Sajdiju v. RM, raise no issues directly related to the right to the bail of Article 5 paragraph 1 item 3 of the ECHR as a measure to secure the presence. The jurisprudence of the ECtHR with regards to other states on the matter of using other guarantees to appear for trail in the criminal procedure, as well as the remarks aimed to the national courts with regards to the overly use of the detention measure indicate to the need of legislative regulation of the provisions related to the effective exercise of the right to bail of Article 5 of the ECHR. This is particularly true when it comes to the lack of legislative possibility for the national court to take their own initiative (*proprio motu*) and propose a bail amount as a potential measure for the safeguard of presence. Such amendments would ensure a more consistent application of Article 5 of the ECHR in the national legislation.

The bail mechanism is widely used in a large number of states across Europe and the USA and its operationalization in the national administration of justice will certainly largely reduce the potential of well substantiated violations due to unfounded deprivation of liberty of its prolongation on one hand, but on the other it will also provide for the necessary safeguard to the swift conduct of the judicial process.

X. HARMONIZATION OF DIFFERENT ARTICLES WITHIN THE DOMESTIC CCP

And finally, another question that needs an answer is the one on the urgent need to harmonize Articles 172 paragraph 4 and 173 paragraph 3 of the new CCP referring to the suspending action of the appeal filed against the decision abolishing the detention as these are all mutually contradictory and potentially represent basis for violation of Article 5 of the Convention. Namely, Article 172 paragraph 4 stipulates that the appeal does not suspend the enforcement of the decision abolishing the detention, while Article 173 paragraph 3 stipulates the contrary. Not only are both provisions in collision, but furthermore, in the light of Article 5 of the Convention, the solution of Article 172 paragraph 4 needs to prevail having in mind that the abolition of the decision on detention dismisses the basis for further detainment in custody of the person regardless whether the decision has become effective or not, implying that the appeal in line with the jurisprudence of the ECHR should not have suspending action.

The legislative term of 24 hours for the filing of an appeal against the decision to detain may cause some problems of noncompliance with the ECtHR jurisprudence in the

[8] *Lazoroski v. Republic of Macedonia, A. no. 4922/04 judgment dated 8.10.2009*

light of Article 5 paragraph 4. This issue has never been raised as one of dispute in the cases against RM. However, the ECHR jurisprudence against other states results in that the term of 24 hours may be considered as insufficient for an effective preparation of the appeal, in particular so in cases of lengthier detentions. The constitutionality and effectiveness of such a solution in the CCP cannot be, unfortunately and due to the fact that fair trial is not part of the rights guaranteed with the RM Constitution, challenged before the Constitutional Court of RM, however the option remains for potential applicants to challenge this before the court in Strasbourg thereby indirectly causing certain legislative changes with regards to the fixed and unique 24-hour term stipulated in the CCP.

XI. CONCLUSION

The analysis above has been made and is based on the detected flaws in the CCP in the part related to the safeguards for the liberty, which have been on the other hand brought before the ECtHR by the applicants themselves. This analysis is certainly not all encompassing nor it detects all potential and current legal issues facing the suspects and defendants in the criminal procedures. Still, it is crucial to note that the main burden to safeguard the rights in these cases where the liberty of the persons is at stake is to be carried by the judges by applying the method 'lighter to heavier measure'. Any potential legislative improvements may be of use in the application of this method, however there is unfortunately no unified template of a decision to detain which would replace the labours of the judge when deciding on such a crucial issue such as the one of the individual's liberty. The individual circumstances of each and every case are specific to each person and should be reasoned as such in the decisions.

In such circumstances, it is recommended to consider legislative amendments any time this is needed or for further precision of the legislative provisions that would diminish any inappropriate interpretation contrary to the ECHR and its jurisprudence, as the case may be. Still, in parallel, it is necessary to strengthen the system of training of judges and prosecutors thus contributing to a more appropriate application of the legislative provisions and bridging the gaps in the spirit and purposes pursued by these provisions.

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