

RIGHT TO LIFE AND USE OF FIREARMS IN THE CASE OF SAŠO GORGIEV V. MACEDONIA

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Abstract: The European Court of Human Rights (ECHR) has noted that the Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. Having in mind that the Macedonian Assembly adopted the said Convention, the paper shall give an overview of the Case of Sašo Gorgiev v. Macedonia, especially of the ECHR's ruling that there has been a violation of Article 2.

In addition, the paper shall pay attention to other ECHR's judgements, as well as to the Macedonian relevant documents. Since Article 2 lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction, the paper shall give proposals with an aim for such violations to be prevented in the future especially from the aspect that the States must display the utmost diligence and define the limited circumstances in which law enforcement officials may use firearms.

Keywords: Gorgiev, Macedonia, Article 2, right to life, use of firearms.

INTRODUCTION

The first right guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) is the right to life (Council of Europe, 1950). According to Korff (2006: 6), the right to life is listed first because it is the most basic human right of all: if one could be arbitrarily deprived of one's right to life, all other rights would become illusory. The fundamental nature of the right is also clear from the fact that it is “non-derogable”: it may not be denied even in “time of war or other public emergency threatening the life of the nation” - although, as discussed later, “deaths resulting from lawful acts of war” do not constitute violations of the right to life (Article 15 (2)). In addition, Harris, O'Boyle and Warbrick (2014: 203), note that as well as a negative obligation not to take life, Article 2 places upon states a positive obligation to protect the right to

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life. This positive obligation must be interpreted and applied so that it is 'practical and effective'. They also point out that physical assault by a state agent that does not result in death will 'almost always' be examined under Article 3, not Article 2. But Article 2 may apply in the absence of death in 'exceptional circumstances': relevant factors are the 'degree and type of force used and the intention or aim' underlying it (2014: 222).

If the Macedonian cases are taken into account, i.e. the total number of 153 judgements delivered by the European Court of Human Rights (ECHR), then it can be established that starting from 1997 (when the Convention has entered into force) till 2018, the ECHR in their 136 judgements has found at least one violation, and in 12 judgements has found no violation (the rest goes to friendly settlements (3) and other judgments (2)). When Article 2 is in question, only by 2 judgements a violation of the "Right to life - deprivation of life" has been found and by 2 judgements a "Lack of effective investigation" has been found (ECHR, 2019). In essence, the 3 judgements in which a violation of the Article 2 was established, are the following:

- *Sašo Gorgiev v. Macedonia* (ECHR, 2012a): Right to life (Article 2-1 - Life) (Substantive aspect),
- *Kitanovski v. Macedonia* (ECHR, 2015): Right to life (Article 2-1 - Life) (Substantive aspect) and Right to life (Article 2-1 - Effective investigation) (Procedural aspect),
- *Kitanovska Stanojkovic and Others v. Macedonia* (ECHR, 2017): Right to life (Article 2 - Positive obligations; Article 2-1 - Effective investigation) (Procedural aspect).

As Davis observes (2016: 169), in its case-law the ECHR refers to the "substantive" and "procedural" limbs of Article 2. The substantive limb relates to the duty to secure life and prevent disproportional use of force; the procedural limb refers to the provision of adequate remedies and, in particular, a state's duty to investigate well founded allegations that Article 2 has been breached. Consequently to this, the point shall be given to the first case because of its importance, i.e. it is classified by the ECHR as a part of "Key cases" (ECHR, 2013). The other two cases are classified with importance level 3 (the second case) and importance level 2 (the third case).

THE CIRCUMSTANCES OF THE GORGIEV'S CASE

Sašo Gorgiev lodged an application no. 49382/06 on 27 November 2006, in which he alleged that the State had been responsible under the Convention's Article 2 for a life-threatening action against him taken by R. D. Namely, Gorgiev was working as a waiter in a bar in Skopje, when at 3.50 a.m. on 6 January 2002, R. D., a police reservist, shot him in the chest. A medical certificate was issued on 12 September 2002, by Skopje Clinical Centre, according to which Gorgiev was

urgently admitted in a “serious condition” (the injuries sustained were described as broken right clavicle and four broken ribs, injury to the subclavian artery, internal haemorrhaging and seizure of the brachial plexus nerves). Also, his right arm was paralysed, which implied that he had sustained serious bodily injury with life-threatening damage and lasting consequences. As a result of the injuries, Gorgiev was operated twice.

Having in mind the above, on 27 March 2003, R. D. was convicted by the Skopje Court of First Instance and was sentenced to two years’ imprisonment, for committing serious crimes against public security. Based on the provided evidence (oral evidence given by R. D., Gorgiev and six witnesses, as well as other material evidence), the Court established that R. D., while intoxicated, had unintentionally pulled the trigger of his service gun and shot Gorgiev, who had been at a distance of one metre. In addition, the Court advised Gorgiev to pursue his compensation claim by means of a separate civil action. Despite the fact that R. D. started to serve his sentence on 6 June 2008, at his request on 23 June 2008, the Trial court reopened the proceedings. Once again, on 12 March 2009 the Trial court found him guilty. However, it sentenced him to two years’ imprisonment, suspended for four years.

Parallel to the criminal proceedings, on 11 November 2002, Gorgiev initiated a civil proceedings for damages against the Ministry of Internal Affairs (the Ministry), i.e. he was seeking a compensation (28,000,000 MKD for non-pecuniary damage and 208,480 MKD for pecuniary damage - expenses related to his medical treatment), and claimed that the State should be held responsible (the reasons were: R. D. had shot him in the bar, instead of being on duty in a police station; R. D. had used his service gun; R. D. had been in uniform). However, on 12 December 2003, the Skopje Court of First Instance dismissed Gorgiev’s claim, finding that the Ministry lacked the requisite capacity to be sued for the damage caused by R. D., who, being a police reservist, was regarded a State official. The Court established the following: R. D. had been on duty in a police station in Skopje between 7.30 p.m. on 5 January 2002 and 7.30 a.m. on 6 January 2002; R. D. had been assigned to stand guard between midnight and 1 a.m. and between 6 a.m. and 7 a.m. on 6 January 2002; After 1 a.m. on 6 January 2002, instead of returning to the police station, R.D. had gone to the bar on his own initiative, without informing his superior or the latter’s replacement; R. D. had been in uniform and had been carrying his service gun; in the bar, in the presence of other customers and under an influence of alcohol, R. D. had pulled the gun out and shot Gorgiev, who had been in front of him at a distance of about 1.5 metres.

Despite the fact that the Court found that Gorgiev had suffered damage as a result of R. D.’s action, it noted that the State can be held responsible only if the damage is caused in the course of or in connection with the performance of the official duties. The Court’s arguments were that the damage must be caused by an official in the performance of his/her duties and has to result from an unlawful action, also the damage may be caused outside official duties, but there must be a

causal link with the performance of the duty or the duty itself. Further, the Court concluded that R. D. was not in the bar in an official capacity, and the damage was not caused in connection with the performance of the Ministry's duties, even though it was caused at a time when R. D. was supposed to be on duty (R. D. was not acting in an official capacity but as a private person, despite the fact that it was within working hours), which implied that R. D. was responsible for the action taken and the damage caused. The Court noted that there was no causal link between R. D.'s action and his duty, and the fact that R. D. was in uniform and used his service gun did not mean, in itself, that he was acting in an official capacity (R. D. did not use the gun in connection with the performance of his duties, but as a customer in the bar). In addition, the Court mentioned that at the time when the damage occurred, R. D., as a police reservist, was an adult and trained to use a gun, indicating the Ministry, as an owner of the gun, was relieved, from responsibility because the damage occurred solely as a result of an unforeseeable action by its agent whose consequences could neither have been prevented nor removed. Once again, the Court concluded that Gorgiev was entitled to claim compensation from R. D. under the Obligations Act.

Even though Gorgiev appealed such judgement, it was dismissed by the Skopje Court of Appeal on 27 April 2004. The Court found no grounds to depart from the lower court's finding, i.e. the Ministry was not responsible (R. D.'s actions in the bar were not related to his official duties as a police officer; When R. D. shot Gorgiev, he had not been acting as a police officer and had not been performing official duties). In addition, the Court confirmed the Gorgiev's entitlement to claim compensation from R. D. Finally, Gorgiev on 21 July 2004 lodged an appeal on points of law to the Supreme Court, arguing that the Court of Appeal had not addressed his arguments regarding the Ministry's responsibility under the Employment Act. However, reiterating the reasons given by the lower courts, the Supreme Court dismissed the appeal on 31 May 2006.

ECHR'S RULING

The ECHR noted that the force used against Gorgiev was not in the event lethal, and it pointed out that this did not exclude an examination of his complaints under the Article 2. The Government objected that Gorgiev had not exhausted all effective remedies (Gorgiev had not claimed compensation from R. D., despite the fact that he had been advised to do so by the first and second instance courts), and gave several arguments to support its submissions (R. D. had not intended to kill Gorgiev; in view of the seriousness of the injuries sustained, Gorgiev had been subjected to ill-treatment capable of falling within Article 3, but the State bore no responsibility under the substantive limb of that Article; the State responsibility ended with the criminal proceedings by which R. D. had been convicted and punished; the civil courts, at three levels, had dismissed Gorgiev's claim, finding that the State could not be held responsible given the absence of a causal link

between R. D.'s action and his official duties; at the critical time R. D. had left his post during his working hours, without the consent of his superiors; the incident had happened after R. D. had carried out his official duty - to stand guard; in the bar R. D. had not performed any official duty in the course of or in connection with his work; R. D. had acted as a private person).

Analysing the arguments given by Gorgiev and the Government, the ECHR concluded that Article 2 can be applicable, since Gorgiev was a victim of conduct by which his life was put at risk, even though, he survived (irrespective of whether or not R. D. actually intended to kill him). Also, the ECHR observed that Article 2 does not solely concern deaths resulting from the use of force by State's agents but also, in the first sentence of the Paragraph 1, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. Based on the ECHR point of view, despite the fact that the positive obligation imposes several duties to the states, it should not be interpreted in such way as not to impose an excessive burden on the authorities, bearing in mind, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. In order to justify its ruling, the ECHR reiterated its case-law by pointing to other relevant judgements. For example, as noted in *Makaratzis v. Greece* (ECHR, 2004), a primary duty on the State is to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. Also, the ECHR stressed that the police officers should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect. For the ECHR, as mentioned in *Ciechońska v. Poland* (ECHR, 2011), the State's duty to safeguard the right to life must also be considered to involve the taking of reasonable measures to ensure the safety of individuals in public places and, in the event of serious injury or death, having in place an effective independent judicial system securing the availability of legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. Further, bearing in mind the difficulties in policing modern societies, observed by the ECHR in *Keenan v. the United Kingdom* (ECHR, 2001), the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from

the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

Having in mind the above, the ECHR assessed that the fact that Gorgiev did not seek compensation from R. D. was not decisive, since the object of his claim, as well as of his application before the ECHR, was to establish the State's responsibility as such. Therefore, the ECHR dismissed the Government's objection of non-exhaustion. Finally, the ECHR ruled that there has been a violation of the Convention's Article 2 (under its substantive limb), i.e. the State can be held responsible for the unlawful actions of its agent taken outside his official duties, based on the following findings:

- The incident occurred during R. D.'s working hours - R. D. was supposed to be on duty in the police station; R. D. left his place of duty without the authorisation of his superiors;
- R. D. was intoxicated - R. D.'s dangerous behaviour put Gorgiev's life at risk;
- R. D. was in uniform when he shot Gorgiev - R. D. was perceived by the public as a law-enforcement agent;
- R. D. shot Gorgiev using his service gun - the gun was provided to R. D. by the authorities.

The ECHR underlined that the State has to put in place and rigorously apply a system of adequate and effective safeguards designed to prevent its agents, in particular temporary mobilised reservists, from making improper use of service weapons provided to them in the context of their official duties. In essence, the Government have not informed the ECHR of any regulations in force in this respect. Consequently, the ECHR pointed out to the Internal Affairs Act, which required that State agents performed their duties "at all times, whether on or off duty" (the permanent engagement of State agents as police officers required that they always carry their service weapon in order to exercise their duties). The ECHR also noted that the States are expected to set high professional standards within their law-enforcement systems and ensure that the persons serving in these systems meet the requisite criteria. In particular, when equipping police forces with firearms, not only must the necessary technical training be given, but the selection of agents allowed to carry such firearms must also be subject to particular scrutiny. Finally, the Government have not informed the ECHR whether any assessment was made by the national authorities as to whether R. D. was fit to be recruited and equipped with a weapon. As mentioned in the press release, the ECHR found in particular that the Government had neither provided information on regulations for the prevention of abuse of official weapons by its agents nor with information as to whether the police reservist had been assessed to ensure that he was fit to be recruited and equipped with a weapon (ECHR, 2012b). Therefore, the ECHR considered that the harmful action taken by R. D. in the bar must be imputable to the respondent State, and obliged the State to pay for the

pecuniary damage (3,390 EUR) and non-pecuniary damage (12,000 EUR), plus any tax that may be chargeable.

CONCLUSION

The Convention's Article 2 protects the right to life. As noted by Murdoch & Roche (2013: 25), it comprises three main requirements: (i) a prohibition on unlawful killing by State agents; (ii) a duty to investigate suspicious deaths; and (iii) a positive obligation, in certain circumstances, to take steps to prevent an avoidable loss of life. This implies that the States must take appropriate steps to safeguard the lives of those within their jurisdiction, and as mentioned in the ECHR's case-law, must put in place a legislative and administrative framework designed to provide effective prevention; must display the utmost diligence and define the limited circumstances in which law enforcement officials may use firearms; must take reasonable measures to ensure the safety of individuals in public places and, in the event of serious injury or death, having in place an effective independent judicial system securing the availability of legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. In the same line is the obligation for a legal and administrative framework to be defined that will limit the circumstances in which law-enforcement officials may use force and firearms, followed by high professional standards to be set within their law-enforcement systems and to be ensured the persons serving in these systems to meet the requisite criteria. Finally, the selection of agents allowed to carry firearms must also be subject to particular scrutiny. Contrary to all the above said, these obligations were not fulfilled in the incident in which Gorgiev sustained serious bodily injury with life-threatening damage and lasting consequences. Therefore, this incident should be seen as negative example that must not be repeated.

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