THE PRINCIPLE OF EQUALITY OF ARMS – CASES VERSUS MACEDONIA IN FRONT OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract: The right to a fair trial as stipulated in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms encompasses in itself several principles among which is the principle of equality of arms. Having in mind the request for the criminal procedure to be fair, which implies the principle of equality of arms to be respected, the paper will focus on two Macedonian cases – the Case of Stoimenov and the Case of Duško Ivanovski. In addition, the paper will focus on the relevant documents and judgements, and will pay a special attention to the Court's statement in which it recalls that the principle of equality of arms is part of the wider concept of a fair hearing within the meaning of Article 6 Paragraph 1. Namely, it requires a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a disadvantage *vis-à-vis* their opponent or opponents.

Keywords: fair trial; equality of arms; Macedonia.

INTRODUCTION

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), defines one of the most relevant rights, i.e. the right to a fair trial (Council of Europe, 1950). As noted by Mole and Harby (2006: 5), the Article 6 guarantees the right to a fair and public hearing in the determination of an individual's civil rights and obligations or of any criminal charge against him. Although it is not expressly referred to within Article 6, OSCE/ODIHR (2012: 110-111)

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point out that the principle of equality of arms is both an autonomous concept and inherent element of the overarching right to a fair hearing under the European Court of Human Rights (the ECHR). The principle of the equality of arms, according to Toma (2011: 3), is extremely important as it implies compliance with the right to defence or the necessity of a contradictory debate, these being strong guarantees in which the principle lies. Therefore, Vitkauskas and Dikov (2012: 48) observe that while there is no exhaustive definition as to what the minimum requirements are of "equality of arms", there must be adequate procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties. These may include opportunities to: a) adduce evidence, b) challenge hostile evidence, and c) present arguments on the matters at issue. In the same line is Leigh (1997), by perceiving that equality of arms implies many things, for example, that a person charged with a criminal offence shall be informed of the facts alleged against him and their legal classification; that he shall be given adequate time to prepare his case; that a party must be able to put forward his arguments in such conditions that he is not put at a considerable disadvantage in relation to the other side; that he shall be given the opportunity to have knowledge of and comment on the observations filed and evidence adduced by his adversary; and that he shall be given access to all material evidence held by the prosecution authorities which bears on his guilt or innocence.

According to Cape and Namoradze (2012: 75), the Convention's Article 6 does not contain any explicit provision giving a suspected or accused person the right to seek evidence, investigate facts, interview prospective witnesses or obtain expert evidence. This may be seen as a *de facto* recognition of the tensions inherent in establishing rights that apply to both inquisitorial and adversarial judicial systems. Whilst adversarial, at least in theory, as regards the accused as a party to the proceedings who is responsible for the production of their own evidence, inquisitorial considers the accused as a subject of a state-sponsored enquiry into their guilt or innocence. In the latter case, it is for the judicial authorities and/or the police to conduct investigations and to determine which pieces of evidence are relevant.

Consequently, attention should be given to the requirement that the expert should fulfil since his relevance in determining the admissibility of expert opinion, i.e. based on the England and Wales Law Commission (2009: 2), the expert must be capable of providing an impartial opinion, in recognition of the fact that an expert's overriding duty is to the court and not the party calling him to testify. Kalajdziev (2014: 103-104) elaborates that the ECHR does not openly oppose the model under which forensic experts, as objective and impartial parties, are appointed by the court. However, in cases when indictment acts are factually based on forensic findings and opinions, they are treated as "witnesses against the defendant" in terms of defendants' right to fair trial and therefore the defence has to be given an adequate and honest chance to contest their findings and opinion, as well as to produce alternative forensic expertise in its defence.

Although Article 6 cases do not generally catch the headlines as much as cases under some other articles of the Convention, Harris, O'Boyle and Warbrick (2009: 329) stress that they are staple diet of the Convention system. As provided by the authors, the majority of cases decided at Strasbourg raise issues under Article 6, probably because it is in the administration of justice that the state is most likely to take decisions affecting individuals in the areas of conduct covered by the Convention. When it comes to the Macedonian cases, it should be pointed out that in the period from 1997, when the Convention was ratified by the Assembly as well as entered into force (Law on Ratification of the Convention, Official Gazette, 1997), until the end of 2019, the ECHR in 145 judgements out of 165 found at least one violation, with a note that in 47 judgements (32.4%) it found the violation of Article 6 (ECHR, 2020: 9). Moreover, if Article 6 is chosen as a search criteria through the HUDOC database that provides access to the ECHR's case-law, as well as "equality of arms" as keywords, despite the

fact that seven Macedonian cases are given as a result of the search, an attention should be given to *Stoimenov v. Macedonia* (ECHR, 2007) and *Duško Ivanovski v. Macedonia* (ECHR, 2014), since they address the issues of fair trial, equality of arms and expert reports.

THE CIRCUMSTANCES OF STOIMENOV'S CASE AND THE ECHR'S RULING

The applicant Mr Jordan Stoimenov (Macedonian national; born in 1963; lives in Vinica), on September 06, 2001 lodged the Application No. 17995/02 against the Republic of Macedonia. He complained that the principle of equality of arms had been breached because the national courts had convicted him on the basis of, *inter alia*, an expert opinion provided by the Forensic Science Bureau ("the Bureau") within the Ministry of Internal Affairs ("the Ministry"), i.e. the same Ministry that had set in motion the proceedings against him. Or, to be more precise, Mr Stoimenov complained about several alleged violations of the Convention's Article 6 - the courts had refused his request for an alternative expert examination concerning the quality of the poppy-tar; the courts had based their decisions on the expert reports produced by the same Ministry that had brought the criminal charges against him; he had been incited by a police agent acting as an agent provocateur to commit the offence of which he was later convicted; and the courts had refused to accept that he had decided to call off the sale of poppy-tar.

Concerning the circumstances of the case, on January 30, 2000, a criminal charge was submitted by the Ministry to the public prosecutor against Mr Stoimenov and four other persons for committing the criminal act of unauthorized production and release for trade of narcotic drugs and psychotropic substances (Article 215 of the Criminal Code). The criminal charge was followed by an indictment that was lodged by the Public Prosecutor to the Kočani Court of First Instance, against Mr Stoimenov and four other persons (Mr M., Mr D., Mr M.G. and Mr I.P.) for possession, offering for sale and selling of opium. During the pre-trial procedure, two expert reports were prepared by the same expert of the Bureau about the quality of the cakes of poppy-tar, i.e. the Expert report No. X-121/2000 of January 28, 2000 (about 23 cakes of poppy-tar that had been confiscated from Mr I.P.), and the Expert report No. X-122/2000 of January 30, 2000 (about the quality of 12 cakes of poppy-tar that had been confiscated from Mr M). As the ECHR observed - "both expert opinions were almost identically worded and provided succinct information about the technique used to determine the composition of the poppy-tar and the conclusion that it was opium".

Although the representative of Mr Stoimenov requested an alternative expert opinion from a scientific institution to be obtained, the Kočani Court of First Instance refused such request at the hearing on March 10, 2000. In essence, the representative submitted such request on two grounds, the first one - the Bureau operated within the Ministry, and the second one - the same Ministry had lodged the criminal charge against Mr Stoimenov. The other reasons were that the poppy-tar was old and had been buried for many years, and because of its poor quality an authorised organisation had refused to buy it. The arguments about the poor quality of the poppy-tar and about the report drawn up by the Ministry were reiterated by the representative at the end of the hearing within his concluding remarks. However, on the same date the Kočani Court of First Instance delivered a judgement by which Mr Stoimenov and the other accused were found guilty and sentenced to imprisonment of three to four years. Even though the accused used the term "poppy-tar", the court ruled that it was in fact opium and based its findings entirely on the written expert reports (the reports undoubtedly have established that it was opium containing all the necessary substances to be considered a psychotropic substance).

Furthermore, the Kočani Court of First Instance stressed that the Bureau was a state body authorised to perform such expert examinations, as well as that there was no prohibition in the Law on Criminal Procedure for the Bureau to provide such expert opinion (Article 234 Paragraph 2).

The procedure continued in front of the Štip Court of Appeal, since Mr Stoimenov logged an appeal in which, among other things, it pointed that the Kočani Court of First Instance refused to order an alternative, an independent analysis of the quality of the poppy-tar. However, the Štip Court of Appeal on June 14, 2000, dismissed his appeal and upheld the lower court's decision. The explanation was that the lower court did not make a mystique when it refused the request for an alternative expert examination of the quality of the drugs; the expert opinion provided by the Bureau was unambiguous; the expert examination by the Bureau had been carried out properly; the lower court had relied entirely on the Bureau's report, and the same as the lower court - it dismissed the request for an alternative examination by another institution.

Finally, by repeating the complaints raised in the appeal, Mr Stoimenov submitted a request to the Supreme Court for extraordinary review of a final decision, but once again his request was dismissed and the lower courts' decisions were upheld (April 12, 2001). The Supreme Court stated that his complaint about violation of defence rights was ill-founded, because the trial court could reasonably establish on the basis of the expert opinion provided by the Ministry that it was opium of good quality; there were no doubts in the expert opinion that would have warranted ordering of another examination or an opinion by other experts; and the expert opinion submitted by the Ministry did not contain any shortcomings or deficiencies which would have raised reasonable doubts as to its validity. In addition, the Supreme Court dismissed his request for extraordinary mitigation of the penalty imposed (April 12, and November 2, 2001), as well as it rejected the second request for extraordinary review of the final decision (May 29, 2002).

Concerning Mr Stoimenov's complaint about the principle of equality of arms regarding the expert evidence, the Government objected to it on two bases: first - the expert opinions provided by the Bureau could not be contested solely on the ground that the Ministry had subsequently filed criminal charges against him, and second - in order to justify a further expert report, Mr Stoimenov should have substantiated his criticism of the reliability of the Bureau's opinion, but had failed to do so. In addition, the Government noted that the Bureau had been equipped to provide such expert opinions and had a statutory basis in the Law on Criminal Procedure. On the other hand, Mr Stoimenov gave the following arguments: the expert opinion provided by the Bureau had fallen foul of the requirements for a proper expert opinion (there was no explanation what kind of "analysis" had been made, what method had been used or the percentage of the alkaloids found in the poppy-tar); the trial court failed to examine the expert who had provided the opinion, despite his alleged request; the Ministry had filed the criminal complaint against him and at the same time submitted the expert opinion on the quality of the poppy-tar; etc.

Based on the circumstances of the case, as well the arguments given by Mr Stoimenov and the Government, in the Judgement dated April 5, 2007 (final July 5, 2007), the ECHR found that there had been a breach of Article 6 Paragraph 1. Namely, the ECHR stressed several issues:

- The expert opinion provided by the Bureau was the only report that existed on the quality of the poppy-tar;
- Mr Stoimenov had no possibility to submit a private expert opinion by himself, since the cakes of poppy-tar had been confiscated by the authorities and he had no possibility to access them;
- The Government's assertion that the quality of the poppy-tar had been irrelevant for conviction cannot be accepted, because it was *corpus delicti* of criminal act;

- The Bureau drew up the expert report whose transmission to the public prosecutor set in motion the criminal proceedings against Mr Stoimenov;
- The national courts refused the defence request for appointment of another expert to determine the quality of the poppy-tar, and found that the Bureau's expert opinion was conclusive;
- The Bureau cannot be considered as a court-appointed expert because it was not appointed by the court to carry out the analysis of the poppy-tar (based on Article 234 of Law on Criminal Procedure). On the contrary, the Ministry on its own motion had drawn the expert report in order to substantiate the criminal charge that had submitted to the public prosecutor;
- The opinion submitted by the Bureau was more akin to evidence against Mr Stoimenov, and it was used by the prosecuting authorities rather than a "neutral" and "independent" expert opinion;
- Mr Stoimenov was unable to challenge the Bureau's report as evidence submitted by the public prosecutor, which means that he was deprived of the opportunity to put forward the arguments in his defence on the same terms as the prosecution.

THE CIRCUMSTANCES OF DUŠKO IVANOVSKI'S CASE AND THE ECHR'S RULING

On March 18, 2005, the Application No. 10718/05 was submitted against the Republic of Macedonia by Mr Duško Ivanovski. The applicant (Macedonian national; born in 1971; lives in Skopje) complained that there was a violation of his rights under the Convention's Article 6, i.e. he was denied the right to a fair trial in the criminal proceedings against him, because the domestic courts had based their judgments on unlawfully obtained evidence (his fingerprint found in the cellar, in respect of which no search warrant had been issued), and on the expert reports produced by the Bureau (could not be considered an impartial expert); as well as he had been denied of the opportunity to examine the witnesses in his defence and have alternative expert evidence.

The criminal charge for drug trafficking, that was submitted by the Ministry against Mr Ivanovski contained several pieces of evidence, among which were: the Expert report (No. 10.2.6-5520/1; February 5, 2003) of examination of a padlock that had secured cellar no. 10 and 13 keys that had been confiscated from Mr Ivanovski (the locking system of the padlock had been damaged and it could be opened with any object, including all keys that were confiscated); the Expert report (No. X-164/2003; February 5, 2003), which confirmed that five packages found in cellar no. 10 contained 2.296 kg of heroin; the Expert report (No. X-164/2/2003; February 10, 2003) that confirmed that 0.991 kg found in the two other packages contained two substances that were often mixed with heroin; the Expert report (No. SK-164/2003; February 5, 2003) about the fingerprint found on one of the packages confiscated in cellar no. 10, with a remark that when the found fingerprints were entered into the system of automatic search of fingerprints, it was determined, after verification of the list of suspected candidates, that they corresponded to the right middle finger of Mr Ivanovski.

Following the examination conducted by the investigative judge (February 5, 2003), in which Mr Ivanovski remained silent, the public prosecutor on February 17, 2003 lodged an indictment against him for possession and offering for sale of heroin and other prohibited substances. The trial court delivered the judgement on March 20, 2003, by which Mr Ivanovski was convicted for drug trafficking and was sentenced to two-and-a-half years of imprisonment. It should be noted that in the concluding remarks at the trial his lawyer drew attention to several issues: no search warrants had been issued regarding the personal search of Mr Ivanovski and the search of cellar no. 10; in the absence of any eyewitnesses,

there had been no direct evidence that would link Mr Ivanovski with the drugs, which had been hidden in a cellar that had belonged to a third party and could have been opened with any key; Mr Ivanovski's fingerprint had been secured in the absence of an expert and the police had sought an expert examination *ex post facto*; the Expert report No. SK-164/2003 had been unclear and imprecise because it had contained no information as to the manner and circumstances under which that fingerprint had been secured; it would have been impossible for Mr Ivanovski to manipulate the packages with only one finger; no fingerprints had been found on the padlock and the cellar where the drugs had been found; the expert examination of the substance found in the packages had been too small to contain compacted material in the quantity indicated in the Expert report No. X-164/2003; the place and the person who had determined the quantity of the substance had not been established; the expert examinations had been carried out in his absence; also he challenged whether the substance found had been pure heroin and that the prosecuting body in practice carried out expert examinations which meant that the evidence obtained thereby was not impartial.

In the appeal Mr Ivanovski repeated the issues that were raised in the concluding remarks by the lawyer. In addition, he pointed out that the trial court did not examine the police officers who had secured his fingerprint in his absence, as well as the experts who had drawn up report No. SK-164/2003 and requested them to be examined. He noted that the trial court could not have validly based its judgment on those expert examinations since they had been carried out by the Bureau and the examinations had been biased, and therefore sought alternative expert examinations to be conducted over the fingerprint, since it had been the sole evidence linking him with the drugs. Furthermore, he requested the neighbours to be examined because they attended the search regarding his allegations that his fingerprint found on one of the packages had been the result of an argument which he had had in the cellar with the police after he had refused to comply with their order to touch the packages. However, the Skopje Court of Appeal at a public session held on May 20, 2004 dismissed both appeals (the public prosecutor also submitted an appeal concerning the determined sentence), and upheld the trial court's judgment.

On July 6, 2004 Mr Ivanovski submitted an application for extraordinary review of a final judgment, and repeated the remarks given in the appeal, with an accent to the quality and impartiality of the expert examinations carried out by the Bureau. Also, he sought alternative expert examinations of the fingerprint and heroin found. However, on November 2, 2004, the Supreme Court dismissed his application and confirmed the lower courts' judgments. Furthermore, on February 17, 2005 he was informed by the public prosecutor that there were no grounds for lodging a request for protection of legality to the Supreme Court.

The same as in the Stoimenov's case, the ECHR ruled that there was a violation of the Convention's Article 6 Paragraph 1 and 3 (d) because domestic courts' refused to hear the defence witnesses and admit alternative expert evidence. Namely, Mr Ivanovski was unable to challenge the reports of the Bureau as evidence submitted by the public prosecutor that created an imbalance between the defence and the prosecution, i.e. the principle of equality of arms between the parties had been breached. In order to support such decision, the ECHR gave the following arguments in its Judgement dated April 24, 2014 (final July 24, 2014):

- The trial court did not refer to any evidence when it dismissed the allegations of defence that Mr Ivanovski was pushed by the police officers and in order not to fall down he touched the packages. There was no other evidence that would link Mr Ivanovski with the substance found in the cellar, i.e. his fingerprint found on one of the packages constituted the principal evidence, because it established a direct link between Mr Ivanovski and the drugs;

- In order for the defence position to be strengthened, Mr Ivanovski asked several persons to be examined (the police officers who had secured the fingerprint in the cellar; the experts of the Bureau who had drawn up the expert report regarding the fingerprint; the neighbours who had attended the search of cellar no. 10), however the Court of Appeal did not examine any of them and gave no explanation. Furthermore, the Supreme Court made no comment about the inability of Mr Ivanovski to call witnesses in his defence. Therefore, not being able to call the experts who had prepared the fingerprint report, made the defence's task of proving the usefulness of the counter-reports more difficult;
- Mr Ivanovski was unable to introduce himself a private expert opinion (which was confirmed by the Government). This implies that he was not given any opportunity to conduct an active defence as required under Article 6 Paragraph 1 and 3 (d), as well as he was not able to raise his grievances regarding the expert evidence;
- The expert reports were akin to incriminating evidence used by the prosecution rather than a "neutral" and "independent" (they were submitted by the Bureau which is a State agency; were performed within the preliminary investigation - not in adversarial proceedings and without any participation of the defence; were drawn up without a court order; were transmitted to the public prosecutor which set in motion the criminal proceedings);
- Even though the expert reports were challenged by the defence on the quality and accuracy, the trial court admitted them as evidence;
- The defence's request for new expert examinations to be performed was refused by the courts, stating that the expert evidence submitted by the prosecution had been based on scientific methods and there was nothing to cast doubt on their credibility; etc.

CONCLUSION

In *Salduz v. Turkey* (ECHR, 2008: §50), the ECHR points out that the principle of fair trial as defined in Article 6 can also be applied in the pre-trail procedure, not just in the procedure in front of a "tribunal" competent to determine "any criminal charge". Namely, as noted in *Lisica v. Croatia* (ECHR, 2010: §47), Article 6 may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. In essence, as mentioned in *Khan v. the United Kingdom* (ECHR, 2000: §34), while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not the role of the ECHR to determine, as a matter of principle, whether particular types of evidence - for example, unlawfully obtained evidence - may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.

In addition, the ECHR in *Bykov v. Russia* (ECHR, 2009a: §90) stresses that it must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use, as well as the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. As illustrated in *Guilloury v. France* (ECHR, 2006: §55), an applicant claiming a violation of his right to obtain the attendance and examination of a defence witness should show that the examination of that person was necessary for the establishment of the truth and that the refusal to call that witness was prejudicial to the defence rights. Therefore, in *Polyakov v. Russia* (ECHR, 2009b: §31), the ECHR

observes that although it is normal for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce, there might be exceptional circumstances which could prompt the ECHR to conclude that the failure to hear a person as a witness was incompatible with Article 6.

By implying these standards in the cases of *Stoimenov v. Macedonia* and *Dusko Ivanovski v. Macedonia*, there is no wonder why the ECHR found the violation of Article 6. Despite the fact that several alleged violations of the principle of fair trial were raised by the Macedonian applicants, one violation was common for both cases. They both raise a doubt whether the expert reports were neutral, especially since such reports were drafted by the Bureau within the Ministry - the same Ministry that submitted criminal charges against them. As the ECHR noted - a doubt was raised concerning the Bureau's opinion that was more akin to evidence against the applicants used by the prosecuting authorities rather than a "neutral" and "independent" expert opinion.

From the above, it can be concluded that if the principle of fair trial is not respected in the pre-trial procedure, it will have a negative impact over the fairness of the procedure in front of the court. And the situation in the Macedonian cases got worse, when the courts' actions created an imbalance between the defence and the prosecution, which violated the principle of equality of arms between the parties. Namely, the main fault of courts was not allowing the opportunity for the accused to challenge the expert reports by examining the experts that drafted the reports. In addition, the courts did not enable another expert reports to be drafted by impartial institution, i.e. the defence did not have the opportunity to present their case under the conditions that do not place them at a disadvantage *vis-à-vis* its opponent - the prosecutor. The courts just accepted the expert reports and admitted them as evidence in the procedure, which implied the judgements to be based on them. All of this was done, beside the fact that the expert reports were prepared in the pre-trail procedure, without a court order, by the Bureau that was within the scope of the Ministry, the same Ministry that logged the criminal charge against the applicants. Furthermore, the courts invoked that the Bureau was an authorized authority for providing such expertise according to the Law on Criminal Procedure.

As a final remark that should be followed by the Macedonian authorities in the future, can be found in the observation made by Decaigny (2014: 156), i.e. two procedural safeguards must be put in place in order to guarantee fair trial rights. First, as a matter of equality of arms, each party must be in a position to gather expert information. Second, a sufficient possibility must be provided to challenge the validity of the expert opinions produced by another party.

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