



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

FIFTH SECTION

**CASE OF ATANASOV v. THE FORMER YUGOSLAV REPUBLIC
OF MACEDONIA**

(Application no. 22745/06)

JUDGMENT

STRASBOURG

17 February 2011

FINAL

17/05/2011

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

In the case of Atanasov v. the former Yugoslav Republic of Macedonia,
The European Court of Human Rights (Fifth Section), sitting as a
Chamber composed of:

Peer Lorenzen, *President*,
Karel Jungwiert,
Mark Villiger,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska,

Angelika Nußberger, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 25 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 22745/06) against the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Macedonian national, Mr Sande Atanasov (“the applicant”), on 20 May 2006.

2. The applicant was represented by Ms V. Koceva, a lawyer practising in Negotino. The Macedonian Government (“the Government”) were represented by their Agent, Mrs R. Lazareska Gerovska.

3. The applicant alleged procedural unfairness, in particular, that he was not given an opportunity to attend the session of 2 November 2005 before the Court of Appeal.

4. On 5 February 2009 the President of the Fifth Section decided to communicate this complaint to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959 and lives in Negotino.

6. On 22 November 2001 the public prosecutor requested an investigating judge of the Negotino Court of First Instance (“the trial court”) to open an investigation against the applicant on the count of forgery of a notice convening a meeting of shareholders of a company, N., in which he

was also a shareholder (“the notice”). The applicant was accused of having deceived a considerable number of shareholders into signing the notice by misleading them in the belief that there would be only one item on the agenda, instead of eight, as was actually the case. The investigating judge heard the applicant and 47 witnesses. After the investigation had been completed, on 29 May 2002 the public prosecutor lodged an indictment against the applicant.

7. The trial court fixed twelve hearings, including that of 6 May 2004, which the applicant did not attend, although he had been summoned properly. During the trial, the court again heard oral evidence from the applicant, who had a court-appointed lawyer, and the 47 witnesses and admitted other documentary evidence. On 31 May 2005, in the presence of the applicant's lawyer only, the trial court convicted the applicant and sentenced him to four months' imprisonment suspended for one year. It did not rely on the statements made by the witnesses before the company's management denying that they had been informed about the remaining items on the agenda. The court rejected the applicant's defence as self-serving and the testimony of 6 defence witnesses as inconsistent and implausible.

8. On 13 July 2005 the applicant who, at the relevant time, was not represented by counsel, appealed against that decision. He did not request to be notified of the date of the session (*седница*) of the Court of Appeal.

9. On 2 November 2005 the Skopje Court of Appeal dismissed the applicant's appeal and upheld the trial court's decision. The court decided in private. The public prosecutor was present, but not the applicant. The court addressed the public prosecutor's written submission of 17 October 2005 and her oral pleadings requesting that the applicant's appeal be dismissed.

10. The decision was served on the applicant on 21 November 2005.

11. On 19 January 2006 the public prosecutor informed the applicant that there were no grounds for lodging a request with the Supreme Court for the protection of legality (“legality review request”).

II. RELEVANT DOMESTIC LAW

12. Under section 361 (1) and (3) of the Criminal Proceedings Act (“the Act”) (*Закон за кривична постапка*), the chairman of the adjudicating panel of the Court of Appeal will appoint a judge rapporteur. The latter, in cases involving offences automatically subject to prosecution by the State, will forward the case file to the public prosecutor, who will examine and return it without delay. After receiving the case file, the chairman will fix a date for the session (*седница*) of the adjudicating panel. The public prosecutor will be notified thereof.

13. Section 362 (1) and (3) of the Act provides for notification of the date of session to be given, *inter alia*, to the defendant and his lawyer, the victim (as a plaintiff, *тужител*) and the private prosecutor (*приватен тужител*) if, within the period prescribed for the appeal or reply to the

appeal, they so request or propose that a hearing (section 364 of the Act) be held before the second-instance court. Such notification may be given to parties who have not made such a request if their attendance would contribute to establishing the facts. The session starts with the presentation of a report prepared by a judge rapporteur. The panel may seek additional explanations from the parties attending the session. Parties can propose, with the aim of supplementing the report, that some documents from the case-file are read. They can also specify their arguments submitted in the appeal or reply to the appeal.

14. Section 364 (1) and (2) of the Act provides that the second-instance court will hold a hearing (*npempec*) only if new evidence needs to be produced or evidence re-produced, or if the case does not need to be remitted for fresh consideration. The defendant and his or her counsel, the public prosecutor, the victim and any witnesses or experts to be heard are summoned to attend the hearing before the second-instance court.

15. Under sections 403-410, the public prosecutor can submit a legality review request in respect of a final decision. The public prosecutor is always apprised of the session of the Supreme Court, which decides the legality review request. If the court accepts the legality review request submitted in favour of a person convicted, it cannot amend the final decision to his or her significant disadvantage in respect of the legal qualification of the crime and penalty imposed. If the legality review request is lodged against the person convicted, the court can only acknowledge the violation without amending the final decision.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

16. The applicant complained under Article 6 that the principle of equality of arms had been violated and the length of the proceedings had been excessive. He complained that, unlike the public prosecutor, he had been deprived of the opportunity to attend the session of 2 November 2005 before the Court of Appeal; that the witnesses' statements to the company's management had been communicated to him with a one-year delay, which had put him at a disadvantage *vis-à-vis* the prosecution; that the examination of witnesses on 6 May 2004 had occurred in his absence; that the courts had refused his request for a re-examination and that the courts had examined only 6 witnesses for the defence – far fewer than for the prosecution. Article 6 § 1 of the Convention, in so far as relevant, reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time... by [a] ... tribunal ...”

A. Admissibility*1. The applicant's absence at the session before the Court of Appeal on 2 November 2005*

17. The Government did not raise any objection as to the admissibility of this complaint.

18. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. The length of the proceedings

19. The Court notes that the proceedings in question started at the earliest on 22 November 2001 when the public prosecutor requested the investigating judge to open an investigation against the applicant (see, *mutatis mutandis*, *Nankov v. the former Yugoslav Republic of Macedonia*, no. 26541/02, § 42, 29 November 2007). They ended on 21 November 2005 when the Court of Appeal's decision of 2 November 2005 was served on the applicant. They therefore lasted almost four years for two levels of jurisdiction.

20. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

21. The Court considers that the applicant's case was complex, in particular because of the large number of witnesses heard by the investigating judge and during the trial.

22. It also observes that there were no significant delays attributable to the applicant.

23. As regards the conduct of the authorities, the Court notes that it took a little above three years for the trial court to issue a decision. During this time, the trial court heard the applicant and 47 witnesses and admitted other documentary evidence. Having regard to the material before it, the Court does not find any period of evident inactivity on the part of the trial court. Lastly, the Court of Appeal decided the applicant's appeal within almost four months.

24. Against this background, the Court considers on the whole that the length of the proceedings was not excessive (see *Bajraktarov v. the former Yugoslav Republic of Macedonia* (dec.), no. 34112/02, 18 November 2008). Accordingly, the applicant's complaint concerning their length is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and

must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Remaining complaints

25. The Court has examined the remaining complaints under Article 6 of the Convention. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

26. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Merits

1. The parties' submissions

27. The applicant stated that, despite his failure to request to attend the session, the Court of Appeal should have summoned him, as provided for in section 362 (3) of the Act.

28. The Government maintained that the applicant had not requested in his appeal to be notified about the session of the Skopje Court of Appeal, although he had been entitled to do so under section 362 of the Act (see paragraph 13 above). Since the case involved an automatically prosecutable offence, the presence of the public prosecutor had been based on section 361 of the Act.

2. The Court's consideration

29. The Court reiterates that the principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. This implies, in principle, the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision (see *Kress v. France* [GC], no. 39594/98, §§ 72 and 74, ECHR 2001-VI).

30. Furthermore, a State which institutes courts of appeal or cassation is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 (see *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11).

31. In this context, importance is to be attached to, *inter alia*, the appearance of the fair administration of justice and to the increased sensitivity of the public to the fair administration of justice (see *Borgers v. Belgium*, 30 October 1991, § 24 *in fine*, Series A no. 214-B).

32. Turning to the facts of the present case, the Court observes that the Skopje Court of Appeal had jurisdiction to examine the case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence (see *Ivanovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 21261/02, 29 September 2005). It decided the applicant's appeal at a session held in private, the date of which was communicated to the public prosecutor under section 361 (1) of the Act (see paragraph 12 above). The public prosecutor attended the session and submitted a final oral statement requesting that the applicant's appeal be dismissed. The Court of Appeal addressed this statement in its decision. The applicant was not present and could not have replied to that position. In this connection the Court notes that the applicant did not exercise his right under section 362 (1) of the Act (see, *a contrario*, *Nasteska v. the former Yugoslav Republic of Macedonia*, no. 23152/05, § 17, 27 May 2010). In result, he was not informed of the Court of Appeal's session. Furthermore, that court did not request his attendance although it had such jurisdiction under section 362 (1) of the Act (see paragraph 13 above). In the Court's view, the applicant's failure to request notification should not be taken to his prejudice given the statutory inequality that the Act created by having provided only the public prosecutor with a right to be apprised of the Court of Appeal's session automatically, while restricting that right for the accused only in case he or she requires so. The Government did not provide any reasonable explanation for this procedural inequality flowing from the Act. Furthermore, it is obvious that such privilege is limited only for the public prosecutor (section 361 (1) of the Act) and does not concern any other private individual acting as a prosecutor (section 362 (1) of the Act). The Court sees no reason why such preferential treatment is offered to the public prosecutor, as a State body, which acts as a party to the proceedings and accordingly the applicant's adversary.

33. The Court considers that the public prosecutor's presence at the Court of Appeal's private sitting afforded her, if only to outward appearances, an additional opportunity to bolster her opinion in private, without fear of contradiction by the applicant (see *Borgers v. Belgium*, § 28, cited above, and *Lobo Machado v. Portugal*, 20 February 1996, § 32, *Reports of Judgments and Decisions* 1996-I).

34. In view of the above, the Court considers that there has been a violation of Article 6 § 1 of the Convention on account of the public prosecutor's presence at the Court of Appeal's session of 2 November 2005, of which the applicant was not even notified.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

36. The applicant claimed 16,000 euros (EUR) in respect of pecuniary damage for loss of income during his unemployment. He also claimed EUR 10,000 in respect of non-pecuniary damage for the stress and suffering caused by the alleged violations.

37. The Government contested these claims as unsubstantiated. They further stated that there was no causal link between the alleged violations and the damages claimed.

38. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, the applicant must have suffered non-pecuniary damage as a result of the violation of the principle of equality of arms. Deciding on an equitable basis, the Court awards the applicant under this head the sum of EUR 3,000, plus any tax that may be chargeable.

B. Costs and expenses

39. The applicant also claimed EUR 200 for the costs and expenses incurred before the domestic courts. He did not seek reimbursement of the costs and expenses incurred in the proceedings before the Court.

40. The Government contested this claim as unsubstantiated arguing that no evidence had been submitted to show that the costs had been actually incurred.

41. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Kostovska v. the former Yugoslav Republic of Macedonia*, no. 44353/02, § 62, 15 June 2006). As to the costs and expenses claimed in respect of the domestic proceedings, the Court notes that such costs were not incurred in order to seek through the domestic legal order prevention and redress of the violation found by the Court (see *Boris Stojanovski v. the former Yugoslav Republic of Macedonia*, no. 41196/06, § 64, 6 May 2010). It therefore rejects the applicant's claim under this head.

C. Default interest

42. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* by five votes to two the complaint concerning the principle of equality of arms admissible;
2. *Declares* unanimously the remainder of the application inadmissible;
3. *Holds* by five votes to two that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint separate opinion of Judges Jungwiert and Villiger is annexed to this judgment.

P.L.
C.W

JOINT DISSENTING OPINION OF JUDGES JUNGWIERT
AND VILLIGER

[(Translation)]

We voted against the majority which found a violation of Article 6 § 1 of the Convention on account of the public prosecutor's presence at the Court of Appeal's session of 2 November 2005, of which the applicant was not notified. The majority considered that the Criminal Proceedings Act ("the Act"), by having provided only the public prosecutor with a right to be apprised of the Court of Appeal's session automatically, while restricting that right for the accused only in case he or she requires so, created a statutory inequality, which in itself was contrary to a fair trial.

We agree that the Act (sections 361 (3) and 362 (1) of the Act, see "Relevant domestic law" above) did not put the public prosecutor and the defendant in equal position as regards the notification about a session of the Court of Appeal. However, we emphasise that the Court's role is not to rule *in abstracto* on the compatibility of the national legislative provisions with the Convention, but to ascertain *in concreto* what effect the application of the Act had on the applicant's rights under Article 6 of the Convention (see, *mutatis mutandis*, *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28).

In the present case, it is not disputed that the applicant did not request in his appeal that the Court of Appeal notify him about the date of its session. This requirement did not entail the completion of any particularly complex formalities: a simple indication in his appeal in this respect would have sufficed. Had the applicant made such request in his appeal, the Court of Appeal would have been obliged, *ex lege*, to notify the applicant about its session. Consequently, his omission to request notification about the date of session could be regarded as an unequivocal, albeit implicit, waiver on his part of the right to attend the appeal session (see, *mutatis mutandis*, *Hermi v. Italy* [GC], no. 18114/02, §§ 77-103, ECHR 2006-XII). That he defended himself in person and not through a legal representative was a matter of his own choice and cannot be understood as implying that he was not capable of realising the consequences of this failure.

In the light of the above and taking account of the nature of the Court of Appeal's session, as opposed to a hearing (sections 362 (3) and 364 (1) of the Act, see "Relevant domestic law" above), we are of the opinion that the applicant did not do everything that could reasonably have been expected of him in order to assert his right to attend the session of 2 November 2005 before the Skopje Court of Appeal. We cannot therefore agree with the majority that the violation of the principle of equality of arms stemmed directly from the Act.