



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

FIRST SECTION

**CASE OF ATANASOV v. THE FORMER YUGOSLAV REPUBLIC
OF MACEDONIA (No. 2)**

(Application no. 41188/06)

JUDGMENT

STRASBOURG

19 April 2011

FINAL

19/07/2011

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 (no. 2),

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Nina Vajić, *President*,
Christos Rozakis,
Peer Lorenzen,
Khanlar Hajiyeu,
George Nicolaou,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges*,

and André Wampach, Deputy Section Registrar,

Having deliberated in private on 29 March 2011,

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

PROCEDURE

1. The case originated in an application (no. 41188/06) 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 9 September 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 the domestic courts had rejected his request to cross-examine Mr G.A., the only witness who had produced evidence against him

4. On 1 March 2010 the President of the Fifth Section decided to communicate this complaint to the Government.

5. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1). The case was assigned to the newly composed First Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

7. The applicant was an employee and shareholder of the company N. (“the company”). He was also Chairman of the company's Union of Workers.

8. On 28 June 2002 a letter was published in the newspaper *M.D.* under the following title: 'Unusual alliances have destroyed the Negotino cable-production factory' (“Неприродни сојузи ја уништија Неготинската фабрика за кабли”). The applicant's name was indicated as the author of the text. The latter spoke about the problems of the company's employees and shareholders. It alleged that since Mr B.J. had become the company's Chief Executive, the shareholders had been deprived of their rights and pressed to withdraw lawsuits against the company's management. The latter had dismissed the Union of Workers and appointed its own union. It further stated, *inter alia*:

“... I, as the Chairman of our Union, was laid off in unfair disciplinary proceedings ... I've already said that Mr I.G. and Mr B.J., the Chief Executives of the company, had taken over the factory from us and engaged in criminal activities in these two and a half years. We, the employees, are laid off in fake disciplinary proceedings, while more senior employees are under continuing pressure to leave the factory as redundant. Why the law cannot reach ... Mr B.J.? ...”

9. On 1 July 2002 Mr B.J. submitted to the Skopje Court of First Instance (“the trial court”) a private criminal complaint against the applicant for defamation. On 24 March 2003 he supplemented the complaint and requested that the applicant be held responsible for defamation in respect of another article published on 5 March 2003 in a weekly newspaper *S.*

10. On an unspecified date in 2004, the trial judge ordered that the police assist in securing the applicant's attendance at a hearing. The applicant relied *inter alia* on that order in his request for withdrawal of the trial judge, which was to no avail.

11. According to the minutes of a hearing of 25 January 2005, Mr A.M., a journalist, and a chief editor of the newspaper *M.D.* did not appear since they had not been properly summoned. On this occasion, the applicant stated the following:

“... I consider the criminal complaint unsubstantiated since the only evidence against me was the extract of the newspaper bearing my name. There is no other evidence that I'm the author of the letter. It is well known that a letter or statement is to be published only if signed by the author ...”

12. Mr B.J. stated, *inter alia*:

“... regarding the letter in question, which was signed by [the applicant], I knew that it was sent by him since another letter with similar content, signed by [the applicant], had been earlier published by the newspaper ... the defamatory statements are similar to some previous statements that he was making continuously directly to me or by e-mail. At every meeting [the applicant] made the same allegations as described in the criminal complaint. He has a web page where many others and I are mentioned and described in the same manner as in the newspaper *M.D.* ...”

13. According to the minutes, the trial court ordered that Mr A.M. and the chief editor of the newspaper be summoned for the next hearing.

14. In a letter of 23 June 2005 (the date of 20 June 2003 was also indicated) Mr G.A., the Director of the newspaper stated, *inter alia*:

“... we inform you that the author of the published letter ... is [the applicant], whose signature was under the text. By rule we publish only letters, which bear the author's signature and address, as well as the identity card number. The newspaper keeps these letters for thirty days before it destroys them. They may be kept longer only if they provoke reactions or become the subject of court proceedings or with a view to identifying the authors. The present letter, signed by [the applicant] and published in our newspaper, did not provoke any reactions nor was its authenticity contested. It is therefore not stored in our records.”

15. On 7 November 2005 Mr B.J. withdrew the complaint which he had submitted on 24 March 2003.

16. During a hearing held on 6 December 2005, the applicant stated that the relevant letter had been published without his permission. In the concluding remarks, he reiterated that he had not been the author of the letter and that no evidence had been presented to prove the contrary.

17. On the same date, the trial court convicted the applicant and sentenced him to three years' imprisonment, suspended for a year. The court *inter alia* stated:

“...Mr G.A.'s letter of 23 June 2005 confirms that the applicant was the author of the letter published in the newspaper *M.D.* ... the text itself concerns the operation of the factory, in particular that of its director, the plaintiff. The letter states that the accused, as the Chairman of the Union, was dismissed in fake disciplinary proceedings. Consequently, it is evident from the content that [the applicant] is the author of the text. In his defence, [the applicant] stated that he was the Chairman of the Union and was dismissed. Since the events related to him, it can be concluded that he wrote the letter and signed it ... The court assessed the applicant's defence that there was no evidence that he was the author of the letter ... and that the criminal complaint was unsubstantiated in the absence of such proof ... furthermore, he stated that he had not given permission for its publication and that he would not reply whether he had sent the letter to the newspaper. That the accused committed the crime and was the author of the letter is confirmed by the letter of the newspaper's director ... the plaintiff's testimony also confirmed that the accused was the author of the text ... since [the applicant] made similar statements to him directly.... On the other hand, [the applicant] did not present any evidence that he had not been the author of the letter nor he had objected to the newspaper in this respect. Consequently, he did not present any evidence that would contradict the statements that the newspaper's director made in his letter ...”

18. On 18 February 2006 the applicant appealed against this judgment arguing that the plaintiff had not presented any evidence to corroborate his guilt. In this connection he argued that the plaintiff could have obtained a copy of the original letter in support of the criminal complaint, which he had lodged three days after its publication. He failed to do so since there was no letter with his signature. He reiterated that he had not signed the letter and

that somebody else had put his name under the text. He further complained that:

“... the trial judge rendered the decision without having examined the only witness mentioned in the decision. Although the trial judge requested his presence, he – the newspaper's director, did not appear in court. He did not produce oral evidence before the court, but sent instead, the letter in which he untruly states that my signature, address and identity card number were indicated under the text. Since the court summoned this witness, his failure to appear should not have been replaced with the letter. This witness should have been heard in my presence and the court should have allowed me to confront him ... In this connection I invoke Article 6 of the Convention ...”

19. The applicant further complained that he was not given access to the case file nor was he allowed to make copies. Lastly, he complained that the trial judge ordered the police to secure his attendance at the trial, on the assumption that he had failed to appear in court on earlier occasions. In this later respect, he argued that there was no evidence in the case file that he had been summoned properly.

20. On 9 March 2006 the Skopje Court of Appeal dismissed the applicant's appeal stating that *inter alia*:

“... there were no substantive procedural flaws ... the trial court duly considered all evidence, established the facts correctly and rendered a decision that is clear and sufficiently reasoned ... Since there are no grounds in [the applicant's] appeal that would contradict the trial court's findings related to the existence of the crime and [the applicant's] criminal responsibility, this court adheres to the facts established by the trial court.”

21. This decision was served on the applicant on 22 March 2006.

22. On 21 June 2006 the applicant requested the public prosecutor to lodge a request with the Supreme Court for the protection of legality. According to him, the public prosecutor rejected this request.

II. RELEVANT DOMESTIC LAW

23. Section 418 (7) of the Criminal Proceedings Act of 2005 (consolidated version) provided that a case may be reopened if the European Court of Human Rights has given a final judgment finding a violation of the human rights or freedoms. The same provision is provided for in section 449 (6) of the new Criminal Proceedings Act, which entered into force in 2010 and would become applicable two years after its entry into force.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

24. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention that the domestic courts had refused to examine Mr G.A., the only witness, whose letter served as key evidence on which his conviction rested. He also complained that the principle of equality of arms had been violated since the trial court had ordered that his attendance at the trial be secured by force, which had not been the case with Mr G.A., who had also refused to appear in court. Lastly, he alleged that he had not been allowed to inspect the case file. Article 6 §§ 1 and 3 (d) of the Convention, in so far as relevant, reads as follows:

Article 6 §§ 1 and 3 (d)

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;”

A. Admissibility

1. The domestic courts' failure to examine Mr G.A.

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

26. 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. Remaining complaints

27. The applicant alleged violation of the principle of equality of arms since the trial court had not requested, unlike in his case, that the police

secure the attendance of Mr G.A. at the trial. Lastly, he alleged having been denied access to the case file.

28. The Court has examined these complaints. 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.

29. 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.

2. *Merits*

a) **The parties' submissions**

30. The Government submitted that the applicant had not made an explicit request that Mr G.A., as well as any other witness, be examined nor had he challenged the trial judge's decision to admit Mr G.A.'s letter in evidence. The trial judge regarded the letter sufficient to corroborate the applicant's guilt and found no reasons to hear oral evidence from Mr G.A. Referring to the Court's relevant case-law, the Government maintained that it was within the competence of the domestic courts to decide about the admissibility of evidence or the manner in which it should be appraised.

31. The applicant reiterated his arguments that he had been convicted without having been given the opportunity to confront the only witness who had presented evidence against him. He stated that his conviction had not been based on facts, but on the assumption that he had been the author of the letter. Before the domestic courts, he had claimed, in vain, that he had not signed the letter and that it had been published without his permission. In this connection he submitted a copy of a letter, which, although he had not signed, was published by a newspaper in March 2010. He concluded that it had been on the plaintiff to provide a signed copy of the letter in support of the criminal complaint.

b) **The Court's assessment**

32. As the guarantees of Article 6 § 3 (d) are specific aspects of the right to a fair trial set forth in paragraph 1 of this Article, the Court will consider the complaint concerning the failure to examine Mr G.A. under the two provisions taken together (see *Asch v. Austria*, 26 April 1991, § 25, Series A no. 203).

33. The Court reiterates that, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce (see *Barberà, Messegue and Jabardo v. Spain*, 6 December 1988, § 68, Series A no. 146). More

specifically, Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the “autonomous” sense given to that word in the Convention system; it “does not require the attendance and examination of every witness on behalf of the accused (see *Engel and Others v. the Netherlands*, 8 June 1976, § 91, Series A no. 22, and *Bricmont v. Belgium*, 7 July 1989, § 89, Series A no. 158).

34. The task of the Court is to ascertain whether the proceedings at issue, considered as a whole, were fair as required by Article 6 § 1 (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, § 33). However, even though it is normally for the national courts to decide whether it is necessary or advisable to call a witness, there might be exceptional circumstances which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6 (see *Popov v. Russia*, no. 26853/04, § 179, 13 July 2006).

35. In the present case, the Court notes that the applicant was convicted of having made defamatory statements against Mr B.J. in the letter published in the newspaper *M.D.* In the proceedings in question, the domestic courts heard the applicant and the plaintiff. The applicant contested that he had been the author of the letter arguing that he had not signed it and had not consented accordingly to its publication. The plaintiff stated that the defamatory statements made in the letter were similar to some prior statements that the applicant had told him. The trial court further referred to the letter itself and concluded that the events described therein related to the applicant. That the applicant was the author of the text, the court relied on Mr G.A.'s letter of 23 June 2005 in which he confirmed that the letter in question had been submitted by the applicant, a fact which was evident from his signature under the text. The newspaper did not have the original letter. Lastly, the trial court held that the applicant did not produce any evidence that he had not been the author of the text.

36. It is clear from the trial court's decision of 6 December 2005, that the applicant's conviction was based mainly on Mr G.A.'s letter. The court did not treat this letter simply as an item of information, but as proof of the truth of the accusations that the applicant was the author of the letter. In the absence of the original letter, there was no direct evidence linking it with the applicant. It is to be noted that Mr G.A.'s letter was admitted in evidence after the trial court had failed to secure the attendance of a journalist and the newspaper's chief editor, witnesses who were proposed for examination, purportedly, by the applicant. From the applicant's appeal of 18 February 2006, it appears that this letter was admitted after the trial court had failed also to secure the attendance of Mr G.A. The applicant's complaints that he was denied the right to cross-examine Mr G.A., as the only witness against him, remained unanswered by the Court of Appeal. In the absence of any explanation by the domestic courts, the Court does not

consider that there existed any particular circumstances justifying their failure to secure Mr G.A.'s attendance at the trial.

37. In such circumstances, it appears that the applicant never had an opportunity to examine Mr G.A. whose written statement - which was vital, was read out at the trial. Admittedly, the applicant was able to submit his comments freely during the hearing, but he was nevertheless convicted on the basis of evidence in respect of which his defence rights were appreciably restricted (see *Unterpertinger v. Austria*, 24 November 1986, § 31, Series A no. 110).

38. There has accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. The applicant claimed EUR 4,000 in respect of non-pecuniary damage for the emotional suffering caused by the alleged violations.

41. The Government contested this claim as unsubstantiated, but left the matter to the Court's discretion in the event of the Court finding a violation of any of the Convention rights.

42. The Court considers that the applicant must have suffered non-pecuniary damage as a result of the violation found. Ruling on an equitable basis, it awards him EUR 3,200 under this head, plus any tax that may be chargeable to him.

43. Furthermore, the Court is of the view that, where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see, *mutatis mutandis*, *Öcalan v. Turkey*, no. 46221/99 [GC], § 210, *in fine*, ECHR 2005 – IV; *Kahraman v. Turkey*, no. 42104/02, § 44, 26 April 2007 and *Halis Tekin v. Turkey*, no. 64570/01, § 53, 19 July 2007).

B. Costs and expenses

44. The applicant also claimed EUR 400 for the costs and expenses incurred before the domestic courts. He further claimed reimbursement of the costs and expenses related to the proceedings before the Court, without specifying any amount under this head. He did not provide any supporting documents.

45. The Government contested this claim as unsubstantiated.

46. The Court notes that the applicant did not submit any supporting documents or particulars to substantiate his claims. Accordingly, the Court does not award any sum under this head (see *Parizov v. the former Yugoslav Republic of Macedonia*, no. 14258/03, §§ 71 and 72, 7 February 2008).

C. Default interest

47. 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 UNANIMOUSLY

1. *Declares* the complaint concerning the domestic courts' failure to examine Mr G.A. admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;
3. *Holds*
 - (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 3,200 (three thousand and two hundred 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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 April 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Nina Vajić
President