



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

FIFTH SECTION

**CASE OF DEMERDŽIEVA AND OTHERS v. THE FORMER
YUGOSLAV REPUBLIC OF MACEDONIA**

(Application no. 19315/06)

JUDGMENT

STRASBOURG

10 June 2010

FINAL

10/09/2010

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

In the case of Demerdžieva and Others 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,

Rait Maruste,

Mark Villiger,

Isabelle Berro-Lefèvre,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 11 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 19315/06) 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 three Macedonian nationals, Ms Nataša Demerdžieva (“the first applicant”), Mr Aleksandar Šuklev (“the second applicant”) and Mr Živko Demerdžiev (“the third applicant”), on 4 April 2006. On 19 June 2006 the third applicant died. Ms Dobrila Demerdžieva, his wife, provided a letter of authority expressing her intention to continue the application in his name.

2. The applicants were represented by Mr T. Torov, a lawyer practising in Stip. The Macedonian Government (“the Government”) were represented by their Agent, Mrs R. Lazareska Gerovska.

3. The applicants alleged, in particular, that they had been denied the right to a fair trial, in particular because the Supreme Court had erroneously declined to examine their appeal on points of law as out of time.

4. On 5 January 2009 the President of the Fifth Section decided to communicate these complaints to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1979, 1986 and 1941 respectively and live in Skopje.

6. On 19 November 2004 the Gevgelija Court of First Instance (“the trial court”) convicted the applicants of drug trafficking and sentenced them to three, six and four years' imprisonment respectively. The trial court established that on 22 June 2004, a certain N. (the last name of Mr K.N., as established in the course of the domestic proceedings, later referred to as Mr K.N.) and the third applicant had arrived at the first applicant's house where she lived with the second applicant, her stepson. The applicants bought 1,012 g of heroin from N. for 7,500 euros (EUR). After keeping some drugs back at the house, the applicants divided the remaining 952 g into two packs to sell to Mr N.N., an unidentified end buyer whom they had arranged to meet in a car park near Gevgelija. The second applicant hired a taxi and the remaining applicants took N.'s car to meet Mr N.N. The police stopped the cars and found the drugs in the taxi. N. escaped. The trial court established these facts on the basis, *inter alia*, of the statements of the second and third applicants given in the pre-trial proceedings. The court also referred to the first and third applicants' statements at the hearing, notably that they had been victims of a constructed scenario and that they had not known N. before the date when the offence was committed, but disregarded them as self-serving. The testimonies of two witnesses, as well as items of real evidence, were also taken into account.

7. The applicants complained, *inter alia*, that they had been set up to commit the offence by N., an alleged *agent provocateur*, whom police had allowed to leave the scene. They further complained that no attempt had been made to uncover the truth as regards N.'s involvement in the commission of the offence.

8. At a public session (*јавна седница*) of 25 March 2005, in the presence of the public prosecutor, the applicants and their lawyer, the Skopje Court of Appeal dismissed the applicants' appeal and upheld the trial court's decision. It stated that efforts to discover N.'s whereabouts had been unsuccessful. It further argued that the trial court had based its decision on considerable evidence which, taken as a whole, had confirmed the applicants' involvement in the commission of the crime.

9. The trial court sent this decision to the applicants by mail. A stamp “Skopje-Madzari” of 13 April 2005 was affixed on the post slip returned to the trial court. According to the Government, this stamp was affixed by the detention centre where the applicants were being detained pending the proceedings in question. According to three other return receipts bearing the

detention centre's receipt stamp, this decision was received by the latter on 14 April 2005. Each applicant signed and dated these receipts: the first applicant received the decision on 18 April 2005, the second applicant on 14 April 2005 and the third on 16 April 2005.

10. On 16 May 2005 the applicants lodged an appeal on points of law with the Supreme Court. They set out its general basis in a succinct manner and stated that detailed submissions would follow.

11. In submissions of 30 May 2005, the applicants provided full factual and legal grounds of appeal. They complained, *inter alia*, of having been entrapped into committing the offence by N., whose real name was Mr K.N. They provided his whereabouts and stated that he had been actively involved in the crime and had operated as an *agent provocateur*, under the guidance of the police, who had sent him to incite the second applicant to buy the drugs, given his previous criminal record in that respect. They further maintained that Mr K.N. had cooperated with the police in other cases, setting up other people in order to help his cousin who was serving a prison sentence for drug trafficking. The police's involvement in the crime was supported, *inter alia*, by the following: they had allowed Mr K.N. and Mr N.N., the unidentified end buyer, to leave the scene at the time of the applicants' arrest; the drugs had not been found in a routine police check, but on the basis of advance information about their whereabouts; and two detectives with known identities had been present at the scene. They further complained that the courts had failed to take evidence from these two detectives and other police officers who had been present at the scene. The applicants made reference to the Court's case-law on the impact of an *agent provocateur* on convicts' rights under Article 6 of the Convention.

12. On 6 September 2005 the Supreme Court rejected (*отфрла*) the appeal on points of law as out of time. It did so after it had obtained submissions from the public prosecutor in which the latter had requested that the appeal be dismissed on the merits. The court established that the Court of Appeal's decision had been served on the applicants on 13 April 2005.

13. In submissions of 7 and 25 November 2005 respectively, the applicants asked the Supreme Court to rectify the error in respect of the date of service of the Court of Appeal's decision. In support of their request they submitted a copy of the return receipts bearing the detention centre's receipt stamp and their signatures (see paragraph 9 above). This request remained unanswered.

II. RELEVANT DOMESTIC LAW

14. Under section 84 of the Criminal Proceedings Act, it is neither the date of service of the judgment, nor the date of the event, that is taken to be the date from which the time-limit starts to run. It is the next day that is

taken as the starting date for calculation of the time-limit. If the last day of the time-limit falls on a public holiday, Saturday or Sunday, the time-limit expires at the end of the next working day.

15. Section 411(1) and (2) provides that a person convicted by a final decision and sentenced to imprisonment may lodge an appeal on points of law (*барање за вонредно преиспитување на правосилна пресуда*). The appeal may be submitted within thirty days of the date on which the convicted person was served with the decision.

16. Other provisions relevant to the present case were described in the cases of *Gorgievski* and *Mamudovski* (see *Gorgievski v. the former Yugoslav Republic of Macedonia* (dec.), no. 18002/02, 6 May 2008, and *Mamudovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 49619/06, 10 March 2009).

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

17. The applicants complained under Article 6 of the Convention that the principle of equality of arms had been infringed, since the courts had not examined the alleged *agent provocateur*, whose active involvement had secured their conviction, or the detectives and police officers who had been present at the scene. They also complained that their conviction had been based only on evidence obtained by the *agent provocateur*; that the courts' decisions had not been reasoned; and that the Supreme Court had denied their right of access to a court by having erroneously declined to examine their appeal on points of law. In connection with this latter complaint, they also invoked Article 13 of the Convention and Article 2 of Protocol No. 7. The Court considers that the applicants' complaints under these latter Articles are in fact a restatement of the complaints under Article 6 and should be examined accordingly. 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 ... by [a] ... tribunal ...”

A. The 'right of access to a court' complaint

1. Admissibility

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

19. The Court notes at the outset that the third applicant died on 19 June 2006. It considers that, for the reasons detailed in the cases of *Ivanovski and Others* and *Stojkovic*, which likewise apply to this case, the third applicant's widow has the requisite standing under Article 34 of the Convention in respect of his complaints (see, *mutatis mutandis*, *Ivanovski and Others v. the former Yugoslav Republic of Macedonia*, no. 34188/03, § 18, 26 November 2009, and *Stojkovic v. the former Yugoslav Republic of Macedonia*, no. 14818/02, § 25, 26, 8 November 2007).

20. It further considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

a) The parties' submissions

21. The applicants reiterated that the Supreme Court had erroneously rejected their appeal on points of law as out of time. They also contested the availability of a request for reinstatement of the proceedings (*враќање во поранешна состојба*) in the criminal proceedings.

22. The Government submitted that the applicants could have made a request, after having received the Supreme Court's decision, for reinstatement of the proceedings. On the substance, the applicants had not been denied the right of access to a court. The Supreme Court, however, had decided the case on the basis of the case file as forwarded by the trial court, which allegedly had not contained a copy of the return receipts bearing the detention centre's receipt stamp and the applicants' signatures (see paragraph 9 above). They conceded that a manifest error had been made in the present case, which had been isolated and had not represented a systemic problem. Consequently, they invited the Court to decide the case in accordance with its jurisprudence.

b) The Court's consideration

23. As regards the Government's argument that the applicants failed to seek reinstatement of the proceedings, the Court notes that the Supreme Court, as the court of final appeal, considered the applicants' appeal on points of law and rejected it as out of time. No ordinary remedy lay against

this decision. The applicants' request of 7 November 2005 (see paragraph 13 above) was to no avail. Furthermore, no jurisprudence was submitted to support the Government's argument that a request for reinstatement of the proceedings against the Supreme Court's decision was available and effective.

24. It further observes that the applicants were convicted and sentenced to a term of imprisonment. An appeal on points of law was therefore an effective remedy against the final decision of 25 March 2005 which upheld their conviction (see *Gorgievski*, cited above, and *Mamudovski*, cited above). On 16 May 2005 the applicants lodged an appeal on points of law with the Supreme Court. The detailed grounds of the appeal were dated 30 May 2005 (see paragraphs 10 and 11 above). The Supreme Court rejected the appeal as having been submitted outside the thirty-day time-limit provided for in section 411 of the Criminal Proceedings Act (see paragraph 15 above). In doing so, the court took 13 April 2005 as the date of service of the Court of Appeal's decision. The court did not, however, take into consideration the copy of the return receipts bearing the detention centre's receipt stamp and the applicants' signatures. This was because, as the Government conceded, they had not been included in the case file forwarded to the Supreme Court. While the Court cannot speculate which authority affixed the stamp of 13 April 2005, it is clear that the Court of Appeal's decision was received by the detention centre on 14 April 2005. According to the applicants' signatures on those receipts, the first applicant received this decision on 18 April 2005, the second applicant on 14 April 2005 and the third on 16 April 2005. In these circumstances, the applicants' appeal on points of law of 16 May 2005 was, in view of section 84 of the Criminal Proceedings Act (see paragraph 14 above), submitted in good time.

25. The Court has already found that the rules setting time-limits for lodging appeals must not be applied in a way which prevents litigants from using an available remedy. The issue is one of legal certainty. The problem in the present case is that a procedural rule has been applied in such a way as to prevent the applicants' appeal being examined on the merits, with the attendant risk that their right to the effective protection of the courts would be infringed (see, *mutatis mutandis*, *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 51, ECHR 2002-IX).

26. In the circumstances of the present case, the Court considers that the Supreme Court erroneously rejected the applicants' appeal on points of law of 16 May 2005 depriving them of their right of access to a court (see, *mutatis mutandis*, *Fetaovski v. the former Yugoslav Republic of Macedonia*, no. 10649/03, §§ 37-41, 19 June 2008).

27. There has accordingly been a violation of the applicants' right of access to a court within the meaning of Article 6 § 1 of the Convention.

B. The remaining complaints under Article 6 of the Convention

28. The applicants further complained under Article 6 of the Convention that an *agent provocateur* had been involved in their conviction, that the courts had not examined him or the detectives and police officers who had been present at the scene, and that therefore, their decisions had not been reasoned.

29. The Court notes that these complaints were raised in the applicants' appeal on points of law before the Supreme Court (see paragraph 11 above). Having regard to its finding that the latter erroneously declined to examine this appeal as out of time, the Court cannot, at this point, examine these complaints. It is so since it cannot speculate as to what the outcome would have been had the Supreme Court declared the applicants' appeal admissible and proceeded to examine it on the merits (see, *mutatis mutandis*, *Nikolov v. the former Yugoslav Republic of Macedonia*, no. 41195/02, § 29, 20 December 2007).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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

31. The first applicant claimed EUR 24,181 in respect of pecuniary damage for loss of earnings between 22 June 2004, the date of her dismissal, and the present. Ms Dobrila Demerdzieva claimed EUR 13,580 for loss of pension covering the period from 19 June 2006 (the date of the third applicant's death) until the date on which he would have turned 75 years old, this being the average life expectancy. In that connection she submitted that the third applicant had died from a stroke while in prison, which he had suffered as a direct consequence of the proceedings in question. In respect of non-pecuniary damage, the first applicant claimed EUR 15,000 and the remaining applicants claimed EUR 20,000 each.

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

33. The Court considers that the basis for an award of just satisfaction in the present case must be the denial of the applicants' right of access to a court under Article 6 § 1 of the Convention. It cannot speculate as to what the outcome of the impugned proceedings would have been had there been

no violation on this ground. It therefore finds no causal link between the pecuniary damage claimed and its finding of a violation of Article 6. Accordingly, the Court makes no award under this head. On the other hand, the applicants must have suffered non-pecuniary damage as a result of the violation of their right of access to a court, which, in principle, is best remedied by reopening the proceedings at national level. Deciding on an equitable basis, the Court awards each applicant the sum of EUR 2,000, plus any tax that may be chargeable

34. However, the Court is of the opinion that the most appropriate form of redress in cases where it finds that, in breach of Article 6 § 1 of the Convention, an applicant has not had access to a tribunal, would, as a rule, be to reopen the proceedings in due course and re-examine the case in keeping with all the requirements of a fair trial (see *Kostadin Mihaylov v. Bulgaria*, no. 17868/07, §§ 59 and 60, 27 March 2008).

B. Costs and expenses

35. The applicants also claimed the equivalent of EUR 6,175 for costs and expenses incurred before the domestic courts and EUR 6,186 for those incurred before the Court. These figures included legal fees for the applicants' representation before the Court and domestic courts, based on the scale rates of the Macedonian Bar, as well as mailing and copying expenses. The applicants provided an itemised list of the legal fees. No document was submitted in support of the mailing and copying expenses.

36. The Government contested these claims as unsubstantiated and excessive. They submitted that no evidence had been submitted to show that they had been actually incurred, let alone necessary in order to seek prevention of and redress for the alleged violations complained of before the Court.

37. 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). Having regard to the fee note submitted by the applicants, the Court considers that the costs and expenses claimed in respect of the proceedings before the domestic courts were not expended with a view to prevent or rectify the violation found or provide the applicants with redress; it therefore rejects the applicants' claim under this head. As regards the costs and expenses claimed in respect of the proceedings before the Court, it finds, regard being had to the documents in its possession and the above criteria, the amount claimed to be excessive and partly unsubstantiated and awards instead the sum of EUR 2,500, plus any tax that may be chargeable to the applicants.

C. Default interest

38. 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 application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the applicants' right of access to a court;
3. *Holds* that there is no need to examine the remaining complaints under Article 6 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the first and second applicants, as well as the third applicant's widow, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement:
 - i) the sum of EUR 2,000 (two thousand euros) each in respect of non-pecuniary damage, plus any tax that may be chargeable;
 - iii) the joint sum of EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicants;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President