



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

FOURTH SECTION

Application no. 53694/08
by Mihal and Vjollca DELIJORGJI
and 3 other applications against Albania
lodged on 7 November 2008

STATEMENT OF FACTS

THE FACTS

The applicants are two Albanian companies and three Albanian nationals.

1. Application no 48729/08 was lodged with the Court on 7 October 2008 by Përparimi sh.a, a company incorporated under Albanian law with its registered seat in Tirana (“the first applicant company”). The first applicant company is jointly owned by the third applicant, who was employed as the Executive Director, and by another company.

2. Application no 48740/08 was lodged with the Court on 7 October 2008 by Park Construction Albania sh.p.k., a limited liability company incorporated under Albanian law with its registered seat in Tirana (“the second applicant company”). The second applicant company is jointly owned by two other companies registered in the British Virgin Islands and the Republic of Liberia, respectively. The third applicant was employed as its administrator and is a shareholder in one of the owner companies.

3. Application no 53694/08 was lodged with the Court on 7 November 2008 by Mr Mihal Delijorgji (“the third applicant”) and Mrs Vjollca Delijorgji (“the fourth applicant”), who were born in 1966 and 1968, respectively. Mr Delijorgji is currently detained on remand in Tirana and Mrs Delijorgji lives in Tirana.

4. Application no 54768/08 was lodged with the Court on 17 November 2008 by Mr Pandeli Delijorgji who was born in 1937 and lives in Albania. He is the father of the third applicant.

All applicants are represented before the Court by Mr A. Hajdari, a lawyer practising in Tirana.

A. The circumstances of the case

On 15 March 2008 a massive explosion occurred at an arms depot in Gërdec, a village around thirty kilometres from Tirana (“the incident”). According to the Government’s submissions¹, the explosion claimed more than two dozen lives and seriously damaged a number of nearby buildings.

The arms depot had been the site of continued munitions-disposal work by a private commercial company, Albdemil sh.p.k. The third applicant was the administrator of Albdemil. The fourth applicant was employed by the company.

Following the incident, the prosecutor opened an investigation to determine the cause of the explosion. On 15 March 2008 the third applicant was detained on remand on a charge of “breach of rules on explosive, flammable or radioactive substances” contrary to Article 282 of the Criminal Code.

On 22 March 2008, at the prosecutor’s request, the Tirana District Court (“the District Court”) issued a seizure order as an interim measure, in accordance with Article 270 of the Code of Criminal Procedure, of bank accounts and real estate which were owned by the third applicant or in which it was believed that he had a vested interest. As a result, the seizure was extended to properties which also belonged to the first, second, fourth and fifth applicants, respectively. The District Court decision, in so far as relevant, reads as follows.

“The Court notes that the incident that took place in Gërdec is believed to have been caused by the commission of the criminal offence of breach of the rules on explosive, flammable or radioactive substances by the person under investigation [the third applicant]. It is universally acknowledged that the loss of human lives or causing bodily injuries, as well as material damage, are some of the most serious ever in Albania. The identification of properties of Mihal Delijorgji by the prosecutor is in the interests of conducting effective investigative actions and those of justice. In this connection, the court considers that the properties of Mihal Delijorgji should be seized. In light of the serious damage caused by the incident, there are substantial reasons to believe that the person under investigation could not have any guarantee that he would pay for the damage caused to private and State property...”

The applicants stated that out of twenty-eight objects seized, one belonged to the fifth applicant, two were owned by the first applicant company and the remainder was the joint property of the third and fourth applicants. Out of thirty-three bank accounts seized, seven bank accounts belonged to the first applicant company, four were owned by the second applicant company and the remainder was the joint property of the third and fourth applicants.

On an unspecified date all applicants challenged the seizure. The first and second applicant companies complained that the District Court’s decision impinged on their property rights, over which the third applicant who was under investigation, enjoyed no title. Seizure of their bank accounts was tantamount to a cessation of their operations and would lead to their bankruptcy. The third applicant argued that the majority of properties seized were co-owned and unrelated to Albdemil sh.p.k. The fourth applicant maintained that her personal bank deposits had been seized at a

¹ Information submitted at the request of the judge rapporteur under Rule 49 § 3 of the Rules of Court.

time when there was no connection between her and the incident or the criminal proceedings against the third applicant. They requested that the District Court decision be partly reversed, in so far as the properties or bank accounts were unrelated to Albdemil sh.p.k. The fifth applicant argued that the seizure of his property was not justified, he being the sole owner and having no connection with the business activity of Albdemil sh.p.k.

On 17 April 2008 the Tirana Court of Appeal (“Court of Appeal”) upheld the District Court’s decision. The relevant parts of the Court of Appeal decision read as follows.

“... Considering the grave damage caused by the explosion, there are reasonable grounds to believe that the appellant [Mr Delijorgji] cannot guarantee payment for the damage to State and private property and, therefore, all properties have to be seized.

The claims submitted in the applicants’ appeal are ill-founded, considering that all real estate and bank accounts are owned by Mr Delijorgji or are otherwise related to him. Since the investigation is still ongoing, there should be a possibility for the examination of the parties’ arguments in relation to the portion of the property and bank accounts seized (*pretendimet e parashtruara në kërkesat ankimore janë të pabazuara për faktin se të gjitha pronat e paluajtshme si dhe llogaritë bankare janë të personit nën hetim Mihal Delijorgjit, apo ka lidhje të tjera me to. Meqenëse çështja është nën hetim, do të krijohet mundësia e shqyrtimit të konflikteve të palëve lidhur me saktësimin e pasurive dhe llogarive bankare që është vënë sekuestro konservative*).

On 16 May 2008 the applicants lodged an appeal with the Supreme Court. The first and second applicants argued that their properties should not have made subject to a seizure order as they were not involved in the incident. The fact that the third applicant was the director of the first applicant company and the administrator of the second applicant company did not make them liable for payment of damages. The fourth and fifth applicants contended that their properties were unrelated to the activities of Albdemil or those of the third applicant. They also held that the prosecutor had not estimated the maximum damage for which the third applicant was liable. They all requested the Supreme Court to review the seizure order and to partially amend it to the extent that it included the shares of the third applicant.

On 14 July 2008 the Supreme Court declared the appeal inadmissible, finding that “it does not contain any grounds of appeal for which Article 432 of the Code of Criminal Procedure provides”.

According to the Government’s submission, on 23 July 2008 the third applicant was charged with manslaughter in aggravating circumstances. The criminal proceedings against the third applicant are ongoing.

On 26 September 2008 the first and second applicants lodged a constitutional appeal with the Constitutional Court. They argued that an interim measure, which causes irreparable damage and infringes a crucial right, is amenable to constitutional review. They further contended that there had been various breaches of Article 6 of the Convention (a breach of the right to be heard, a breach of equality of arms, lack of reasoning in the domestic courts’ decisions, a breach of the right of access to the Supreme Court) and Article 1 of Protocol No. 1 to the Convention.

On 26 December 2008 the Constitutional Court rejected their appeal on the grounds that the domestic courts’ decisions concerned a provisional measure and did not decide the merits of the case.

To date, it would appear that the applicants’ properties remain seized.

B. Requests for the application of an interim measure

On 17 November 2008 the President of the Fourth Section decided to reject the third and fourth applicants' request for the indication of an interim measure under Rule 39 of the Rules of Court.

On 1 June 2010 the President decided to reject a renewed request by the first and second applicant companies and by the third and fourth applicants to apply a Rule 39 measure. The President further rejected the applicants' request to apply Rules 40 and 41 of the Rules of Court.

C. Relevant domestic law

1. The Constitution

1. The relevant provisions of the Albanian Constitution read as follows.

Article 42 § 2

"In the protection of his constitutional and legal rights, freedoms and interests, or in the case of a criminal charge brought against him, everyone has the right to a fair and public hearing, within a reasonable time, by an independent and impartial court established by law."

Article 131

"The Constitutional Court shall decide: ... (f) Final complaints by individuals alleging a violation of their constitutional rights to a fair hearing, after all legal remedies for the protection of those rights have been exhausted."

2. The Code of Criminal Procedure ("CCP")

(a) Seizure

Article 270 § 1 of the Code empowers the prosecutor to seize all movable and immovable properties of the defendant and any other savings or items in his possession, in so far as the law provides for such a seizure, when "there are reasonable grounds that the defendant could not guarantee the payment of the penalty/fine, expenses of the proceedings and any other obligation for which he is liable in relation to State property."

Article 271 § 1 of the Code provides that seizure is ordered by a court decision and is enforced by the bailiffs pursuant to the rules of the Code of Civil Procedure. Article 271 § 4 states that the seizure is lifted when the defendant has been declared innocent or the case has been dismissed (*pushuar*) by a final decision.

Article 276 of the Code lays down the appeal procedure in respect of an appeal against a seizure order of a court.

(b) Appeal proceedings

Article 422 provides that any party may appeal against a first-instance court decision, which is a decision taken by a district court.

Article 425 defines the scope of the examination of an appeal by the Court of Appeal. It provides that the examination of a case by the Court of Appeal is not limited to the grounds of appeal but extends to the whole case.

Under Article 427, in the event that one of the parties requests the re-examination of evidence administered during the first-instance court

proceedings or seeks the collection of additional new evidence, the Court of Appeal, when deemed necessary, may decide to re-examine the evidence in part or in whole. The Court of Appeal will re-examine evidence if the accused did not attend the first-instance court proceedings, either because he was not notified or because he was unable to attend those proceedings on lawful grounds.

Article 428 establishes which decisions may be taken by the Court of Appeal. It provides that the Court of Appeal may dismiss the appeal and uphold the first-instance court decision, amend the first-instance court decision, quash the first-instance court decision and terminate the criminal proceedings, or quash the first-instance court decision and remit the case for a fresh trial.

(c) The Supreme Court proceedings

Court of Appeal decisions may be appealed against to the Supreme Court in compliance with one of the following requirements of Article 432: a) the criminal law has not been respected or has been erroneously applied; b) there have been breaches which have resulted in the court's judgment being declared invalid in accordance with Article 128 of the Code; c) there have been breaches of procedural rules which have affected the adoption of the judgment.

Article 434 provides that the Supreme Court will examine the appeal in so far as points of law have been raised therein. It has the right to examine and to decide of its own motion and at any stage or instance of the proceedings legal issues which have not been examined before. Article 437 provides that the accused and private parties must be represented by a defence lawyer. As to the procedure, paragraph 5 of the said article provides that the judge rapporteur will introduce the case, followed by the prosecutor's oral submissions and the defence lawyer's pleadings. No counter-pleas are allowed.

3. The Code of Civil Procedure

Article 527 requires the bailiff to execute the seizure of a debtor's credit, movable and immovable property, to the extent that that such is necessary for the fulfilment of the debtor's obligation.

Article 529 of the Code provides an exhaustive list of items which cannot be the subject of a seizure order. In so far as relevant, seizure cannot be imposed on:

- “1. things of personal use of the debtor and his family such as clothes, sheets, covers, furniture in so far as they are necessary for their living;
2. food and fuel which are necessary to the debtor and his family for up to three months.
- ...”

COMPLAINTS

The first and second applicant companies make a number of complaints under Article 6 § 1 of the Convention. They allege that they were denied the right to be heard before the District Court and the Court of Appeal owing to a failure to notify them of the hearing dates. They complain that those courts acted in breach of the principle of equality of arms as their decisions were based entirely on the prosecutor's case, without examining their requests. They further claim that the Supreme Court's decision lacked reasons and that the rejection of their appeal by the Constitutional Court constituted a breach of their right of access to court. Both applicant companies argue that there has been an unlawful and unjustified breach of their right of property under Article 1 of Protocol No. 1 to the Convention. They complain that they did not have an effective remedy within the meaning of Article 13 of the Convention for the protection of their property rights.

The third and fourth applicants complain that the disproportionate seizure of their properties, which resulted in a decrease of their income, has put at risk the health and life of their children contrary to Articles 3 and 8 of the Convention. The fourth applicant further contends that the total seizure of her share was in breach of Article 1 of Protocol No. 1 to the Convention. She alleges a violation of Article 13 in conjunction with Article 1 of Protocol No. 1 because of the lack of an effective remedy.

The fifth applicant complains that there has been a breach of Article 8 and Article 1 of Protocol No. 1 to the Convention as a result of the seizure of his property. He alleges that there was no effective domestic remedy within the meaning of Article 13 of the Convention to enable him to defend his property rights against interference.

COMMON QUESTIONS TO THE PARTIES

1. Have the applicants exhausted all effective domestic remedies, as required by Article 35 § 1 of the Convention? In particular, under what circumstances does domestic law provide for a revision of the seizure? Have the applicants availed themselves of any opportunity to challenge the continuing seizure of their properties?

2. Has there been an interference with the applicants' peaceful enjoyment of possessions, within the meaning of Article 1 of Protocol No. 1? If so, was that interference necessary to control the use of property in accordance with the general interest? Did that interference impose an excessive individual burden on the applicants (see *Immobiliare Saffi v. Italy*, [GC], no. 22774/93, § 59, ECHR 1999-V? In particular:

a. Did the domestic courts make a global assessment of the ownership of properties or conduct a balancing exercise of the rights of all shareholders?

b. In the circumstances, is the prolonged continuation of the seizure still justified?

c. Did the domestic courts counterbalance the effects of the seizure against the need for the applicant companies to continue their normal

business activities and the impact on the individual applicants' and their families' quality of life?

CASE SPECIFIC QUESTIONS

Questions in respect of applications nos. 48729/08 and 48740/08

3. Did the applicant companies have a fair hearing in the determination of their civil rights and obligations, in accordance with Article 6 § 1 of the Convention? In particular:

a. Has there been a public hearing in the present case, as required by Article 6 § 1 of the Convention? If so, were the applicant companies notified of the dates of public hearings? If so, did they avail themselves of the right to attend the public hearings? If so, were they allowed to make oral submissions?

b. Did the applicant companies' appeal raise issues on points of law before the Supreme Court? If so, could the Supreme Court be expected to have given reasons for its decision on those points?

c. Has the Constitutional Court examined constitutional appeals as regards the fairness of proceedings concerning interim measures? The parties are requested to submit relevant case-law.