CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 18670/03
by Dzavit BERISHA and Baljie HALJITI
against the former Yugoslav Republic of Macedonia

The European Court of Human Rights (Fifth Section), sitting on 10 April 2007 as a Chamber composed of:

Mr P. LORENZEN, *President*,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER,
Mr M. VILLIGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having regard to the above application lodged on 17 June 2003,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together.

Having regard to the partial decision of 16 June 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The first applicant, Mr Dzavit Berisha and the second applicant, Mrs Baljie Haljiti, are citizens of Serbia and are of Egyptian ethnic origin. They were born in 1977 and 1980 respectively and live in Hungary. They were represented before the Court by the European Roma Rights Centre,

Budapest. The Macedonian Government ("the Government") were represented by their Agent, Mrs R. Lazareska Gerovska.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 27 March 2003 the Supreme Court dismissed the applicants' request for asylum. Despite the thirty-day expulsion order, they stayed in the former Yugoslav Republic of Macedonia.

On 15 September 2003 at around 2 a.m. the applicants were stopped by the police in the vicinity of the village of Dragos in an attempt to enter Greece illegally. The applicants alleged that they had been in Velushina, which was not a border town, when apprehended by police. They were detained at the police station and contended that they were not allowed to call anyone, including their lawyer. The police lodged with the Bitola Court of First Instance an application for proceedings to be brought under the Misdemeanours Act on two grounds: that they had attempted to cross the border at a place and at a time not allocated for crossing and that they had stayed in the former Yugoslav Republic of Macedonia without a valid permit.

The same afternoon, the Bitola Court of First Instance found the applicants guilty of committing minor offences in breach of the Law on Border Crossing and Movement within the Border Area and the Law on Movement and Residence of Foreigners. It fined them 4,000 Macedonian denars (MKD) each (approximately EUR 65) and banned them from entering the country for 2 years. They were expelled to Serbia, from where they went to Lipljan, Kosovo. The decision stated that no appeal could be lodged against it as the parties had waived their right to appeal.

The minutes of the hearing of 15 September 2003 stated that the applicants had been "instructed about their statutory rights" ("*опоменати на правата што по законот им припаѓаат"*). The document continued that the first applicant had stated that they had arrived in Bitola to see whether there were any other Roma asylum-seekers at the border with Greece. The taxi driver who had driven them told the first applicant that they might be able to find other asylum-seekers in Dragos, and had told him to go there and to say that he was looking for a job. The first applicant had stated that he had been looking for a job and that he had wanted to go to Greece to work. As stated in the minutes, the first applicant had wanted to go to Greece to work illegally. He had presented two photographs: one of the applicants' destroyed house in Kosovo and the second of his injuries sustained while in the province. Describing the circumstances of the event, the first applicant had stated that he did not know the name of the taxi driver, but had given the make of the taxi. In reply to a question of the

representative of the Ministry of the Interior ("the Ministry") about his employment while in Skopje, the first applicant had stated that he had worked in the Refugees and Forced Emigration Office of the Institute for Political and Sociological Research ("the Institute"). He had also stated that he had not intended to cross the border; that he had walked on the main road in order to return to Bitola, intending to come back to Skopje at 5 a.m. to submit a fresh request for asylum on the basis of the newly adopted Asylum Act. The minutes provided that the second applicant had confirmed the first applicant's statements with the latter's assistance, as she spoke neither Macedonian nor Serbian.

The minutes were signed by the applicants. The minutes noted that "the persons accused and [the representative of the Ministry] stated that they do not complain against the decision" (*"обвинетите изјавија дека не се жалат на оваа одлука како и претставникот на подносителот на барањето")*.

On 1 October 2003 the applicants left Kosovo for Hungary. Their request for asylum was granted, and since 17 December 2003 they have lived in Hungary.

B. Relevant domestic law

1. Misdemeanours Act (Закон за прекршоци)

Section 2 of the Misdemeanours Act ("the Act") provides that the provisions of the general part of the Criminal Code apply to misdemeanour liability, and to the imposition of and execution of minor sanctions, if not otherwise stipulated by law. The provisions of the Criminal Proceedings Act apply in misdemeanour proceedings, if not otherwise stipulated by law.

According to section 11 § 1 of the Act, an individual shall be fined or imprisoned if he has committed a misdemeanour.

Section 90 § 1 (3) of the Act provides that summary proceedings are conducted if the perpetrator is held by a competent official for committing an offence.

By virtue of section 92 of the Act, the court is available for twenty-four hour a day, in order to ensure speedy proceedings.

Section 93 § 2 of the Act provides that when the defendant is a foreigner, the court is to decide as speedily as possible and within three days at the latest.

Section 95 § 2 of the Act provides that a final decision is to be enforced after service on the parties concerned or if there are no obstructions for the enforcement. If an appeal was not submitted or the person accused waived the right to appeal, a decision becomes enforceable after expiry of the time-limit for appeal, or from date of the waiver.

2. Criminal Proceedings Act (Закон за кривичната постапка)

Section 3 of the Criminal Proceedings Act ("the Act") provides that everyone summoned, apprehended or arrested has to be informed promptly, in a language that he understands, of the reasons for the summons, apprehension or arrest; of the cause of the accusation against him and of his rights and that he cannot be forced to make a statement. The suspect or the person accused has to be at first instructed *inter alia*, of his right to remain silent; to consult a lawyer and to be represented by a lawyer of his own choosing.

Section 4 of the Act provides *inter alia,* that everyone charged with a criminal offence has the following minimum rights: to be informed promptly, in a language which he understands and in detail, of the nature of the accusation and the evidence against him; to have adequate time and facilities for the preparation of his defence and to communicate with an attorney of his own choosing; to be tried in his presence and to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Under section 7 §§ 2, 3 and 4 of the Act, other parties, the witnesses and other participants in the proceedings have the right to the free assistance of an interpreter if they cannot understand or speak the language used in court. The person concerned is to be instructed of his right to an interpreter. An entry is to be made in the minutes about the instruction given and the person's statement in reply. Interpretation may only be given by a certified interpreter.

Section 66 § 1 of the Act provides *inter alia*, that if a person accused is dumb, deaf or incapable of defending himself effectively he must have a counsel from the moment of the first interrogation.

Section 79 § 7 of the Act provides that the minutes set out the objections concerning their contents.

According to section 326 § § 2 and 4 of the Act, the parties must be provided with a copy of the minutes. They can put remarks as to their contents and can seek rectification. The remarks and the proposals of the parties must be included in the minutes.

Section 354 § 1 (1) of the Act provides that the judgment can be appealed where there has been a substantial infringement of criminal procedure.

In accordance with section 355 § 2, *inter alia* there is a substantial infringement of criminal procedure in cases where the court during the preparation or course of the hearing or during the decision-making process did not apply or wrongly applied a statutory provision or violated the right to defence at the hearing.

COMPLAINTS

The applicants complained under Article 6 of the Convention that they had been denied a fair trial, in particular that their right of access to court had been violated (due to the lack of reasoning in the court decision and the lack of instruction about their procedural rights). They also complained under Article 6 § 3 (b), (c) and (e) that they had not had adequate time and facilities to prepare their defence; had not been allowed to have legal assistance or legal aid, and had not had the services of an interpreter during the trial.

THE LAW

The applicants complained under Article 6 § § 1 and 3 (b), (c) and (e) of the Convention that they had been denied a fair trial in the misdemeanour proceedings. Article 6 of the Convention, in so far as relevant, reads:

> 1. "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:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

a. The parties' submissions

The Government submitted that the applicants had stayed in the former Yugoslav Republic of Macedonia without legal ground as their residence permit had expired on 7 June 2003 following the Supreme Court's decision of 27 March 2003 dismissing their request for asylum. As they were apprehended by police in an attempt to cross the border and enter Greece illegally, the Ministry submitted to the Bitola Court of First Instance an application for misdemeanour proceedings. The court had considered the case in summary proceedings in accordance with the Misdemeanours Act. After it had explained to the applicants the nature of the accusations against them, it examined them; they signed the minutes of the hearing without making any comments; they waived their right to appeal; the decision became immediately final and enforceable. Referring to the rights as

enshrined in the Criminal Proceedings Act, the Government argued that the applicants "had been instructed about their statutory rights".

Concerning the applicants' complaint about the lack of adequate time and facilities to prepare their defence, the Government stated that the case had been of a straightforward nature and that accordingly, it had not required a lengthy consideration. In addition, they argued that the applicants had not proposed any evidence to be adduced or witnesses to be heard; they had presented just two photos and a copy of the Supreme Court's decision of 27 March 2003 in their case; they had not requested an adjournment of the hearing.

As regards the applicants' complaint that they had not been allowed to have legal assistance or legal aid, the Government submitted that they had decided to defend themselves in person, although they had been instructed about their right to a legal assistance of their own choosing. Moreover, the nature of the case did not require the trial court to appoint them an attorney *ex officio*.

Concerning the applicants' complaint that they had been denied the right to have the free assistance of an interpreter, the Government acknowledged that the Albanian language had been their mother tongue and that they had not been provided with an interpreter. However, they stressed that the right to the assistance of an interpreter was the right of a person accused; it was not a duty of the court to provide free assistance of an interpreter when a defendant did not understand or speak the court's official language. They maintained that the first applicant had had a sufficient understanding of the Macedonian language and had most probably spoken it, as he had understood the accusations against the applicants and had presented his version of events. The Government averred that such inferences could be drawn from the minutes of the hearing: the trial court had understood and noted down his words. They submitted that he had, furthermore, answered the question put by the Ministry's representative; that he had worked in the Institute and that he had voluntarily provided interpretation for the second applicant which also called for inferences to be drawn as to his proficiency in understanding and speaking the Macedonian language. The Government accepted that the second applicant had not known of the language of the court, but it had been her decision not to have the assistance of an interpreter appointed by the court.

The applicants did not accept the Government's assertion that they had been instructed about their rights. They contended that the minutes of the hearing of 15 September 2003 had not set out these rights in detail, or even given their statements in reply. Relying on section 66 of the Criminal Proceedings Act (see "the Relevant domestic law" above), the applicants submitted that the second applicant should have had a legal counsel as she could not defend herself effectively. They maintained that the lack of legal representation, the lack of interpretation and the speediness with which the

trial court had considered their case served as *prima facie* evidence that they had been deprived of their right to self-defence. They furthermore stated that they had been under extreme duress when signing the minutes as they had been subjected to psychological pressure by the police and threatened with beatings and deportation if they refused to sign. In addition, they argued that for sixteen hours during the pre-trial interrogation and the trial proceedings, they had not been allowed to sit down; they had been refused food and water; and had been prohibited from using the toilet. They claimed that the waiver of the right to appeal was not valid as it had been given under extreme conditions of threat and duress. They argued that the trial court had not provided sufficient reasoning for its decision and that there had been no equality of arms as they had been prevented from requesting the examination of the taxi driver as a witness.

Concerning their right under Article 6 § 3 (b) of the Convention, they underlined that they had been brought before the court on the same day as their arrest. They had thus been given insufficient time to prepare the defence. Moreover, they alleged that they had been prohibited from bringing any vital evidence on their behalf before the court.

The applicants submitted that the national authorities had violated Article 6 § 3 (c), as they had failed to notify them of their right to legal aid and had refused their request for legal counsel, in particular as they had a limited command of the language of the proceedings. They claimed that they had requested permission to contact their lawyer while detained at the police station, but that police officers had prevented them from making any phone calls. They maintained that the lack of legal representation had prevented them from exercising the remedy of appealing the decision to which they had been entitled.

Concerning their complaint under Article 6 § 3 (e) of the Convention, the applicants stated that the right to an interpreter was absolute; that there had been no explicit reference in the minutes to the trial court's instruction about this right and their statement in reply (as required under section 7 of the Criminal Proceedings Act); that they had exhibited just a basic understanding of the circumstances of their case; that the first applicant had managed to speak some Serbian during the trial, but that he could not understand the Serbian legal terminology nor what had been dictated in the minutes exclusively in Macedonian; that they had been made to sign the minutes although they had not been translated or explained to them; that the first applicant's working language while employed with the Institute had been English and that accordingly, no inferences about his proficiency in Macedonian could be drawn. They argued that as the second applicant "spoke neither Macedonian nor Serbian", as accepted by the Government, she should have been provided with a court-certified professional interpreter, as required under section 7 § 4 of the Criminal Proceedings Act,

instead of relying on the first applicant who had not been linguistically equipped to fulfil that role.

b. The Court's assessment

The Court notes that the national rules provided for the rights complained of by the applicants (see sections 4 and 7 of the Criminal Proceedings Act, stated above). It would appear, therefore, that an alleged breach of these rights could be regarded as a proper ground for challenging the first-instance decision before the Court of Appeal (see sections 354 and 355 of the Criminal Proceedings Act, above). In addition, an appellate court would have full jurisdiction to review the case on questions both of fact and law, including the alleged violations complained of before the Court. Furthermore, it could make a full assessment of the question of the applicants' guilt or innocence (see, *mutatis mutandis*, *Ivanovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 21261/02, 29 September 2005). The appeal proceedings would have been therefore adequate to remedy any defects allegedly made at the first instance (see the reference at *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 66, ECHR 2000-II).

The Court observes that the applicants waived their right to appeal against the first-instance decision. The issue therefore arises whether or not they have exhausted domestic remedies within the meaning of Article 35 § 1 of the Convention. The Court needs nevertheless not resolve this matter since the applicants' complaints are in any event inadmissible for the following reasons.

The Court notes that the Government and the applicants submitted different versions of events. In order to establish the facts of the case, the Court considers that the minutes of the trial court's hearing of 15 September 2003, as the official record of events, is the starting point. As indicated in the minutes, the applicants “had been instructed about their statutory rights” as set forth in the Criminal Proceedings Act (see “Relevant domestic law” above) and the first applicant, on his own behalf and on behalf of the second applicant, presented the arguments in their defence in an understandable language. The applicants have not expressly objected to the contents of the minutes, except insofar as they claimed that they had not been informed about their rights. In addition, the applicants signed the minutes without making any comment or reservation that would confirm their allegations before the Court. They did not make any other remarks nor did they seek rectification, as they were entitled to under the national legislation (see “Relevant domestic law” above).

On the contrary, as indicated in the minutes, the applicants waived their right to appeal against the trial court's decision. They thus deprived themselves of the possibility to remedy alleged deficiencies at the trial level and, at the same time, put themselves in a position where they came to the

Court without the benefit of the domestic courts' consideration of their contentions, and with no any other evidence whatever to support their challenge to the minutes. The Court is not persuaded by the applicants' allegations that the waiver was made under extreme conditions of threat and duress by the police as – here too - they have failed to support their assertions by any evidence.

It follows that the applicants' complaints have not been substantiated. They are therefore manifestly ill-founded and the application must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to discontinue the application of Article 29 § 3 of the Convention;

Declares the remainder of the application inadmissible.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President