DURATION OF DETENTION IN THE LIGHT OF INTERNATIONAL STANDARDS, DOMESTIC LAW AND CASE LAW

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Abstract

The paper encompasses the detention as a measure that infringes upon the fundamental human right to personal freedom, from the aspect of international legal human rights instruments, the jurisprudence of the European Court of Human Rights, the legal acts of the Council of Europe and the EU, and the jurisprudence of the Constitutional Court and the Supreme Court of the Republic of Macedonia.

The authors identify and elaborate the basic principles of, and the preconditions for, the determination and duration of detention in European Convention law, as well as in the domestic legal order with special focus on the conditions for prolonging detention. Besides the substantive legal conditions for terminating detention, such as the cessation of the grounds for detention and the principle of proportionality, the terms of duration of detention for each stage of the procedure and in total for the entire procedure play an important role in limiting the duration of the alienation of freedom by way of detention.

Therefore, a signifi cant part of the paper is devoted to the resolution of contested issues concerning the calculation of the terms of detention in conformity with the provisions of the Criminal Procedure Act and the case law of the Republic of Macedonia.

Key words: detention, criminal procedure, duration, international standards.

Introduction

European Convention points to there being a presumption that everyone should enjoy liberty and that, therefore, a person can only be deprived of it in exceptional circumstances. Thus it begins with an unqualified assertion of the right, “Everyone has the right to liberty and security of the person” and this is followed by the structure that “No one shall be deprived of liberty save in the following cases and in accordance with a procedure prescribed by law”. Furthermore, the presumption in favour of liberty is underlined by the imperative requirement under Article 5 to ensure that liberty should both be lost for no longer than is absolutely necessary and be capable of being readily recovered where such loss is not justified.

The former is evident in the stipulation that suspected offenders “shall be entitled to trial within a reasonable time” and the latter is found in the prescription that everyone deprived of liberty “be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”. There is thus a clear burden of proof on those who have taken away someone’s liberty to establish not only that the power under

which it occurred falls within one of the grounds specified in Article 5 but also that its exercise was applicable to the particular situation in which it was used.

This burden necessarily requires a self-critical analysis by those who can exercise powers which may lead to a deprivation of liberty to ensure that, when they do use them, the limits imposed by Article 5 are continually observed. However, the assurance that such an analysis is both undertaken and is effective is heavily dependent upon a sceptical perspective being adopted on the part of judges when performing the key supervisory function assigned to them by Article 5 (3) and (4). In any case, where a deprivation of liberty is contested it will be essential for a judge to start from the proposition that the person affected should be free. Pursuant to such a proposition the judge should not only expect and require reasons to be advanced for this deprivation of liberty but also subject them to close scrutiny to see whether they actually support the action that has been taken. Anything less than that would entail an abandonment of the rule of law and a surrender to arbitrary treatment.

The length of Pre-Trial Detention

Article 5 (3) requires that deprivation of liberty pending trial should never exceed a reasonable time. The European Court held repeatedly that *continued detention may be justified in a given case only if there are clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty.*[55]

Moreover, the Court argued that the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain elapse of time it is no longer sufficient. The Court must then establish if the other grounds given by the judicial authorities continue to justify the deprivation of liberty. Where such grounds exist and are "relevant and sufficient", the Court proceeds to the next step, which is to ascertain if the competent authorities displayed "special diligence" in the conduct of the proceedings.[56]

The period of the detention considered by the Court runs from the moment of the arrest until the moment the person is released. If the person is not released during the trial, the period to be considered ends when the first instance court issues a decision (of acquittal or conviction). The period of detention following conviction by the trial court – for example during the appeal proceedings – is not taken into account. As the Court held, Article 5 (3) ceases to apply to detention following conviction by the trial court, which will be founded on the basis of Article 5 (1) (*a*).[57] However, if an appellate court quashes the first judgment and a new trial is ordered, the detention during the period between the quashing and the new judgment is also considered.[58] This does not mean that the period of sentence served until the initial judgment is quashed will be considered as pre-trial detention for the purpose of Article 5 (3).[59]

[55] Among others, Punzelt v. the Czech Republic.
[56] W v. Switzerland, Assenov v. Bulgaria and Punzelt v. the Czech Republic.
[57] *B. v. Austria*, 28 March, 1990.
[58] *Punzelt v. the Czech Republic.*
[59] *I.A. v. France.*

The period of the Detention

It should also be noted that the Court is competent to consider only the periods of detention following the ratification of the European Convention by the respondent State, although it will consider the extent of a deprivation of liberty prior to that moment in assessing whether or not what follows is reasonable.[60]

In determining what is "reasonable", the Court has never accepted the idea that there is a maximum length of pre-trial detention which must never be exceeded since this would involve an assessment *in abstracto* and a judgment must always take into account all the special features of each case.[61] It is worth bearing in mind the averages derived from comparative studies which were cited by Judge Pettiti in his dissent in *W v. Switzerland*. These were less than two or three months in general and less than a year with respect to economic offences and bankruptcies.

These figures may not be accurate for the enlarged Council of Europe but they are still likely to be a starting point for consideration of whether there are factors in a case that makes a much longer period of pre-trial detention unobjectionable. Furthermore, as the reasonableness guarantee in Article 5 (3) only applies to those deprived of their liberty, it is important to bear in mind that rulings of the Court as to reasonableness of the length of criminal proceedings under Article 6 (1) – which applies to all proceedings – should not be taken as a guide as to what is acceptable since the applicants will not always have been detained and more leeway might, therefore, be allowed to delay.

Any period, no matter how short, will always have to be justified. The Court's jurisprudence has proved the significance of the particular circumstances of a case. While periods in excess of a year were considered excessive,[62] periods between two and three years were found both acceptable and objectionable. A similar difference in the view can also be seen of periods between three and four years.[63] Periods beyond five years have not been found to be justified.[64]

Domestic Law

A domestic law providing for a maximum period of pre-trial detention would raise no problems of compatibility with the Convention. However, it would undoubtedly be a mistake to be guided by such a maximum since it is the particular circumstances of a case that will determine whether or not a reasonable time has been exceeded.

The cases in which longer periods have been found unobjectionable have tended to be the ones in which there have been difficulties caused by the complexity of the case, as a result of the

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[60] *Mansur v. Turkey*, *Trzaska v. Poland*, *Jėčius v. Lithuania* and *Kudla v. Poland*.

[61] *Stögmuller v. Austria*, *W v. Switzerland*, *Wemhoff v. the Federal Republic of Germany*. It is worth bearing in mind the averages derived from comparative studies which were cited by Judge Pettiti in his dissent in *W v. Switzerland*.

[62] *Jėčius v. Lithuania* (14 months and 26 days).

[63] Such a period was considered acceptable in *W v. Switzerland* (4 years and 3 days) but found objectionable in *Clooth v. Belgium* (3 years, 2 months and 4 days), *Muller v. France* (3 years, 11 months and 27 days), *Česk□ v. the Czech Republic* (3 years, 3 months and 7 days), *Trzaska v. Poland* (3 years 6 months), *Barfuss v. the Czech Republic* (3 years, 5 months and 19 days).

[64] *Birou v. France*, 27 February 1992 (5 years, 2 months and 27 days) (a friendly settlement); *I.A. v. France* (5 years 3 months) (in this case the justifications had, however, ceased to be effective long before the end of this period).

nature of the offence[65] and/or the number of potential suspects involved or the conduct of the accused person.

However, factors which make a case particularly complex can only justify the prolongation of a deprivation of liberty where the relevant authorities have actually shown “special diligence” in conducting the proceedings.[66] Many violations of Article 5 (3) are the result of long periods of inactivity in the handling of a case prior to trial,[67] or of delays caused by experts,[68] inadequate facilities or working practices,[69] staffing difficulties[70] and problems arising from the need to protect the identity of a witness.

Violations of Article 5 (3) will definitely be found in cases where the courts extend the pre-trial detention for long periods of time under the argument of severity of the sentence faced with full disregard of the pertinent facts, such as: the arrested person has a family and a stable way of life and after the passage of time any possible danger of collusion and absconding had receded. This was the case in *Ilijkov v. Bulgaria*, where the applicant spent three years and four months in pre-trial detention.[71] In addition, in this case, the Court held that the domestic findings – that there were no exceptional circumstances warranting the release of the applicant – were unacceptable and shifted the burden of proof to the detained person. The duty to prove the grounds for prolongation of the pre-trial detention stays with the authorities and not with the detained person.

In the complex cases, long periods of time were unobjectionable if the Court was satisfied that the investigators had carried out their inquiries with the necessary promptness and that no delay had been caused by shortages or personnel or equipment.[72] In such cases it can be particularly significant that a special unit has been created to deal with the case or that additional resources have been provided for existing ones expected to handle a case of an exceptional character; but above all it will be essential to demonstrate that the overall length of proceedings had been kept under review and that all possible efforts to expedite them had been taken. The exercise of such review and the encouragement of expedition will be a particular responsibility of the court when considering applications for release.

A suspect is not considered by the Court to be under any obligation to co-operate but his conduct in not doing so will be recognised as a factor in slowing the overall progress of an investigation. Lack of cooperation, as well as actual obstruction, will thus also be considered in

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[65] This will be particularly true of offences involving fraud but it will apply to any which entail a large volume of documentation and many witnesses. For example, *W v. Switzerland*, 26 January 1993 (an extensive fraud involving the management of sixty companies).

[66] Although this is required in all cases, the Court saw it as particularly important in *Assenov v. Bulgaria*, 28 October 1998, where a minor was involved.

[67] *Assenov v. Bulgaria*, where there was virtually no activity for a year; *Punzelt v. the Czech Republic*, where the trial court did not deliver its second judgment until ten months after the first one had been quashed; *Barfuss v. the Czech Republic*, where was no explanation – other than that the case was complex – for an 11-month gap between being remanded in custody and being charged, as well as a further eight months' delay between the quashing of a decision ordering further investigations and the first substantive hearing of the case.

[68] Generally the failure to submit a report within the deadline set; see *Clooth v. Belgium*.

[69] *Assenov v. Bulgaria*, where the Court held that time was unnecessarily lost as a result of the investigation's being effectively suspended every time the applicant lodged an appeal for release because of the practice of sending the original file rather than a copy of it to the relevant authority.

[70] *Stögmuller v. Austria*, in terms of the level being adequate; *Clooth v. Belgium* and *Muller v. France*, the change in persons responsible for a case arising from promotions, reassignments and retirements; *Trzaska v. Poland*, where proceedings came to a standstill for nine months when the composition of the court had to be changed after the judge rapporteur fell ill.

[71] *Clooth v. Belgium*, 26 July 2001.

[72] For example, *W v. Switzerland*.

assessing whether or not the total tention in order to ensure the proper conduct of the trial – failed to consider any alternative “preventive measure” such as bail or police supervision. period of pre-trial detention is excessive.[73]

In any event no reliance can be placed on allegedly obstructive conduct to excuse the length of pre-trial detention that has already become unreasonable.[74] In *Jablonski v. Poland*,[75] the domestic courts extended the applicant’s detention beyond the statutory time-limit (three years) because he had previously inflicted injuries on himself and had thus obstructed the progress of the trial. The European Court found a violation of Article 5 (3), arguing that the national courts – when they decided that the applicant should be kept in de- tention in order to ensure the proper conduct of the trial – failed to consider any alternative “preventive measure” such as bail or police supervision.[76]

Conclusion

Convention established a legal requirement upon the executive and the judiciary to act in respect with the Convention and to construe the Common Law in line with these laws. The Convention ought to be seen with respect and should be implemented with the same principles and spirit which founded the Common Law. It is an opportunity to apply basic fair trial principles from another perspective, namely the European Union.

Laws that deal within a reasonable judgment in the Republic of Macedonia not only guarantee but also create other prerequisites for realizing this right even if it is breached. This is the result of increasingly high efforts to limit unnecessary delay. But taking into consideration the legal time controlled by the courts, laws present the clock and the courts are its hands. This means that the laws are necessary, but courts are even more necessary because they apply laws. How do things function here in Macedonia? There is no law for disciplining of judicial time. Judicial practice relies on the decisions of the Strasbourg Court, which is considered as a confirmed source of law for us. But whether the courts apply it or not it remains a big question mark. This article is closed with an expression of Shakespeare that says:,, How does the world move? , the painter responds:" It wears,sir, as it grows ". The world is consumed and it has no time to expect a delayed justice.

References

1. R Clayton, H Tomlinson, *The Law of Human Rights* (Oxford University Press, Oxford, 2000).
2. S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, Cambridge 2006).
3. DJ Harris, M O’Boyle, C Warbrick, *Law of the European Convention on Human Rights* (2nd ed., Butterworths, London, 2007).

[73] *W v. Switzerland*, where the applicant refused to make any statement to those investigating a fraud arising out of his management of sixty companies.
[74] *Stögmuller v Austria*.
[75] 21 December 2000.
[76] Macovei, M., The right to liberty and security of the person, Council of Europe, Strasbourg, 2002.

4. Davor Krapac, Kazneno procesno pravo, II izmenjeno i dopunjeno izdanje, Zagreb, 2003.
5. *Janis, M. W., Kay, R. S., Bradley, A.:* European Convention on Humman Rights, New York: Oxford University press, 2000.
6. Krapac, D., Kambovski, V., Kajalxhiev, G., Buzharovska, G., "Strategjia për reforma në të drejtën penale", Skopje: Ministerstvo za pravo, 2007.
7. Kajalxhiev, G., "Apsenjeto i zdruzhuvanjeto i pravata na osomnicenite vo Republika Makedonija", Balkan Yearbook of Human Rights, Police and human rights in the Balkans, part II, 2002.
8. Makovei, M., "The Right to Freedom and Security of the Elder", Guide to the Implementation of Article 5 of the European Convention on Human Rights, 2001.
9. Матовски, Н., Бужаровска, Г., Кајалџиев, Г., Казнено процесно разово, того изменето и дополнето издание, Скопје, Академик, 2011.
10. Law of Criminal Procedure the Republic of Macedonia (Official Gazette of RM, no.150, 18.11. 2010).