

REOPENING OF CIVIL PROCEEDINGS FOLLOWING A JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN REPUBLIC OF NORTH MACEDONIA

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Abstract

The reopening of civil proceedings is an extraordinary legal remedy, which is made after the national court decision has become final on grounds specifically provided in the Law on civil proceedings. The Republic of North Macedonia successful implementation of the Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the reexamination or reopening of certain cases at domestic level following judgments of the European Court of Human Right in the new Law on civil proceedings adopted in 2005, in article 400, provided the opportunity to reopen civil proceedings following a final judgment of the European Court of Human Right when the European Court of Human Rights confirmed a violation of certain human right or of fundamental freedoms guaranteed in the Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols, ratified by the Republic of North Macedonia.

The objective of this paper is to analyze the reopening of civil proceedings following a judgment of the European Court of Human Rights in Republic of North Macedonia, according to the Law on civil proceedings, as a means of ensuring restitution in integrum, to clarify the scope of the obligation to adopt such a measure, its implementation in the practice of the courts and its limitations.

Keywords: retrial, law on civil proceedings, case law, recommendation

1. Introduction

The European Convention on Human Rights¹ (ECHR) is an international human right treaty composed of 47 states² that are members of the Council of Europe³. The creation of the ECHR led to the establishment of the European Court of Human Rights (ECtHR)⁴. It was set up in 1959 and is based in Strasbourg, France. It rules on individual or State applications alleging

¹Formally the Convention for the Protection of Human Rights and Fundamental Freedom. The Convention entered into force on 3 September 1953. https://www.echr.coe.int/Documents/Convention_ENG.pdf

² The human rights convention protects the rights of more than 830 million people in Europe. All 47 Council of Europe member countries have signed up to the European Convention on Human Rights (ECHR), a treaty designed to protect people's human rights and basic freedoms.

More: <https://www.coe.int/en/web/impact-convention-human-rights/how-it-works>

³<https://www.coe.int/en/web/portal>

⁴ According to the article 19 of the ECHR (Establishment of the Court) To ensure the observance of the engagements undertaken by, the High Contracting Parties in the Convention and the Protocols there to, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

violations of the civil and political rights set out in the ECHR⁵. Since 1998 it has sat as a full-time court and individuals can apply to it directly.

The Republic of Macedonia ratified the ECHR on 10 April 1997. At the same time, the Republic of Macedonia has ratified Protocols No.1,2,3,4,5,6,7,8,11,12,13,14 to the Convention. On 16 June 2016, the Republic of Macedonia ratified Protocol No. 15, which has not yet entered into force.⁶

The member states have undertaken obligation to comply with final judgments of the ECtHR finding violations of the ECHR, as well as with Court decisions taking note of friendly settlements⁷. The adoption of the necessary execution measures is supervised by the Committee of Ministers of the Council of Europe.⁸ The measures might relate to the individual applicant or they can also have general nature.

The first type of measures, such as individual measures, concerns the applicants. They relate to the obligation to erase the consequences suffered by them because of the violations established so as to achieve, as far as possible, *restitutio in integrum*. The second type of measures, such as general measures, relate to the obligation to prevent violations similar to that or those found or to put an end to continuing violations. In some circumstances they may also concern the setting up of remedies to deal with violations already committed. The obligation to take individual measures may be taken in two different ways: the first is to pay any just satisfaction (normally a sum of money) that the Court may have awarded. The consequences of the violation for the applicant are, however, not always adequately remedied by the Court's award of money or the finding of a violation. It is here that a further aspect of individual measures intervenes. Depending on the circumstances, the basic obligation of achieving, as far as possible, *restitutio in integrum* may thus require further actions involving, for example, the reopening of unfair criminal proceedings, the destruction of information gathered in breach of the right to privacy, the enforcement of an unenforced domestic judgment or the revocation of a deportation order issued despite a real risk of torture or other forms of ill-treatment in the country of destination.⁹

The Convention does not contain any provision which would require that the State Parties provide the possibility for retrial or reopening of the case. Even the Court itself noted in one of the cases that "the Convention does not give it jurisdiction to direct [French] State to open a new trial"¹⁰. On the other hand, there is also no provision that explicitly forbids a retrial.

⁵The Convention secures in particular: the right to life, the right to a fair hearing, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion and, the protection of property. The Convention prohibits in particular: torture and inhuman or degrading treatment or punishment, slavery and forced labor, death penalty, arbitrary and unlawful detention, and discrimination in the enjoyment of the rights and freedoms set out in the Convention.

⁶On 21 April 2021, Italy deposited its instrument of ratification of Protocol No. 15 amending the European Convention on Human Rights (ECHR), thereby bringing the Protocol into force for all CoE member states with effect from 1 August 2021.

⁷ See Articles 46 and 39.4 of the ECHR.

⁸ The Committee of Ministers of the Council of Europe is made up of representatives of the governments of the 47 Member States, assisted by the Department for the Execution of Judgments of the Court (Directorate General I of Human Rights and Rule of Law).

⁹https://www.echr.coe.int/Documents/Anni_Book_Chapter05_ENG.pdf

¹⁰*Saïdi v. France*, 20 September 1993, § 47 Series A no. 261-C

The Committee of Ministers issued a specific recommendation¹¹ to member States in 2000 inviting them to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum* and, in particular, ‘adequate possibilities of reexamination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention especially where: the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and the judgment of the Court leads to the conclusion that the impugned domestic decision is on the merits contrary to the Convention, or the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

In Republic of North Macedonia, the Law on civil proceedings adopted in 2005, in article 400, provided the opportunity to reopen civil proceedings following a final judgment of the ECtHR when the ECtHR confirmed a violation of certain human right or of fundamental freedoms guaranteed in the ECHR and its additional protocols, ratified by the Republic of Macedonia.

2. The reopening of civil proceedings following a judgment of the ECtHR in Republic of North Macedonia according to the Law on civil proceedings

Recommendation no. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgment of the European Court of Human Rights had been addressed in the Macedonian legislation. Namely, the Law on civil proceedings¹² in article 400, for the first time in the history of the Macedonian civil procedural law, provided the opportunity for reopening a civil proceedings following a final judgment of the ECtHR when the ECtHR confirmed a violation of certain human right or of fundamental freedoms guaranteed in the ECHR and its additional protocols, ratified by the Republic of Macedonia.

The party (applicant) can, within 30 days from the day on which the judgment of the ECtHR became final, submit a request to the court in the Republic of Macedonia that had adjudged in the first instance proceedings wherefore the decision violating some human right or fundamental freedom is adopted, to amend the decision violating such right or fundamental freedom.

The provisions on repeating the procedure shall accordingly apply to the procedure of reopening civil of proceedings following a judgment of the ECtHR¹³. In the retrial, the courts are obliged to comply with the legal stances adopted in the final judgment of the ECtHR finding the violation of a fundamental human right or freedom.

The request for reopening of the civil proceedings following a judgment of the ECtHR shall always be submitted to the court having rendered the decision in first instance. The request, in particular, contains the basis, on which the reopening is requested, the circumstances from

¹¹Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights, (Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06

¹²Law on civil proceedings (“Official Gazette of the Republic of Macedonia” nos. 79/2005)

¹³ The procedure of reopening a civil proceeding following a judgment of the European Court of Human Rights is regulated in article 395-399 of the Law on civil proceedings and it the same procedure that applies on reopening of civil proceedings in general due to the reasons stated in article 392 of the Law on civil proceedings.

which it follows that the request has been submitted within the statutory time limit, and evidence corroborating the party's allegations. This means that the applicant must submit the final judgment of the ECtHR in which it is confirmed a violation of certain human right or of fundamental freedoms guaranteed in the ECHR and its additional protocols, ratified by the Republic of Macedonia within 30 days from the day on which the judgment of the ECtHR became final.¹⁴

After the request has been received, the single judge, i.e. the President of the Chamber firstly decides whether the request for reopening is submitted timely, whether it is completed and admissible. If it is not submitted on time, if it is incomplete or inadmissible, the single judge, i.e. the President of the Chamber without holding a trial will have dismissed it. If the single judge, i.e. the president of the Chamber does not dismiss the request, he will serve a copy of the request to the opposing party. The opposing party has the right to provide his or her answer to the request within fifteen days. When the court receives the response to the request or when the period for responding expires, the single judge, i.e. the President of the Chamber will schedule hearing to hear the request.

After the hearing on the request has been held, the single judge or the President of the Chamber of the court of first instance will make a decision about the request, except when the reason for reopening relates solely to proceedings before a higher court. In the ruling by which reopening is allowed, it shall be stated that the decision made in the previous trial shall be abolished. The single judge or the President of the Chamber will schedule a trial only after the ruling by which reopening is granted has become legally effective. However, in that ruling the President of the Chamber may decide that the hearing on the merits shall commence immediately.¹⁵ At a new trial the parties may present new facts and offer new evidence.

If the reason for reopening relates solely to the proceedings before a higher court, the single judge or the President of the Chamber of the court of first instance, after the hearing on the request, will forward the record to that particular higher court in order that it may make a decision. When the record arrives at the higher court, it shall be acted in accordance with the provisions of Article 351 of the Law on civil proceedings. The court shall decide on the request for reopening without holding a hearing.

When the higher court establishes that the request for reopening is justified and that it is not necessary to hold a new trial, it shall abolish its own decision, as well as the decision of the higher court, if any, and make a new decision on the merits.

¹⁴In addition, we can conclude that the Macedonian legislation i.e the article 400 of the Law on civil proceedings does not provide the opportunity to the applicant to request reopening of the proceedings following a friendly settlements or unilateral declarations. The article 400 of the Law on civil proceedings does not clearly states that, the request for reopening of civil proceedings may be submitted, only on the basis on a final judgment of the ECtHR in which it is confirmed a violation of certain human right or of fundamental freedoms guaranteed in the ECHR and its additional protocols, in a same or similar legal matter with the one for whom the application had been submitted and the judgment rendered. This means that party can request reopening of the civil proceedings based on final judgment of the ECtHR concerning another (third) party if legal matter and the violation of certain human right or of fundamental freedoms in the hers proceedings are in accordance with one confirmed in the final judgment of the ECtHR (More in: Markoska, J. (2014) The final judgment of the European Court of Human Right as reason for reopening civil proceeding in the in the practice of courts in the Republic of Macedonia, Master thesis. Skopje, Republic of Macedonia: Ss. Cyril and Methodius University Skopje, Faculty of Law Iustinianus Primus Skopje, Page 30-31)

¹⁵No separate appeal shall be allowed against the ruling by virtue of which retrial is granted if a single judge or the President of the Chamber has decided that a hearing on the merits shall commence immediately. If a single judge or the President of the Chamber has granted reopening and decided that a decision on the merits shall be made immediately, or if the request for reopening was heard jointly with the merits, the ruling by which retrial is granted and the decision rendered in the previous proceedings is abolished shall be included in the decision on the merits.

3. The reopening of civil proceeding in the Macedonian jurisprudence

There are numerous examples in the Macedonian jurisprudence where applicants have requested a reopening of the civil proceedings under the article 400 of Law on civil proceedings¹⁶. It is necessary to be emphasized the fact that final judgment of the ECtHR does not have impact to the national legislation but through national legislation it can impact the jurisprudence of the national courts because as such they became sources of law, as is stated above in Law on civil proceedings in the retrial the courts are obliged comply with the legal opinions stated in the judgment of the ECrHR confirming the violation of the fundamental human rights and freedoms. This provision does not comply with provisions of the Law on courts which states that the courts shall decide and establish their decisions on the basis of the Constitution, laws and international agreements ratified in accordance with the Constitution.¹⁷

The analysis of in the Macedonian jurisprudence shows that there are cases where the question arises as to when the deadline of 30 days for the submission of the request by the party begins to run. Although it is clearly stated in the Law on civil proceedings that the time limit is 30 days from the day on which the judgment of the ECtHR became final, the domestic courts in the case of *Bajaldžiev v. the former Yugoslav Republic of Macedonia*, no. 4650/06, 25 October 2011 the court was not sure whether the time-limit should begin to be considered from the moment the applicant found out about the finality of the judgment or from the finality of the judgment itself. However, in the end the second-instance court closed this dilemma by affirming that the deadline should begin to run from the finality of the judgment, not from the moment the party found out about the finality of the judgment¹⁸. According to, the article 44 of the ECHR, the judgment of the Grand Chamber shall be final. The judgment of a Chamber shall become final: when the parties declare that they will not request that the case be referred to the Grand Chamber; or three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or when the panel of the Grand Chamber rejects the request to refer under Article 43. The final judgment shall be published. The HUDOC¹⁹ database provides access for everyone to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).

Another question that had arisen is whether the applicant can request reopening of the proceedings following friendly settlements? In the determination Gdz. No.3753/12 from 13.12.2012 of the Appellate Court Bitola, the Appellate Court Bitola stated that the friendly

¹⁶In the research we used documents' analysis and qualitative method. The documents were collected from web page of the Judicial Portal of Republic of North Macedonia (<http://sud.mk/wps/portal/osskopje2/sud/odluki/>), advanced search, type of case: civil cases, keyword Article400of Law on civil proceedings. We only analyzed three specific civil cases where the courts had dilemmas in implementation of article 400 of the Law on civil proceeding, because the procedure of reopening a civil proceeding following a judgment of the European Court of Human Rights is regulated in article 395-399 of the Law on civil proceedings and it the same procedure that applies on reopening of civil proceedings in general due to the reasons stated in article 392 of the Law on civil proceedings.

¹⁷ See more, article 2 of Law on courts, ("Official Gazette of the Republic of Macedonia" nos. 58/2006, 62/2006, 35/2008, 150/2010, 83/2018, 198/2018and "Official Gazette of the Republic of North Macedonia" no. 96/2019).

¹⁸Cuculovska, I. Reopening of the domestic civil proceedings following a judgment of the European Court of Human Rights, Legal dialogue, No, 11, Institute for human rights, p. 28.

¹⁹<https://hudoc.echr.coe.int/eng#%7B%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%7D>

settlement is not considered to be final judgment of the ECtHR in which is confirmed a violation of certain human right or of fundamental freedoms guaranteed in the ECHR, a so it cannot be base under which the applicant can request reopening of the civil proceedings²⁰.

The Basic civil court Skopje in the determination RO No.612/14 had refused the plaintiff's request for reopening of the proceedings in the case no. XIII.P.893/01-new number 210/2008 because the reasons under section 392 of the Law on civil proceedings had not been fulfilled so that the plaintiff can request a reopening of the proceedings. The court found that the facts on which the plaintiff his request for reopening, and the same supports with the evidence, judgment of the ECtHR, are none of the frame of the points 1 to 10 of Article 392 paragraph 1 of the Law on civil proceedings, and are not provided as a legal ground on which a reopening of proceedings can be required.

In the determination of the Appellate Court Skopje ROzd No.1164/14, the Appellate Court Skopje, had approved the applicant's appeal, dismissed the determination RO No.612/14 of the Basic civil court Skopje. It had stated that the first - instance court had not having regard to the fact that the plaintiff had submitted a request to reopen the proceedings pursuant to Article 400 of the Law on civil proceedings, so it is not clear on what basis the first instance court has established court that there are no conditions for reopening the proceedings without assessing whether the requirements of article 400 of the Law on civil proceedings are fulfilled.

In this case the Appellate Court Skopje gives an answer to the question whether the final judgment of the ECtHR is a separate reason for reopening a civil proceedings or it has been in correlation with the reasons stated in the article 392 of the Law on civil proceedings? In the opinion of the court, in the case, the circumstances of which could be ascertained with certainty remained uncertain whether there are conditions, i.e. whether the legal assumptions are fulfilled prescribed by the cited provision of article 400 of the Law on civil proceedings, to apply it as in the present case, and which is justified in the appeal of the plaintiff. This means that the court states that the final judgment of the ECtHR is a separate reason for reopening civil proceedings and does not have to be in correlation with the reasons stated in the article 392 of the Law on civil proceedings.

In the end we can see that the article 400 of the Law on civil procedure has one limitation. It can also be noted that the legislator has conditioned the court to reopen the civil proceedings and to amend the court's decision violating the applicant's human rights and freedoms. This needs to be changed in the future because the reopening of the proceedings does not always necessarily mean that the court in the new proceedings has to amend its decision. The judges should have the freedom to decide whether the violation of certain human right or of fundamental freedoms will also lead to a substantial change in the court's decision in the present case.

4. Conclusions

In Republic of North Macedonia, the Law on civil proceedings which was adopted on 2005, in article 400, provided the opportunity, that the party can request reopening of civil proceedings following a final judgment of the ECtHR when the ECtHR confirmed a violation of certain human right or violation of a certain fundamental freedoms guaranteed in the ECHR and its additional protocols, ratified by the Republic of Macedonia. The party (applicant) can, within 30 days from the day on which the judgment of the ECtHR became final, submit a request to the court in the Republic of Macedonia that had adjudged in the first instance proceedings wherefore the decision violating some human right or fundamental freedom is adopted, to amend the decision violating such right or fundamental freedom. The Macedonian

²⁰ More in determination Gdz. No.3753/12 from 13.12.2012 of the Appellate Court Bitola.

legislation i.e. the article 400 of the Law on civil proceedings does not provide the opportunity to the applicant to request reopening of the proceedings following a friendly settlements or unilateral declarations. The final judgment of the ECtHR is a separate reason for reopening a civil proceeding and does not have to be in correlation with the reasons stated in the article 392 of the Law on civil proceedings.

Appendix

List of cases

ECrHR

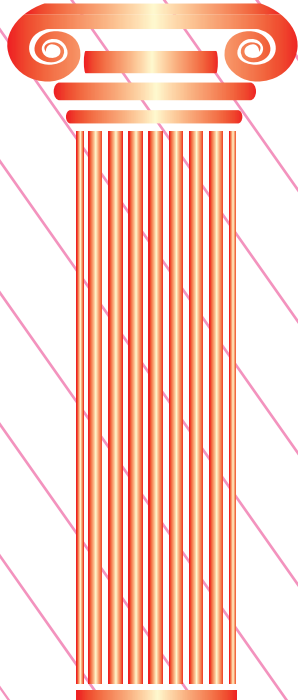
Bajaldžiev v. the former Yugoslav Republic of Macedonia, no. 4650/06, 25 October 2011
Saïdi v. France, 20 September 1993, § 47 Series A no. 261-C

National courts

Determination of the Appellate Court Bitola Gdz. No.3753/12 from 13.12.2012
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