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IN THE BALKAN COUNTRIES**

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DETENTION - ANALYSIS OF THE DOMESTIC AND INTERNATIONAL LEGISLATION (THEORY AND PRACTICE)

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Abstract

This paper elaborates the key role of detention in criminal proceedings and provides guidance for its successful application in accordance with the domestic and international legal standards and human rights. Furthermore, it emphasizes the importance of the implementation of other measures to ensure defendant's presence and successful criminal case (hereinafter referred as alternative measures).

The way in which analysis of detention is applied in North Macedonian judiciary, indicates significant deficiencies in decisions ordering and continuation of this measure expressed by inadequate explanations of the legal grounds. Namely, the conclusion is that the explanations are stereotyped, non-individualized and include a retelling of the legal text of the Law on Criminal Procedure. Inescapable impression is that the approach of judges when assessing which measure to be enforced, often begins and ends with detention, instead first evaluating the possibilities afforded by other provisions of the criminal procedural legislation and which do not lead to strictly limiting the freedom of the defendant, but they mean imposing injunctions, restrictions or obligations.

The practice applied in the field of detention in North Macedonia is very common in the context of public arrests of subjects. Entities taken into custody are considered guilty since the beginning, and it is forgotten they are innocent until proven otherwise. In terms of the new law on criminal procedure, the presence of three key UNITS in deciding detention is highlighted, and those are: primary suspicion for committing a crime, explaining the grounds for granting custody and explaining why any alternative measures are not implemented. Combining alternative measures can bring results, but unfortunately in North Macedonia it is not used. Finally, this paper underlines that there must be relevant and specific

reasons before adoption of detention, and not making exceptions and emphasizing exaggerated and misused role of the media in the act of arresting.

INTRODUCTION

What is detention? Detention is a measure of procedural coercion whereby due to the unobstructed criminal procedure interferes with the right to freedom and human security. It is manifested by limiting the right to freedom of movement, freedom of communication and the right to family life, through detention of an accused (*d.e jige* innocent) person for a committed crime usually in detention rooms.

Why detention is applied? This measure serves as an aid to ensure the presence of the accused before a competent court in the criminal proceedings against him. It is also a safety element that the defendant will not hamper the proceedings (e.g. work of the investigators) concerning the case in any way, nor will it affect the evidence or witnesses. Furthermore, this measure is applied in order to prevent the risk of further criminal conduct of the accused.¹

Detention is not the only measure that can ensure the presence of the accused in front of the court and successful procedure. The Republic of North Macedonian and the international law allow a range of other measures that can be applied to achieve the same goal. These measures do not lead to restriction of freedom, but consist of imposing special obligations, restrictions or prohibitions, are more humane and cost effective, can be combined in order to ensure an unobstructed criminal proceedings, have a certain duration or a certain amount and also allow special control for compliance obligations, restrictions and prohibitions of the assigned person.

However, when it comes to efficiency in achieving the objectives of the measures for ensuring the presence and successful conduct of the proceedings, detention takes the first place. The easiness by which the detention is adopted leads to a conclusion that, at times, severity is being forgotten, cruelty and uncertainty that detention incorporates, and financial resources needed for its implementation. The right to liberty and personal security is beneficiary of protection in constitutional law, international law on human rights and within the procedural laws of the penalty area. With

¹ Gordana Buzarovska, Margarita Caca Nikoloska, Agim Miftari Jani tation; Manual for application of detention, the Association of Judges of the Republic of North Macedonia, 2009.

detention some of the fundamental human rights and freedoms guaranteed by the domestic and international rules are inevitably suspended.²

DOMESTIC AND INTERNATIONAL LEGISLATION

Article 12 of the Constitution of the RNM (as amended by Constitutional Amendment III) provides that the freedom of man is inviolable and it cannot be restricted, except by court decision or in cases and procedures determined by law. Court decides for the legality of their detention, without any delay. After indictment, detention is rendered or continued by a competent court and the detainee may, under conditions prescribed by law, be released on bail.

The detention may be determined only under the conditions set out in the Criminal Procedure Code (CPC).³ The possibility of North Macedonian courts to order detention, is allowed in Article 144 of the CPC chapter XVI along with other "measures to ensure the presence of the defendant and successful conduct of criminal proceedings."

Current Code of Criminal Procedure appoints alternative measures for detention in Articles 145 - 163. Measures which can be taken against the defendant **for securing his presence and for the unobstructed implementation of the criminal procedure** are subpoena, precautions, guarantee, arrest, permanent detention, house arrest and detention. When deciding which measure to be applied, the competent authority shall comply with the requirements established for the implementation of certain measures, taken into account not applying more severe measure, if the same objective can be achieved with a more lenient. Court can simultaneously order the defendant several measures under paragraph (1) of this Article, except when it orders detention.

These measures will be revoked ex officio when the legal conditions for the application of the measures will either end or be replaced with another measure when there are conditions for it. If the defendant fails to comply with certain measures for ensuring his presence, the court may determine other measures for ensuring defendant's presence. The defendant has the

² Fundamental civil and political rights and freedoms, analysis of monitored court proceedings for the period from 01.09.2013 to 30.06.2014, Skopje, July 2014.

³ CCP R. North Macedonia 18.10.2010.

right to inform the family or other close person for the apprehension, arrest and detention.⁴

Regarding the duration of detention, it must be reduced to the shortest necessary time. The duty of all authorities that participate in the criminal proceedings and the entities that provide legal assistance, is to act with particular urgency if the defendant is in custody. When deciding for detention, especially for its duration, special account shall be taken for proportionality between the severity of the crime committed, the punishment that can be expected according to the information available to the court and needs for determination and duration of the detention. Detention shall be revoked as soon as the grounds on which it was determined cease.⁵

CCP⁶ set strict conditions which the court must comply in cases where a decision for detention is adopted.

Namely, the first condition is the existence of reasonable suspicion that the accused committed the crime. Once existence of reasonable doubt is established and decision for investigation is made, the court may order the accused **to be detained under the following legal bases:**

- ❖ is hiding, if it is unable to determine his identity or if there are other circumstances indicating an escape possibility;
- ❖ there is a justified fear that he would hide, forge or destroy evidence of the crime or if particular circumstances indicate that he will hinder the criminal proceedings by influencing the witnesses, accomplices or conspirators;
- ❖ special circumstances justify the fear that he will repeat the criminal offense or complete the attempted crime or commit a crime which he threatens with or
- ❖ subpoenaed defendant obviously avoids appearing at the main hearing, or if the court made two attempts to properly subpoena the defendant, and all the circumstances show that the defendant apparently refuses to accept the invitation.

⁴ CCP R. North Macedonia Art.144 paragraph 1,2,3,4 and 5.

⁵ CCP R. North Macedonia, Art. 164 (ordering detention)

⁶ CCP R. North Macedonia Art. 165 (grounds for adopting detention)

The court orders detention at the preliminary procedure in written and elaborated proposal by an authorized plaintiff and only on grounds listed in the proposal by the authorized plaintiff.⁷

Law on Criminal Procedure determines a series of precautions in order to achieve the objective set out in Article 144, paragraph 1.

- ❖ a prohibition against leaving the residence or temporal residence;
- ❖ defendant is obligated to report occasionally to a specified official or a competent state authority;
- ❖ temporary seizure of passport or other document for crossing the state border, i.e. ban for its issuance;
- ❖ suspension of driving license, or a ban for its issuance;
- ❖ a ban for visiting a particular place or area;
- ❖ a ban for approaching or establishing i.e. maintaining contacts or relations with certain persons and
- ❖ a ban for undertaking certain work activities related to the crime.

Precautions may last as long as necessary, at the latest until the judgment becomes final. Every two months court ex officio, evaluates the need for duration of the precautionary measure and it can also be canceled before the deadline referred to in paragraph 2 of this Article, if it no longer required or if there are no legal grounds for the application. Precautions, upon proposal by the public prosecutor during the investigation procedure, are determined by the Judge of the previous procedure, and after indictment enters into legal force or after the submitting the prosecution proposal until the final verdict, the court before which the proceedings are conducted.⁸

On 17th of April 1997 North Macedonia by law ratified the European Convention on Human Rights - ECHR of 17 April 1997 and thus it became legally valid. According to Article 1 of the ECHR, the Republic of North Macedonia took the responsibility for respect and protection of human rights and freedoms of all persons under its jurisdiction.

ECHR is considered to be a source of law taking into account the constitutional provisions of the Republic of North Macedonia (Article 118), and it can be applied directly whenever circumstances allow and indirectly, through the incorporation of its standards into domestic legislation through

⁷ CCP R. North Macedonia Art 166 (authority for detention during the preliminary procedure)

⁸ CCP Republic of North Macedonia Art. 146, 3. Precautions, types of precautions.

the implementation of the decisions of European Court of Human Rights (ECHR) by comparative principle of study and eventual implementation of the decisions of the ECHR, related to other countries, where certain situations allow it.

Similarly, Article 5 of the European Convention on Human Rights provides that everyone has the right to liberty and security, and no one shall be deprived of liberty except by virtue of law. a. the lawful detention of a person after conviction by a competent court; b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him. 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. 4. Everyone who is deprived of his liberty by arrest or detention shall 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. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation. All these rights are guaranteed and regulated in detail both by the previous Law on Criminal

Procedure⁹ (which still applies to proceedings commenced before December 1, 2013), and through the new Law on Criminal Procedure (CCP).¹⁰

ILLEGAL PRACTICE OF DETERMINATION AND CONTINUATION DETENTION

In determination and continuation of detention, particularly worrying are abovementioned reasons, even when it has not met the legal preconditions. The increased number of convictions of the ECHR in Strasbourg indicate many problems when applying this least preferred measure. Their lawyers are being suggested to file complaints of decisions for detention, because by filing a complaint defendant lose the right for applying to the Court. An example for it was the case with the journalist Kezarovski, when in the initial stage was assigned a lawyer *ex officio*, who did not appeal to the detention decision and thus lost the right to submit an application.

This was especially noted in the case M. Sh. and others K.br.23 / 14 of the Basic Court Skopje 1. After arresting the other defendants of the case, M. Sh. was in the United States and was determined to face charges, voluntary and traveled to North Macedonia early, and when he was arrested in Austria did not request extradition, which ruled out possibility of escape. At that moment he was not authorized person in the company, where has allegedly been committed a crime and there was no possibility to repeat or complete the offence, and the danger of influencing witnesses was minimal because the investigation was in an advanced stage and they were already heard by the investigating judge. Possible influence on witnesses could have been prevented also by mitigated by determining a milder alternative measure (ex. house-arrest). Nevertheless, the detention was repeatedly extended, and M.SH. had spent over 8 months there.¹¹

⁹ Official Gazette of Republic of North Macedonia "No.15 / 1997; 44/2002; 74/2004; 83/2008;

¹⁰Fundamental civil and political rights and freedoms, analysis of monitored court proceedings for the period from 01.09.2013 to 30.06.2014 Skopje July 2014 Helsinki Committee for Human Rights in the Republic of North Macedonia. Page 21, 22.

¹¹Fundamental civil and political rights and freedoms, analysis of observed court proceedings for the period from 01.09.2013 to 30.06.2014 Skopje July 2014 Helsinki Committee for Human Rights in the Republic of North Macedonia. Pages 21, 22

In the observed proceedings, where more persons appeared as defendants, it was established that judges still determine and continue detention by collective solutions. Although in determining there is evident progress (judges in separate passages refer to each defendant individually), the practice of collective continued the detention of a group of defendants whose names are mentioned persists, but not individual review of the reasons for which each defendant's detention is continued. This is contrary to the case law of the European Court of Human Rights which ruled against Republic of North Macedonia Vasilkoski and others against the Republic of North Macedonia in 2010 and Miladinov and others against the Republic of North Macedonia in 2014.¹² In the first decision the Court stated "confirming the applicants' detention (...) the domestic courts constantly repeated the same formula using identical words. It appears that they had taken very little into account, if any at all, for the individual circumstances of each applicant, as their detention has been continued by collective detention orders. The Court has already found by the practice of issuing collective detention orders to be incompatible with Article 5 paragraph 3 of the Convention, if it allows continued detention of a group of people without individual assessment of the grounds of detention in respect of each member group."¹³

In the case T.K. and others KOK.no.51/13 of the Basic Court Skopje 1 adoption of the decisions to continue the detention against T.K., Court conducted the proceeding in a manner contrary to the European Convention on Human Rights and the practice of the European Court of Human Rights. Namely, there were committed substantive and procedural violations regarding the evaluation and argumentation of the necessity of detention continuation by the Basic Court Skopje 1 and failure to act on the appeal by the Court of Appeal in Skopje. In this case the detention was also continued collectively, without individual assessment of the grounds for each defendant. Decisive arguments in decisions which continued detention of eight defendants were stated on one page only.¹⁴

The judges in Strasbourg advise that the seriousness of the offenses should be taken into account, before assigning the most severe measure -

¹² Applications no. 46398/09, 50570/09 and 50576/09, Strasbourg, 24 April 2014

¹³ Application no. 28169/08, Strasbourg, 28 October 2010, paragraph 63.

¹⁴ Ibid.

custody. Cases of Mitrevski¹⁵, Stojanovski¹⁶, Lazarovski, against North Macedonia before the European Court of Human Rights are just examples where North of Macedonian judges made mistake in determining this measure. - The Court has also delivered judgment based on unjustified detention.

In the case Lazarovski against North Macedonia the Court stated that there had been violation; the person was detained for more than 9 hours without explaining the reasons for his detention.

In the case against Stojanovski North Macedonia the applicant alleged that his continued detention in a psychiatric hospital is no longer justified under Article 5 paragraph 1 (e) of the Convention. The Court found that there had been a violation of Article 5 paragraph 1 (d) of the Convention.

European Court of Human Rights unanimously ruled that in the case Vasilkovska and 37 others against the Republic of North Macedonia¹⁷, there had been unjustified and prolonged detention of the defendants in the action "Snake Eye". Thus, a violation of Article 5 paragraph 3 of the right to liberty and security of the European Convention on Human Rights was made. North Macedonia should pay the applicants 2,000 euros for expenses. The Strasbourg Court did not discuss the basis of the case and the indictment raised against those from the action "Snake Eye", only the appeal of the defendants which concerned the detention.

Court of Human Rights based in Strasbourg ruled against North Macedonia in favor of North Macedonian citizens Dimitrija and Gjorgi Miladinovski who would be paid 3,000 euros each for damages and 1,350 euros for court costs. Simultaneously the ruling also applies to Dimitri Golabovski. The three persons, the court stated, were groundlessly held in custody as defendants in the process "Sunrise." According to the Court three were groundlessly held in custody and Court of Appeal did not allow an oral hearing and equal treatment in the proceedings in question and disregard of the principle of equality of arms in proceedings before the Court of Appeal. According to the initial judgment, Miladinovski brothers were sentenced to

¹⁵ Application 11621/09 25.03.2010 25.06.2010 Mitreski against R. North Macedonia.

¹⁶ Application. 1431/03) 22 October 2009 Stojanovski against R. North Macedonia.

¹⁷ Application 28169/08 28.10.2010 28.01.2011 Vasilkoski and others against R. North Macedonia.

six and a half years in prison for money laundering and crime and Golabovski was sentenced to two years in prison.¹⁸

In the case against Mitreski of North of Macedonia, the applicant stated, in particular, that his initial order for house arrest was changed to detention in proceedings which were not contradictory as well as without holding an oral hearing. For these reasons, the court unanimously declared the complaint concerning the alleged violation of the principle of equality of arms and the absence of an oral hearing before the Council admissible, and the remainder of the application inadmissible. The Court believes that there is a violation of Article 5 paragraph 4 of the Convention in terms of the principle of equality of arms and the absence of an oral hearing before the Council, believes the finding of a violation of Article 5 paragraph 4 itself is sufficient just satisfaction in terms of any non-pecuniary damage sustained by the applicant.¹⁹

Velinov against North Macedonia²⁰ entitled to trial within a reasonable time frame in civil proceedings, there is no compensation for unlawful arrest, unlawful detention (police fail to explain the reasons why he was arrested) had no effective remedy in domestic proceedings. Declares the complaints under Articles 5, 6 (about the length of the compensation proceedings) and 13 of the Convention admissible, and the remainder of the application inadmissible; believes there is a violation of Article 5 paragraph 1 (b), paragraph 2 and paragraph 5 of the Convention.

Inappropriate and excessive adoption of detention as a guarantee that the defendant will appear at trials made North Macedonia the first country that will need to report to the European Court of Human Rights for alleged cooperation with the US intelligence agency CIA in the arrest the German citizen Khaled el-Masri at the end of 2003. Court examines the role of North Macedonian authorities in the arrest of El Masri. According to the indictment, Macedonian police in December 2003 illegally arrested Khalid El-Masri at the request of the CIA and held him in custody for 23 days.²¹ The Court unanimously determined that the detention of the applicant in hotel for a period of 23 days was arbitrary, contrary to Article 5 of the Convention;

¹⁸Application 46398/09, 50570/09 and 50576/09 24.04.2014 Miladinov and others against North Macedonia.

¹⁹Application 11621/09 25.03.2010 25.06.2010 Mitreski against R. North Macedonia.

²⁰Application 16880/08 19.09.2013 19.12.2013. Velinov against R. North Macedonia.

²¹Application 39630/09) December 13, 2012. El-Masri against R. North Macedonia.

determined that the defendant is responsible under Article 5 of the Convention for the subsequent captivity of the applicant in Afghanistan; determined that the respondent State has failed to conduct an effective investigation into the applicant's allegations for arbitrary detention, as required by Article 5 of the Convention. Because of the seriousness of the violations that were identified, the applicant considered that the Court had to recognize that in the absence of any effective remedy – for which the government also agreed - the applicant was also deprived of the "right to truth", i.e. the right to just explanation of sustained suffering and the role of those responsible for such torture. Finally, the court determined that the defendant should pay the applicant, within three months, EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage.

PRACTICE IN THE REPUBLIC OF NORTH MACEDONIA IN APPLICATION OF DETENTION

The Law on Criminal Procedure in 2010 introduced a number of changes in terms of detention in order this measure to be less frequently used by prosecutors and the court. The judge of the preliminary procedure which determines detention upon a proposal of the prosecutor acts as a guarantor of the rights of the suspect. In parts of the law, it is clearly stated that detention should be a last measure that the judge should consider, it is obligatory all the evidence and facts for reasonable suspicion that someone has committed a crime to be highlighted, and then explain individually the grounds for requiring detention. Furthermore, in the solutions should also be stated the reason why the judge did not choose milder measure.

With the application of the new Criminal Procedure, old problems in relation to detention permeate: unexplained detention orders, a decision for several defendants, the presumption of innocence is not taken into serious account during the investigation, so it is stated that detention is determined because of threatened punishment and the way the crime is committed, no specific evidence and facts for reasonable suspicion that the suspect committed the crime are mentioned, as well as evidence of grounds for determining detention – I mean evidence of escape by the prosecutor or evidence for influencing witnesses. This must not be reduced to lump explanations without offering material evidence, or stereotyped phrases - that

someone has not established a family and is not employed, therefore the court accepted that he would abscond, and a person on the verge of adulthood is in question - graduate and such a thing is not expected of him. Now the court has the necessary elements that should be included in the detention decision; for example the evidence and facts to reasonable suspicion that someone has committed a crime for which detention is required, furthermore he has to explain the grounds for detention - each individually and indicate why he did not choose the milder measure but determined the most severe measure - detention. There is no choice or alternative, if the judge fails to comply with the law, such solutions are unlawful and everyone should bear responsibility for that".

Table. BASIC COURT SKOPJE 1 Skopje, ADULT CRIMINALS – 2014

Department/stage of the proceedings	Total number of cases	Detention determined (no. of cases)	Detention determined (no. of defendants)	House arrest determined (no. of defendants)	Precaution measures determined (people)	Other
Preliminary procedure	944	172	238	10	7	1 person to compulsory medical treatment
Preliminary procedure organized crime and corruption	522	118	251	2	18	/
After indictment	4036	238	/	/	/	/
After indictment organized crime and corruption	110	62	/	/	/	/
Criminal court panel	238	/	150	10	4	/
						7 persons have been given guarantee
Criminal court panel organized crime and corruption	251	/	244	/	/	1 person's detention has been canceled because 1 year deadline expired

According to the statistics of the Public Prosecution Office of RSM in 2013 where it is stated that requests for the detention of 278 defendants were submitted to the Department for Organized Crime; 275 have been placed in detention, while 3 defendants were put under house arrest, which is striking figure of requested and determined detentions which ranges over 99%. Detention of 107 defendants was continued for more than 6 months.

The extension of detention should be strongly justified. The Court of Human Rights, among others things, indicate the lengthy proceedings before the Court of Appeal when deciding on appeals of decisions for continuation of detention, for which the ECHR suggests that any extension has greater weight, so explanations should be more extensive with reasonable grounds for detention.

CONCLUSIONS AND RECOMMENDATIONS

In a number of court procedures, the practice of adopting decisions on establishment and continuation of detention without having to justify the grounds for it, is concerning. The practice of collective continuation of detention of a group of defendants whose names are mentioned persists, but the decisions do not contain individual review of the grounds for which each defendant's detention is continued. Such decisions are contrary to the domestic and international law and practice of the European Court of Human Rights. Detention lasts too long, even after the completion of the investigation and interrogation of the defendants. Failure to use milder measures, such as guarantee is worrying. Detention units in prisons are overcrowded to the extent that service of detention can be considered torture, because of the poor living conditions and inadequate health care.

- ❖ Detention should be used as an exception rather than a rule, the duration should be reduced to the shortest necessary time, and first of all the possibility of using milder preventive measures should be considered.
- ❖ When determining, and especially in the continuation of the detention, judges should take the practice of the European Court of Human Rights into account, to explain in detail and review the grounds for which that have decided to take such measure, to stop the practice of signing identical stereotyped formulation decisions and to

develop an individual approach to every defendant by abandoning the practice of making collective detention decisions.

- ❖ During regular weekly detention facilities visits, the judge in charge of supervision over the living conditions of detainees should pay particular attention to vulnerable citizens and those in need of health services. When violation of rights is identified, supervising judges should inform judges of the preliminary procedure on the situation of detainees and the need for some detainees to be sent to hospital treatment outside of detention.
- ❖ Continuous training for judges and prosecutors to be made in following years, in order to reduce the number of unsubstantiated, baseless, illegal, too long detentions, to start applying other measures that are not present.
- ❖ Lawyers should fight against such decisions by filling complaints in all instances, such as public meetings before the Criminal Chamber, Court of Appeal and the Supreme Court, and finally, after so many decisions of the ECHR against North Macedonia, to submit an application before the court.

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7. Application 16880/08 19.09.2013 19.12.2013 Velinov against North Macedonia.
8. Application 39630/09 El-Masri against R. North Macedonia December 13, 2012.

