

THE PRESUMPTION OF INNOCENCE - CASES VERSUS MACEDONIA IN FRONT OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

One of the basic principles that falls under the right to a fair trial of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), is the presumption of innocence. Namely, the Article 6 Paragraph 2 prescribes that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. Having in mind the case law of the European Court of Human Rights (ECtHR), the Paper shall pay attention to two Macedonian cases, i.e. Case of *Poletan and Azirovik v. Macedonia* and Case of *Ramkovski v. Macedonia*. It is interesting to note that in both cases, ECtHR found that there had been no violation of Article 6 Paragraph 2 of the Convention. Further, the Paper shall pay attention to other ECtHR's judgements, as well as to the Macedonian relevant documents.

Keywords: Fair trial; Presumption of innocence; Poletan and Azirovik; Ramkovski; Macedonia.

I. INTRODUCTION

“Proof lies on him who asserts, not on him who denies” (*Ei incumbit probatio qui dicit, non qui negat*), as a general rule of evidence was prescribed in the sixth-century Digest of Justinian (22.3.2).¹ This rule, further developed as a presumption of innocence, is one of the basic human rights that is stipulated in numerous documents. For example, the Article 11 of the Universal Declaration of Human Rights defines that “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”.² Similar provision is encompassed in the Article 14 Paragraph 2 of the International Covenant on Civil and Political Rights,³ and the Article 66 of the Rome Statute of the International Criminal Court.⁴ Furthermore, the Green Paper on the presumption of innocence should be

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¹ See: A. Watson, ed.: 22.3.2. *The Digest of Justinian*, Philadelphia: University of Pennsylvania Press, 1998.

² The Universal Declaration of Human Rights, was adopted by the United Nations General Assembly as a Resolution 217 on 10.12.1948.

For more, see: <https://www.un.org/en/universal-declaration-human-rights/>

³ The International Covenant on Civil and Political Rights, was adopted by the United Nations General Assembly as a Resolution 2200A (XXI) on 16.12.1966, and it came into force on 23.03.1976. The ICCPR's Article 14 Paragraph 2 defines that “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”.

For more, see: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁴ The Rome Statute of the International Criminal Court was adopted at a diplomatic conference in Rome, Italy, on 17.07.1998, and came into force on 01.07.2002. The presumption of innocence defined in Article 66 of the Rome Statute notes the following:

mentioned,⁵ as well as the Directive on strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.⁶ Complementary to the above acts, a special attention should be given to the Right to a fair trial defined in the Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention),⁷ which Paragraph 2 describes the presumption of innocence as “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

If the Macedonian legislative is taken into account, the presumption of innocence is prescribed by the Constitution (A person indicted for an offence shall be considered innocent until his guilt is established by a legally valid court verdict - Article 13 Paragraph 1),⁸ as well as by the Law on Criminal Procedure (LCP). Concerning the old LCP,⁹ this principle was defined in the Article 2 Paragraph 1, i.e. any person charged with a criminal offence shall be presumed innocent until his guilt is established by a valid and final court verdict. The same provision is prescribed with the new LCP (Article 2 Paragraph 1),¹⁰ with a note that it is supplemented with the Paragraph 2 stipulating that the state authorities, media and all other entities shall be obliged to observe the rule of Paragraph 1, and their public statements about the ongoing procedure shall neither violate the rights of the defendant and the injured party, nor harm the judicial independence and impartiality. In connection to this principle, is the provision titled as “Right to a fair trial” (Article 5), specifying that any person charged with a criminal offence shall have the right to a fair and public trial before an independent and impartial tribunal, in an adversarial procedure, with a possibility to challenge the accusations and tender and present evidence in his defence.

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1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
 2. The onus is on the Prosecutor to prove the guilt of the accused.
 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

For more, see: <https://www.icc-cpi.int/resource-library#coreICCTexts>

⁵ Green Paper on the presumption of innocence (COM/2006/0174), was presented by the Commission of the European Communities on 26.04.2006. This document poses nine questions in relation to the scope and operation of the presumption of innocence, such as pre-trial pronouncement of guilt, pre-trial detention, the burden of proof, privilege against self-incrimination, right of silence, right not to produce evidence...

For more, see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52006DC0174>

⁶ Directive (EU) 2016/343 of the European Parliament and of the Council of 09.03.2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (“Official Journal of the European Union” L 65/1). The Directive, among other things, explains that the presumption of innocence would be violated if public statements made by public authorities, or judicial decisions other than those on guilt, referred to a suspect or an accused person as being guilty, for as long as that person has not been proved guilty according to law. Such statements and judicial decisions should not reflect an opinion that that person is guilty. This should be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, such as the indictment, and without prejudice to judicial decisions as a result of which a suspended sentence takes effect, provided that the rights of the defence are respected. This should also be without prejudice to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and are based on suspicion or on elements of incriminating evidence, such as decisions on pre-trial detention, provided that such decisions do not refer to the suspect or accused person as being guilty. Before taking a preliminary decision of a procedural nature the competent authority might first have to verify that there are sufficient elements of incriminating evidence against the suspect or accused person to justify the decision concerned, and the decision could contain reference to those elements.

For more, see: <https://eur-lex.europa.eu/eli/dir/2016/343/oj>

⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), was opened for signature by the members of the Council of Europe in Rome on 04.11.1950 and came into force in 1953.

⁸ Constitution of the Republic of Macedonia (“Official Gazette of the Republic of Macedonia” No. 52/1991) and its Amendments (“Official Gazette of the Republic of Macedonia” No. 01/1992, 31/1998, 91/2001, 84/2003, 107/2005, 03/2009, 13/2009, 49/2011, 06/2019).

⁹ Law on Criminal Procedure - old LCP (“Official Gazette of the Republic of Macedonia” No. 15/1997, 44/2002, 74/2004, 15/2005 - consolidated text, 83/2008, 67/2009, 51/2011).

¹⁰ Law on Criminal Procedure - new LCP (“Official Gazette of the Republic of Macedonia” No. 150/2010, 100/2012, 142/2016, 198/2018).

II. THE IMPORTANCE OF THE PRESUMPTION OF INNOCENCE

A bewildering variety of claims have been made about the meaning and implications of the presumption of innocence in the Criminal law. Given its apparent elasticity, it is natural to wonder whether the presumption is an honorific concept, one that is mostly empty and therefore adaptable to the needs and interests of legal theorists of diverse kinds. Far from confining in to the criminal trial, which seems its native habitat, legal theorists have proposed that implies not only to the pre- and post-trial contexts, but to humans generally, whether or not they have fallen under suspicion of any criminal conduct. Other theorists claim that the presumption ought to act as a constraint on the content of the Criminal law.¹¹ While presumption of innocence is the continuous subject of academic debates and relevant scholarly writings, its everyday relevance is of essential importance for a democratic society governed by the principle of the rule of law. Presumption of innocence is a key element of the fair trial rights which affect the rights of suspects and the accused to remain silent, the prosecution's burden of proof obligations, and the *in dubio pro reo* principle (if there is a doubt of one's guilt, no conviction can be rendered).¹²

In addition to the above, the presumption of innocence of the accused contains two rules: about the burden of proof and about the distribution of the risk of the facts of the crime and guilt not to be proved.¹³ Furthermore, the presumption of innocence is raised as a constitutional principle and gives the accused the right to be treated as a person against whom there is a reasonable suspicion that he has committed a crime, but for which it is not yet established whether he is really guilty. The consequence of this principle is the duty of the authorized accuser to prove the defendant's guilt, while the defendant should not prove his innocence, i.e. the burden of proof falls on the authorized accuser.¹⁴

The presumption of innocence under Article 6 Paragraph 2 of the Convention is an overriding principle of criminal procedure. It also represents one of the key structural elements of fair criminal procedure, although this very guarantee should be separated from the general right to a fair trial under Article 6 Paragraph 1 of the Convention. An elaborate mechanism of specific safeguards confers upon the presumption of innocence the power to protect individuals and legal persons from arbitrary treatment by the state authorities.¹⁵ This provision primarily disallows premature declarations of guilt by any public official. Declarations of guilt may take the form of: a statement to the press about a pending criminal investigation; a procedural decision within criminal or even non-criminal proceedings; or even of a particular security arrangement during the trial (where the applicant was shown to the public in prison garments during the bail proceedings).¹⁶ It guarantees a right that is fundamental to both common law and, despite legend in the United Kingdom to the contrary, civil law systems of criminal justice. The obligation in the Article 6 Paragraph 2 is independent of those in other Article 6 guarantees, so that there may be a breach of it even though the rest of Article 6 is respected.¹⁷

¹¹ See: R. L. Lippke: *Taming the Presumption of Innocence*, Oxford University Press, 2016, p. 11.

¹² See: T. Đaković / S. Marčelić / I. Novosel / S. Sharifi: *The Importance of Appearances: How Suspects and Accused Persons are Presented in the Courtroom, in Public and in the Media - Research Report 2018*, Human Rights House, Zagreb, 2018, p. 6.

¹³ See: N. Matovski / G. Lažetik - Bužarovska / G. Kalajdziev: *Kazneno procesno pravo - vtoro, izmeneto i dopolneto izdanie*, Skopje, 2011, p. 64.

¹⁴ See: *op. cit.*, p. 131.

¹⁵ See: A. Mickonytė: *Presumption of Innocence in EU Anti-Cartel Enforcement*, Nijhoff Studies in European Union Law, Volume: 15, 2018.

¹⁶ See: D. Vitkauskas / G. Dikov: *Protecting the right to a fair trial under the European Convention on Human Rights - Council of Europe human rights handbooks*, Council of Europe, Strasbourg, 2012, p. 78.

¹⁷ See: D. J. Harris / M. O'Boyle / E. Bates / C. Buckley: *The European Convention on Human Rights (Third Edition)*, Oxford, 2014, p. 460.

III. MACEDONIAN CASES IN FRONT OF THE ECtHR

By ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention),¹⁸ Republic of Macedonia obliged itself to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention. If the Macedonian cases concerning the presumption of innocence are observed,¹⁹ then two cases should be analysed - Case of *Poletan and Azirovik v. Macedonia*²⁰ and Case of *Ramkovski v. Macedonia*²¹. In both cases, among other alleged violations, the applicants complained under the Article 6 Paragraph 2. However, in both of them, ECtHR found no violations of the said provision.

In the first case, i.e. *Case of Poletan and Azirovik v. Macedonia*, the Macedonian nationals Ms. Stanislava Poletan and Mr. Alija Azirovik filed three applications complaining that during the trial their rights under Articles 6 and 7 of the Convention had been violated (Nos. 26711/07, 32786/10 and 34278/10 on 12.06.2007, 7 and 16.06.2010). When it comes to the presumption of innocence, Mr. Azirovik complained that:

- Domestic courts did not establish and failed to provide any reasoning to demonstrate that he knew of the presence of the drugs in the cans, i.e. no evidence had been presented to show that he had known of the presence of the drugs;
- The wording used in the trial court's judgment had clearly shown that the domestic court had shifted onto him the burden to prove that he had not known that there had been drugs in the cans (that he was transporting drugs);
- The prosecution had failed to prove the crime of which he was accused "beyond reasonable doubt" and that the courts had incorrectly applied the principle *in dubio pro reo*.

Contrary to the applicants, the Government explained that the domestic courts had established and provided sufficient reasoning in their judgments to show that Mr. Azirovik had known and had been aware of the unlawful actions that he had taken. Namely, together with others, he had transported drugs for the purpose of selling them, and also the evidence supporting his guilt and criminal liability had been irrefutable.

Based on the circumstances of the case, ECtHR in the Judgement dated 12.05.2016 (final 17.10.2016) established that there had been no violation of Convention's Article 6 Paragraphs 1 and 2. ECtHR noted that domestic authorities are better placed to assess the credibility of evidence with a view to establishing the facts, and there was nothing that would cast doubt on their conclusion regarding the second applicant's knowledge of the presence of the drugs in the cans. That was the reason why, ECtHR did not depart from the assessment made by the domestic courts. Further, ECtHR pointed out that the second applicant's complaint was considered from the standpoint of two provisions taken together - the presumption of innocence defined in Article 6 Paragraph 2 as one of the elements of a fair criminal trial as required by Paragraph 1.²² In order to ascertain whether the proceedings

¹⁸ The Convention was ratified by Republic of Macedonia in 1997. See: Law on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the First Protocol, Protocol No. 4, Protocol No. 6, Protocol No. 7 and Protocol No. 11 to the said Convention ("Official Gazette of the Republic of Macedonia" No. 11/1997); Protocol No. 12 ("Official Gazette of the Republic of Macedonia" No. 30/2004); Protocol No. 13 ("Official Gazette of the Republic of Macedonia" No. 30/2004); Protocol No. 14 ("Official Gazette of the Republic of Macedonia" No. 30/2005); Protocol No. 14 *bis* to the said Convention ("Official Gazette of the Republic of Macedonia" No. 41/2010).

¹⁹ If the Article 6 Paragraph 2 is chosen as a search criteria through HUDOC database (provides access to the ECtHR's case-law), only two cases concerning Republic of Macedonia are given as a result of the search (Case of *Poletan and Azirovik* and Case of *Ramkovski v. Macedonia*).

For more, see:

<https://hudoc.ECtHR.coe.int/eng#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22respondent%22:%5B%22MKD%22%5D,%22article%22:%5B%226-2%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D%7D>

²⁰ See: European Court of Human Rights: *Poletan and Azirovik v. Macedonia*, Applications Nos. 26711/07, 32786/10 and 34278/10, Judgement 12.05.2016 - Final 17.10.2016.

²¹ See: European Court of Human Rights: *Ramkovski v. Macedonia*, Application No. 33566/11, Judgement 08.02.2018 - Final 08.05.2018.

²² For example, ECtHR in the Case of *Janosevic v. Sweden* reiterated that the presumption of innocence enshrined in Article 6 Paragraph 2 is one of the elements of the fair criminal trial that is required by Paragraph 1, which means that the

considered as a whole were fair, the ECTHR observation about the presumption of innocence, i.e. the Article 6 Paragraph 2 requires the following:

- The members of the court should not start with the preconceived idea that the accused has committed the offence charged;
- If any doubt, then the accused should benefit;
- The burden of proof is on the prosecution;
- The presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence.²³

In the second case, also known as *Case of Ramkovski v. Macedonia*, Mr. Velija Ramkovski and Ms. Emel Ramkovska on 23.05.2011 logged an application No. 33566/11 to ECTHR against Republic of Macedonia. Two Macedonian nationals alleged that their rights under the Article 5 Paragraph 3 and 4 and Article 6 Paragraph 2 of the Convention had been violated by the court orders extending their pre-trial detention and the proceedings for review of those orders. Concerning the second alleged violation (Article 6 Paragraph 2), they complained that the wording of the courts' decisions on their detention had violated their right to be presumed innocent. The applicants pointed out that the three-judge panel extended their pre-trial detention by decision dated 22.03.2011, in which it stated, *inter alia*, that:

- "The accused committed the criminal offences as a well-organised and compact group";
- "Having regard to the degree of danger for society and criminal responsibility" and
- "Some of the criminal offences were committed as continuous crimes".

In essence, the detention to the applicants was firstly ordered on 24.12.2010 by the investigating judge (on the same day when the investigation was opened for suspicion of criminal conspiracy and tax evasion), and it was extended several times. Based on the first order the applicants and other suspects were held in pre-trial detention for thirty days (old LCP's Article 199 Paragraph 1), because of risk of absconding, reoffending and interfering with the investigation. Further, not only that the three-judge panel of the pre-trial court ordered thirty-day extensions of the detention on all three grounds specified under the LCP, but also the three-judge panel of the trial court on 22.03.2011 ordered another thirty-day extension on grounds of the risk of the accused absconding and reoffending.

According to the applicants' appeals logged on 28.03.2011, the court order violated their rights under Convention's Article 5 because there were no concrete reasons for their detention. In addition, the applicants stressed that the court issued a collective detention order since identical wording and standardised phrases were used without specifying any particular reason concerning the applicants' personal character that would justify their detention. Also, they noted that there was a violation of the principle of presumption of innocence, because of the wording used by the panel. The applicants unsuccessfully applied for release on several occasions, however on 14.03.2012 the trial court convicted them and decided that they would remain in custody until the judgment became final.

On the other hand, the Government argued that the three-judge panel had only expressed a suspicion that the applicants had committed the crimes with which they had been charged, i.e. in order to justify

applicant's complaint should be considered from the standpoint of these two provisions taken together. Also, ECTHR noted that the meaning of Paragraph 2 of Article 6 was described by the Court in *Barberà, Messegué and Jabardo v. Spain* in the following way: "Paragraph 2 embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him."

For more, see: European Court of Human Rights: *Janosevic v. Sweden*, Application No. 34619/97, Judgement 23.07.2020 - Final 21.05.2002, para. 96-97; European Court of Human Rights: *Barberà, Messegué and Jabardo v. Spain*, Application No. 10590/83, Judgement 06.12.1988, para. 77.

²³ The same was noted in the Case of *Telfner v. Austria*.

For more, see: European Court of Human Rights: *Telfner v. Austria*, Application No. 33501/96, Judgement 20.03.2001 - Final 20.06.2001, para. 15.

Compare to: European Court of Human Rights: *John Murray v. the United Kingdom*, Application No. 14310/88, Judgement 28.10.1994, para. 52 -54.

the reasons for extending the applicants' pre-trial detention, the panel had taken into consideration the specific circumstances regarding the manner in which the alleged offences had been committed.²⁴

Having in mind the allegations of the applicants, as well as the Government's explanation, ECtHR in the Judgement dated 08.02.2018 (final 08.05.2018) found that there had been no violation of Convention's Article 6 Paragraph 2 since the wording of the detention order did not amount to a declaration of the applicants' guilt in breach of the presumption of innocence. From the reading of the decision as a whole, ECtHR noted that the domestic courts treated the impugned circumstances not as established facts, but only as allegations. Therefore, ECtHR did not consider that the impugned statements contained an explicit and unqualified declaration that amounted to the determination of the applicants' guilt before they were proved guilty under the law (the used statements were made in order to justify extending the applicants' pre-trial detention on grounds of the risk of their absconding and reoffending). The impugned phrases contained concomitant statements clearly saying that the applicants were suspected of the offences set out in the bill of indictment. In addition, the ECtHR stressed that the domestic courts referred to a reasonable suspicion that the accused had committed the crimes with which they were charged in the bill of indictment. The ECtHR was satisfied that the domestic courts were referring not to the question whether the applicants' guilt had been established by the evidence, which was clearly not the issue to be determined in the context of detention, but to whether there were legal grounds for the applicants' continued detention.²⁵

In addition, the ECtHR clarified that the principle of presumption of innocence will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proved under the law. It suffices, in the absence of a formal finding, that there is some reasoning suggesting that the court or the official in question regards the accused as guilty, and a premature expression of such an opinion by the tribunal itself will inevitably run foul of the said principle. However, a distinction should be made between statements which reflect the opinion that the person concerned is guilty and statements which merely describe "a state of suspicion". The former infringe the presumption of innocence,²⁶ whereas the latter have been regarded as unobjectionable in various situations examined by ECtHR.²⁷

IV. CONCLUSION

Having in mind the both Macedonian judgements regarding the Article 6 Paragraph 2 by the ECtHR, as well as the previous ECtHR's jurisprudence, several remarks can be drawn out. Firstly, the court's members should not start the trial with preconceived idea that the accused has committed the offence for which indictment has been made, and secondly, the burden of proof is on the prosecution which implies that if there is any doubt, then the accused should benefit, as well as if the burden of proof is shifted from the prosecution to the defence, then the presumption of innocence will be infringed (Case

²⁴ Compare to: European Court of Human Rights: *Miladinov and Others v. Macedonia*, Application Nos. 46398/09, 50570/09 and 50576/09, Judgement 24.04.2014 - Final 24.07.2014, para. 75-76.

²⁵ Similar to this, in the Case of *Perica Oreb v. Croatia*, ECtHR noted that the domestic courts justified the applicant's pre-trial detention by, inter alia, the gravity of the offences and the manner in which they were committed. They did not, however, treat those circumstances as established facts but only as allegations. In the wording of their decisions the domestic courts relied on the bill of indictment, stating that there was a justified suspicion that the applicant had committed the offences in question. Thus they solely relied on the charges brought against him. In that respect the wording of their decisions did not amount to finding the applicant guilty of the charges brought against him in violation of the presumption of innocence under Article 6 Paragraph 2 of the Convention.

For more, see: European Court of Human Rights: *Perica Oreb v. Croatia*, Application No. 20824/09, Judgement 31.10.2013 - Final 31.01.2014, para. 142-143.

²⁶ The same was noted in the Case of *Garycki v. Poland*. The former infringe the presumption of innocence, whereas the latter have been regarded as unobjectionable in various situations examined by the ECtHR.

For more, see: European Court of Human Rights: *Garycki v. Poland*, Application No. 14348/02, Judgement 06.02.2007 - Final 06.05.2007, para. 67.

²⁷ ECtHR has previously held that the impugned statements must be read as a whole and in their proper context.

For more, see: European Court of Human Rights: *Böhmer v. Germany*, Application No. 37568/97, Judgement 03.10.2002 - Final 21.05.2003, para. 60.

of *Poletan and Azirovik v. Macedonia*). Thirdly, when it comes to the court's statements used to justify the imposed detention, a distinction should be made between statements which reflect the opinion that the person concerned is guilty and statements which merely describe "a state of suspicion" (Case of *Ramkovski v. Macedonia*). If these remarks are respected, then no violation of the presumption of innocence will be made by the domestic authorities.

Finally, the traditional approach in which the presumption is treated as applicable only to the trial itself leaves those accused of crime, as well as those who have been tried but acquitted, in danger of being treated less favourably than other citizens. Treating the presumption of innocence as a practical attitude reminds us that those who are accused or suspected of criminality are not to be equated to those whose guilt has been formally established.²⁸

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