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STANDARDS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE AREA OF ADMINISTRATIVE LAW WITH SPECIAL REFERENCE TO THE REPUBLIC OF MACEDONIA

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In many occasions, the European Court of Human Rights has reiterated that the ECHR is a 'living instrument'. The rights enshrined in the Convention have to be interpreted in the light of present day conditions so as to be practical and effective. Therefore, the Court has on several occasions modified its views on certain subjects because of scientific developments. Although in the scope of Article 6(1) of European Convention on Human Rights are civil rights and obligations and criminal charges, the application to administrative disputes has arisen from the Court's case-law. This paper will try to analyze the framework of administrative disputes in the Republic of Macedonia, mainly the Law on Administrative Disputes and its consolidation with the international standards, specifically with the ECHR. Further, subject of elaboration will be the Macedonian dossier in Strasbourg and the judgments in which the ECtHR found violation of Article 6 of ECHR in relation to administrative disputes and procedures.

Key words: *administrative dispute, fair trial, independence, impartiality, length of proceedings*

INTRODUCTION

The term 'Strasbourg standards' which is widely accepted refers to the acts of the Council of Europe, primarily to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred as ECtHR) and its Article 6 which regulates the right to a fair trial. Subsequently, it concerns many other international instruments and recommendations in the area of protection of human rights with special reference to administrative disputes. The application of the standards of the ECHR is undoubtedly important not only for the protection of human rights, but

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also for construction of an effective mechanism for preservation of the guaranteed human rights and implementation of the decisions of the European Court of Human Rights (hereinafter referred as ECtHR). The case law of ECtHR provides authentic and competent interpretation of the Convention rights and also allows understanding and applying the standards contained in the ECHR.

Republic of Macedonia as a member State of the Council of Europe³ has ratified the ECHR in 1997 and it became an integral part of the internal legal order. According to Article 118 of the Constitution: *“The international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law”*.⁴ In connotation with the above cited provision, one conclusion can be derived and that is the fact that the Constitution has legal supremacy over national laws such as the Law on Administrative Disputes and in the same time ratified conventions have supremacy, because they cannot be changed by relevant laws. The development of the procedural and legal institute for protection of the right to a fair trial and the right to have a hearing in reasonable time in the Republic of Macedonia can be observed from the moment of ratification of ECHR. Namely, from that moment Republic of Macedonia is been oblige with the Article 6 of the ECHR.⁵

IMPLEMENTATION OF THE RIGHT TO A FAIR TRIAL IN ADMINISTRATIVE DISPUTES

The standards that affect the development of administrative law of the member States of the Council of Europe are developed through the case law of the ECtHR. For administrative law, the most significant standards arise from the interpretation of Article 6 (1) of the ECHR: *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”*. This provision sets out the minimum procedural guarantees, through which it can be decided on subjective rights and legal interests of the party.⁶ What is more essential is that Article 6 enshrines the principle of the rule of law, upon which a democratic society is built, and the paramount of the judiciary in the administration of justice. Additionally, it is necessary to “portray” the contours of the content of

³ Republic of Macedonia became 38th member State of the Council of Europe on 9 November 1995. For more information see: <https://www.coe.int/en/web/portal/-the-former-yugoslav-republic-of-macedonia>.

⁴ Constitution of the Republic of Macedonia, Official Gazette of the Republic of Macedonia No. 52/1991.

⁵ The ECtHR interprets the legal notions employed in the ECHR autonomously. Terms which are contained in the Convention may have a different scope within the legal framework of a contracting state. The Court does not consider itself bound by the meaning which these terms have in a domestic jurisdiction. Thus, the protection afforded by the Convention may be much wider in scope than the protection offered under national law.

⁶ Lilić, Stevan. *Evropsko upravno pravo*, Beograd, 2011, p. 103.

Article 6 (1) of the ECHR. The catalog of special rights covers both those explicitly listed and those recognized by the ECtHR as implicitly contained. Explicitly listed are following rights: right to fair trial; public hearing; hearing before an independent and impartial tribunal; hearing within a reasonable time and public pronouncement of judgments. Beside these rights, the ECtHR in its practice of interpretation of the ECHR, has determined that Article 6(1) also contains implicit rights such as: access to a court (right to submit a claim to a tribunal); presence in the procedure; equality of arms, burden of proofs and elaboration of the judgments.⁷ However, it is important to note that Article 6(1) itself was not originally intended to apply in the administrative (public) law, but rather that opportunity derived from the Court's case-law. Namely, Article 6(1) applies to civil rights and obligations and in criminal charges,⁸ so these are two autonomous terms determined through the ECtHR practice. The Court further took the view that civil rights and obligations can be decided in the administrative procedure, and consequently, in the administrative-court procedure.⁹

Having in mind the Strasbourg case-law, the case of *Ringeisen v. Austria*¹⁰ was the first case in which the notion of civil rights and obligations has been extended, covering some of the rights and obligations that could be solved in an administrative and administrative-court procedure.¹¹ The essence of this case starts when the Austrian District and Regional Real Property Transactions Commission refused to approve the sale of a number of plots of land. The applicant challenged the refusal alleging bias and contending that his Article 6 rights were violated for that reason. The Austrian statute provided that the refusal of approval rendered the sale null and void. Held: *'In the present case, when Ringeisen purchased property from the Roth couple, he had a right to have the contract for sale which they had made with him approved if he fulfilled, as he claimed to do, the conditions laid down in the Act. Although it was applying rules of administrative law, the Regional Commission's decision was to be decisive for the relations in civil law ('de caractere civil') between Ringeisen and the Roth couple. This is enough to make it necessary for*

⁷ Цуцић, Вук. *Стразбуришки стандарди у управном спору*, Анали Правног факултета у Београду, бр. 2/2009, стр. 249-250.

⁸ Applicability of Article 6 to pre-trial, appeal and other review stages is established based on non-autonomous criteria, and depends to a large extent on the existence of accessible remedies in domestic law. For more information see: Vitkauskas Davydas and Dikov Grigoriy, *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe, Strasbourg 2012, p. 11.

⁹ In every democratic society, the right to a fair implementation of justice has an important place and every kind of limitation to the interpretation of Article 6 (1) would not correspond with the object and purpose of the provision. According to the above mentioned it is clear that paragraph 1 applies to all legal procedures which refer to determination of individual rights and obligation, while paragraph 2 and 3 apply exclusively to criminal proceedings.

¹⁰ European Court of Human Rights [ECtHR]. (1971). *Ringeisen v. Austria*, No. 2614/65.

¹¹ The character of the legislation governing how the matter is to be determined (civil, commercial, administrative law etc.) or the authority invested with jurisdiction in the matter (court, tribunal, local authority or professional body) is of little consequence. So long as that body has the power to determine the 'dispute', Article 6 will apply. This was ruled by the ECtHR in the case of *Ringeisen v. Austria*.

*the court to decide whether or not the proceedings in this case complied with the requirements of article 6(1) of the Convention.*¹²

Further, in the case of *Hornsby v. Greece*,¹³ the ECtHR held that there had been a violation of Article 6(1) of the ECHR on account of the administrative authorities' failure to comply within a reasonable time with two judgments of the Supreme Administrative Court quashing the Minister of Education's refusal to grant the applicants authorization to open a private school for the teaching of English.

The scope and meaning of the terms contained in the provisions of the ECHR can be seen through the present case-law. Each of the notions contained in Article 6(1) acquired a different meaning other than that normally granted by the national legal system. Thus, the term civil rights¹⁴ and obligations is of extensive importance. In several rulings, the ECtHR found that in the framework of these rights can be incorporated: property rights and obligations (property rights, claim for compensation against the state and other legal and natural persons); the right to engage in professional activities (eg doctor, attorney, judge, taxi driver) or commercial activities; the right to social security; the right to a military pension; the right to protection against discrimination due to confession or political opinion; family rights (for example, determining paternity, exercising parental rights); the right to register associations; the right to higher education; the right to change the surname, etc.

Additionally, the right to a fair trial applies in procedures where there must be a dispute over a right or obligation¹⁵. Subsequently, this dispute may exist in litigation procedure where the right to a fair trial and hearing within a reasonable time can be engaged, so these rights can also refer in administrative procedure. For example, in the case of *Bentham v. the Netherlands*, the ECtHR held that there was a violation of Article 6(1) of ECHR. The ruling of the Court led to substantial changes of Dutch administrative law, most notable the elimination of the Kroonberoep and the establishment of a separate court procedure.¹⁶

The role of the court in the protection of human freedoms and rights corresponds to the fundamental human right of an independent and impartial tribunal, provided

¹² See: <http://swarb.co.uk/ringeisen-v-austria-echr-16-jul-1971/>.

¹³ European Court of Human Rights [ECtHR]. (1997). *Hornsby v. Greece*, No.18357/91.

¹⁴ The jurisprudence on what does or does not constitute a "civil right" is complex and lengthy but a general rule is that the characterization of the matter in domestic law is not determinative. While such civil rights could be brought into play either by direct challenge or by administrative action, it was the nature and purpose of the administrative action that determined whether its impact on private law rights was such that a legal challenge involved a determination of civil rights.

¹⁵ According to what are known as the *Bentham criteria*, Article 6 must involve a 'dispute' over a right or obligation which: a) must be construed in a substantive rather than formal meaning; b) may relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised; c) may concern questions of fact or law; d) must be genuine and serious and e) must be decisive for the applicant's rights, and must have a mere tenuous connection or remote consequences. For more information see: Rónai, Orsolya, A general overview of Article 6 I. of the European Convention on Human Rights, 2013, p.3, retrieved from https://www.researchgate.net/publication/258963140_A_general_overview_of_Article_6_I_of_the_European_Convention_on_Human_Rights.

¹⁶ European Court of Human Rights [ECtHR]. (1985). *Bentham v. the Netherlands*, No.8848/80.

in the ECHR (Article 6(1)...*the right to a fair and public trial within a reasonable time before an independent and impartial tribunal*). The main function of the court, including the administrative court, is the independent, impartial and objective resolution of legal disputes between legal entities; the independent and objective control over public authorizations; the behavior of individuals; guaranteeing and protection of the fundamental rights that the individual has in a democratic society.

GENERAL FRAMEWORK OF ADMINISTRATIVE PROTECTION IN THE REPUBLIC OF MACEDONIA

In Republic of Macedonia, deciding on an individual “civil right or obligation”, i.e. examination of the legality of administrative acts is within the competence of the Administrative Court. Article 4 from the Law on Administrative Disputes stipulates the following: “*Administrative disputes in the Republic of Macedonia shall be decided by: the Administrative Court as court of first instance, the Supreme Administrative Court as court of second instance and the Supreme Court of the Republic of Macedonia, which decides upon extraordinary legal means, in the cases when it is regulated by this Law*”.¹⁷ Further, Article 5 prescribes that decisions of the courts adopted in administrative disputes shall be binding and enforceable. Having in mind the fact that Republic of Macedonia has aspirations to be a member State of the European Union, additional amendments to the existing Law on Administrative Disputes were necessary in order to comply with the standards provided in Article 6 of ECHR. Decisions upon administrative lawsuits and the creation of the practice of the Administrative Court in relation to the particular issues for which it decides on, the precise standardization of the proceedings before the court and the determination of the deadlines in which the decisions must be adopted, as well as those in which the body will be obliged to act under these decisions are fundamental conditions for adjusting the practice and legislation to the standards of the ECHR and the legal practice of the ECtHR.

The lack of the oral and contradictory public hearing (as a rule) and the inability to control the determination of the actual situation significantly limits the Administrative Court to influence the minimization of mistakes in administrative conduct. The administrative dispute is also reduced to a dispute over the legality of the administrative act, while the dispute of full jurisdiction in which the court itself decides on the specific administrative matter and possibly itself to determine the actual situation is almost not applicable, except where it is necessary (bringing a decision which replaces the administrative act in case of administrative silence).¹⁸ However, it should not be misunderstood that the public hearing is completely excluded according to the current decision of the Law on Administrative Disputes

¹⁷ Amendments to the Law on Administrative Disputes, Official Gazette of the Republic of Macedonia No. 150/2010.

¹⁸ Koprić, Ivan. *Upravno sudovanje u svjetlu prilagodbe standardima EU-a*, Reforma upravnog sudstva i upravnog postupanja, Zagreb, 2006, p. 59.

of the Republic of Macedonia from 2006. It is carried out solely with the request of the party. Thus, it should be noted that the legislator was not consistent with the application of the provisions from ECHR. It is therefore necessary for the Republic of Macedonia to include certain procedural standards¹⁹ provided in Article 6(1) and to incorporate them in the functioning of the Administrative Court. Additionally, when we refer to the standards incorporated in the ECHR, we must emphasize that Article 6 refers to the right to a fair trial, but also contains the right to access to court. However, this right was not explicitly stated in Article 6 of ECHR, but the ECtHR in the case of *Golder v. United Kingdom* ruled that this right implicitly is contained in Article 6. According to the findings of the ECtHR: “Article 6(1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right...”²⁰ Therefore the right of access to a court draws its source from the principle of international law that forbids denial of justice. It follows that the right of access constitutes an element which is inherent in the right stated by Article 6(1).²¹

From the above mentioned arise the legal basis for acting of the Supreme Court of the Republic of Macedonia in respect of the right to a trial within a reasonable time guaranteed with the ECHR, but also the introduction of the practice and rules of the ECtHR in deciding and protecting the right to a trial within a reasonable time constituted the State’s response to the numerous judgments of the ECtHR with established violations of the right to a trial within a reasonable time. Thus, the legal provision from Article 36 of the Law on Courts²² of the Republic of Macedonia allowed direct application of the rules and practice of the ECtHR by the Supreme Court of the Republic of Macedonia in deciding about the right to a trial within a reasonable time. In this connotation, having in mind the actual court cases against Republic of Macedonia before the ECtHR, it is evident that in near future the Legislature should determine the court practice (domestic and international) as a source of the law in the Republic of Macedonia.

¹⁹ Omejec, Jasna. *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Evropskog suda za ljudska prava – Strasbourški acquis*, Zagreb, 2014, p. 1116-1122.

²⁰ European Court of Human Rights [ECtHR]. (1975). *Golder v. United Kingdom*, No. 4451/70.

²¹ Vitkauskas Davydas and Dikov Grigoriy, *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe, Strasbourg 2012, p. 23.

²² According to Article 36 of the Law on Courts: “(1) The party that considers that the competent court has violated its right to trial within a reasonable period of time, shall have the right to submit a request for protection of the right to trial within a reasonable period of time to the Supreme Court in the Republic of Macedonia. (2) The request referred to in paragraph (1) of this Article may be submitted by the party in the course of the procedure before the domestic courts, and within a period of six months as of the day the decision becomes legally valid at the latest....”. For more information see: Law on Courts, Official Gazette of the Republic of Macedonia No. 58/06.

THE INSTITUTE OF JUDICIAL PROTECTION WITHIN A REASONABLE TIME

The institute request for protection of the right to a trial within a reasonable time occurred as a result of the occurrence of a backlog of a number of court cases. From judges has been expected lawful and effective justice. This right is an element of the right to a fair trial, which implies a request for a timely decision-making of the court, which is, “sharing justice without delay that could jeopardize its effectiveness and credibility”.²³ Hence, it can be concluded that this right derives both from the wording of Article 6 and from the principle of effectiveness. For example, in the case of *Guincho v. Portugal*,²⁴ the ECtHR sentenced the Portuguese Government for violation of Article 6(1) of the EHR, in the point of the applicant’s right to a judicial decision in reasonable time.

Further, the ECtHR considered that, when ratifying the ECHR, Portugal has obliged in organizing its judicial system in order to comply with basic principles enshrined in Article 6(1). According to the ECtHR, stabilized jurisprudence, the increase of pending cases in a national court does not affect the international responsibility of the State under the Convention, and it concludes that the exceptional difficulties existing in Portugal didn’t give reason to the delay of the decision.

The ECtHR has repeatedly drawn attention to a reasonable time, as a request for a decent judiciary. The purpose of this request is to protect the parties in the judicial procedure from excessive delays in the hearings and the long duration of the court proceedings, which often receives the form of torture to the parties. Upon the acting of the judgments brought by the ECtHR, the right to a trial within a reasonable time has become an integral part of human rights in the Republic of Macedonia. According to the Law on the Courts of the Republic of Macedonia from 2006, the party who considers that the competent court violated the right to a trial within a reasonable time has the right to submit a request for protection of the right within a reasonable time to the immediate higher court and to seek just compensation. In this way, the legislator of the Republic of Macedonia wanted to reduce the number of applicants to the ECtHR, but the number of applications continues to grow which is a worrying fact.²⁵ For justice as a universal legal value, the right of a citizen to sue his own state before an international authority means a confirmation of the centuries-old experience that the truth breaks out, although it is constantly suppressed (*Veritas laborat nimis, extinguitur numquam*).²⁶

²³ Камбовски, Владо. *Правото на судска заштита на човековите права и претпоставките за неговото остварување*, Судска заштита на човековите права во Република Македонија, Скопје, 2014, p. 27-28.

²⁴ European Court of Human Rights [ECtHR]. (1984). *Guincho v. Portugal*, No.8990/80.

²⁵ Шкарик, Светомир. *Научно толкување – Устав на Република Македонија*, Скопје, 2014, стр. 174.

²⁶ Шкарик, Светомир. *Македонија на сите континенти*, Скопје, 2000, стр. 325.

The ECHR requires that a court hearing on a particular case must be carried out in a “reasonable time”. In a “reasonable time”, in many cases, the court gives only a free assessment, while in others it estimates the time spent at each particular stage of the proceeding.²⁷ The interests of individuals regarding the speed of decision-making must coincide with the requirement of proper conduct of the proceedings. However, it is important to note that a reasonable time limit is not defined with respect to the time frame with any normative legal act, nor with the ECHR or with the Constitution of the Republic of Macedonia or the Law on Courts. Hence, the ECHR did not precisely define the purpose of the procedure for the right to trial within a reasonable time, so even the “claim” arising from this right is not completely clearly demonstrated.²⁸

The main reason could be located in the fact that the temporal dimension - the duration of the court proceedings (the process of enforcement of justice) is not precisely determined by the ECHR. In other words, the right to a trial within a reasonable time has been incorporated in the practice of the ECtHR and as it is, it can be qualified as a legal standard because it has casuistic meaning. In the framework of this right, from a judge it is expected lawful and effective justice. Lawful in the sense of correctly determining the relevant legal facts, the correct application of the material and procedural law. Effective means that these lawful objectives are attained in a shorter period of time, that subjects who are seeking justice and legal protection should receive it as soon as possible from a timeline perspective.²⁹

Starting from the point of view that the rights for which it is decided in the administrative procedure have a pronounced time dimension, so if some right is not recognized and realized within the time required by the party, the delayed realization of that right becomes irrelevant, i.e. the involved party has no more interest to achieve that right (for example, the right to a medical treatment). Therefore, a timely action by the administrative authorities of the state is required. In contrast, untimely action can cause harmful implications, both for public and private interests.

The Constitution of the Republic of Macedonia does not contain all human rights and liberties guaranteed with international conventions upon which every citizen has a right to judicial protection such as: the right to equal access to courts, the right to an independent and impartial tribunal, a fair trial and a trial within a reasonable time, etc. (envisaged by the ECHR; the more fundamental is the repertoire of fundamental rights provided by the Charter of Fundamental Rights of the European Union, which, again, are not explicitly proclaimed with the Constitution of the

²⁷ Britvić Vetma, Bosiljka, „*Europska konvencija za zaštitu ljudskih prava i temeljnih sloboda*“, Zbornik radova Pravnog fakulteta u Splitu, 2008, p. 138.

²⁸ While there is no established guidance on the time allowed by Article 6, it depends primarily on the number of court instances involved. As a rule, more scrutiny will be given to cases that last more than three years at one instance, five years at two instances and six years at three levels of jurisdiction. For more information see: Vitkauskas Davydas and Dikov Grigoriy, *Protecting the right to a fair trial under the European Convention on Human Rights*, Council of Europe, Strasbourg, 2012, p.74-75.

²⁹ Radolović, Aldo. „*Zaštita prava na suđenje u razumnom roku – realna mogućnost, (pre)skupa avantura ili utopija?*“, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 2008, p. 7.

Republic of Macedonia). On the other hand, the Law on Courts of the Republic of Macedonia has incorporated Article 6 of ECHR that covers the standards of exercising someone's rights before an independent and impartial tribunal with the obligation to conduct a fair procedure which will end within a reasonable time.

3.1. STRASBOURG CASE-LAW IN RELATION TO THE JUDICIAL CONTROL OF PUBLIC ADMINISTRATION IN THE REPUBLIC OF MACEDONIA

In the past several years, Macedonian dossier in Strasbourg has been increased with judgments in which the ECtHR has established violation of Article 6(1) of the ECHR concerning the right to a fair trial and hearing within a reasonable time. However, not all of the cases submitted to the ECtHR have been considered as admissible due to the timeframe for submitting an application. For example, in 2014, the ECtHR has brought eight (8) judgments and in four of them the ECtHR established violation of Article 6 of ECHR (in most cases it was about the duration/length of the procedure). In 2015 it can be noticed a slight increasing of the judgments to eleven (11) from which five (5) were connected to Article 6 of the ECHR. In 2016 from 11 judgments, the ECtHR detected violation of Article 6 of the ECHR in six (6) applications submitted to the ECtHR.

In the administrative procedure, the deadline in some cases starts from the day of the initiation of the administrative procedure, that is, the filing of the remedy of the second instance body, depending on when, in the circumstances of the case, it can be considered that there is a disputed legal situation. The reasonable duration of the proceedings is assessed in the light of the specific circumstances of each case, and on the basis of the following standards established in the Court's case-law: the complexity of the case; the behavior of the applicant; acting by the competent authorities; the significance of the decision in the case for the applicant. For example, with the failure of the administrative bodies to act in a timely manner after the court decision, it is the actions of the competent authorities that violate the principle of reasonable time.

This opinion was supported by the ECtHR in the case of *Dumanovski v. Macedonia*³⁰, where the Court found violation of Article 6(1) concerning the length of the proceedings. In this particular case, the applicant complained that the length of the proceedings had been incompatible with the 'reasonable time' requirement provided in Article 6 (1). Namely, the application has been submitted to the ECtHR because the procedure before the Employment Bureau and the Ministry of Labour and Social Policy has lasted four years, five months and seven days.

Further, in the case of *Gjoreski v. Macedonia*,³¹ the Court held that there has been a violation of Article 6 (1) of the ECHR in respect of the length of the proceedings.

³⁰ European Court of Human Rights [ECtHR]. (2006). *Dumanovski v Macedonia*, No. 13898/02.

³¹ European Court of Human Rights [ECtHR]. (2014). *Gjoreski v Macedonia*, No. 27307/04.

Namely, on 12 September 2000 the applicants initiated restitution proceedings. On 20 July 2001 they lodged a “silence of administration” appeal. After one remittal, on 5 October 2005 the Restitution Commission dismissed their claim to have the property restored into their possession and awarded them compensation instead. The type of compensation was to be decided with a separate decision. On 12 December 2008 the Administrative Court finally upheld the restitution order. On 23 February 2008 the applicants were requested to specify the type of compensation, which on 3 March 2009 they refused to do until, according to them, the Court would decide their case.

In 2015, the Court delivered a judgment in the case of *Mitkova v. Macedonia*,³² and found that there had been a violation of Article 6(1) as regards the length of the proceedings and on account of the lack of an oral hearing.³³ In the following year, in the case of *Ivanovski v. Macedonia*,³⁴ the ECtHR held that there had been a violation of the right to fair hearing, due to the overall unfairness of the lustration proceedings relating to the former President of the Constitutional Court. In this case, the applicant Ivanovski complained that the Lustration Commission and courts lacked impartiality and independence.³⁵

The latest case concerning Republic of Macedonia, where the ECtHR has established violation of Article 6 (1) has been solved in 2017, when the Court delivered a judgment in the case of *Petrovic v. Macedonia*. In this case the Court held that there was violation of Article 6(1) regarding the length of the restitution proceedings.³⁶

³² European Court of Human Rights [ECtHR]. (2015). *Mitkova v Macedonia*, No. 48386/09.

³³ The Court notes that the applicant lodged her claim for referral for treatment abroad after she had been treated abroad and had returned to the respondent State. The Administrative Court finally dismissed her claim for reimbursement of the total expenses for the treatment abroad, finding that the applicant had acted contrary to section 30 of the Health Insurance Act of 2000.

³⁴ European Court of Human Rights [ECtHR]. (2015). *Ivanovski v Macedonia*, No. 29908/11.

³⁵ On 8 October 2010 the applicant brought an action for judicial review in the Administrative Court against the Commission’s decision. He complained that the proceedings before the Commission had been unfair and of errors of fact and law. In particular, he complained that the session before the Commission had been held without Rules of Procedure having been adopted, which the Commission should have done ex lege before commencing the proceedings. The public session had not been, as initially planned, followed by proceedings in camera and he therefore had not had an opportunity to fully present his arguments.

³⁶ On 11 December 2002 the applicant instituted proceedings for restitution of a hotel in Skopje which had been confiscated from his predecessor in 1948. On 7 June 2004 a commission responsible for such matters within the Ministry of Finance dismissed the applicant’s claim. On 27 July 2004 he appealed. On 16 November 2004 a second-instance commission set up within the Government dismissed his appeal. Subsequently, the case went back and forth several times between the administrative bodies and courts at two levels of jurisdiction. The proceedings are currently pending before the Higher Administrative Court, awaiting a decision on an appeal by the applicant of 26 January 2016 against a judgment of the Administrative Court.

THE IMPORTANCE OF INDEPENDENT AND IMPARTIAL TRIBUNAL

The ECHR in its Article 6(1) connects the right to a fair and public hearing within a reasonable time, with the right to an independent and impartial tribunal established by law as a fundamental human right.³⁷ Judges should have sufficient powers and be able to exercise them in order to carry out their duties and maintain their authority and the dignity of the court. All persons connected with a case, including public bodies or their representatives, should be subject to the authority of the judge.³⁸ These functions can only be exercised by the court if its independent and impartial position in relation to the legislative and executive power is constitutional and legal guaranteed and provides it with freedom in decision-making, based exclusively on the law and the moral assumptions that give credibility to its decisions. Today its independence implies independence in relation to the political structures in the country. According to the ECtHR, independence implies first and foremost independence from Legislature and the Executive branch of power and then independence from the parties to the proceedings.

The requirement of the ECHR under Article 6(2), that the court is “established by law” is a reflection of the principle of separation of powers: the judicial system is established by law and its organization, the types of courts, their jurisdiction and other issues related with the exercise of judicial office cannot be regulated by arbitrary rules of the executive branch. At the same time, it means that the courts themselves have no competence to determine their organization or competence.

The law regulates the conditions for undertaking, i.e. transferring the competence from one court to another (resolving the conflict of competences by a joint higher court and delegated competence). This “Establishment by law” implies legality in the exercise of the functions of the court: the election of judges in accordance with law, the lawful composition of the court which decides in the concrete case, etc. It is not a requirement for fulfilling this requirement to determine the types of courts as courts with general jurisdiction or specialized courts, if their organization and competence are regulated by law. Assumption of effective legal protection of freedoms and rights is, namely, the legal regulation of the means of protection and the court procedure, so that the procedural powers of the court are prescribed (and limited) by law.

³⁷ At the heart of Article 6 of the ECHR is the guarantee of the right to be heard by an independent tribunal. The ECtHR and the former Commission have specifically developed four criteria to determine the independence of a tribunal: “*In order to establish whether a body can be considered “independent” regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressure and to the question whether the body presents an appearance of independence*”. For more information see: Power, Ann. “*Judicial Independence and the Democratic Process: Some Case Law of the European Court of Human Rights*”, 2012.

³⁸ See Chapter I (6), Council of Europe - Recommendation CM/Rec(2010)12 “*Judges: independence, efficiency and responsibilities*”, 17 November 2010.

Because of that purpose the Law on Courts of the Republic of Macedonia clearly stipulates that “the procedure before the court is regulated by law”.³⁹ Further, the Constitution of the Republic of Macedonia as a highest normative act in the country contains a decisive ban on emergency or ad hoc courts.⁴⁰ Regardless of whether it is established by law, there is *a priori* suspicion in the bias of the court whose function is delivering judgments only on a particular case or several such specific cases. In the judicial system of a country in which there are no such extraordinary circumstances, the establishment of an extraordinary court indicates the abuse of legislative powers for the use of the court as an instrument for achieving some short-term political goals.⁴¹

The independence implies to institutional and personal independence of the judge from political or other influences. This requirement has been met when more than one individual requirements are met in terms of: the manner of appointing judges (without political pressure, independent body), the duration of their mandate (unlimited, immovability), the existence of guarantees against clearing suspicions of “quasi-independence” and the position of the administrative bodies in imposing sanctions in a misdemeanor procedure. On this way it could be achieved, a certain level of security that the organization of the judiciary in democratic societies is not subject to the free assessment of the executive power, but rather it is precisely regulated by law.⁴² Subsequently, the Law on Administrative Disputes from 2006 contains *expressis verbis* - an explicit provision according to which the administrative disputes are resolved by the Administrative Court of the Republic of Macedonia, i.e. the proposal for repetition of the procedure is decided by the Administrative Court in a council composed of five judges.⁴³

The request for the independence of the decision-making body according to the established practice of the ECtHR has not been satisfied or achieved by the public administration bodies. This is argued with the connection of the lower governing bodies of the state to the instructions of the higher administrative bodies of the state,

³⁹ See Article 10 (1) of the Law on Courts, Official Gazette of the Republic of Macedonia No. 58/06.

⁴⁰ Amendment XXV replaces Article 98 of the Constitution, according to which: “*Judiciary power is exercised by courts. Courts are autonomous and independent. Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution. There is one form of organization for the judiciary. Emergency courts are prohibited. The types of courts, their spheres of competence, their establishment, abrogation, organization and composition, as well as the procedure they follow are regulated by a law adopted by a majority vote of two-thirds of the total number of Representatives*”. For more information visit the website <https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nsp.x>.

⁴¹ Камбовски, Владо. *Право на судска заштита на човековите права и претпоставките за неговото остварување*, Судска заштита на човекови права во Република Македонија, Скопје, 2014, p. 24.

⁴² See Article 6(2) of the Law on Courts, where it is stated that: “*When deciding about citizens' rights and obligations and deciding about criminal liability, everyone shall be entitled to fair and public trial before an independent and impartial court established by law within a reasonable period of time*”.

⁴³ According to the amendments on the Law on Administrative Disputes from 2010, has been determined the composition of the Administrative and Higher Administrative Court in resolving court cases.

with hierarchical structured responsibility in the performance of administrative activities, and the responsibility of the state administrative bodies, i.e. the executive power of the legislative power.

In the practice of the ECtHR, it is accepted that the court deciding on a civil right or obligation has the power to independently establish the facts or independently perform and evaluate the evidence; in short, it must be a court with full jurisdiction.⁴⁴ When deciding on civil rights within the meaning of Article 6(1) of ECHR, the Administrative Court should not be bound by the facts established in the administrative procedure, but it should be authorized to independently perform and evaluate the evidence, and to take into account all the facts that are relevant to his decision i.e. he must be a court with full jurisdiction. Hence, a crucial question is raised about the real-factual fulfillment of this condition, when it comes to the Administrative Court of the Republic of Macedonia. The fact that this court is obliged to resolve the administrative cases in a dispute of full jurisdiction does not mean anything else, if it is taken into consideration that the number of these solved cases is modest and does not fully satisfy the established criteria.

According to the applicable Law on Administrative Disputes in the Republic of Macedonia, the court resolves the dispute on the basis of facts established in the administrative procedure. It follows, from the above, that the actual situation in the administrative procedure is controlled by the Administrative Court. If the Court finds that the dispute cannot be resolved on the basis of the facts established in the administrative procedure because there is a contradiction in the materials of the case, or if he finds that in the administrative procedure have not been taken into consideration the rules of the procedure which could be of greater importance in the process of resolution of the case – the court will annul the administrative act with a judgment. In such a case, the competent administrative body is obliged to act in the manner prescribed in the judgment and to adopt a new administrative act. However, when it finds that the disputed administrative act should be annulled, the Administrative Court may, with a verdict, to settle the administrative matter, if the nature of the case allows it, and if the data of the procedure provides a reliable basis for that.⁴⁵ In relation to the above stated, it is obvious that the procedure before Administrative Court is in correlation with Article 6 of ECHR. Namely, in order to increase the efficiency of administrative dispute, the legislator in Article 40 of the Law on Administrative Disputes with an imperative legal norm, established the competence of the Administrative Court and prescribed successively the cases when the court is obliged to determine the factual situation itself if it is a matter of the administrative act that decides on the right or the obligation of the party, and the party disputes the correctness of the factual condition established in the administrative procedure. There is no need for the Administrative Court to independently determine the actual situation which has already been established in

⁴⁴ Britvić Vetma, Bosiljka, „*Evropska konvencija za zaštitu ljudskih prava i temeljnih sloboda*“, Zbornik radova Pravnog fakulteta u Splitu, 2008, p. 129-148.

⁴⁵ Article 40 of the Law on Administrative Disputes, Official Gazette of Republic of Macedonia No. 62/2006.

the administrative procedure, if the party does not contest it.⁴⁶ Hence, the Law on Administrative Disputes enables the Administrative Court to determine the facts and apply the law which subsequently means that the Court must determine the actual situation. When the Administrative Court will establish the actual situation, the resolution of the administrative matters is accelerated, which is often very important for the exercise of the party's right, i.e. for the administrative action in favor of the public interest. The new two-tiered structure of handling with cases of administrative nature has been established in 2010 with the amendments to the Law on Administrative Dispute. But, the problem lies in the fact that the Higher Administrative Court has no competence to determine new facts and in majority of the cases decides on nonpublic session. Because of that reason, it is important to take into consideration the request for involvement of the public in the process of bringing a verdict, which has been demanded by the ECHR as a core value for having trust in the judiciary and in courts as a whole.

4.1. MEANING OF IMPARTIALITY

Independence and impartiality should be recognizable and important categories connected to the judiciary in order to establish the rule of law and implementation of democracy. Public perception that justice is impartial is the foundation for the confidence which citizens must have in their judicial system. The requirement of an independent and impartial judiciary embraces both subjective and objective elements.⁴⁷

Article 6 of the ECHR guarantees the right to have disputes decided not only by an independent but also an impartial tribunal. Therefore, it is essential that judges show their impartiality⁴⁸ in the way in which they decide cases and hold the government accountable in the interest of the public. Indicators of an impartial functioning of courts can be seen in the rate of successful and unsuccessful cases in given constellations. For example, where the rate of successful cases against the

⁴⁶ Britvić Vetma, Bosiljka, „*Europska konvencija za zaštitu ljudskih prava i temeljnih sloboda*“, Zbornik radova Pravnog fakulteta u Splitu, 2008, p. 143.

⁴⁷ In the case of Piersack v. Belgium, the ECtHR (Application No.8692/79) described its approach to impartiality. Impartiality normally denoted absence of prejudice or bias. However, its existence could be tested in several ways. Thus a distinction was to be drawn between the subjective approach and the objective approach. The subjective test consists of endeavoring to ascertain the personal conviction of a given judge in a given case. It is of course notoriously difficult to substantiate allegations of actual bias and the Court has made it clear that personal impartiality is to be presumed until proof to the contrary. For more information see: Wildhaber, L. “*Judicial Impartiality under the European Convention on Human Rights*”, 2001, p. 1.

⁴⁸ Principle 2 of the Basic Principles on the Independence of the Judiciary specifies: “*The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason*”. For more information see: Office of the high commissioner for human rights, “*Human rights in the administration of justice: a manual on human rights for judges, prosecutors and lawyers*”, 2013, p. 135.

executive in administrative courts is rising, this can indicate less influence of the executive vis-à-vis the courts.⁴⁹

The notion of impartiality implies to subjective impartiality (the absence of prejudice and conviction of the judge in the present case) and objective impartiality (existence of facts that can be confirmed and create suspicion of the judge's impartiality, prior participation in the case, etc.). According to the ECtHR, the test of personal (subjective) impartiality is based on the presumption of non-existence of any prejudice or special preliminary subjective relation of the judge to the parties to the dispute or to the very subject of the dispute. A cumulative objective test of impartiality based on the existence of any objective fact that creates doubt in the impartiality of the judge.

From the Strasbourg case-law, we can emphasize the case of *Wettstein v Switzerland*.⁵⁰ In this particular case, the judge on the bench at the applicant's proceedings before the Administrative Court was also acting as legal representative for the municipality against the applicant in proceedings pending before the Federal Court. The ECtHR found that this situation raised legitimate objective concerns of the applicant regarding the impartiality of the judge.

Additionally, in the case of *Sramek v Austria*⁵¹ the applicant claimed that the Regional Real Property Transactions Authority that upheld an appeal against the Hopfgarten District Authority's decision to permit the purchase of property in a village in the Austrian Tyrol by the applicant, a foreign national, was not an independent and impartial tribunal.⁵²

Impartiality does not mean that the judge does not have a prior position or opinion on the subject itself, but rather the persistence of such an opinion and the immutability of the position, which would lead to the thoughtless presentation of the evidence and the establishment of the facts in the procedure. Hence, an impartial judge's request requires that the court be not burdened with the judgment in relation to the decision it adopts. Namely, he must not allow inside the courtroom to be influenced, but it is necessary to form his opinion on the basis of what was put

⁴⁹ Council of Europe – Report: “Challenges for judicial independence and impartiality in the member states of the Council of Europe”, SG/Inf (2016)3, 15 January 2016.

⁵⁰ European Court of Human Rights [ECtHR]. (2000). *Wettstein v Switzerland*, No 33958/96.

⁵¹ European Court of Human Rights [ECtHR]. (1984). *Sramek v Austria*, No. 8790/79.

⁵² The ECtHR held that the Office of the Land Government had acquired the status of a party when one of its Transactions Officers filed an appeal against the District Authority, and the inclusion in the Regional Authority of a civil servant from the Office of the Land Government whose hierarchical superior was that same Transactions Officer prevented the Regional Authority from being regarded as sufficiently independent. This was held despite the existence of regulations prohibiting the government from instructing civil servants on carrying out their judicial functions and despite the lack of any evidence that any actual (subjective) influence had been exerted. Where a “tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society. For more information see: OSCE/ODIHR and Folke Bernadotte Academy, “*Handbook for monitoring administrative justice*”, 2013, p. 41.

at trial. When examining whether a “tribunal” has prejudices, the court makes distinctions between objective and subjective impartiality.

The subjective approach refers to the personal impartiality of the members of a particular tribunal within the meaning of Article 6 of ECHR and it is presumed until proven otherwise. Contrary to the objective approach, which refers to the question of the composition and organization of the court, or there is overlapping of the functions or sequence of functions of one of the members of the court, it can give grounds for suspicion of the “tribunal” impartiality member. In the event of any reason for the said doubt, even if subjectively no specific indications are made about the bias of the persons mentioned, even this remains unacceptable endangering the trust that the court in a democratic society should admit.⁵³

The applicable Law on Administrative Disputes of the Republic of Macedonia from 2006 does not contain provisions for the exclusion of a judge, and on the basis of Article 51 of the same law, the provisions on exclusion of the judge are prescribed by the Law on Civil Procedure Republic (Articles 64-69). In view of this, it can be concluded that the parties are given the opportunity to ‘choose’ an impartial judge in the administrative dispute.

Further, Article 6 of the ECHR states that the trial should be public, since it is in favor of both the interest of the party itself and of the public interest in a manner that provides the opportunity for checks and reporting to the public during the procedure itself, as well as the creation of trust in the judiciary itself.⁵⁴ The right to a fair trial includes the right of any person to a public trial. A public trial is an essential feature of the right to a fair trial. This usually takes place at a first instance trial, however, if no such trial was committed, the violation can be removed so that a public trial is held before the higher court.⁵⁵ The European Convention on Human Rights allows limitations solely with regard to the public nature of the procedure (and not in the case of the judgment itself), the interests of national security, in the cases concerning the private life of the party, and the last condition, i.e. the interest of justice which is exclusively left to the domestic court. Regarding the Law on Administrative Disputes, it is the rule that the court decides in an administrative dispute at a session that is not public, ie without the presence of the parties. And with this rule, due to the complexity of the case in the administrative dispute or due to better clarification of the state of affairs, the court may decide to hold a public oral hearing. For the same reasons, the party may propose to hold a public oral hearing.⁵⁶ However, there is a rule that the court decides on a non-public session. The principle of literacy, mediation and non-competition is dominant in the administrative dispute.

⁵³ Britvić Vetma, Bosiljka, „*Europska konvencija za zaštitu ljudskih prava i temeljnih sloboda*“, Zbornik radova Pravnog fakulteta u Splitu, 2008, p. 139-140.

⁵⁴ Borković, Ivo, *Upravno pravo*, Zagreb, 2002, p. 512.

⁵⁵ Omejec, Jasna, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava – Strasbourški acquis*, Zagreb, 2014, p. 1141-1143.

⁵⁶ See Article 30 of the Law on Administrative Disputes: Generally, the Administrative Court in administrative disputes shall decide in a session which is not public. For administrative disputes the court shall decide on: - the lawfulness of the acts and - the administrative matter itself.

There is no doubt that the principle of hearing the parties, and then in the ultimate consequence and the principle of material truth, can be better achieved in conditions of the principle of tenor, immediacy and contradiction of culpability. The right to access to the court means that the person not only has the right to address to the court for the purpose of determining his rights and obligations and, in a prescribed and satisfactory manner, to present his case, but as mentioned above, he has the right to an independent and impartial tribunal.

CONCLUSION

The promotion of the 'Strasbourg standards' and their practical implementation is not possible without a functioning system of administrative justice, which allows private persons to effectively challenge administrative acts and decisions and holds public authorities accountable for breaches of law and infringements of human rights. For that purpose, Article 6 of ECHR enshrines the right to a fair trial and hearing within a reasonable time among other rights prescribed in its summary.

Republic of Macedonia performed crucial reforms in its judicial system as a requirement for the start of the accession negotiations with the European Union and afterwards gaining a membership in it. For that purpose was adopted a new Law on Administrative Disputes, and subsequently were founded the Administrative Court and Higher Administrative Court. Insofar, these reforms have been implemented, although there are proceedings and standards which should be changed in order to satisfy the requirements set up in the ECHR.

The Strasbourg case-law concerning the Republic of Macedonia is showing increased number of judgments in which the ECtHR has established violation of Article 6 of ECHR in administrative disputes. This is a good indicator that the administrative proceedings should be carried in accordance with the applicable laws and international standards such as the ECHR in order to decrease the applications before the ECtHR.

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