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THE CASE OF MUSTAFA V. BULGARIA (application № 1230/17, Judgement from 28.11.2019, that became final on 28.02.2020)

The judgement on Mustafa v. Bulgaria is the only one against Bulgaria which has as its subject the independence and impartiality of military courts in the light of Art. 6, § 1 of the Convention. Its execution has been followed independently by the Department for the Execution of Judgements of the ECHR (classified as a standard procedure).

VIOLATION ESTABLISHED BY THE COURT

In its judgement the ECHR held that there has been a violation of Art. 6, § 1 of the Convention – the right of the applicant to have an independent and impartial tribunal hear the criminal charges against him.

REASONINGS OF THE COURT

Facts of the case

The applicant was charged with two general (not military related) crimes – participation in an organized criminal group acting with venal goal and illegal transborder traffic of goods and objects with high value for commercial purposes and in execution of the decisions of an organized criminal group. He was accused along with four other people, one of whom was a member of the military forces in Bulgaria. For this reason, under Art. 396, § 2 and Art. 411a, § 7 of the Criminal Procedure Code, the criminal procedure has been lead during its pretrial proceedings by military pretrial officials (military prosecutor and military investigative officers) and during the court trial it has been held before the Military Court – Sliven, the Military Appellate Court and the Supreme Court of Cassation. The applicant was held guilty for the crime of illegal transborder traffic of goods and objects with high value for commercial purposes. Before the Supreme Court of Cassation the applicant's defendant made an objection that his right of fair trial was violated because the case had been heard by military courts as first and second instance, but in its judgement the Supreme Court of Cassation held that the military court's jurisdiction did not lead to an infringement of the right of the applicant of a fair trial.

Findings of the Court

In its judgement the Court finds that there has been a violation of the right of the applicant to have the criminal charges against him be heard by an independent and impartial tribunal,

because he is a civilian, but in accordance with the abstract rule of Art. 396, § 2 of the Criminal procedure code the criminal case against him had been led by military pretrial authorities and by the military courts. The Court concluded that the applicant's right of fair trial has been violated for two reasons. The first reason is that the characteristics of the Bulgarian military courts can cause doubts in the court's independence and impartiality (the military judges are bound by military discipline; from the moment of their appointment, they become a part of the military structure and are appointed a military rank, and the jurors sitting with the judge are generals (admirals), commissioned officers and non-commissioned officers in military service). The second reason, which according to the Court has particular significance, is the way in which the military courts were entrusted with the hearing of the accusations against the applicant – the Bulgarian national legislation provides *in abstracto* that every crime, which has allegedly been committed together by military officers and civilians, falls under the jurisdiction of military courts irrespective of its nature. The only fact taken into account when estimating the jurisdiction of the military investigative authorities and the military courts under Bulgarian law is the capacity of one of the accused. In its judgement of the case Mustafa v. Bulgaria the Court paid separate attention to the fact that the violation can't be compensated by the fact that the cases, heard by the military courts as first and second instance, fall within the jurisdiction of the Supreme Court of Cassation as a last instance. Because despite the fact that the Supreme Court of Cassation is a general court, as a cassation court it has limited competence – it can only rule on the point of law and cannot hold a new factual situation, differing from the one already recognized by the courts acting as first and second instance. According to the Court, in the particular criminal case the Supreme Court of Cassation did not make the analysis which would have enabled it to identify the shortcomings that led to the violation of Art. 6 of the Convention. And having in mind the absolute competence of the military courts that follows directly from the legal provisions, even after making such an analysis the Supreme Court of Cassation could not alter the jurisdiction within which the criminal case falls (§ 48 of the judgement).

The finding of the Court that the Bulgarian legislation does not comply with the international standards of independent and impartial military tribunal is fundamental. The Court explicitly stated that “a judicial system in which a military court can rule against a person, who does not belong to the military forces, can be easily assumed to be one that ignores the necessary distinction between the court and the parties in the criminal proceedings even when enough protection measures exist to guarantee the independence of this court.” (§ 31 of the judgement).

The Court explicitly states that the jurisdiction of the military courts provided for by the national legislation *in abstracto* for some categories of crimes is not enough and can put the affected civilians in a position which is significantly different from the position of the people tried by the courts with general competence (§ 37 of the judgement).

The Court finds a violation of the right of a fair trial in the light of the “developments on an international level”, set forth in the judgement, according to which the competence of the military courts has to be limited to strictly military crimes, committed by members of the military forces (§§ 48 and 54 of the judgement) and that “the state have an obligation to create courts with general competence, which are independent, impartial, competent and responsible and therefore capable to fight impunity.” And if the state can’t achieve that, this fact “cannot serve as a reason for the existence military or specialized courts, which try civilians.” (§ 19 from the judgement).

INFORMATION ABOUT THE VIOLATION

The reasons that lead to the violation originate from the legislation, according to which the jurisdiction of the military pretrial authorities and military courts is based on general rules and may apply to civilians accused of committing every possible crime. At the same time the bond of the military judges, jurors, investigative officers and prosecutors with the military order and discipline cause doubts in their independence and impartiality.

In its judgement the Court emphasizes on the jurisdiction of military courts and the trial phase of the criminal proceedings and respectively the Military Court – Sliven and the Military Appellate court are outlined as the authorities responsible for the violation. However, the fact that the court’s jurisdiction caused the pretrial proceedings against the applicant to be led by the authorities in accordance with Art. 399 of the Criminal Procedure Code, shouldn’t be overlooked. Because those authorities – the military prosecutors and military investigative officers, are bound by military order and discipline in the same way in which the military judges and jurors are. The criminal proceedings as a whole were led by military authorities without the existence of specific and substantial reasons, justifying their jurisdiction over civilians and without the necessary procedural guarantees for their independence and impartiality.

The necessity for the whole criminal proceedings to be led by authorities, whose competence is in accordance with the requirements of independence and impartiality, can be derived from the acts of the UN, quoted by the Court and set as a basis for the judgement, according to which “the organization and the functioning of the military courts have to guarantee as a whole the right of every person to a competent, independent and impartial tribunal during every stage of the proceedings – during the investigative phase as well as during the court proceedings...The status of the military magistrates has to guarantee their independence and impartiality especially from the view point of military hierarchy (§ 17 of the judgement).

STAGE OF JUDGEMENT EXECUTION

The Bulgarian government submitted an Action Plan for the Implementation of the Judgement from 11.01.2021 and a Revised Plan from 06.01.2022. They include a summary of

the executed individual measures and general measures. They point out the necessity for amendments of Art. 396, § 2 and Art. 411a, § 7 from the Bulgarian Criminal Procedure Code.

The Bulgarian government carried out a number of individual measures – the compensation, awarded to the applicant, has been paid. With Judgement № 97/21.12.2020 in criminal case 336/2020 of the Supreme Court of Cassation the criminal case against the applicant – Mr. Mustafa, has been reopened. It has been sent to the pretrial authorities with general competence – the District prosecution – Burgas, for pretrial proceedings, followed by a trial, led by a court with general competence – the District Court – Burgas.

In order to execute the necessary general measures, the government has translated, published and disseminated the judgement of the Court to the Supreme Court of Cassation, the Military Court – Sliven and the Appellate Military Court. It is unclear why the judgement has not been sent to the other Bulgarian military courts (set in Sofia and in Plovdiv).

There is no information whether the judgement of the Court has ever been included in any trainings of judges, and even less so – in the trainings of prosecutors and investigative officers, including military ones, despite the general obligation of all authorities, deriving from Art. 46 of the Convention, for execution and compliance with all the judgements of the Court. An obligation, which in accordance with Art. 5, § 4 of the Bulgarian Constitution has a direct effect and prevails over the national regulations which contradict it.

As far as the necessity for legislative changes in the Criminal Procedure Code, the Bulgarian government has informed the Committee of Ministers (in its Action plan on the Implementation of the Judgment of the ECHR in the case Mustafa v. Bulgaria from 11.01.2021 and the Revised plan from 06.01.2022) that an amendment bill had been lodged before the Parliament for the amendment of articles 396, § 2 and 411a, § 7 of the Criminal Procedure Code in relation to the military courts jurisdiction and that it provides that civilians can only be tried by military courts if they have participated in the execution of crimes against the military forces or against military property and for all other crimes civilians will be tried before the general courts. In the Revised plan it was specified that a working group for the amendment of the Criminal Procedure Code is to be set up to make an analysis and to propose the necessary legislative measures to comply with the Court's judgement.

No working group has actually been set up.

Also, the claims of the Bulgarian government for an amendment bill for the alteration of the regulations of the Criminal Procedure Code, made before the Committee of Ministers, following the process of judgement execution, significantly differ from the actual content of the amendment bill submitted to the Parliament.

The amendment bill, submitted to the Parliament on 16 October 2020, relates to the figures of European prosecutor and European delegated prosecutor. The only proposed amendment concerning the military courts, is in Art. 441, § 7 of the Criminal Procedure Code. To the existing

general rule that when a case falls under the jurisdiction of both the military and the specialized courts, the jurisdiction of the military court prevails, was set out an exception – when the case falls under the jurisdiction of the European Prosecution, the case falls under the jurisdiction of the Specialized court. This amendment entered into force and since then was repealed with the abolishment of the Specialized prosecution and courts in the spring of 2022.

On the 08 June 2020 another amendment bill was submitted to the Parliament in relation to the jurisdiction of the military courts in relation to civilians (and not only to Art. 396, § 2 of the Criminal Procedure Code) and was not mentioned to the Department for the Execution of Judgements of the ECHR. It included many propositions for the widening the jurisdiction of military courts, including giving them jurisdiction not only over cases, allegedly committed in complicity between members of the military forces and civilians, but also many crimes allegedly committed only by civilians. It was proposed that military courts had the competence over every criminal case against employees of the General Directorate "Execution of punishments" (ГДИН) and of General Directorate "Protection" (ГДО) with the Minisry of Justice for crimes committed during or in relation to the execution of their duties; all cases for crimes against property if the property concerned belongs to the Ministry of defense or its departments or the army, the State Agency for National Security (ДАНС), the National Service For Protection (НСО), the State intelligence agency (ДАР), as well as some of the crimes in Chapter 8 of the Special part of the Criminal Code, when the public relations, related to the normal functioning of the public authorities from the national security forces or of the persons, executing public functions in the sphere of defense or national security, have been threatened or damaged; for the military crimes under Chapter 12 of the Special part of the Criminal Code; for all crimes, allegedly committed in the territory of sites, property, equipment, vehicles belonging to the Ministry of defense, its departments or the army. The amendment bill has gone as far as the stage of "Allocation to Parliament Commissions". The long listing of the proposed amendments is not without a purpose. Because it shows with the upmost clarity that for the long period, in which the Bulgarian government owes the undertaking of specific actions for the alignment of the Criminal Procedure Code with the Convention and the international standards for the jurisdiction of military courts, the only amendment bill actually presented to the Parliament contains a proposition for amendments that are in total disregard of the ruling in the case of *Mustafa v. Bulgaria*. Instead of altering the *in abstracto* regulations giving military courts jurisdiction over crimes committed by civilians if they have supposedly been committed in complicity with a member of the military forces, with the proposed regulations, again *in abstracto*, the government aims at a significant widening of the military court's jurisdiction, giving them the competence to try a huge amount of cases for crimes committed solely by civilians (and not just when committed in complicity with a member of the military forces) and

mostly in cases concerning general crimes and not military crimes. Such amendments could only lead to even more violations of Art. 6 of the Convention.

POSSIBLE ACTIONS FOR THE EFFECTIVE EXECUTION OF THE JUDGEMENT

The articles of the Criminal Procedure Code regarding the jurisdiction of military courts have to be amended, but in accordance with all the conclusions made by the Court for the incompatibility of the Bulgarian national regulations with the fair trial standards. The amendments have to be consistent with the international tendencies of limiting the jurisdiction *ratione personae* of the military courts to trials against members of the military forces, accused of committing military crimes or offences in breach of military discipline (the latter in Bulgaria fall within the jurisdiction of the administrative courts). The only exception to this rule allowed in the international practice relates mainly to civilians, who are assumed equal to the military personnel because of the specifics of their obligations or their whereabouts or in relation to the nature of the crime, in which they have been accused – only crimes affecting the legally protected interests of the military order. If Bulgarian legislation continues to provide for the possibility of some criminal cases against civilians to fall under the jurisdiction of the military courts, it is necessary that those are only cases strictly related to military crimes. And even in such cases the investigative officers and the prosecution during the pretrial phase and the courts during the court proceedings have to be bound by a legal obligation to execute a particular estimation for the existence of exceptional reasons, of a compelling need for the specific allegations against a civilian to fall within the jurisdiction of the military pretrial and investigative authorities and the military courts. The authorities, involved with the criminal proceedings, have to be bound by a legal obligation to objectify in every separate case the existence of serious reasons for the accusations against a civilian to fall under the competence of military investigative officers, military prosecution and military courts. In accordance with the right to fair trial there has to be a regulation providing that if for the disclosure of objective truth (a main principle in the Bulgarian procedural law) it is necessary for a number of crimes (but with some link to the military) committed by a number of people, incl. civilians, to be tried as one case, this case shall fall under the jurisdiction of the general courts and not the military courts.

The need for such amendments in the current legislation is pressing since even at the moment before the military courts there are pending cases (including ones that are considered publicly significant and of high public interest) against civilians just on the basis of the abstract regulation of Art. 396, § 2 of the Criminal Procedure Code, which is not nearly enough to guarantee the right to fair trial under Art. 6 of the Convention.

Only such significant and necessary amendments will guarantee there won't be any more violations of Article 6 on the basis of military courts jurisdiction over crimes committed by

civilians. This fact leading to the need to limit the already quite narrow scope of military courts jurisdiction even further, puts forward the need for a serious reevaluation of the matter of the existence of military courts altogether. As it was pointed out, the states “are obliged to create courts with general competence, which are independent, impartial, competent and responsible and therefore capable to fight impunity”. And this obligation has to be fulfilled irrespective of the capacity of the person who will be tried before them.

In the meantime, in order to avoid the repetition of the same violation of the right to an independent and impartial tribunal under Art. 6 of the Convention, the Bulgarian investigative and prosecution authorities and the Bulgarian court have to refer directly to Art. 6, § 1 of the Convention and, irrespective of the general imperative regulation of Art. 396, § 2 of the Criminal Procedure Code, they have to make a comprehensive and well substantiated written estimate *in concreto* of the specific facts of any case, concerning a civilian suspected of committing a crime in complicity with a military person, and to apply the rule of Art. 396, § 2 of the Criminal Procedure Code only when there are sufficient objective reasons for that in the light of Art. 6, § 1 of the Convention. And this estimate has to be duly revised by the prosecution and by the court during the different stages of the criminal proceedings.

In any case the court, and the pretrial authorities before that, are obliged to decide on the merits of any objection made before them in relation to the unlawful application of Art. 396, § 2 of the Criminal Procedure Code in violation of Art. 6, § 1 of the Convention (such instructions are given, for example, with Judgement 183 from 10 December 2020 in case 822/2020 of the Supreme Court of Cassation, II criminal division, with which the case has been returned to the Appellate Military Court for a retrial). Future practice will show if in their judgements the courts will be bold enough to apply Art. 6 of the Convention directly as prevailing over the national legislation that contradicts it (based on Art. 5, § 4 of the Bulgarian Constitution). At the moment the common tendency of the authorities to apply Art. 396, § 2 of the Criminal Procedure Code strictly and formally, without complying with the principles and criteria set forth in the Judgement of the Court in *Mustafa v. Bulgaria*, prevails. Despite this fact, there are rulings of the Supreme Court of Cassation in the opposite sense – Judgement 2 from 14 February 2022 in criminal case 997/2021 of the Supreme Court of Cassation, II criminal division. In this judgement the Supreme Court of Cassation repealed the judgements of the Military Court – Plovdiv and of the Military Appellate Court based on the direct application of the Convention, the primacy of the Convention over any conflicting provision of the domestic legislation, and the obligation of the state to comply with the judgements of the Court against it. The case was returned to the Military Court – Plovdiv for a retrial from the stage of operative hearing (Art. 248 etc. of the Criminal Procedure Code) and the Supreme Court of Cassation gave binding instructions for the case to be returned to its pretrial phase, where the military prosecutor to send it to a

prosecutor with general competence so that he can conduct the pretrial criminal proceedings against an accused civilian, who was sentenced by military courts on charges of hooliganism, which was allegedly executed in complicity with a member of the military forces. The Supreme Court of Cassation gave explicit instructions that the authorities have to make a comprehensive evaluation if there is an actual necessity for the accused member of the military forces to be tried before military courts in the light of the fact that the crime, for which he has been accused, has no relation whatsoever to his military capacity or his military duty.

GENERAL MEASURES, TAKEN BY OTHER MEMBER STATES OF THE CONVENTION, AGAINST WHICH THE EUROPEAN COURT OF HUMAN RIGHTS HELD JUDGEMENTS FINDING A SIMILAR VIOLATION

The Court's judgement in the case *Mustafa v. Bulgaria* is an affirmation of the already established practice in many other cases, including *Pop and others v. Romania*, app. № 31269/06, judgement from 24.03.2015; *Maszni v. Romania*, app. № 59892/00, judgement from 21.09.2006, *Erdin (№ 6) v. Turkey*, app. № 47533/99, ECHR 2006-VI (extracts). The execution of all three judgements had been followed by the Committee of Ministers and the procedure was closed for all three.

In order to execute its obligations in relation to *Erdin (№ 6)* and to prevent subsequent identical violations of the Convention Turkey has undertaken amendments in two stages. First, right after the judgement of the Court, the legislation was amended so that when during peacetime a civilian is charged with committing a crime, falling under the scope of military criminal law, he/she is tried by a general court, which applies special procedural rules for the hearing of this type of crimes. No military magistrates or military personnel is involved in the proceedings. Afterwards, in 2017 with an amendment of the Turkish Constitution the military courts have been abolished altogether (including the Military Supreme Court of Cassation and The Military Supreme Administrative Court). The proceedings in relation to military crimes are heard by general courts applying special procedural rules. In addition, in relation not only to this violation of the Convention, Turkey has implemented the right of an individual application to the Constitutional Court in connection to violations of human rights, which the Court has acknowledged in its following judgements to be an effective remedy against violations of the Convention.

In order to execute its obligations in relation to *Maszni* and *Pop*, soon after they were held, Romania amended its legislation, which until then had provided that military courts had the jurisdiction to try cases for crimes committed in complicity with a member of the military forces. After the amendments the Romanian law provides that when there is a link between the different deeds or the proceedings can't be divided, if there are grounds for jurisdiction over the

criminal case of both general and military courts, the general court's jurisdiction prevails and the hearings are held before it. In addition, since the applicant in the *Maszni* case was a police officer and was tried (and found guilty) by military courts on this ground, the Romanian legislation has been amended so that the criminal proceedings against police officers fall fully under the jurisdiction of the general courts.

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