EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Applications nos. 13545/16 and 13572/16
Dejan NIKOLOV against North Macedonia
and Trajan DJIDJEV against North Macedonia

The European Court of Human Rights (First Section), sitting on 3 March 2020 as a Committee composed of:

Aleš Pejchal, *President,*
Tim Eicke,
Jovan Ilievski, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having regard to the above applications lodged on 5 March 2016,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

## THE FACTS

1. The applicants, Mr Dejan Nikolov ("the first applicant"), and Mr Trajan Djidjev ("the second applicant") are Macedonians/citizens of the Republic of North Macedonia, born in 1976 and 1972 respectively, and live in Gevgelija. They were represented before the Court by Ms K. Petkova and Mr D. Ajcev respectively, lawyers practising in Gevgelija.

2. The Government of North Macedonia ("the Government") were represented by their Agent, Mrs D. Djonova.

### The circumstances of the case

3. The applicants are police officers who were stationed at a border-crossing point at the border with Greece, near the city of Gevgelija. During the Syrian refugee crisis the border-crossing point in question was used as a key checkpoint by the authorities.

4. On 2 July 2015 the applicants were arrested for having allegedly solicited a bribe from a group of Syrian refugees who had entered North Macedonia from Greece the previous day. Allegedly, they had asked for 15 euros (EUR) per person in order to issue the group with the necessary documents and expedite their transit through the territory of the respondent State.

5. On the same day M.M. and M.D., Syrian refugees, gave a statement before a prosecutor. Neither the applicants nor their representatives were present at that time, only an interpreter was in attendance. M.M. and M.D. stated that upon entering North Macedonia on 1 July 2015 as members of a group of thirty refugees, they had been approached by an unidentified person in plain clothes who had offered to help them obtain the necessary documents faster in order to be able to pass through the country. The person had asked for EUR 15 per person, or EUR 450 in total. M.M. and M.D. had gathered travel documents issued by the Greek authorities from the group, collected the money, and told him that they would pay him after they had obtained the necessary documents. After some time had passed they had tried to get in touch with the person in question, but they could not find him. At one point in the afternoon a police officer had sent for them both and interviewed them, and he had asked them questions about the person who had solicited the money.

6. On 7 July 2015 the applicants were indicted before the Gevgelija Court of First Instance ("the trial court") for soliciting a bribe. As part of its evidence, the prosecution proposed to call the witnesses M.M. and M.D., who had been transferred to a reception centre for foreigners in Skopje in the meantime.

7. On 10 July 2015 the trial court contacted the reception centre in Skopje to summon M.M. and M.D. for a subsequent hearing.

8. On 16 July 2015 the reception centre notified the trial court that M.M. and M.D. had fled the centre (*се во бегство*). The centre had sent a written notice to a joint contact centre with Serbia in an attempt to locate them.

9. On 23 July 2015 a hearing took place before the trial court, in the presence of the applicants and their representatives. M.M. and M.D. were not present. At the hearing, M.P. and J.J., hierarchical superiors of the second applicant, testified that on the afternoon of 1 July 2015, as they had approached the border-crossing point, they had seen a person in plain clothes carrying a big pile of documents and heading to the police station. They had seen him hand over the documents to the second applicant at the entrance to the police station. After approaching the second applicant, they had found that he was in possession of identification documents issued by the Greek authorities which belonged to the group of Syrian refugees. They had asked him about the identity of the person who had handed him the documents, and he had identified the first applicant. He denied that he had solicited payment from the group, but said that he had instead been helping

the first applicant with his regular work. The witness J.J. stated that he had never seen the first applicant before that day, but he was 95% certain that he could identify him as the person who had been carrying the documents. M.P. and J.J. said that they had then spoken in English with M.M. and M.D., who had confirmed that they had handed the group's identification documents to a third party who had asked for EUR 15 per person in order to arrange for them to obtain the necessary transit documents. One of them had shown J.J. the money that he had collected from the group. M.P. and J.J. were then cross-examined by the applicants, through lawyers of the applicants' own choosing.

10. At a hearing held on 24 July 2015 the prosecution proposed that the trial court should admit the statements which M.D. and M.M. had given on 2 July 2015 into evidence, given that they were unavailable to testify. In spite of the defence's protests, the trial court accepted the proposal, holding that the witnesses had fled and had become untraceable. At the same hearing the trial court admitted all evidence proposed by the defence, heard several other witnesses, and admitted additional evidence proposed by the prosecution. The defence withdrew a proposal to have the applicants testify.

11. On 27 July 2015 the trial court convicted the applicants as charged and sentenced them to eleven months' imprisonment. It established the facts on the basis of the testimony of M.P. and J.J. In addition, it relied on written evidence, such as the group's identification documents issued by the Greek authorities which had been found by M.P. and J.J., and the applicants' mobile phone records, which served to prove that the applicants had been in constant communication with each other at the material time. The court based its finding that the applicants had requested money from the group on the testimony of M.P. and J.J., and on M.M. and M.D.'s statements.

12. The applicants appealed, stating, *inter alia*, that a judgment could not be based on M.M. and M.D.'s statements. They relied on relevant sections of domestic law, as well as Article 6 of the Convention.

13. In its comments submitted in reply, the prosecution proposed that the appeal court should uphold the judgment. The higher prosecution authority (*Вишо јавно обинителство*) also submitted comments, inviting the appeal court to quash the judgment, which in its opinion was insufficiently supported by evidence.

14. On 10 September 2015 the Skopje Court of Appeal (*Апелационен суд Скопје*) upheld the judgment. The relevant part of the judgment reads as follows:

> "[T]he first-instance court was notified that [M.M. and M.D.] had fled and their presence could not be secured. On the other hand, taking into account the verbal and material evidence in the case, this court finds that there is sufficient evidence to establish the facts and uphold the conviction of the applicants, even without relying on the statements of [M.M. and M.D.] (*фактичката состојба ... и нивната кривична одговорност наоѓа поткрепа во доказите и без да се земат предвид исказите*

*на сведоците Сириски државјани*), since the decisive facts are corroborated by all of the remaining evidence (*решителните факти се потврдуваат од сите останати докази*)."

# THE LAW

15. The applicants complained under Article 6 §§ 1 and 3 (d) of the Convention that the criminal proceedings against them had been unfair, given that their conviction had been based on statements provided by M.M. and M.D., whom they had been unable to cross-examine. Article 6 §§ 1 and 3 (d), in so far as relevant, provide as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

..."

## A. The parties' arguments

16. The Government submitted that M.M. and M.D. had become untraceable, given their departure from the reception centre. They had not been detained there and had left of their own free will. From that point on, the courts had had no means of locating them, apart from contacting the joint contact centre with Serbia, which had been to no avail. Neither the trial court nor the State had had information regarding their whereabouts or their destination. The Government further submitted that neither the applicants nor their lawyers could be summoned when the prosecutor had heard from M.M. and M.D., since such an action at that point in the investigation could have obstructed the subsequent collection of evidence. In any event, there had been other corroborating evidence in support of the courts' findings. Therefore, the statements of M.M. and M.D. had not constituted the sole or decisive evidence for the applicants' conviction. Lastly, there had been sufficient counterbalancing factors to alleviate any burden placed on the defence, factors including: the applicants having the opportunity to present their own version of the events, a right which they had waived by refusing to testify; the fact that they had been represented by a lawyer of their own choosing throughout the proceedings; and the fact that they had had the opportunity to propose other evidence, all of which had been accepted by the trial court.

17. The applicants argued that there had been no good reason for the prosecution's failure to summon them when M.M. and M.D. had given statements on 2 July 2015. The reception centre for refugees had been under the control of the Ministry of Interior, so the Government was responsible for the witnesses fleeing. They further argued that the courts had relied solely on M.M. and M.D.'s statements to establish that a bribe had been solicited, which was a crucial element for the conviction. Lastly, they had not waived their right to testify, but their testimony would have been irrelevant, given the trial court's unlawful decision to allow M.M. and M.D.'s statements into evidence.

### B. The Court's assessment

18. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single decision.

19. The relevant principles developed in the Court's case-law on the compatibility with Article 6 §§ 1 and 3 (d) of the Convention of proceedings in which statements made by a witness who had not been present and questioned at the trial were used as evidence were set out in the cases of *Schatschaschwili v. Germany* ([GC], no. 9154/10, § 107, ECHR 2015), and *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, § 119, ECHR 2011). These principles were recently summarised in the case of *Seton v. the United Kingdom* (no. 55287/10, §§ 58 and 59, 31 March 2016).

20. The Court observes that M.M. and M.D. were part of a group of thirty refugees. Upon entering North Macedonia, they clearly expressed their desire to pass through the country and continue to their destination, which remained unspecified.

21. The Court notes that the trial court made an unsuccessful attempt to secure the attendance of M.M. and M.D. by writing to the reception centre where they had been staying (see paragraphs 7 and 8 above), but they had left in the meantime. The centre's attempt to locate them through a joint contact centre with Serbia appears to have been unsuccessful as well (see paragraph 8 above). Therefore, in the absence of any other information regarding M.M. and M.D.'s destination, the trial court had no viable means at its disposal of tracking their whereabouts or obtaining any information about their address once they had left the reception centre. There were therefore good reasons for the witnesses' non-attendance at the trial (see *Schatschaschwili*, cited above, § 140, and compare *Asani v. the former Yugoslav Republic of Macedonia*, no. 27962/10, § 45, 1 February 2018). The Court makes this conclusion notwithstanding the Government's failure to present satisfactory reasons as to why neither the applicants nor their representatives were notified of the interview which took place before the prosecutor on 2 July 2015 (see paragraph 5 above).

22. The Court further notes that the applicants were convicted for soliciting a bribe from the group of Syrian refugees. In this regard, the domestic courts relied on the testimony of the eyewitnesses M.P. and J.J. - who had spoken to the applicants, as well as to M.M. and M.D. – as decisive evidence to establish the sequence of events on the day in question. The Skopje Court of Appeal confirmed that the evidence of these witnesses – taken together with other available evidence, such as the group's documents issued by the Greek authorities and the applicants' mobile phone records – was decisive (see paragraph 14 above).

23. The Court considers it noteworthy that the veracity of M.M. and M.D.'s testimony was never contested by the applicants, who limited their defence to arguing that such testimony could not serve as a basis for a conviction (see paragraph 12 above).

24. In view of the above, the Court considers that the statements by M.M. and M.D. did not constitute the "sole" or "decisive" evidence for the applicants' conviction (see, among other authorities, *Dzelili v. Germany* (dec.), no. 15065/05, 29 September 2009, and compare *Asani*, cited above, § 48; see also, by contrast, *Paić v. Croatia*, no. 47082/12, § 41, 29 March 2016). The defence was thus handicapped to a much lesser extent.

25. Lastly, the Court will examine whether there were sufficient counterbalancing factors present to compensate for the defence's handicap.

26. In this regard, the Court notes that the Skopje Court of Appeal attached less weight to the untested statements of M.M. and M.D. by holding that the conviction would be upheld even without reliance on their statements (see paragraph 14 above).

27. In addition, there was a considerable volume of corroborating evidence to support the applicants' conviction (see paragraphs 11, 14 and 22 above), and the applicants were provided with the opportunity to present their own version of events, but they chose not to use that opportunity (see paragraph 10 above).

28. Against this background, even though the Government failed to present valid reasons for the failure to summon either the applicants or their representatives for M.M. and M.D.'s interview with the prosecutor, the Court finds that the rights of the defence were not restricted to an extent incompatible with the guarantees provided in Article 6 §§ 1 and 3 (d).

29. Consequently, the Court finds that the complaint is manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

*Decides* to join the applications;

*Declares* the applications inadmissible.

Done in English and notified in writing on 26 March 2020.

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| Renata Degener<br>Deputy Registrar | Aleš Pejchal<br>President |