Department of Human Rights and Communities

Legal System Monitoring Section

Failure to Properly Address Interlocutory Applications in Civil Proceedings

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Failure to properly address interlocutory applications in civil proceedings

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) is concerned that courts' failure to properly address interlocutory applications[1] made during the course of contested civil proceedings in Kosovo courts may violate the Kosovo legal framework and lead to violations of international human rights law. In cases which it has monitored, the OSCE has observed that courts frequently do not provide adequate reasoning in the interlocutory decisions which they issue, or in some instances, neglect to respond at all to interlocutory applications made by parties. In addition to potentially violating the Kosovo legal framework, this practice may also negatively affect parties' enjoyment of the rights implicit in the right to a fair trial as guaranteed by Article 6 of the *European Convention on Human Rights and Fundamental Freedoms* (ECHR).[2] Among these are the right to have one's case properly examined, the right to a reasoned judgment, the right to trial within a reasonable time, and the right to an independent and impartial tribunal established by law.

The court's proper treatment of interlocutory applications made by parties is essential to the fairness of contested civil proceedings. When hearing a case, the court has a duty to "effectively examine the grounds, arguments, and evidence adduced by the parties."[3] Failure by the court to properly examine a party's "specific, pertinent, and important"[4] arguments has consistently been held by the European Court of Human Rights (ECtHR) to be a violation of Article 6 of the ECHR.[5]

Courts' failure to properly address the interlocutory applications of parties may also have an adverse impact on parties' right to trial within a reasonable time as guaranteed by Article 6 of the ECHR. This right may be violated when courts needlessly delay decisions on interlocutory applications by parties or address such applications with unreasoned decisions such as may constitute violations of the 2008 law on contested procedure.[6]

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1 An interlocutory application is a request or petition, interim or temporary, the resolution of which does not constitute "a final resolution of the whole controversy." See *Black's Law Dictionary, 8th edition* (United States, Thomson West, 2004), page 832.

2 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted in Rome, 4 November 1950.

3 *Dulaurans v. France*, ECtHR judgment of 21 March 2000, paragraph 33. See *Kraska v. Switzerland*, ECtHR judgment of 19 April 1993, paragraph 30: the effect of Article 6(1) is to obligate the tribunal "to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision." See also *Van de Hurk v. the Netherlands*, ECtHR judgment of 19 April 1994, paragraph 59; *Jokela v. Finland*, ECtHR judgment of 21 May 2002, paragraph 68.

4 *Pronina v. Ukraine*, ECtHR judgment of 18 July 2006, paragraph 25. In that case, the ECtHR found that a violation of Article 6 ECHR occurred when the domestic court ignored the point that the applicant raised in her petition, even though it was "specific, pertinent, and important".

5 In addition to the aforementioned judgments, see also: *Kuznetsov v. Russia*, ECtHR judgment of 11 January 2007, paragraph 84, in which the ECtHR found that a violation of Article 6 ECHR occurred when the crux of the applicants' grievances was left outside the scope of review by the domestic courts, which declined to undertake an examination of the merits of their complaint; and *De Moor v. Belgium*, ECtHR judgment of 23 June 1994, paragraph 55, in which the court held that the requirements of a fair hearing were not met when the Belgian Bar Council rejected the applicant's application without reviewing the relevant legal criteria.

6 Law No. 03/L-006 on contested procedure, Kosovo Official Gazette, 20 September 2008 (2008 law on contested procedure), which courts in Kosovo began applying on 6 October 2008. See also

The 2008 law on contested procedure establishes a normative framework for conducting civil proceedings in a predictable and transparent manner. The law particularly specifies that a basic violation of contested procedure always exists when a decision has deficiencies which prevent it from being scrutinized. Among these deficiencies is "when the verdict has no reason or gives no justification for the final facts, or which reasoning are unclear, contradictory, or if in the final facts there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of proceeding."[7] The requirement that interlocutory decisions taken by the court during the course of proceedings be well-reasoned is implicit in the law's requirement that final verdicts be well-reasoned.[8] Furthermore, certain provisions of the 2008 law on contested procedure which pertain to final judgments are also applicable to rulings/decisions issued during the proceedings.[9] A violation of the "provisions on contestation procedures", which may include failure to provide a well-reasoned interlocutory decision, is grounds for striking a verdict.[10]

A reasoned judgment is another vital component of a fair hearing, and is essential to enable public scrutiny of the administration of justice.[11] Reasoned judgments demonstrate to parties that they have been heard, and afford parties the possibility to appeal against them or have the decision reviewed by an appellate body.[12] Courts are not required to give a "detailed answer to every argument,"[13] and they have a "certain margin of appreciation when choosing arguments in a particular case and admitting

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Official Gazette of the Socialist Federal Republic of Yugoslavia 4/1977, 36/1980, and 66/1982 (12 February 1982) (with amendments from 1998) (1982 law on contested procedure). Many provisions in the 2008 law on contested procedure remain substantially similar to those in the 1982 law on contested procedure. As discussed below, such violations of the 2008 law on contested procedure may be grounds for striking the verdict. In such case, the parties must wait for the outcome of a retrial for a determination of civil rights and obligations which would have been made earlier but for the failure of the court to follow the correct procedure. See *König v. FRG*, ECtHR judgment of 28 June 1978, paragraph 99 (the conduct of the competent administrative and judicial authorities is one factor to be taken into consideration when determining the reasonableness of the length of civil proceedings).

7 Article 182.2 (n), 2008 law on contested procedure. See also Article 354, paragraph 2, section 14 of the 1982 law on contested procedure, which imposes a similar requirement.

8 Article 160 of the 2008 law on contested procedure specifies the requirements for written verdicts. These requirements consist, in part, of reasoning both of the final outcome and of decisions made by the court during the proceedings which affect the final outcome. Article 160.4 provides that "Justification of the verdict consists of: requests of parties, facts submitted and proposed proofs, which of the facts are validated, why and how they were validated, if they were validated according to the proof which proofs were used and how they were validated." Article 160.5 provides that "The court specifically should show which provisions of the material right are applied in the case of deciding upon the requests from the parties. If necessary, the court will pronounce on the standing of the parties regarding the judicial basis for the contests, as well as for their proposals and turndowns, for which the court hasn't justified decisions issued earlier in the process."

9 See Article 175, 2008 law on contested procedure.

10 See Article 181.1 (a), 2008 law on contested procedure. A verdict can also be stricken: "(b) due to a wrong ascertainment or partial ascertainment of the factual state; [or] (c) due to the wrong application of the material rights." Article 181.1.

11 *Tatishvili v. Russia*, ECtHR judgment of 9 July 2007, paragraph 58. See, *mutatis mutandis*, *Hirvisaari v. Finland*, ECtHR judgment of 27 September 2001, paragraph 30.

12 *Suominen v. Finland*, ECtHR judgment of 1 July 2003, paragraph 37.

13 *Pronina v. Ukraine, supra* at note 4, paragraph 23.

evidence in support of the parties' submissions."[14] However, the ECtHR's jurisprudence nonetheless obliges authorities to justify their activities by giving reasons for their decisions,[15] and this obligation includes, in particular, a requirement that courts give reasons for their judgments.[16]

Despite the law's clear requirement that courts respond to the interlocutory applications of parties in a reasoned manner, the OSCE has monitored cases in which courts provided no justification for their interlocutory decisions, even in the final verdict.[17] The following cases serve as examples.

> On 5 September 2008, in a compensation for damage case in a court in the Prishtinë/Priština region, the president of the municipal court issued a decision denying the respondent's request to exclude the presiding judge. The decision merely stated that the presiding judge had acted "according to the law" and that "none of the procedural actions of the presiding judge could be regarded as illegal." It neither enumerated which actions the respondent had challenged, nor made reference to any specific legal provisions grounding the decision. As of October 2009, the case was still awaiting expertise assessing the damage caused to the plaintiff.

Decisions on requests to exclude a judge from contested civil proceedings should always include reasoning. The 2008 law on contested procedure enumerates specific criteria for when a judge may be excluded.[18] The court should always refer to the applicability of these criteria when issuing a decision on a party's request for exclusion of a judge.

Request for exclusion of a judge is just one type of interlocutory application which a party may make during the course of contested civil proceedings. Another type of interlocutory application is a request to adduce evidence.[19] The OSCE has noted that courts frequently do not provide sufficient reasoning in their decisions to accept or refuse proposals to adduce evidence. The case below serves as another example of failure by a court to issue a sufficiently reasoned interlocutory decision.

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[14] *Tatishvili v. Russia*, *supra* at note 11, paragraph 58. *Suominen v. Finland*, *supra* at note 12, paragraph 36. "The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is, moreover, necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and [. . .] differences [. . .] with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments." *Hiro Balani v. Spain*, ECtHR judgment of 09 December 1994, paragraph 27.

[15] *Tatishvili v. Russia*, *supra* at note 11, paragraph 58.

[16] *Pronina v. Ukraine*, *supra* at note 4, paragraph 23.

[17] The 2008 law on contested procedure clearly requires that final verdicts must include the court's reasoning of interlocutory decisions which affect the outcome of the proceedings. See Articles 160.4 and 160.5, cited above at footnote 8.

[18] See the 2008 law on contested procedure at Article 67. See also the similar and analogous provision in the 1982 law on contested procedure, Article 71.

[19] To adduce is "to offer or put forward for consideration (something) as evidence or authority." See *Black's Law Dictionary, 8th edition* (United States, Thomson West, 2004), page 42. Both the 1982 and 2008 laws on contested procedure give the court discretion in deciding which evidence it will use to inform its decision. See Articles 219 and 220 of the 1982 law on contested procedure, and Article 319 of the 2008 law on contested procedure.

> On 3 September 2009, during the preliminary hearing in a case involving an amendment of a child custody decision in a court in the Prizren region, the representatives of each party proposed the adduction of separate pieces of evidence. That same day, following deliberation, the trial panel issued a decision. The decision stated that both parties' proposals to adduce evidence were refused. No reasoning was provided. On 16 September 2009, following another hearing, the panel again deliberated and again refused to adduce the evidence. This time, the reasons for refusal were stated orally by the court. However, this reasoning was not reported in the minutes, thereby depriving the parties of the opportunity to authoritatively incorporate it into any further filings before the court.[20]

According to the 2008 law on contested procedure, parties in contested civil proceedings are required to "present all facts on which they base their claim and propose evidence which establishes such facts."[21] In turn, the law requires the court to "decide on eligibility of the evidence truthfully and cautiously as well as based on the results of the entire proceeding,"[22] and to "examine each evidence individually and collectively."[23] When a party asks the court to adduce a piece of evidence, the court should demonstrate that it has fulfilled its obligations as set forth in the aforementioned articles by issuing a well-reasoned decision in response.

The OSCE has also monitored cases in which courts unduly delayed their responses to the interlocutory applications of parties, or ignored the interlocutory applications of parties altogether. The following cases serve as examples.

> On 22 June 2007, in a municipal court in the Prishtinë/Priština region, the petitioner in a case requesting the extension of a protection order filed a petition requesting the exclusion of the judge from the case on the grounds that the presiding judge had not yet decided on the case and the petitioner question the judge's objectivity. The petition was submitted to the president of the municipal court, and stated that the petitioner had previously informed the president orally of the circumstances whereby the exclusion was requested. On 22 June 2007, the municipal court issued a decision refusing the request for extension of the protection order. The president of the municipal court never addressed the request for the exclusion of the judge. On 27 June 2007, the petitioner filed an appeal to the district court. On 13 November 2007, the district court issued a decision sending the case back to the municipal court for retrial, on the grounds that Article 354, paragraph 2, part 10 of the 1982 law on contested procedure had been violated.[24] On 12 September 2008, the first

[20] Additionally, such failure to record the oral reasoning in the minutes may violate the 2008 law on contested procedure, Article 135.2, which states: "The record should contain the essential information about the content of the action undertaken. The record of the main proceeding of the matter shall include especially whether the proceeding was undertaken behind open or closed doors, the content of the statements made by the parties, their proposals, the evidence provided, the evidence used, the statements of witnesses and experts, decisions rendered by the court while proceeding but also the decision rendered after completion of the main proceedings of the matter."

[21] Article 7.1, 2008 law on contested procedure.

[22] Article 8.1, 2008 law on contested procedure.

[23] Article 8.2, 2008 law on contested procedure.

[24] As per the cited provision, an essential violation of the provisions of the law on contested procedure, meriting the challenge of a judgment, exists if "the court reached a judgment without

> retrial hearing was held in the municipal court, and was assigned to the same presiding judge who had issued the first instance judgment.[25] Due to lack of decision by the president of the court on the petitioner's previous request to exclude the presiding judge, the presiding judge postponed the session until 6 October 2008. The president of the municipal court in fact did issue a decision on 12 September 2008 rejecting the request of the plaintiff as ungrounded, without any additional explanation.[26]

Both the 1982 and 2008 laws on contested procedure clearly foresee steps which the court should take when presented with a request by a party to exclude a judge from a trial.[27] The court does not have the option to ignore or indefinitely delay such a request; if it deems that the request has not been made in a timely manner in accordance with the law, then it should issue a decision articulating that opinion.

When courts do not properly address parties' requests for exclusion of a judge from the case, they may jeopardize the parties' right to an independent and impartial tribunal established by law. Courts violate parties' right to an impartial tribunal when they fail to offer "sufficient guarantees to exclude any legitimate doubt" of their impartiality.[28] Therefore, if a party requests exclusion of a judge from a proceeding based on such doubt, failure by a court to dispel that concern by evaluating the request in a timely manner may perpetuate a violation of the party's right to an independent and impartial tribunal.

The following case serves as a further example of a court's failure to properly address the interlocutory application of a party.

> On 16 September 2009, during the main hearing in an interethnic property usurpation case held in a court in the Prizren region, the respondent's lawyer contested the evaluation of the damage made by the construction expert. The respondent's lawyer stated that the evidence submitted in the construction expert's report was in contradiction with the "state on the field regarding the surface of the object" as well as with the "findings of the expert of geodesy

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holding the main trial thus being obliged to hold it." In this case, the court held no hearing between the petitioner's submission of claim on 7 May 2007 and its decision on 22 June 2007, despite the requirements of Articles 12 and 7 of UNMIK Regulation 2003/12 on Protection Against Domestic Violence.

[25] Article 394 of the 1982 law on contested procedure permits a case sent back to the first instance court for retrial to be heard in front of the same or another panel. Article 198.3 of the 2008 law on contested procedure similarly provides that "the court can decide that another judge resides over the case."

[26] The municipal court subsequently held hearings in retrial on 6 October 2008 and 24 October 2008. On 24 October, the municipal court again issued a judgment refusing the request for extension of the protection order as ungrounded. The petitioner again appealed to the district court. On 6 February 2009, the district court again issued a decision sending the case back to the municipal court for retrial, this time on the grounds that Article 354, paragraph 2, part 14 of the 1982 law on contested procedure had been violated. The case was again assigned to the same presiding judge who had issued the first instance judgment. After two scheduled second retrial hearings which neither party attended, the court issued a judgment stating that the claim was considered to be withdrawn.

[27] See Articles 73 and 74 of the 2008 law on contested procedure. See also Articles 72 to 75 of the 1982 law on contested procedure.

[28] *Findlay v. United Kingdom*, ECtHR judgment of 21 January 1997, paragraph 73. Courts also violate this right when the tribunal is not "subjectively free of personal prejudice or bias." *Id*.

and the state of facts in the cadastral books." The respondent's lawyer also challenged the legality of the amendments to the plaintiff's claim. At the end of the main hearing, on the same day, the court issued a decision establishing the value of the dispute in the matter in the amount requested by the plaintiff. However, the court never addressed the objections raised by the respondent or specified reasons why such arguments were rejected.

In this case, as in the example cited before it, the court failed to properly address requests by parties to decide on issues which could have been outcome determinative in the ongoing proceedings. Instead of ignoring the objections, requests, or other duly made interlocutory applications of parties, courts must clearly demonstrate to parties that their decisions are not rendered arbitrarily. The only way to do this is by always responding to interlocutory applications made by parties in a timely manner, and by issuing well-reasoned decisions.

Conclusion and Recommendations

Proper conduct of contested civil proceedings is vital to the public confidence in the professionalism and fairness of the judiciary. Parties in contested civil proceedings have the right to have their case properly examined, the right to receive a reasoned judgment, the right to trial within a reasonable time, and the right to an independent and impartial tribunal established by law. The courts' proper handling of interlocutory applications by parties is essential to ensuring that these rights are respected.

Extensive reasoning of interlocutory decisions is not required. The OSCE has previously expressed its concern regarding the extensive case backlog and insufficient allocation of judges to Kosovo courts, and recognizes the challenges which these circumstances present.[29] However, in order to comply with the Kosovo legal framework and international human rights standards, courts must always address the interlocutory applications of parties in a timely manner, according to the procedures foreseen by law, and through reasoned decisions.

In response to the concerns identified, the OSCE recommends:

- Courts should respond to the interlocutory applications of parties in a timely manner.
- Courts should respond to the interlocutory applications of parties with reasoned decisions which analyse the facts in reference to relevant legal criteria.
- The Kosovo Judicial Institute should continue to train judges in legal reasoning and writing, with a particular focus on the drafting of well-reasoned decisions and judgments.

[29] See the OSCE report *"Insufficient Number of Judges in Kosovo"* (June 2009). Available at http://www.osce.org/documents/mik/2009/09/39346_en.pdf.