

Legal Innovations to the Strasbourg Court and the Decision Qama versus Albania

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Abstract

Strasbourg Court in the past three years has undergone some important changes relating to its internal functioning. Precisely the aim of this article is to reflect these innovations to give a better understanding of the organization on the Strasbourg Court issues. We have to mention here as the first legal innovation of the court the judicial disputes according to the urgency of the application, and when the request is based on the articles 2,3,4,5 par. 1 of the ECHR. Also part of this paper will be the next innovation of the Strasbourg Court the pilot judgment and his positive consequences, on the functioning of the court.

Part of our analysis will be the final decision against Albania of Mr. Qama on January 8, 2013, which represents for us, but we think also for the readers, a special interest in terms of legal issues raised in the trial of the case. The question in this part of analysis is: To what extent are recognized foreign decisions in our country, by the Albanian state courts, at the time when there was a decision of another court outside Albania on the same issue, facts, subject? Also a very important aspect of this decision is the interpretation of the legal notion of a state's positive obligation to take steps to protect the privacy of its citizens. After analyzing our article it is stated that Strasbourg Court seeks to achieve a very high level of professional and legal justification of its decision, with a main disadvantage the large number of applications that it faces.

Keywords: Filtering, request, application, urgency, positive obligation.

Introduction

1. Unilateral statement and its notion of Law

In the case before the Strasbourg Court an amicable solution has been unsuccessful, without result of compromise between the parties, the government can undertake corresponding affirmative, citing a statement by its Contracting State has violated the European Convention and shall take all steps for the compensation of the applicant-seeker¹. This statement is known as unilateral declarations and is regulated by Law No. Regulation 62A of the Strasbourg Court. Use of this declaration has spread since 2007 (Entered into force on 1 September 2012.). In 2011, 692 statements were made compared with 30 in 2007 applied. In February 2010 the Interlaken Conference on the topic of the future of the Strasbourg Court, cited the crucial role of the unilateral Declaration, particularly in the treatment of recurrent cases (Giorgetti, Ch. 2012 pg. 325, Keller, H& Forowicz, M &Engi, L. 2010 .pg. 15).

¹ At every moment of trial court performance may suggest that the parties reach a settlement of their dispute through compromise. Compromise is an agreement between the parties in which the issue will be closed. When the state and the applicant reach an agreement to resolve their clash, this compromise by the state agrees brings a profit-compensation award to the applicant. After examining the conditions of compromise and fall upon the issue by the Court of gliston table issues. If no agreement is reached. The court will proceed with the examination of the case as required by procedure.

1.1 Filling and component elements

A unilateral declaration is completed after a failed attempt to reach an amicable solution (Also, except in cases of recurring issues). Submission of declaration should be made in public (Bates, E.(2010). *The Evolution of the European Convention on Human Rights*, pg. 490, Christoffersen, J.& Madsen, Mikael R. (2011). *The European Court of Human Rights between Law and Politics*, pg. 138.). The applicant is invited to submit comments. If the claimant is dissatisfied with the terms of issue unilateral declaration will be removed from the list of issues the Court and its implementation will be supervised by the Committee of Ministers (Article 39 of the European Convention). In case the applicant seeks the continuation of the trial of the case is that the Court will determine its performance (Article 37 of the European Convention.). In the event that the Court finds that it is necessary to proceed with this matter it undertake unilateral declaration, which must contain the following criteria:

- 1) Existence of previous issues as concrete issue where the actual issue is based;
- 2) Assertion of clear violation of the Convention and explaining the nature of the violation;
- 3) adequate compensatory damages;
- 4) When you can take the necessary steps of a general nature as such amendment of legislation or administrative practice or introduction of a new policy.
- 5) Respect for human rights. Declaration of Human Rights to argue that respect for human rights requires no further examination of this issue. If the Court accepts the unilateral declaration it can proceed with the issuance of a decision

1.2 Execution of unilateral Declaration

The Committee of Ministers has no authority to supervise the fulfillment of commitments unilateral declaration as it was taken by the Court². In case the government fails to take individual measures the applicant may request that his case be reinstated for trial table³.

1.3 Policy Priority and Urgency Court Issues Judgment

1.3.1 Article 41 of the Rules of the Court of Strasbourg

1.3.2 The processing requirements of the case

In June 2009 the Court of Strasbourg Court amended the rules regarding the performance criteria of the case. So far cases processed and judged primarily on a chronological basis. In short issues were examined in a way that they become almost award decision. In this way it was possible given priority to issues that had an element of urgency within it. With the increasing number of cases the Strasbourg Court saw no need to change the rules of this Court. Also noticed an increase in the number of cases of some specific countries, the Strasbourg Court decided to adopt a new policy, the essence of which is expressed in Article 41 of the Rules of the Court. Based on this article court must see the importance and urgency of the matter to decide which cases should be tried by the Court immediately (Temperman, J. 2011. pg. 78). This body also set some fixed criteria by which the Court will decide the issue. These criteria which determine the performance of this case are:

- 1) emergency applications where human life or health is in danger or circumstances related to personal and family life of the applicant, especially when there's a child's welfare.
- 2) Requests that raise questions capable of having an impact on the effectiveness of the conventional system, especially in an endemic or structural situation which the Court has yet to adjudicate, or requests which raise a question of general interest, especially when it Question major implications of the internal legal system or the European system.

² If there is a unilateral declaration Deadline in time for implementation, the Court will allow three months for fulfilment of commitments.

³ Cases of unilateral declaration are: 1) *v Bekerman. Lechtenstein* (No. 15994/10), 29.11.2011. Longiness unilateral declaration affirmed the long anticipated issues and adequate compensation. (Article 37 ECHR) 2) *v Liptay. Hungary* (No. 12144/09) 22.05.2012. Longiness unilateral declaration affirmed the long anticipated issues and adequate compensation, terms which were accepted by the applicant (Article 39 ECHR). 3) *v Rozhin. Russia* (No. 50 098) 06/12/2011. Unilateral declaration claimed violation of the right to a fair legal process without reopening the issue take nationally. Collapse The statement by the Court. Other cases see Hudoc database.

- 3) Request that make complaints under Articles 2,3,4, and 5 § 1 of the Convention (core rights), no matter if they are repeated, in cases where they give direct threats to human dignity and psychological integrity.
- 4) potentially well-founded request to the ECHR Articles
- 5) The application filed before the pilot trials.
- 6) Request that identify problems that lead to the admissibility of the request
- 7) Request that identify problems that lead to the inadmissibility of the claim.

Based on the above chart in a matter of a higher category will be judged before an issue that is in a lower category. However belongs to a room or its President to decide an individual case should be handled in a different way. In practice this means that a plausible allegation of torture or cruel and inhumane acts (Article 3 of ECHR) will be dealt with precedence compared to alleged violations of the right of expression (Article 10 ECHR) in the same state. The purpose of the categories set out above is clearly intended as more serious matters or those which exhibit significant problems and have numerous to be treated quickly (Mowbray, A 2012.. pg. 27. Piet Eeckhout, &Tridimas, T. 2011., pg. 17).

2. The process of filtration speed of issues

In the Interlaken Conference in February 2010 a court ruled by the filter section on disputes coming from five (5) countries, from which originates a greater number of cases in the Strasbourg Court (Mowbray, A 2012. pg. 27. Piet Eeckhout, &Tridimas, T. 2011, pg. 17). These states are: 1) Russia 2) Turkey 3) Romania, 4) Ukraine, 5) Poland (Christoffersen, J.& Madsen, Mikael R. 2011. pg. 138. Giorgetti, Ch. 2012.,pg. 315). These countries account for about half of the cases are awaiting trial in this Court. the filter section came into force in 2011. Its main function is to provide a precise way that all applications will be placed in the correct procedural step, if that will be sent to a judge for decision or to a committee of three judges or by prioritizing the Court Room. After six (6) months was evident that the creation of this filter has helped to speed the progress of the case to the Strasbourg Court. At the end of 2011 had the filter section 859 claims impressive numbers. Compared to 2010 we had an increase of 42%. The filter section is able to decide on the appropriate procedural stage all the requests coming to the Court. Ukraine and Poland for all issues identified immediately treated by a single judge. For Romania the proportion of single judges is more than 90%. For Russia and Turkey filtration section is able to handle about 75% of cases by a single judge (Wolfrum, R. & Deutsch U.(2009)., pg. 109).

2.1 Pilot trial

The court may initiate a pilot judgment procedure and adopt a pilot trial when the facts reveal that state a contractual requirement (ie one of the 47 states that have ratified the ECHR) has a structural or systemic problem or similar problems which are raised or can rise in demand in the future run the Court of Strasbourg (Pilot judgment entered into force on 21.02.2011). Before you initiate a pilot trial court must first of all identify the opinions of the parties in the event that the judgment of the case in question has problems which are above type (structural problems, systemic or dysfunctional state) and if this issue can be judged the pilot judgment procedure. This type of trial may be initiated by the court upon its own motion or at the request of one of the parties (Pilot trial applied under Article 41 of the Rules of Court). The court must identify the pilot trial (Sadurski, W. 2012. pg 41. Kicker, R. 2010. , pg. 49):

- 1) the nature of the problem first and systemic or structural problem and dysfunctional state
- 2) The second type of corrective measures that Contracting State shall be taken at the national level. The Committee of Ministers, the Parliamentary Assembly of the Council of Europe Secretary General of the Council of Europe and the Commissioner of Human Rights of the Council of Europe should be informed of the adoption of the pilot judgment and any other kind of judgment in which the Court draws attention for a structural or systemic problem of contractual state. Information about the pilot trial initiation, adoption and execution of pilot judgment and also their closure of such procedures should be published on the official website of the Court (Lambert Abdelgawad, E 2008. , pg. 58. Mowbray, A 2012.. pg. 47. Piet Eeckhout, &Tridimas, T. 2011., pg. 97).

2.2 *The issue Qama Versus Albania and Italy*

This issue explains the concept of legal practice that has a positive obligation for the state to take all necessary and legal steps to ensure the child's contact with his father. This is one side of this concept as the other features and mosdetyrimin State to implement this obligation when it is impossible for the State party to make it possible to provide or ensure the right of contact between parent and child. This obligation in many cases based on the principle of good child and always viewed and parental responsiveness, desire and willingness of the parent to assume legal responsibilities.

2.3 *Circumstances of the Case*

On 17.10.2002 aunt of a boy Albanian origin applied a request to the Court of Ancona for minors to get custody of her grandson (Family Qama has left Albania in 1997 to Italy without documents. In 2002, the boy's mother dies from a terminal illness, while Mr. Qama was expelled from Italy because he had no legal documents to stay). On 04.06.2003 the Court of Rome aunt took custody of the boy child. Have cited the fact that the Italian authorities had communication with the boy's father on 25.09.2003, but the father asked the son to return to Albania and the place where he lived. Further Mr. Qama was informed by the Italian Ministry of Justice the right to complain that he never exercised. 15.01.2007 Child was asked by the judicial authority with which the party wanted to stay and his answer was that he had nothing whatsoever talking on the phone with his father after the father had not treated well in the past and this arsze want to live with aunt His. This statement was repeated again on 7.12.2007 by the child. The boy's father tried to contact his son through emails and these were registered on 22.01.2007. He stated that the boy was assigned guardianship of his aunt without the consent of Mr. Qama. A month later Mr. Qama Court took judicial way of fact in Durres, which in its decision of 30.06.2007 asked the boy's behavior in Durres to meet his father in his inability to travel to Italy after crossing not allowed. Through the Hague Convention on Protection of Children to 25.10.1980 and entered into force in Albania on 1.09.2007 and 1.05.1995 in Italy in its first article stated that:

- a) The aim of this Convention is to return the children to get unfairly and held by one of the states that have ratified the Convention.
- b) Ensure that the rights of child custody and access to meetings with parents to be respected by States Parties

2.4 *The argument of the Italian State*

Mr. Qama has not make use of all internal remedies of his state of origin. He should have filed an appeal

2.5 *The argument of the Albanian State*

Albania used the same argument as Italy. As regards the argument that it violated the right to privacy, family and personal (ie Article 8 of the ECHR), in terms of unrealized contact with his child by the respective countries (Albania and Italy). Albania as a state party to the facts before the Court argued through its efforts to contact the child, but the fact that the child was outside the jurisdiction of the Albanian state to limit it as an implementation of the core of Article 8 of the ECHR. Strasbourg Court argument concerning Article 8 of the ECHR was such. Article 8 can not be understood as extensor of the obligations of a Contracting State, then in its obligation to provide the applicant his contact with the child, the child has moved to another jurisdiction and the jurisdiction of the state. Article 8 of the ECHR read in the light of the Hague Convention sets no national-state authorities positive obligations to ensure the return of the child if the applicant holds the right to contact or simply visit (So guests or contractual rights). The Court concluded in its decision citing 'from the moment that both parents Mr. Qama his wife agreed to be removed from Albania to Italy and from that moment the boy stayed in Italy by the Court's decision, which does not recognize Mr. Qama the right of custody, from this moment there is a positive obligation to Albania to take steps to ensure the implementation of the decision of the Court of Durres Albania, which recognized the right of contact. The applicant should have filed this appeal in order to be eligible to win the Italian Court. For this reason there were no violations of Article 8 of the ECHR.

3. **Conclusions**

As analyzed above, there is an attempt by the Strasbourg Court to improve its services, specifically in the delivery of justice in a faster time. The reforms of factors decision of this Court (General Assembly of Ministers and Committe)

based on figures show that reforms have brought very positive results for the Court, specifically in its functioning more effectively and rapidly. The influx of claims in excess of this Court makes its necessary reform over the years so such initiatives should be applied, otherwise the Court would lose its value as a complementary tool in delivering justice. The decision against Mr. Qama clearly shows that individuals should not forget their legal obligations which lie primarily in assisting, raising their children, that the exercise of parental rights and obligations (talk about family rights package which includes the right to contact and child's communication with its parent) and secondly must understand that the rights should be asked consistently at every level of the judiciary.

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