Business and Human Rights Journal (2024), **9:** 183–189
doi:10.1017/bhj.2023.20

Business and Human Rights Journal

DEVELOPMENTS IN THE FIELD

Barriers to Access to Justice in North Macedonia for Violations of Human Rights in the Context of Air Pollution

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Abstract

This article analyses a domestic litigation matter seeking to establish accountability for air pollution-related human rights violations. It examines how the judiciary applied national and international law to dismiss the case on procedural grounds. It argues that the domestic case deserves careful reading for a number of reasons that can be distilled into two premises. Firstly, the national legal framework and its respective judicial interpretation impede access to justice for victims of state and/or corporate human rights violations. Secondly, it is essential that the state develops laws and policies in line with the United Nations Guiding Principles on Business and Human Rights, which would allow claimants to focus their argumentation on material, rather than procedural issues relevant to proving the merits of the case.

Keywords: Accountability; air pollution; judicial interpretation; North Macedonia; PM concentrations

I. Introduction

The Skopje Basic Court (SBC) brought a decision, *B.N. and Macedonian Young Lawyers Association (MYLA) v the Government of North Macedonia and Others*,[1] regarding the negative impact of particulate matter 10 (PM10) and particulate matter 2.5 (PM2.5) in the ambient air on human rights. This important lawsuit has prompted a discussion about access to justice for victims of human rights violations.

The SBC rejected the lawsuit of B.N., an individual, and MYLA, a non-governmental organization, claiming that the state and its bodies have failed to fulfil their obligations regarding limit values of PM concentrations in the ambient air and have thus violated the human rights of B.N. The SBC also rejected the second claim – for certain obligations to be imposed on the government to combat air pollution. The Skopje Appeal Court (SAC) confirmed the SBC ruling.[2] However, as an exception, it allowed the extraordinary remedy of a revision with the Supreme Court of North Macedonia (SCNM), as it determined that the lawsuit raises legal questions important for ensuring a unified application of the law.[3]

[1] Decision P4.578/19, 28 September 2020.

[2] Decision GZ-507/21, 28 June 2020.

[3] According to article 372, para 4 of the Law on Civil Procedure, the court of second instance can allow revision with the SCNM if it determines that the decision in the dispute depends on a material or process legal issue important for ensuring a unified application of the law and harmonization of court practice. In the explanation of the verdict, the court of second instance outlines the legal issue and the decisions indicating an uneven application of the law.

The SCNM rejected the revisions of the plaintiffs, holding that the SAC has failed to point to decisions based on a different application of the law.[4] Section II of this piece provides an analysis of the case, covering the different stages of the procedure. Section III then outlines the author's views on the implications of the decision on access to justice for any state or corporate violations of human rights in the context of air pollution and beyond.

II. Case Analysis

PM10 and PM2.5 are among the most harmful air pollutants in North Macedonia. The daily limit value of PM10 constantly exceeds 120 to 180 days per year, which is way above the accepted norm of 35 days per year.[5] The annual concentrations of PM2.5 exceed the European Union (EU) limit value of 25 $\mu g/m^3$ in nearly all Macedonian cities.[6] These pollutants have severe consequences on the health and the healthy environment of the population. For example, the decline in life expectancy attributed to PM2.5 exposure exceeding the World Health Organization Air Quality Guidelines (AQG) level is eight months for individuals aged 30 who live in the capital of Skopje.[7] Industry, together with households and commercial units, have been identified as having the biggest impact on air quality in the country.[8]

On 18 July 2019, B.N. and MYLA filed a lawsuit against the Government of North Macedonia, the Ministry of Environment and Physical Planning, and the municipality of Skopje at the SBC. The lawsuit initiated the first domestic litigation seeking the state's and its bodies' accountability for air pollution-related human rights violations.[9] The lawsuit contained a declaratory and a condemnatory claim. With the first claim, the plaintiffs requested that the SBC declares that within an extended period (between 2008 and 2018 in the case of PM10, and between 2013 and 2018 in the case of PM2.5), the defendants have failed to comply with their respective obligations to prevent a situation where the accepted annual ambient air PM limit values are exceeded, resulting in violation of the first plaintiff's rights. The plaintiff invoked the right to health, the right to a healthy environment, the right to privacy of personal and family life, and the inviolability of the home, without seeking compensation for damages linked with air pollution.[10]

The second claim requested that the SBC orders the government to take certain measures, such as to fully harmonize national legislation with the EU Air Quality Directives, to establish an integrated system that will provide for a comprehensive, unimpeded exchange of data, and to ensure timely submission and completeness of the

[4] Decision Rev2.br.85/22, 14 June 2022.

[5] United Nations Environment Programme, *Air Quality and Human Health Report – The Case of the Western Balkans* (Vienna: UNEP, 2019), 6.

[6] Ibid.

[7] Ibid, 19.

[8] Ibid, 29.

[9] According to the author's knowledge, there are several environmental related procedures seeking for accountability of state bodies or officials, although with a different claim than the present case: Case USPI no. 12/2020 at the Administrative Court, TS-13/19 at the Primary Court Ohrid, P1-6/21 at the Primary Court Struga, and a criminal charge filed on 25 October 2019 at the Basic Prosecution Office. All cases are pending.

[10] Cf. *JP v Ministre de la Transition écologique, Premier minister* (C-61/21), Opinion of Advocate General Kokott, 5 May 2022, arguing that in the event of a sufficiently serious breach and a direct causal link by an EU Member State of the obligations resulting from rules on air quality, individuals can claim compensation from the Member State for damage to their health; cf. also *Dimitar Yordanov v Bulgaria*, no. 3401/09, paras 57–70, where the ECHR awarded the applicant compensation for the breach of his property rights as a result of the exposure of his property to environmental hazard.

data from the stationary sources of pollution to provide a comprehensive information system for ambient air quality.

The plaintiffs alleged that the defendants failed to discharge their obligations to maintain the level values of the PM concentrations, including in relation to the industry. They supplied evidence of a lack of environmental inspection of certain stationary sources, an absence of a cadaster of pollutants and a lack of emission data on ambient air quality from individual stationary sources. The plaintiffs positioned the case within the stream of environmental litigation relying on international treaties, the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECHR) jurisprudence and reports of the United Nations human rights bodies.

The defendants invoked various objections, such as the lack of active standing on the part of MYLA and the lack of competence *ratione materiae*, indicating that the first claim is a confirmation of facts, which is forbidden in line with the Law on Civil Procedure (LCC).[11] In addition, the plaintiffs argued that they have undertaken all respective obligations, submitting evidence mostly from 2018 onwards, and proposing that the SBC rejects the lawsuit as inadmissible or unfounded.

The Decision of the SBC

In a relatively speedy procedure, the SBC rejected the lawsuit as inadmissible for the following reasons. The SBC agreed with the defendants that the first claim required confirmation of facts, forbidden in the LCC. The SBC also found that it is not competent to impose measures on the executive branch, as required by the second claim. The SBC stated that the plaintiffs could have filed the lawsuit directly against the economic operators, or that they could have initiated an administrative or a constitutional procedure.

The SBC interpreted relevant international law extensively. In the view of the court, article 9 of the Aarhus Convention allows access to justice only for breaches of the right to access public information or the right to public participation, but not for challenging acts and omissions by public authorities which contravene provisions of its national law relating to the environment. Furthermore, referring to *European Commission v Republic of Poland* (Case C-336/16), the SBC stated that EU jurisprudence is irrelevant as North Macedonia is not an EU member state. Also, the SBC ruled that it is bound by the final rulings of the ECHR brought only against North Macedonia as a party to the proceedings, but not by the remaining ECHR jurisprudence.

The Procedure in Front of the SAC

The plaintiffs filed an appeal with the SAC, asking the court to quash the first-instance decision and instructed the lower court to reopen the procedure. The plaintiffs challenged the judicial interpretation of national and international law. They argued that the first claim seeks to confirm the existence of a legal relationship between the state and an individual that came about because of the failure of the state to fulfil its obligations.[12] The plaintiffs stressed that only the civil court has the jurisdiction to adjudicate on the lawsuit's claims. The Constitutional Court lacks the competence to hear complaints for invoked human

[11] LCC, article 177, para 1 reads: 'In the lawsuit, the plaintiff may seek the court only to determine the existence, or the non-existence of a right or legal relationship or truth, or the falseness of a document'.

[12] With Decision TSZ-427/19, the Appeal Court Bitola quashed the decision TS-13/19 of the Primary Court Ohrid, instructing the lower court that it cannot reject a lawsuit under the Law on Civil Procedure, article 177 para 1, but should decide upon the merits of the order with a similar claim as the case of this 'Developments in the Field' piece.

rights.[13] In addition, while the Administrative Court (AC) has a mandate to decide on the legality of administrative acts, this case is not challenging an administrative act. Neither can the plaintiffs seize the AC by request for an unlawful act, as this legal remedy is non-existent in the new Law on Administrative Disputes. In the end, the plaintiffs argued that the civil court wrongly indicated that they could have based their submission on articles 157–159 of the Law on Environmental Protection, as they did not claim damages from operators.[14]

The appeal stated that article 9, paragraph 3 of the Aarhus Convention explicitly gives the plaintiffs the right to access to justice, as they are challenging the failure of the public authorities to undertake obligations relating to the environment. The plaintiffs stressed that a court of a candidate EU country should strive to invoke the CJEU jurisprudence, such as Case C-336/16, especially as the latter case resonates around Directive 2008/560/EC, which is nearly fully integrated into the Law on Ambient Air Quality. Concerning the implementation of ECHR jurisprudence, the plaintiffs noted that the decision of the SBC deviates from the numerous judgements brought by the civil courts, especially in the area of protection of freedom of expression, where the civil courts rely heavily on the ECHR jurisprudence in their rulings.

In their reply, the defendants proposed to the SAC to reject the appeal as unfounded.

In a short decision, the SAC confirmed the SBC ruling fully. However, as an exception, it allowed the parties to submit a revision, which is an extraordinary remedy, to the SCNM. The ASC found that this remedy would allow the highest court to decide upon the legal issue, i.e., whether the plaintiffs had the right to submit the lawsuit to the SBC, which is important in order to ensure consistent implementation of the law and unification of judicial practice.

The Procedure at the SCNM

On 16 and 24 December 2021, the plaintiffs filed revisions with the SCNM, arguing that they, as plaintiffs, have a right to submit the lawsuit to the SBC, the only forum with jurisdiction to decide upon civil rights and obligations. A rejection of the lawsuit would have a disproportionate effect on the plaintiffs' access to justice. On 5 January 2022, the government and the ministry submitted a reply asking the court to reject the revisions as unfounded. On 14 June 2022, the SCNM ruled that the revisions were unfounded as the Appeal Court failed to refer to cases that indicate disharmonized judicial practice. Basically, the SCNM stated that due to the failure of the second instance court, the highest court cannot adjudicate whether the plaintiffs have a right to access to the civil court for both or one of the claims.

III. Implications of the SBC Decision

The North Macedonian legal system is firmly nested in the civil law tradition; therefore, case-law is not *per se* a source of law. However, in practice, judges cite national jurisprudence in their reasoning. Therefore, the SBC decision deserves a careful reading for five key reasons.

[13] According to article 110, para 1(3) of the 1991 Constitution of North Macedonia, as well as articles 51–57 of the Rules of Procedure of the Constitutional Court, a citizen may request protection by the Constitutional Court alleging that his/her right or freedom was infringed upon by an individual act or action. However, the procedure can be initiated only for a restricted list of rights and freedoms, which does not include the rights mentioned in the respective lawsuit.

[14] Articles 157–159 of the Law on Environmental Protection prescribes accountability for harm caused to the environment by operators by means of their professional activities.

Firstly, this decision reveals that, at present, the Macedonian civil courts cannot adjudicate whether state bodies, but also even business entities, have violated their respective obligations, which has in turn, led to air pollution-related human rights violations. This argument can be applied beyond the context of air pollution. The case raises the issue of access to justice when the state is responsible for failing to act in general, including failing to fulfil its obligation to protect citizens against business-related human rights abuses.[15] Contrary to the analysed case, in a recent ground-breaking judgement,[16] the Sofia civil court upheld the plaintiffs' claims against the municipality of Sofia, alleging that the excessive PM10 air pollution in the period between January 2015 and May 2017, coupled with the failure of the authorities to remedy the situation, amounted to a breach of the citizens' right to clean air and ordered the defendant to implement a series of regulatory measures and practical activities.

Secondly, the decision exemplifies how international law is interpreted by national courts. The author believes that it is contrary to the basic tenets of the constitution to accept the judicial reasoning that international jurisprudence unless issued against North Macedonia, is not applicable in the country.[17] The case may set a precedent for interpreting treaties and international jurisprudence on other topics, such as business and human rights-related issues. Furthermore, in the context of accountability for (corporate) violations of human rights, it may be even more difficult for parties to invoke 'soft' law sources such as the United Nations Guiding Principles on Business and Human Rights (UNGPs) or UN Special Procedures reports.

Thirdly, the SBC decision conveys that the judiciary is not mandated to compel the executive to act. Contrary to the Macedonian judiciary, the CJEU found that Bulgaria, Poland and Romania have failed to comply with their respective obligations under the EU Directive 2008/80 as the daily limit values for PM10 were exceeded, and obliged the states to take action.[18] Now, as it stands, Macedonian courts refuse to take a *proactive role* by deciding on the merits and join the group of courts that impose obligations on states[19] or companies[20] on business and human rights-related topics.

[15] For a pending case from the region, cf. *RERI v EPS*, 6 PR no. 181/21, Higher Court in Belgrade, where the applicant alleges that due to the failure of EPS (a state-owned company) to fulfil its obligations regarding sulphur dioxide, EPS has violated the right to health and environment of the citizens in Serbia. European Environmental Bureau, 'Serbia's Public Electricity Company Faces Court Challenge for Breaching Toxic Emissions Limits', *European Environmental Bureau* (26 January 2021), https://eeb.org/serbias-public-electricity-company-faces-court-for-breaching-toxic-emission-limits/ (accessed 28 September 2022).

[16] UNECE, 'Case Summary Posted by the Task Force on Access to Justice' (15 March 2022), https://unece.org/sites/default/files/2022-04/Bulgaria_2021_Air_quality_class_action_summary.pdf (accessed 4 May 2022); cf. also *O. P. v Polish Ministry of Environment* III CZP 27/20, http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/iii%20czp%2027-20-1.docx.html (decision in Polish), where the Polish Supreme Court held that air pollution can violate personal rights such as health, freedom and privacy, and lead to civil law claims in favour of the individual. Also, in *Metlaš and others v City of Belgrade* P-20265/2020, the First Basic Court of Belgrade in a non-final decision ruled that noise pollution has violated the human rights of the plaintiffs under articles 2, 3 and 8 of the ECHR, and ordered the City of Belgrade, the defendant, to pay 1000 Euros to each of the plaintiffs.

[17] Cf. along the same lines, Center for Legal Research and Analysis, 'How to Achieve Efficient and Effective Environmental Justice?', Policy Paper (February 2021), How-to-achieve-efficient-and-effective-environmental-justice-(1).pdf (accessed 9 May 2022).

[18] Cf. *Commission v Bulgaria* C -488/15 (2017), *Commission v Poland* Case C-336/16 (2018), *Commission v Romania* C-638/18 (2020); cf. also CEE Bankwatch Network, 'Implementation of the Air Quality Directive by Western Balkan Countries – 2022 Update', *CEE Bankwatch Network* (14 February 2022), https://bankwatch.org/publication/implementation-of-the-air-quality-directive-by-western-balkan-countries-2022-update (accessed 4 May 2022).

[19] Cf., e.g., Conseil d'État, Décision No. 394254, 12 July 2017.

[20] *Milieudefensie et al v Royal Dutch Shell* C/09/571932 / HA ZA 19-379 (2021).

Fourthly, procedural barriers prevent victims from publicly presenting relevant evidence on human rights violations. This case was rejected on procedural grounds, and the claimants could not present any evidence of the failure of the state to efficiently and continuously protect individuals from human rights violations, including those arising from the activities of the business community. As demonstrated by several ECHR judgements,[21] evidence is crucial for substantiating the allegations of violations of the right to private and family life and the inviolability of the home in the context of air pollution.

Finally, the decision represents a paradigmatic example of the necessity of adopting a regulatory framework that will accommodate new developments on the accountability of state and non-state actors in cases involving human rights violations. As a first step, the country should live up to its commitments to adopt a national action plan (NAP) on business and human rights,[22] as has been done by some countries in the region.[23] Concerning state-based judicial mechanisms, a NAP can be seen as a stepping stone to explaining the legal avenues the victims of state or corporate human rights violations have available to claim their rights. As the SBC decision demonstrates, it is recommended that the NAP envisages capacity-building activities for the judicial personnel by incorporating the international legal framework on business and human rights in the programme for initial and continuous training of the Academy of Judges and Public Prosecutors.[24] In the NAP, the country should also consider ways of granting access to remedy through non-judicial grievance mechanisms. Currently, the Ombudsman, a national human rights institution, is mandated to receive, consider and resolve complaints from individuals alleging human rights violations by public authorities.[25] However, similar to other countries in the region,[26] the mandate of the Ombudsman does not extend to the private sector, i.e., individuals cannot file complaints with the Ombudsman for corporate human rights violations.

Overall, the author believes that it is essential that the country reviews the effectiveness of the judicial and non-judicial mechanisms against the Office of the High Commissioner for

[21] *Fadeyeva v Russia*, no. 55723/00, paras 79–88, *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v Russia,* nos. 53157/99, 53247/99, 53695/00 and 56850/00, paras 89–90, *Grimkovskaya v Ukraine*, *38182/03*, no. paras 60–73.

[22] Government of North Macedonia, 'Midterm Strategy on Social Responsibility of the Republic of North Macedonia 2019-2023', *Government of North Macedonia* (5 November 2019), https://www.economy.gov.mk/mk-MK/news/strategii-2753.nspx (accessed 12 December 2022).

[23] Cf., e.g., Human Rights Council, 'Universal Periodic Review – Bosnia and Herzegovina', A/HRC/43/17/Add.1 (25 March 2020), para 30; Human Rights Council, 'Universal Periodic Review – Azerbaijan', A/HRC/39/14 (11 July 2018), para 140.

[24] Academy of Judges and Public Prosecutors, 'e-Academy', https://jpacademy.gov.mk/en/eacademy/ (accessed 12 December 2022).

[25] Law on the Ombudsman (Official Gazette no. 60/03 of 22 September 2003).

[26] For example, the human rights institutions of Albania, Bosnia and Herzegovina, Montenegro, Slovenia and Serbia, are not vested with the ability to receive complaints against private bodies. See, respectively, Law on the People's Advocate (No. 8454 of 4 February 1999), https://www.avokatipopullit.gov.al/en/article/legislation; Role and Function of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina, https://www.ombudsmen.gov.ba/Default.aspx?id=10&lang=EN; Law on the Protector of Human rights and Freedoms of Montenegro (Official Gazette no. 042/11 of 15 August 2011, in Montenegrin), https://www.ombudsman.co.me/docs/1665053392_zakon_o_zastitniku_ci_ljudskih_prava_i_sloboda_crne_gore.pdf; Human Rights Ombudsman Act (ZVARCP-UPB2 of 28 November 2017); Law on the Protector of Citizens (Official Gazette 105/2021, in Serbian), https://ombudsman.rs/index.php/o-nama/normativni-okvir-za-rad/126-z-n-z-sh-i-ni-u-gr-d-n (all accessed 12 December 2022). However, see the Ombudsman Act (Prom. SG. 48/23 May 2003, in force from 1 January 2014), https://www.ombudsman.bg/storage/pub/files/20220725170050_Ombudsman%20Act%20EN.pdf and Ombudsman Act (713-01/12-01/01 of 29 June 2012), https://www.ombudsman.hr/wp-content/uploads/2020/06/The-Ombudsman-Act-2.pdf (both accessed 12 December 2022), establishing the mandate of the human rights institutions of, respectively, Bulgaria and Croatia, to receive complaints against public and private bodies.

Human Rights' (OHCHR) Accountability and Remedy Project guidance[27] and recommended action[28] and develops laws and policies aligned with the effectiveness criteria set out in Guiding Principle 31. Eventually, if the country has a *lex specialis* legislation that mirrors the requirement of the UNGPs, then it would be more probable that the argumentation in the courtroom would shift from procedural to material issues relevant for proving or contesting the merits of the case.

Acknowledgements. The author would like to thank Fidanka Gacheva-McGrath, Ioana Ciuta, Mirjana Vukajlovic, Irmina Kotiuk, Jovan Rajic, Hristina Vojvodic, Marina Mijatovic, Ana Toskić, Jasna Orovchanec Arangelovik, Pavlina Zefik and Aleksandar Godzo for sharing case-law information from the region.

Competing interest. The author works for the law firm INTER PARTES Skopje, which acts for the Macedonian Young Lawyers Association.

[27] OHCHR, 'Improving accountability and access to remedy for victims of business-related human rights abuse', A/HRC/32/19 (10 May 2016).

[28] OHCHR, 'Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms', A/HRC/38/20 (14 May 2018).