

SLOVAKIA BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS IN RECENT YEARS – AN UPCOMING FAIR TRIAL PROBLEM? / Adam Máčaj

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Abstract: *The paper aims to clarify whether the recent applications made against Slovakia and communicated by the European Court of Human Rights to the government for observations disclose presence of increasing fair trial issues for the country. More specifically, the paper focuses on whether applications alleging deficiencies in the fairness of criminal proceedings in Slovakia have recently gained traction. The paper contributes to the debate by performing a quantitative analysis of applications communicated to the government of Slovakia from 2019 to 2023, considering the proportion of criminal proceedings-related applications in relation to the overall amount of applications communicated. It shows that as the overall amount of communicated cases declined between 2019 and 2021, the issues associated with criminal proceedings remained consistent in absolute terms, but gained traction in relative numbers. Moreover, in 2023, when the overall amount of cases communicated is again on the rise, the issues of fair trial in criminal proceedings are similarly on the rise. Finally, the paper seeks to identify the most common topics of interest to the European Court of Human Rights, and discuss the potential implications arising for Slovakia.*

Key words: *Slovakia; European Court of Human Rights; Right to a Fair Trial; Criminal Proceedings*

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1. INTRODUCTION

In recent months, public discourse in Slovakia has been overwhelmingly devoted to discussions of alleged threats to right to a fair trial and role of the law enforcement, in particular Special Prosecution Office, while the public discourse was simultaneously focused on the alleged breaches of the rule of law resting in attempts to dismantle the body. Both debates regarding human rights, as well as the rule of law, are topics of an ongoing debate in the European Union more broadly (Kiššová, 2022a, 2022b; Mokrá, 2021). Unsurprisingly, even this discussion therefore caught the attention of the European Union (hereinafter “EU”) and its institutions, as regards not only rule of law generally, but protection of the EU budget, and framework of the conditionality

mechanism within the so-called Rule of Law Regulation (European Parliament, 2023; European Public Prosecutor's Office, 2023; Rhawi, 2023).¹

Without assessing the merits of legislative changes and their impact on the rule of law situation in Slovakia, this paper aims to assess position the right to a fair trial has in Slovakia from an international standpoint. More specifically, the paper considers whether the European Court of Human Rights (hereinafter "ECtHR") demonstrates an increased interest in cases involving right to a fair trial under Art. 6 of the European Convention on Human Rights (hereinafter "ECHR"). To do so in the context of contemporary discussion as regards prospective legislative amendments in Slovakia, it focuses specifically on cases where fair trial is of concern in criminal proceedings. In order to examine the interest of the ECtHR, the analysis focuses on the communicated cases, which the ECtHR deems admissible and requires Governments to submit observations thereto.

Since the alleged fair trial violations are inferred specifically as regards activities of the recent years, and these serve as grounds for proposed legislative changes (Office of the Government of Slovakia, 2023), the particular issue this paper is analysing is the manner in which analysis of fair trial problems identified by the ECtHR should be conducted to yield the most recent results. As the proceedings before the ECtHR usually take years between lodging of an application and a final judgment, the analysis of recent judgments would not provide findings concerning fair trial as regards the criminal proceedings conducted most recently. For that purpose, the contemporary analysis must be targeted on relevant current cases the ECtHR has recently communicated to the government of Slovakia for observations, due to several reasons. Firstly, all communicated cases are available and public, offering a most comprehensive and transparent database of most recent applications against any particular State Party to the ECHR. Secondly, in comparison to quantitative analysis of applications lodged with the ECtHR, the analysis of communicated cases offers a better insight into focus of the ECtHR itself, not the individual applicants. It will thus consider only the applications which have not been declared inadmissible without communicating the case, and thus will eliminate the clearly inadmissible and most frivolous cases. Thirdly, as the communicated cases concern allegations far more recent in comparison to judgments, quantitative analysis thereof, as provided below, offers a chance to answer the question whether the ECtHR has taken an increased interest in fair trial during criminal proceedings in Slovakia more recently.

In performing a quantitative analysis of the communicated cases, the paper seeks to assess the interest of the ECtHR in situation of criminal cases in Slovakia generally. However, the paper complements the assessment with a qualitative approach, where the individual communicated cases in this area are further categorised and disaggregated into the specific topics of interest that the ECtHR is concerned with as regards criminal procedure and its potential deficiencies. Granted, although these findings are not determinative of the actual violations of human rights in criminal proceedings in Slovakia, and the analysis is limited entirely to pending cases only, its findings may be regarded only as preliminary. Nevertheless, this approach is efficient for findings concerning the most recent events from the perspective of the ECtHR, instead of analysing final judgments only. While the pending cases may therefore end with finding no violation of the ECHR, or being struck out for other reasons, the results presented here serve as an essential interim assessment of deficiencies in right to a fair trial in criminal proceedings that may yet be discovered and documented more extensively.

¹ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 4331/1, 22 December 2020.

2. COMMUNICATIONS OF APPLICATIONS MADE AGAINST SLOVAKIA BY THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN 2019 AND 2023 – THE QUANTITATIVE ASPECTS

In assessing whether the ECtHR has taken an increased interest in criminal limb of the right to a fair trial in Slovakia, the communicated cases that have been published the HUDOC database were analysed.² The recent five years of communicated cases represent a relevant pool of most recent cases deemed presumptively admissible and significant enough to warrant observations from the government. These cases spanned the communications referred to two subsequent governments formed of various political parties, and deal with factual circumstances and criminal proceedings preceding even 2019, but also proceedings that started or took place since the transfer of power following the 2020 elections.

Among the communicated cases, facts of the case were considered first, in order to ascertain whether these disclose that the applications raise allegations pertaining to criminal charges or investigations against the applicants. Where the communicated applications did not disclose issues related to criminal proceedings, they were not considered any further. In cases where the allegations raised were related to criminal proceedings or criminal activity, but concerned merely issues related to the serving of sentences, conditions in prisons etc., these were similarly left out of further considerations.

Overall, there were 97 cases communicated to the government of Slovakia between 2019 and 2023. Out of those, 41 were related to allegations of violations of the ECHR concerning criminal proceedings in light of the criteria set out above, and were accordingly considered further (see below).

When disaggregating the communications by year of communicating the application, it is notable that more than 40 % (18 out of 41 communications) were made to the Slovak government in 2023 only. In all the preceding years assessed, the number of applications communicated remained in single digits (between 4 criminal proceedings-related communications in 2022 and 7 communications in 2020).

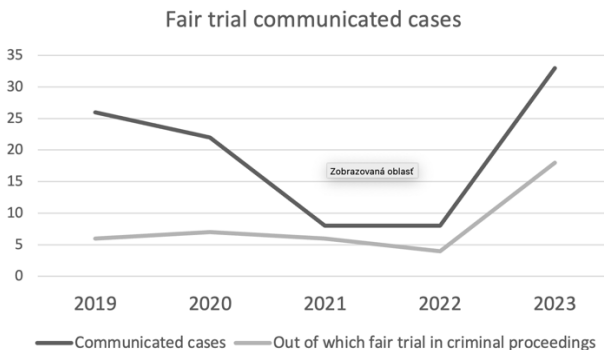


Figure 1

² The database is publicly available free of charge on: <https://hudoc.echr.coe.int/>

Once communications not related to criminal proceedings were eliminated, the analysis of the individual communications shifted from the facts of the case to the specific complaints raised by the applicants that the ECtHR communicated to the government. Principally, the allegations raised fell within three categories, occasionally intertwined. First group of the allegations related to Art. 6 of the ECHR and right to a fair trial, particularly as regards final decisions of domestic courts. Second group related to Art. 5 of the ECHR and the issues in connection with deprivation of liberty, mostly concerning pre-trial detention, its length, lawfulness, and conditions in pre-trial detention facilities. Finally, a number of other provisions were invoked in the communicated cases, mostly Arts. 3 (prohibition of ill-treatment), 8 (right to private and family life) and 13 (right to an effective remedy).

What is notable is that these allegations pertaining to provisions other than Arts. 5 and 6 of the ECHR are relatively novel in the communications. Allegations of violations of right to liberty and security or right to a fair trial are evenly dispersed across the considered period of 2019-2023, with the largest amount of four Art. 5 communications in 2023 and five Art. 6 communications in 2020. Other than that, the amount of communications remains fairly consistent, e. g. with two communications related to both provisions in 2019, three communications related to both provisions in 2021.

However, such is not the case with communications related to cases where the applicants allege violations of provisions of the ECHR other than Arts. 5 and 6. The heightened attention paid to these provisions in relation to criminal proceedings has seen even higher increase than the share of criminal cases amongst the overall amount of communications. Over 70 % (12 out of 17 communications containing these allegations) of the allegations assessed over a five year period were communicated to the government in 2023 alone.

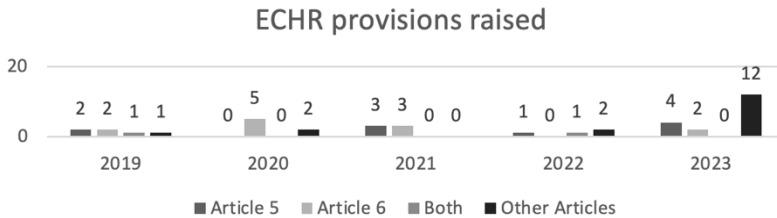


Figure 2

Finally, given this substantial increase in allegations related neither to Art. 5 nor Art. 6 of the ECHR, it must be ascertained what was the specific subject-matter of the applications that have been responsible for such an increase in amount of communicated cases in this category.

Several important results arise from the assessment. Firstly, the only identified category where there was not a substantial increase in the amount of communicated cases are the communications of applications that are not made by defendants in criminal proceedings. The communicated applications lodged by victims alleging e. g. use of force by police, ineffective investigation of crimes, or other rights from the position of victims of crimes, remain relatively rare in the last five years and appear rarely in the ECHR's docket, with two communications in 2023 and one in 2020.

Secondly, the complaints made by the defendants and communicated to the government are significantly more common in the recent years, specifically in two areas:

allegations concerning searches and interferences with privacy (most often made under Art. 8 of the ECHR) and allegations concerning detention conditions and regimes defendants face when deprived of their liberty (most often made under Arts. 3, 5 and 8 of the ECHR). Both types of communications had a single case communicated in the HUDOC database between 2019 and 2021. On the other hand, there were four communications related to searches and interferences with privacy made in 2023 alone, and five communications concerning detention conditions and regimes made in the last two years. Taken together, in 2022 and 2023, these two types of communications alone represent over 40 % of all communications against Slovakia as regards criminal proceedings (nine cases out of twenty two), and over 20 % of all communications made to Slovakia (nine cases out of forty one).

Finally, there is an apparently marginal category of two communications dealing with asset freezing during criminal proceedings, and its compatibility with Art. 1 of the Protocol to the ECHR. While fairly insignificant in the last five years in terms of overall communications, both communications were made in 2023 only, on a topic that has been until then absent from the communications made to the Slovak government.

Allegations raised under other provisions, 2019-2023

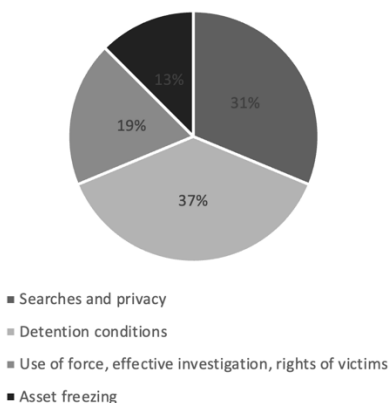


Figure 3

3. DISCUSSING THE TRENDS AND IMPLICATIONS OF APPLICATIONS COMMUNICATED TO THE GOVERNMENT OF SLOVAKIA

From the available data, it is apparent that overall, the number of both the cases communicated in 2023, as well as the proportion of communications dealing with criminal proceedings, have increased significantly. Moreover, the amount of communicated applications had been in decline up until 2022, while the absolute numbers of communications related to criminal proceedings have remained fairly consistent until the same year. The overall proportion of communications dealing with the issue has therefore remarkably increased in comparison to 2019, the starting point of the assessment.

Looking into the content of the allegations, the rights most intimately associated with criminal proceedings – Arts. 5 and 6 of the ECHR – were the subject-matter in the

communications from the ECtHR to the Slovak government at a consistent rate. On the other hand, the ECtHR communications represent a substantial increase of allegations related to other substantive provisions of the ECHR, which the government will have to face.

Finally, regarding the content of other communicated cases, not associated with Arts. 5 and 6 of the ECHR, several conclusions can be made. Firstly, the cases of victims of crimes and their position in criminal proceedings, while lodged with the ECtHR against Slovakia and being communicated to the government, are currently not yet increasing with sufficient severity to indicate a trend. That being said, similar cases are persisting even in the ECtHR jurisprudence against Slovakia, and it seems that the persisting deficiencies in e. g. investigating police racism, or structure of the police inspection, are ongoing trends.³

Secondly, in terms of cases communicated to the government of Slovakia, the situation of interferences with privacy, as well as conditions of detention, are facing increased attention. Despite the fact that these types of cases are not associated with Arts. 5 or 6 of the ECHR, and do not deal with issues of fair trial or detention directly, they have formed a substantial part of cases related to criminal proceedings communicated to the government of Slovakia, in particular since 2022. This signals an increase in the amount of allegations that the ECtHR deems admissible and necessary to communicate to the government of Slovakia for their observations. Contrary to the consistent amount of cases related to fair trial and personal liberty, these types of criminal proceedings-related communications are on the rise and it remains to be seen whether the trend will persist despite the recent, as well as planned, changes to the criminal law in Slovakia.

Moreover, an interesting development to follow is the consideration of asset freezes in criminal proceedings from the viewpoint of right to property in Slovakia. The ECtHR has not communicated similar cases until 2023, and it could signal an emerging broader interest in the regime of asset freezes and interferences with right to property in the criminal procedure in Slovakia. Various aspects of right to property, its deprivation and control via criminal proceedings were already subject of scrutiny by the ECtHR, and it already found a violation of Article 1 of Protocol to the ECHR as regards other states.⁴

4. CONCLUSIONS

The purpose of this paper was to assess the emerging trends in content of the applications alleging violations of the ECHR stemming from criminal proceedings, which the ECtHR has communicated to the government of Slovakia for observations in the last five years.

Overall, the trend towards increasing proportion of communications dealing with criminal proceedings is evident, especially since 2022. However, the available data also shows that the increase in these cases is not present across the board. In fact, in the majority of the communicated cases, the ECtHR was not interested in observations

³ See e.g. ECtHR, *Mižigárová v. Slovakia*, app. no. 74832/01, judgment of 14 December 2010, ECLI:CE:ECHR:2010:1214JUD007483201; ECtHR, *Lakatošová and Lakatoš v. Slovakia*, app. no. 655/16, judgment of 11 December 2018, ECLI:CE:ECHR:2018:1211JUD00065516; ECtHR, *R.R. and R.D. v. Slovakia*, app. no. 20649/18, judgment of 1 September 2020, ECLI:CE:ECHR:2020:0901JUD002064918; ECtHR, *M.B. and others v. Slovakia*, app. no. 45322/17, judgment of 1 April 2021, ECLI:CE:ECHR:2021:0401JUD004532217; ECtHR, *M.B. and others v. Slovakia (no. 2)*, app. no. 63962/19, judgment of 7 February 2023, ECLI:CE:ECHR:2023:0207JUD006396219.

⁴ See e.g. ECtHR, *Kruglov and others v. Russia*, app. nos. 11624/04 and others, judgment of 4 February 2020, ECLI:CE:ECHR:2020:0204JUD001126404; ECtHR, *Shorazova v. Malta*, app. no. 51853/19, judgment of 3 March 2022, ECLI:CE:ECHR:2022:0303JUD005185319.

related to right to a fair trial or right to liberty and security. Rather, the communicated cases more prevalent in recent years focus on various other substantive rights associated with interferences during criminal proceedings, such as privacy, property, or detention conditions.

Therefore, these findings present several implications, as well as questions for further assessment. Firstly, it is obvious that the government of Slovakia will face increased pressure in responding to these allegations, and could face increased international pressure, depending on the proportion of the cases it loses, and the gravity or systematic nature of human rights violations the ECtHR may find. Additionally, it will be interesting to assess the development of trends in communicated cases against Slovakia post-2023, with a view to ascertaining the effect change of the government will have on the flow of new applications, stemming from factual circumstances taking place in 2024 onwards.

Despite the contemporary concerns about fair trial in criminal proceedings, which the recent communications from the ECtHR seem to support, there are caveats to be made about the implications drawn from analysis of the communicated cases only and the analysis cannot be conclusive in certain aspects. The findings from the quantitative analysis communicated cases is merely an indicator of interest the ECtHR has in cases, not the actual violations that may or may not be found eventually. Therefore, a more accurate insight into the fair trial deficiencies in Slovakia from the perspective of the ECtHR is only possible as regards older periods. Essentially, this is possible if two conditions are fulfilled. Firstly, the quantitative analysis in this regard would have to cover predominantly time periods from which most of the communicated cases concerning criminal proceedings were already decided by the ECtHR, whether by admissibility decisions, or final judgments. Secondly, given the length of proceedings before the ECtHR, the relevant timeframe assessed would presumably cover factual allegations arising even years prior to the time-period during which the assessed applications were introduced. In this regard, other international bodies produce arguably more timely reports on the fair trial situation in Slovakia (European Commission, 2023; U.S. Embassy in Bratislava, 2022). Nevertheless, the increased interest flags the issue for further consideration in the future, in particular once the communicated cases assessed will progress towards judgments.

ANNEXES

Annex A – Table of cases before the European Court of Human Rights communicated against Slovakia between 2019 and 2023⁵

Application no.	Date communicated	Criminal procedure	Articles included	Notes
21662/23	6.11.2023	Yes	6	with Arts. 8, 13 and 18
29229/22	6.11.2023	No		
42073/22	9.10.2023	No		
12862/22	18.9.2023	Yes	Other	Art. 8, search
29359/22	18.9.2023	No		

⁵ As available in the HUDOC database.

9152/23	18.9.2023	No		Concerns prison sentence without relation to criminal proceedings
15008/22	18.9.2023	No		
50301/22	18.9.2023	Yes	6	
6796/23, 8123/23, 13641/23, 13848/23, 16058/23, 20789/23	18.9.2023	No		Concerns prison sentence without relation to criminal proceedings
8280/23	18.9.2023	Yes	Other	Arts. 3, 8, 13 restraints and strip searches
2091/22	5.9.2023	No		
21846/21	10.7.2023	No		
23112/22	10.7.2023	Yes	5	
23445/21	10.7.2023	No		
46293/22	10.7.2023	No		
49617/22	10.7.2023	Yes	Other	Arts. 8, 13, search
57748/21	10.7.2023	Yes	Other	Art. 8, search
34483/21	30.5.2023	No		
17242/22	15.5.2023	Yes	Other	Art. 13, A1P1, freezing order
30483/22	15.5.2023	Yes	5	
33603/22	15.5.2023	Yes	Other	Art. 8, search, use of force
38283/21	15.5.2023	No		
40478/22	15.5.2023	Yes	Other	A1P1, freezing order
43341/22	15.5.2023	Yes	Other	Arts. 3, 8, detention conditions
56545/21	15.5.2023	Yes	Other	Arts. 3, 8, detention conditions
13284/22, 12127/23	15.5.2023	Yes	Other	Arts. 8, 13, 18, search
39980/22	5.4.2023	No		
38838/21, 39024/21, 45671/21 and 15011/22	9.2.2023	Yes	5	
30515/22	6.2.2023	No		
36989/21 and 7 945/22	6.2.2023	Yes	5	

16627/21 and 47 others	24.1.2023	No		
22083/21	13.1.2023	Yes	Other	Arts. 3, 5, detention conditions and duration
48587/21	13.1.2023	Yes	Other	Arts. 4, 8, ineffective investigation
12131/21	12.12.2022	No		
41955/22	8.12.2022	Yes	Other	Arts. 3, 8, 13 restraints and strip searches
50704/21 27787/22 and 30195/22	21.11.2022	Yes	Both	
55792/20 and 3 5253/21	25.10.2022	Yes	Other	Arts. 3, 8, 13 restraints and strip searches
34281/20	9.9.2022	No		
5541/22	6.7.2022	No		
57752/21	7.2.2022	No		
45645/21	10.1.2022	Yes	5	
59217/21	17.12.2021	Yes	5	
615/21 9427/21 and 36765/21	2.11.2021	Yes	5	with Art. 8
31870/20 31896/20 and 31903/20	20.10.2021	Yes	6	with Arts. 8 and 13
35015/20	20.10.2021	Yes	6	
55788/20 and 3 others	28.9.2021	Yes	5	
6251/20	13.9.2021	No		
35673/18	5.2.2021	No		Concerns prison sentence without relation to criminal proceedings
32084/19	4.1.2021	Yes	6	
4315/18	16.12.2020	Yes	6	
63703/19	5.12.2020	Yes	6	
41217/20 and 4 others	5.12.2020	No		
35025/20	27.11.2020	Yes	6	
43932/19	27.11.2020	No		
43995/19	27.11.2020	No		
18593/19	17.11.2020	Yes	Other	Arts. 8, 13, wiretapping

20877/19	17.11.2020	No		Concerns prison sentence without relation to criminal proceedings
55617/17	19.10.2020	No		
37574/19	4.9.2020	Yes	6	with Arts. 2, 3 and 13, ineffective investigation
81292/17	4.9.2020	No		Concerns prison sentence without relation to criminal proceedings
19990/20	4.9.2020	Yes	6	
40925/17	9.7.2020	No		
63783/19	15.6.2020	No		
737/19	15.6.2020	No		
31975/19	11.6.2020	No		
42149/17	4.6.2020	No		
33160/17	27.5.2020	No		
74543/17	27.5.2020	No		
63962/19	20.3.2020	Yes	Other	Arts. 3, 13 and 14, ineffective investigation
16231/17	14.1.2020	No		
34159/17	14.1.2020	No		
14661/17	29.11.2019	No		
15765/17	29.11.2019	No		
46341/17	29.11.2019	No		
17101/19	12.11.2019	Yes	5	
43225/19	14.10.2019	No		
26826/16	2.10.2019	No		
41510/16 and 81651/17	2.10.2019	No		Concerns prison sentence without relation to criminal proceedings
7286/16	2.10.2019	Yes	6	with Art. 8, wiretapping
40132/16	17.9.2019	Yes	5	with Art. 13
56293/15	17.9.2019	No		
7796/16	17.9.2019	No		
27429/16	16.9.2019	No		
45558/15	16.9.2019	No		Concerns prison sentence without relation

				to criminal proceedings
56751/16 and 33762/17	16.9.2019	No		
39654/15	12.9.2019	Yes	Both	
25220/15	11.9.2019	No		
28081/19 29664/19 and 35946/19	11.9.2019	Yes	6	
25175/15	8.7.2019	No		
57085/18 (judgment 38321/17)	28.5.2019	Yes	Other	Arts. 3, 8, 13 and 14, ineffective investigation
36446/17	24.5.2019	No		
2749/17	3.4.2019	No		
35361/17	3.4.2019	No		
55610/18	3.4.2019	No		
74175/17	3.4.2019	No		
75041/17	3.4.2019	No		
38321/17 and 8 others	13.3.2019	No		Concerns prison sentence without relation to criminal proceedings

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