



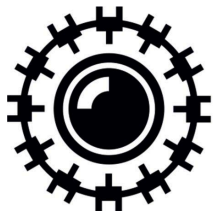
ELDH European Association of Lawyers for Democracy & World Human Rights

EJDM Europäische Vereinigung von Juristinnen & Juristen für Demokratie und Menschenrechte in der Welt

EJDH Association Européenne des Juristes pour la Démocratie & les Droits de l'Homme

EJDH Asociación Europea de los Juristas por la Democracia y los Derechos Humanos en el Mundo

EGDU Associazione Europea delle Giuriste e dei Giuristi per la Democrazia e i diritti dell'Uomo nel Mondo



Border Violence Monitoring Network



LEGAL
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Preliminary Report of the international trial observers following the Appeal Trial against Homayoun Sabetara

I. Introduction

1. The case concerns the arrest of Homayoun Sabetara, an Iranian asylum seeker, on the 25th of August 2021 in Thessaloniki on smuggling related charges. Homayoun Sabetara flew from Iran to Istanbul and then reached Greece with the aim to finally end his journey in Germany to reunite with his children, who have already been there with a study visa. The defendant was (forced) to drive a vehicle with 7 other passengers inside, after spending 4 days in Greece in a forest in the Evros region, without food or water. He was one of the only members of the group with a driving licence and was forced to drive the vehicle to leave the Evros area, which has largely been reported for pushing back people on the move to Turkey¹.

2. Following his arrest, he was placed in pretrial detention waiting for his trial. After three postponements, the first instance Court on the 26th of September 2022

¹ Border Violence Monitoring Network, 'Detained for two days without water' 2019, available at: <<https://www.borderviolence.eu/violence-reports/december-11-2019-0000-soufli-greece>> ; Forensic Architecture, 'Pushbacks across the Evros/Meriç River: The Case of Parvin, 2020, available at: <https://forensic-architecture.org/investigation/pushbacks-across-the-evros-meric-river-the-case-of-parvin>; Border Violence Monitoring Network, 'People beaten nearly to death by Greek police during a mass pushback across Evros/Meric river, 2020, available at: <https://www.borderviolence.eu/violence-reports/july-5-2020-2200-meric-river-near-meric-ipsala-turkey/> .

found him guilty and sentenced him to 18 years of imprisonment. His appeal hearing was scheduled to take place on 22 April 2024, but was interrupted and rescheduled for the following day. During this period of 576 days waiting for his appeal hearing, he was held in Trikala prison.

3. Following a call from the FreeHomayoun Campaign, three trial observers representing the Border Violence Monitoring Network (BVMN), the European Lawyers for Democracy and Human Rights (ELDH) and the Legal Centre Lesvos (LCL), followed the first part of the Appeal trial held on Monday and Tuesday, 22 and 23 April 2024, before the Appeal Court of Thessaloniki. This preliminary report portrays the observations and conclusions after this first part of the Appeal trial. A full report will be issued after the final appeal judgement. The appeal trial is scheduled to continue on 24 September 2024 before the Thessaloniki Appeal Court.

4. The purpose of the trial observation was to monitor the proceedings in view of the right to a fair trial, in particular²:

- The Prohibition of Torture and the Right to Humane Conditions during detention;
- The right to a fair hearing;
- Right of all persons to equality before the law and the courts;
- Right to a competent, independent and impartial tribunal established by law;
- Right to call and (cross-)examine witnesses;
- Right to translation into a language the defendant understands;
- Right to a trial without Undue Delay.

II. Charges

5. Homayoun was arrested and then found **guilty** from the Court of First Instance of Thessaloniki, on the 26 September 2022, for reception of third-country nationals who are not entitled to enter the territory of the country from a point of entry at the internal borders, for the purpose of transporting them into the territory of the country from which there may be a serious likelihood of causing harm to someone and by a person acting for profit, acting in confluence.

6. This act is considered as a criminal offence under art. 30 par 1. a, b and c of the Law 4251/2014, according to which:

*1. Captains or captains of ships, vessels or aircraft and **drivers** of any kind of means of transport who transport to Greece from abroad citizens of third countries who do*

² European Lawyers for Democracy and Human Rights, Trial Observation Guide, 2013; available at: https://eldh.eu/wp-content/uploads/2018/01/ELDH_Guide_on_Trial_Observation_2013.pdf

not have the right to enter Greek territory or who have been denied entry for any reason, as well as those who pick them up at entry points, external or internal borders, in order to forward them to the interior of the country or to the territory of an EU Member State or third country, or facilitate their transport or provide them with accommodation for concealment, shall be punishable:

a. with imprisonment of up to ten (10) years and a fine of ten thousand (10,000) to thirty thousand (30,000) euros for each transported person,

b. to a term of imprisonment of at least ten (10) years and a fine of between thirty thousand (30,000) and sixty thousand (60,000) euros for each person carried, if the offender acts for profit, by profession or habit, or is a follower or has the status of a public official or a tourist, shipping or travel agent, or if two or more persons act in concert,

c. with imprisonment of at least fifteen (15) years and a fine of at least two hundred thousand (200,000) euros for each person transported, if the act may result in danger to a person [...]

7. The Court of First Instance accordingly appointed Homayoun an 18 year imprisonment penalty.

8. The second defendant at the First Instance Court, was a Greek citizen, accused of accessory to the above mentioned acts for which Homayoun was found guilty. The second defendant, a Greek citizen, was accused of providing Homayoun with the car of his ownership, knowing that Homayoun is supposed to use this car to receive 7 citizens of third countries with no right to enter Greek territory and gain financial benefit from such acts. The second defendant was found **innocent** for the above described acts from the respective Court.

III. Appeal trial in front of the Thessaloniki Three-Member Appeal Court

9. The case was heard before the Thessaloniki Three-Member Appeal Court of Felonies, which is the competent Court to adjudicate on appeals filed against decisions issued by the Thessaloniki Appeal Court of Felonies.

A) First Court day on 22 April 2024

10. The Appeal Court was scheduled for 22 of April 2024, but the case being number 22 out of 25 cases scheduled. In Greece each court lists the number of cases that will potentially be heard during the day. The cases are numbered from 1 to 25 and the Court proceeds in this order until closure (15:00 EET). Therefore, the scheduling of

the case at the end of the list made its postponement predictable. After waiting for 6 hours, from 9:00 to 14:00, the hearing was postponed to the following day.

11. Moreover, on 22 April 2024, access to interpretation was limited due to the absence of the court appointed interpreter. This caused difficulties of communication between the lawyers and the defendant.

12. The observation concludes that the procedure violated the right of the defendant to have free access to his lawyers, thus breaching Article 6§3 of the European Convention on Human Rights and Article 14§3 of the International Covenant on Civil and Political Rights.

13. However, the observation welcomed the decision of the Court to assess the case the following day, and not transfer it to a later date, having considered the long waiting time in detention that the defendant faced.

B) Second Court day on 23 of April 2024

1. Witnesses Statements

14. On 23 April 2024, the hearing began with the testimony of one of the two prosecution witnesses that the conviction was based on:

- This first witness was a police officer who conducted the arrest of Homayoun in 2021.
- The second witness, a passenger from the car, was not present in the first instance trial.

15. This second witness was again not present in court on 23 April 2024, which led to the defence lawyers petitioning his testimony not to be read out in Court. The conviction of Homayoun had been mostly based on this one testimony that stated that Homayoun was the driver of the car.

16. The defence argued that according to the case law of the European Court of Human Rights (ECtHR), confirmed by the Greek Supreme Court, testimonies of witnesses that are not present in the court, should be only used as a last resource and are usually not considered as sufficient evidence for a conviction of the defendant. According to the same case law, the court has to do everything in their power to locate and summon the witness before being able to read their testimony in court.

17. Indeed, the right to a fair trial includes the defendants' right to examine, or have examined, a witness against them as set out in Articles 6 §3(d) ECHR³ (European Convention on Human Rights) and 14 §3(e) ICCPR⁴ (International Covenant on Civil and Political Rights).

18. In this context, the ECtHR has established in its case law the so-called Al-Khawaja and Tahery test, containing of three steps: first, whether there was a 'good reason' for the non-attendance of a witness at the trial; second, whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction; third, whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured⁵.

19. The trial observers have no knowledge either to the reasons for the witness's absence, or the efforts made by the court to ensure the witness's presence in court, and therefore this report cannot make any statement whether or not there were "good reasons"⁶ for the prosecution's witness's absence. In any case, the ECtHR in its case law does not consider "that the absence of good reason for the non-attendance of a witness [can] of itself be conclusive of the unfairness of a trial"⁷. Rather, "the lack of a good reason for a prosecution witness's absence is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 §§1⁸ and 3(d)"⁹.

20. While the ECtHR doesn't absolutely prohibit the admission of incriminating testimony provided by a witness whom the defendant never had the opportunity to examine or to have examined, the ECtHR has held that where a "conviction is based solely or to a decisive degree"¹⁰ on such a witness testimony, "the rights of the defence

³ Article 6 §3 ECHR: 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.

⁴ Article 14 §3 ICCPR: In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

⁵ See, Al-Khawaja and Tahery v. the United Kingdom [GC], Nos. 26766/05 and 22228/06, 15 December 2011

⁶ Schatschaschwili v. Germany [GC], No. 9154/10, 15 December 2015, §113.

⁷ Ibid.

⁸ Article 6 §1 ECHR: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

⁹ Schatschaschwili v. Germany [GC], fn. 35

¹⁰ Hümmel v. Germany, No. 26171/07, 19 July 2012, §42

may be restricted to an extent that is incompatible with the guarantees provided by Article 6¹¹.

21. Based on the information accessible to the international trial observers, the conviction of the defendant in the first instance, in fact, was based to a decisive degree on the witness statement by the individual present in the car. Therefore, the Al-Khawaja and Tahery test's third step, in the present case, is of particular relevance: whether there were sufficient counterbalancing factors which permitted "a fair and proper assessment of the reliability"¹² of the written witness statement.

22. The importance of testimonies, serving as definitive for the issuing of the decision evidence, being read in Court, is reflected also in the Greek legislation. According to the Greek code for Criminal Procedure, from the combination of the provisions of Articles 329, 331, 333 par. 2 and 362 and 369, it follows that taking into account by the Court, as evidence for the formation of its judgement on the guilt of the accused, of a document which was not read during the public and oral discussion of the case in the hearing, violates the principle of the oral and public nature of the proceedings and the exercise of the accused's right under Article 358 of the same Code to make statements and explanations concerning that evidence and constitutes an absolute nullity of the proceedings.

23. The prosecutor requested to reject the claim of the defence not to read the testimony of the absent witness and the Court went to recess.

24. Based on the information available to the international trial observers the absent witness evidence was admitted at the first instance trial without such sufficient counterbalancing factors. This testimony of an absent witness, was thus used as the only proof of the defendant's alleged guiltiness, that was not cross-examined by the First Instance Court. This constitutes a violation of article 6 of the ECHR. The decision of the First Instance Court to assess the testimony of an absent witness whom the defence could not question during the trial and largely base the decision on this testimony, violated the right to a fair trial.

25. The observers note that the decision of the Appeal Court to postpone the trial in order to locate the witness does not constitute a violation of the defendants' right to examine, or have examined, a witness against them under Article 6. It remains yet to be seen what the decision of the Court will be in case the witness is not located and does not appear in the next hearing.

¹¹ Ibid.

¹² Schatschaschwili v. Germany [GC], fn. 35, §125.

26. However, the observers highlight that the decision of the Court to search and try to locate the witness, does not justify the postponement of the trial for such a long period. The lengthy wait of the defendant for 676 days in prison prior to the appeal hearing followed by the postponement of the trial for September 2024, constitutes a violation of the right of the defendant to a decision in due time.

2. Defence's objection concerning the lack of impartial translation

27. Additionally the defence presented an objection concerning the lack of impartial translation at the pre-trial stage provided in the investigation proceedings conducted at the police station after the defendant's arrest. After Homayoun's arrest, a police officer, colleague of the arresting officers who served at the respective police Station was assigned as a translator. As supported by the defence, police officers do not meet the condition of impartiality when conducting interpretation, since in Homayoun's case there was no search for interpretation through the official catalogues and the police officer was according to the objection arbitrarily chosen, thus contesting the transparency of the procedure.

28. According to article 233 of the Greek Criminal Procedures Code, at any stage of the criminal proceedings, when a suspect, accused person or witness who does not speak or does not understand Greek adequately is to be examined, he or she shall be provided with interpretation without delay. Where necessary, interpretation shall be provided for communication between the accused and their counsel at all stages of the criminal proceedings. The interpreter shall be appointed from a list drawn up by the Chamber of Public Prosecutors. In cases of extreme urgency and where it is not possible to appoint an interpreter from among those on the list, a person not on the list may be appointed as an interpreter. In any event, the court may also appoint an interpreter chosen by the accused person from outside the list.

29. According to the defence, the invalidity in the translation selection can be invoked in the appeal Court, due to the important effect it has in the formation of the final decision. The prosecutor proposed the rejection of this objection. According to the prosecutor's proposal, invalidities which occurred during the pre-trial stage, cannot be projected in the main hearings before the Court. Such not proposed procedural invalidities are thus covered, cannot affect the procedure and cannot be projected at a later stage. The Judge did not decide upon this objection, which yet remains to be decided upon in the next hearing after assessing the petition of the defence concerning the witness.

30. Art. 174 par. 1 and 2 of the new Criminal Procedures Code read in conjunction with Art. 176 par. 1 of the same Code, "1. The judicial Council is competent to declare the nullity of the acts of the pre-trial proceedings, while the court which undertakes the trial of the accusation is competent to declare the nullity of the acts of the proceedings at the hearing, main and preparatory". From the combination of these provisions of the new Code of Criminal Procedure, it can be concluded that the absolute nullity of the pre-trial proceedings can be claimed, until the accused is irrevocably referred for a hearing before the Court, in particular, in the case of referral by direct summons until the expiry of the time limit for appeal under the above Art. 322 par. 1 of the Code of Criminal Procedure, and in the case of a referral by direct summons, until the referral becomes irrevocable. If not claimed within the above mentioned time limitations, such nullities are covered, and cannot be taken into account by the Court.

3. Defence's objection that the defendant meets the criteria of an asylum seeker and cannot be charged with the criminal offence

31. According to article 2 law 4251/2014, article 3 of the new law 5038/2023 (Migration Code): 1. The provisions of this Code shall not apply to the following categories of persons, unless otherwise specified in individual provisions: (...) c. To beneficiaries of international protection, as well as to applicants for international protection within the meaning of the 1951 Geneva Convention and in accordance with national law.

32. The defence presented the documents of his registration of an asylum claim in order for the Court to assess the adhering in the standards of the law. However, the decision upon this claim presented by the defence will be ruled upon in the next hearing, set for September 2024, after the decision upon the testimony of the absent witness is issued.

IV. Decision from the Court to postpone the trial

33. Following the Court's recess, the judges decided to postpone the trial and therefore, proceed to try locating the witness. Therefore, the Court postponed the hearing to the 24 of September 2024. The defence argued that due to Homayoun good behaviour in prison and due to health condition issues that cannot be treated while inside the Greek prison system, he should be released while awaiting the appeal trial. Homayoun himself declared he would stay in Thessaloniki and abide by the terms of his conditional release.

34. The right to a fair trial (Art. 6 ECHR) establishes the right to be tried without undue delay. The speed of a trial affects the overall fairness of the proceedings. BVMN and ELDH observed that the decision of the Court to postpone the hearing of a case for 5 months, which concerns a defendant that was already held for 576 days in prison, constitutes a failure of the respective Court to administer justice expeditiously, thus showing the non-adherence of the procedures with Article 6 ECHR.

V. Conclusions

35. In summary, the defendant who is suffering from severe health issues got his appeal trial postponed in order to find a key witness that was neither present during the first instance Court trial nor the Appeal Court hearing. When examining the proceedings, the international trial observers identified several breaches of different aspects of the fair trial principle that were mentioned above.

36. The postponement of the hearing to the 24 September 2024, after 576 days of waiting for a decision of this matter on appeal, without having properly considered the health conditions and the time spent in inhumane detention conditions, constitutes an outrageous delay and a breach of the rights of the defendant to a trial within a reasonable time under international law.