



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MAJSKI v. CROATIA (No. 2)

(Application no. 16924/08)

JUDGMENT

STRASBOURG

19 July 2011

FINAL

19/10/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Majski v. Croatia (no. 2),

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Anatoly Kovler, *President*,

Nina Vajić,

Peer Lorenzen,

Elisabeth Steiner,

Khanlar Hajiyev,

Julia Laffranque,

Linos-Alexandre Sicilianos, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 28 June 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 16924/08) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Radovan Majski (“the applicant”), on 17 March 2008.

2. The Croatian Government (“the Government”) were represented by their Agent, Mrs Š. Stažnik.

3. The applicant alleged, in particular, that there had been a violation of his right of access to court.

4. On 10 November 2010 the President of the First Section decided to communicate the complaint concerning access to court to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, who is of Serbian origin, was born in 1949 and lives in Vukovar.

6. On 28 October 2004 the applicant submitted an application for the post of deputy county state attorney in the Vukovar County State Attorney’s Office. He relied on section 22(2) of the Constitutional Act on the Rights of

National Minorities and section 63(2) of the State Attorneys Act (see paragraphs 17 and 19 below).

7. On 11 January 2005 the State Attorneys Council (*Državnoodvjetničko vijeće*), after a secret ballot, unanimously adopted a decision appointing D.K.I. deputy county state attorney in the Vukovar County State Attorney's Office. It found that both candidates satisfied the statutory requirements to be appointed deputy state attorney but gave priority to D.K.I., having regard to her extensive experience of working on civil and administrative law cases. The decision contained an information notice (*pouka o pravnom lijeku*) to the effect that administrative dispute proceedings could be instituted against it by bringing an action in the Administrative Court (*Upravni sud Republike Hrvatske*) within thirty days of its service. The information notice reads as follows:

“Against this decision an administrative dispute may be instituted by bringing an action in the Administrative Court within thirty days of the service of the decision.”

8. On 4 February 2005 the applicant instituted administrative dispute proceedings in the Administrative Court by bringing an action under section 23 of the Administrative Disputes Act (see paragraph 26 below) against the State Attorneys Council's decision of 11 January 2005. He again relied on section 22(2) of the Constitutional Act on the Rights of National Minorities.

9. On 16 March 2005 the Administrative Court declared the applicant's action inadmissible, finding that the contested decision did not constitute an “administrative act” within the meaning of section 6(2) of the Administrative Disputes Act (see paragraph 24 below). Therefore, instead of instituting administrative dispute proceedings by bringing an action (against an administrative act), the applicant should have lodged “a request for the protection of a constitutionally guaranteed right” (*zahtjev za zaštitu ustavom zajamčenog prava*), a remedy provided in section 66 of the Administrative Disputes Act (see paragraph 34 below). The Administrative Court also held that the applicant's action could not have been, even in substance, regarded as such a request, because he had not relied on any provision of the Constitution, but only on the Constitutional Act on the Rights of National Minorities.

10. On 18 July 2005 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) against the Administrative Court's decision. In so doing the applicant, alleging a violation of his right of access to court, relied on Article 6 § 1 of the Convention.

11. On 13 February 2008 the Constitutional Court dismissed the applicant's constitutional complaint. The relevant part of that decision reads as follows:

“The Constitutional Court finds that the complainant’s rights under Article 6 § 1 of the European Convention on Human Rights and Fundamental Freedoms were not breached in the proceedings before the Administrative Court because the Administrative Court did not proceed contrary to the legal views established by the European Court of Human Rights in the application of that provision to individual cases.

...

The Constitutional Court notes that in its practice it has established the rule that there is a remedy before the Administrative Court (a request under section 66 of the Administrative Disputes Act) against a decision on appointment of a deputy state attorney, and that this remedy has to be used before a constitutional complaint is lodged with the Constitutional Court (decision no. U-III-4364/2005 of 19 December 2005).”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

1. *Relevant provisions*

12. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette of the Republic of Croatia nos. 56/1990, 135/1997, 8/1998 (consolidated text), 113/2000, 124/2000 (consolidated text), 28/2001 and 41/2001 (consolidated text), 55/2001 (corrigendum) and 76/2010) read as follows:

Article 18

“The right to appeal against decisions adopted in the first-instance proceedings before a court or other authorised body shall be guaranteed.

The right of appeal may exceptionally be excluded in cases provided by law if other legal protection is ensured.”

Article 29(1)

“In the determination of his rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law.”

Article 44

“Every national of the Republic of Croatia shall have the right, under equal conditions, to take part in the conduct of public affairs, and to be admitted to public service.”

2. The Constitutional Court's jurisprudence

13. In its decisions no. U-III-1733/2000 of 24 November 2004 (published in the Official Gazette no. 179/2004 of 17 December 2004), no. U-III-2808/2007 of 13 February 2008 (published in the Official Gazette no. 26/2008 of 29 February 2008) and no. U-III-3071/2006 (published in the Official Gazette no. 42/2009 of 6 April 2009) the Constitutional Court held that in cases where the first-instance courts had wrongly informed parties on legal remedies by indicating longer time-limits for lodging appeals against their decisions than those provided in the relevant legislation, and the parties lodged their appeals outside of the statutory time-limits but within the time-limits indicated by the first-instance courts, those appeals could not be declared inadmissible as lodged out of time. To do so would run contrary to the constitutional right to appeal guaranteed by Article 18(1) of the Constitution, and the constitutional right to a fair hearing, in its part concerning access to court, guaranteed by Article 29(1) of the Constitution (see preceding paragraph).

3. The case-law of the Administrative Court

14. In its judgment no. Zpa-5/2004-5 of 2 December 2004, following a request for the protection of a constitutionally guaranteed right (see paragraph 34 below) the Administrative Court quashed the decision of the National Judicial Council on appointment of a municipal court judge. It held that every candidate satisfying the statutory requirements had the right to equal participation in a competition for public office. Therefore, by appointing a candidate who did not satisfy the statutory requirements for appointment as a judge of a municipal court, the National Judicial Council violated the other candidate's constitutional right to "equal access to public service" guaranteed by Article 44 of the Constitution (see paragraph 12 above).

B. The Constitutional Court Act

1. Relevant provisions

15. The relevant provision of the 1999 Constitutional Act on the Constitutional Court of the Republic of Croatia (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette of the Republic of Croatia no. 99/1999 of 29 September 1999 – "the Constitutional Court Act"), as amended by the 2002 Amendments (*Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu Republike Hrvatske*, Official Gazette of the Republic of Croatia no. 29/2002 of 22 March 2002), which entered into force on 15 March 2002, reads as follows:

Section 62

“(1) Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that the decision of a state authority, local or regional government, or a legal person invested with public authority, on his or her rights or obligations, or as regards suspicion or accusation of a criminal offence, has violated his or her human rights or fundamental freedoms, or the right to local or regional government, guaranteed by the Constitution (‘constitutional right’)...

(2) If another legal remedy is available in respect of the violation of the constitutional right [complained of], a constitutional complaint may be lodged only after this remedy has been used.

(3) In matters in which an administrative action or, in civil and non-contentious proceedings, an appeal on points of law [*revizija*] is available, remedies shall be considered to have been exhausted only after a decision on these legal remedies has been given.”

2. *The Constitutional Court’s jurisprudence*

16. In its decision no. U-III-4364/2005 of 19 December 2005 (Official Gazette no. 6/2006 of 13 January 2006) the Constitutional Court held that a request for the protection of a constitutionally guaranteed right under section 66 of the Administrative Disputes Act (see paragraph 34 below) must be lodged against a decision of the State Attorneys Council on appointment of a deputy state attorney before a constitutional complaint under section 62 of the Constitutional Court Act.

C. The Constitutional Act on the Rights of National Minorities

1. *Relevant provisions*

17. The relevant provisions of the Constitutional Act on the Rights of National Minorities (*Zakon o pravima nacionalnih manjina*, Official Gazette of the Republic of Croatia nos. 155/2002 and 80/2010), which entered into force on 23 December 2002, read as follows:

Section 22(2) and (4)

“(2) The representation of members of national minorities in the organs of State administration and judicial organs shall be secured in accordance with special legislation, and taking into account the proportion of members of national minorities in the total population at the level in respect of which the organ of state administration or judicial organ is established, and acquired rights.

(4) In filling the posts referred to in paragraphs 2 and 3 of this section, priority shall be given under the same conditions to members of national minorities.”

2. The case-law of the Administrative Court

18. On 23 March 2006 the Administrative Court delivered its judgment in case no. Zpa-39/2005, where an aggrieved candidate, member of a national minority, lodged a request for the protection of a constitutionally guaranteed right under section 66 of the Administrative Disputes Act (see paragraph 34 below) against a decision of the National Judicial Council on appointment of a municipal court judge. He argued that the contested decision had breached his right guaranteed by Article 44 of the Constitution (see paragraph 12 above) in conjunction with section 22(4) of the Constitutional Act on the Rights of National Minorities (see paragraph 17 above). The Administrative Court dismissed his request (only) because in his application for the post of a municipal court judge he had not expressed the wish to be treated as a member of a national minority and had not relied on section 22(4) of the Constitutional Act on the Rights of National Minorities.

D. The State Attorneys Act

1. Relevant provisions

19. The relevant provision of the State Attorneys Act (*Zakon o državnom odvjetništvu*, Official Gazette of the Republic of Croatia nos. 51/2001, 16/2007, 20/2007 (corrigendum), 146/2008), as in force at the material time, provided as follows:

a) Appointment of deputy state attorneys

Section 62

“(1) Deputy state attorneys shall be appointed in a manner, under the conditions and according to a procedure that guarantees they possess the expertise, independence and moral standing necessary to discharge the duty of a state attorney.

(2) Any Croatian national who holds a law degree and has passed the bar exam may be appointed a deputy state attorney.”

Section 63(2)

“A person may be appointed a deputy state attorney in a county state attorney’s office if he or she has, as a holder of public office in the judiciary, exercised judicial duties, or has been an advocate, notary public or notary public’s assessor, or lecturer of law courses at a law faculty for at least ten years, or has worked in another legal profession for at least twenty years after passing the bar exam.”

20. The State Attorneys Act provided that decisions of the State Attorneys Council rendered in disciplinary proceedings (section 114) and

decisions on removal from the office of a state attorney (section 118(5)) could be challenged by instituting administrative disputes proceedings before the Administrative Court in the form of an action under section 23 of the Administrative Disputes Act. However, the State Attorneys Act had no provisions on remedies available against decisions of the State Attorneys Council on appointment of state attorneys.

2. The case-law of the Administrative Court

21. In its decision no. Us-6683/2004 of 17 November 2004 the Administrative Court held for the first time that a decision of the State Attorneys Council on appointment of a deputy state attorney was not an administrative act within the meaning of section 6(2) of the Administrative Disputes Act. It also held that such a decision could only be contested before that court by lodging a request for the protection of a constitutionally guaranteed right under section 66 of the Administrative Disputes Act (see paragraph 34 below).

E. The Administrative Disputes Act

1. Relevant provisions

22. The Administrative Disputes Act (*Zakon o upravnim sporovima*, the Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/1977, and the Official Gazette of the Republic of Croatia nos. 53/1991, 9/1992 and 77/1992) in its relevant part provides as follows:

23. Section 6(1) provides that administrative dispute proceedings may be initiated only against an administrative act.

24. Section 6(2) provides that an administrative act, within the meaning of the Act, is an act whereby a State organ, in the exercise of public authority, decides on a right or obligation of an individual or an organisation in an administrative matter.

25. Section 10(1) provides that an administrative act may be challenged for: (a) misapplication of substantive law, (b) lack of jurisdiction, or (c) procedural errors or incorrect findings of fact.

26. Section 23 provides that administrative dispute proceedings are instituted by bringing an action.

27. Section 24(1) provides that the action has to be brought within thirty days from the service on the plaintiff of the administrative act (that is, a decision) being contested by the action.

28. Section 27(1) provides that a statement of claim must contain: (a) the first and last name, or the name and the seat, of the plaintiff; (b) the administrative act being contested by the action; (c) a brief statement of the cause of action; as well as (d) to which direction and to what extent it is

proposed to quash the administrative act, and (e) the signature of the plaintiff. The statement of claim must be accompanied by the original or a copy of the contested act.

29. Section 29(1) provides that if the action is incomplete or incomprehensible, the president of the panel shall invite the plaintiff to rectify the shortcomings within a certain time-limit. In doing so, the president should instruct the plaintiff as to what has to be done and how and warn him or her of the consequences of failing to comply with the court's request.

30. Section 29(2) provides that if the plaintiff does not rectify the shortcomings in his action within the time-limit fixed, and they are of such a nature as to prevent the court proceeding with the case, the court shall declare the action inadmissible as deficient.

31. Section 30 provides that the Administrative Court must declare an action inadmissible if, *inter alia*, the contested decision does not constitute an administrative act within the meaning of section 6 of that Act.

32. Sections 52-59 provide for the remedy of reopening of proceedings before the Administrative Court and regulate the procedure following a petition for reopening.

33. Section 60 provides that if the Administrative Disputes Act does not contain specific provisions on the procedure before the Administrative Court (that is, in administrative disputes), the provisions of the Civil Procedure Act should apply *mutatis mutandis*.

34. Section 66 reads as follows:

“A request for the protection of a constitutionally guaranteed right or freedom ... if such a right or freedom has been violated by a final individual act [that is, a decision], and no other judicial protection is ensured, shall be decided by the [Administrative Court], by applying the provisions of this Act *mutatis mutandis*.”

2. The case-law of the Administrative Court

35. According to the conclusion reached at the plenary session of judges of the Administrative Court held on 26 October 1987, an action against an administrative act is to be considered a request for judicial protection within the meaning of section 66 of the Administrative Disputes Act if from the content of the action it transpires that it may concern a breach of rights or freedoms guaranteed by the Constitution. In such cases the Administrative Court could not review every breach of procedural or substantive law but only those that amount to breaches of constitutionally guaranteed rights or freedoms.

36. According to the Administrative Court's case-law (judgment no. Zpa-5/2004-5 of 2 December 2004), the requirements for affording judicial protection under section 66 of the Administrative Disputes Act, which must be met in their totality, are: (a) the request has to concern rights or freedoms expressly guaranteed by the Constitution, (b) those rights or

freedoms were allegedly breached by a final decision which does not have the characteristics of an administrative act, and (c) the legal system does not provide for another judicial avenue of redress. If the request lodged under section 66 of the Administrative Disputes Act does not concern a right or freedom guaranteed by the Constitution, it should be declared inadmissible (decision no. Zpa-4/2003 of 15 December 2004). The time-limit for lodging such a request is the same as the time-limit for bringing an action against an administrative act under section 23 of the Administrative Disputes Act (see paragraphs 26-27 above), that is, thirty days from the service of the contested decision (Zpa-9/05 of 13 April 2005).

F. The Administrative Procedure Act

1. Relevant provisions

37. The relevant provisions of the Administrative Procedure Act (*Zakon o općem upravnom postupku*, the Official Gazette of the Socialist Federal Republic of Yugoslavia 47/1986 (consolidated text), and the Official Gazette of the Republic of Croatia no. 53/1991) provide as follows:

Section 210(1), (3) and (4)

“(1) By notice on legal remedies a party is informed whether he or she may lodge an appeal against the decision or institute administrative dispute proceedings or other judicial proceedings.

(3) Where administrative dispute proceedings may be instituted against the decision, the notice shall indicate in which court and within what time-limit the action should be brought. Where other judicial proceedings may be instituted, it [the notice] shall indicate before which court and within what time-limit the proceedings should be instituted.

(4) When incorrect information has been given, a party may follow the legislation in force or the notice. A party which followed the incorrect information shall not suffer any adverse consequences as a result.”

2. The case-law of the Administrative Court

38. In its decision no. Zpa-9/2005-4 of 13 April 2005 the Administrative Court held that an incorrect information as regards the remedies available against a decision of the State Attorneys Council did not give rise to the rights stipulated in section 210 of the Administrative Procedure Act (see preceding paragraph).

G. The Civil Procedure Act

39. The relevant provision of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 4/1977, 36/1977 (corrigendum), 36/1980, 69/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990 and 35/1991, and Official Gazette of the Republic of Croatia nos. 53/1991, 91/1992, 58/1993, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008 and 123/2008) reads as follows:

5.a. Reopening of proceedings following a final judgment of the European Court of Human Rights in Strasbourg finding a violation of a fundamental human right or freedom

Section 428a

“(1) When the European Court of Human Rights has found a violation of a human right or fundamental freedom guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms or additional protocols thereto ratified by the Republic of Croatia, a party may, within thirty days of the judgment of the European Court of Human Rights becoming final, file a petition with the court in the Republic of Croatia which adjudicated in the first instance in the proceedings in which the decision violating the human right or fundamental freedom was rendered, to set aside the decision by which the human right or fundamental freedom was violated.

(2) The proceedings referred to in paragraph 1 of this section shall be conducted by applying, *mutatis mutandis*, the provisions on the reopening of proceedings.

(3) In the reopened proceedings the courts are required to respect the legal opinions expressed in the final judgment of the European Court of Human Rights finding a violation of a fundamental human right or freedom.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LACK OF ACCESS TO COURT

40. The applicant complained that despite the fact that the State Attorneys Council had wrongly informed him on the legal remedies available against its decision of 11 January 2005, the Administrative Court had refused to review his action on its merits and thereby violated his right of access to court. He relied on Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”

41. The Government contested that argument.

A. Admissibility

42. The Government disputed the admissibility of this complaint on two grounds. They argued that Article 6 was inapplicable and that, in any event, the applicant had failed to exhaust domestic remedies.

1. Applicability

(a) The arguments of the parties

43. The Government first referred to the Court’s case-law, according to which the right of access to court extended only to “contestations” (disputes) over (civil) “rights and obligations” which were, at least on arguable grounds, recognised under domestic law (see *James and Others v. the United Kingdom*, 21 February 1986, § 81, Series A no. 98). When it was clear that that right did not exist in the domestic legal system, Article 6 was not applicable, and the Court, when interpreting that Article, could not create a right which had no foundation in the domestic legal system.

44. In that connection the Government first submitted that in Croatian law there was no substantive (civil) right to employment or appointment to the civil service. In particular, they explained that in order to acquire the right to be appointed to the position of deputy county state attorney it was not sufficient for a candidate to meet the formal statutory requirements set forth in sections 62(2) and 63(2) of the State Attorneys Act (see paragraph 19 above). It was also necessary that a candidate had the required expertise and independence, as provided in section 62(1) of the State Attorneys Act (see paragraph 19 above), and received a sufficient number of votes from the members of the State Attorneys Council. Therefore, even if all candidates met the formal statutory requirements, the post of deputy county state attorney could remain vacant if none of them received the required number of votes. In assessing the expertise and independence of the candidates in the present case, after holding a secret ballot the State Attorneys Council appointed Mrs D.K.I., and not the applicant, deputy county state attorney in the Vukovar County State Attorney’s Office. It followed that the applicant had not had the right to be appointed to that post.

45. The Government further argued that, even if the Administrative Court had quashed the impugned decision of the State Attorneys Council, the applicant would not have been appointed instead of Mrs D.K.I.; rather, the position would have remained vacant. A new advertisement would have been published and a new selection procedure conducted. That fact was a

strong indication that: (a) as already stated above, the applicant had not had the right to be appointed to the post of deputy county state attorney in the Vukovar County State Attorney's Office (see, *mutatis mutandis*, *Sultana v. Malta* (dec.), no. 970/04, 11 December 2007), and (b) even if he had had that right, the proceedings in question had not been directly decisive for his "rights and obligations" (see, *mutatis mutandis*, *Revel and Mora v. France* (dec.), no. 171/03, 15 November 2005).

46. Lastly, the Government submitted that in Croatian law there was no right to challenge an appointment to the civil service either. In particular, decisions of the State Attorneys Council on appointments could only be reviewed, under section 66 of the Administrative Disputes Act, if they were not in accordance with constitutionally guaranteed rights or freedoms (see paragraph 21 above). However, in the *Sultana* case, the Court had already held that the right to lodge a similar remedy had no features of private law and thus had no elements which could make it akin to a "civil" right, which would be required to make Article 6 applicable (see *Sultana*, cited above).

47. Having regard to the above, the Government considered that Article 6 was not applicable in the present case.

48. The applicant argued that the domestic courts failed to protect his right to access to public service. In his view, that right was a "civil right" within the meaning of Article 6 § 1 of the Convention.

(b) The Court's assessment

49. The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. The right of access, namely the right to institute proceedings before a court in civil matters, constitutes one aspect of this "right to a court" (see, notably, *Golder v. the United Kingdom*, 21 February 1975, §§ 28-36, Series A no. 18). This right extends only to "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law (see *James and Others*, loc. cit.). Therefore, in order to establish whether the civil head of Article 6 is applicable in the present case, and, consequently, whether the applicant could rely on the right of access to court, the Court should first examine whether he had a "right" which could arguably be said to be recognised under Croatian law, and secondly, whether that right was a "civil" one.

(i) Existence of a right

50. The Court notes in this connection that according to the Administrative Court's case-law, every candidate satisfying the statutory requirements has the right to equal participation in a competition for a public office, which right is a corollary of the right to equal access to public service guaranteed by Article 44 of the Constitution (see paragraphs 12 and 14 above). Having regard to the findings of the State Attorneys Council in

the present case, according to which both the applicant and Mrs D.K.I. satisfied the statutory conditions for appointment to the post of deputy county state attorney in the Vukovar County State Attorney's Office (see paragraph 7 above), the Court considers that the applicant had a "right" which could arguably be said to be recognised under Croatian law (see, for example, *Kübler v. Germany*, no. 32715/06, § 46, 13 January 2011; *Lombardi Vallauri v. Italy*, no. 39128/05, § 62, ECHR 2009-... (extracts); and *Fiume v. Italy*, no. 20774/05, § 35, 30 June 2009).

(ii) *Civil nature of the right*

51. As regards the "civil" nature of the right, the Court held that the approach developed in the case of *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-IV, see paragraph 53 below) also applied to the right of access to a public office (see, notably, *Kübler*, cited above, § 45; and, implicitly, *Josephides v. Cyprus*, no. 33761/02, § 54, 6 December 2007; *Lombardi Vallauri*, cited above, loc. cit.; and *Penttinen v. Finland* (dec.), no. 9125/07, 5 January 2010).

52. Before the judgment in the *Vilho Eskelinen* case, the Court held that employment disputes between the authorities and public servants whose duties typified the specific activities of public service, in so far as the latter was acting as the depositary of public authority responsible for protecting the general interests of the State, were not "civil" and were excluded from the scope of Article 6 § 1 of the Convention (see *Pellegrin v. France* [GC], no. 28541/95, § 66, ECHR 1999-VIII). Likewise, employment disputes involving state attorneys (solicitors general) were also excluded from the scope of Article 6 § 1 (see *Mickovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 68329/01, 10 November 2005).

53. In the *Vilho Eskelinen* case the Court revisited the applicability of Article 6 § 1 and held that it was for the Contracting States, in particular the competent national legislature, and not the Court, to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way. If a domestic system barred access to court, the Court would verify that the dispute was indeed such as to justify the application of the exception to the guarantees of Article 6. If it did not, then there was no issue and Article 6 § 1 would apply (see *Vilho Eskelinen and Others*, cited above, § 61).

54. Following the *Vilho Eskelinen* case, the Court found Article 6 to be inapplicable to proceedings concerning recruitment (see *Apay v. Turkey*, no. 3964/05, 11 December 2007) and (disciplinary) proceedings concerning the termination of employment of public prosecutors (see *Nazsiz v. Turkey*, no. 22412/05 26 May 2009) but only because the domestic law expressly excluded access to court. However, turning to the circumstances of the present case, the Court first notes that section 66 of the Administrative

Disputes Act provides for “a request for the protection of a constitutionally guaranteed right”, a judicial remedy open to anyone who considers that his or her rights or freedoms guaranteed by the Constitution have been violated by a decision of a public authority in a situation where no other judicial remedy is available (see paragraph 34 above). It further notes that in the present case the applicant was entitled to contest the impugned decision of the State Attorneys Council of 11 January 2005 before the Administrative Court by lodging such a request in so far as that decision was contrary to his constitutional right to equal access to the public service (see paragraphs 9, 14, 16 and 21 above).

(iii) Conclusion

55. In the light of the foregoing, the Court finds that Article 6 of the Convention under its civil head is applicable to the present case (see, *mutatis mutandis*, *Josephides*, cited above, § 55; *Penttinen*, cited above; *Kravchenko and Others (military housing) v. Russia*, nos. 11609/05, 12516/05, 17393/05, 20214/05, 25724/05, 32953/05, 1953/06, 10908/06, 16101/06, 26696/06, 40417/06, 44437/06, 44977/06, 46544/06, 50835/06, 22635/07, 36662/07, 36951/07, 38501/07, 54307/07, 22723/08, 36406/08 and 55990/08, § 23, 16 September 2010; and *Kübler*, cited above, § 46) and, consequently, that the applicant should have had access to court in respect of his right to equal access to public service guaranteed by Article 44 of the Constitution.

56. It follows that the Government’s objection to the applicability of Article 6 of the Convention must be dismissed.

2. Non-exhaustion of domestic remedies

(a) The arguments of the parties

57. The Government further argued that, after the Administrative Court declared his administrative action inadmissible on 16 March 2005, the applicant should have lodged a request for the protection of a constitutionally guaranteed right under section 66 of the Administrative Disputes Act. According to the Government, that followed from the Administrative Court’s decision of 16 March 2005. That would have enabled the Administrative Court to decide on the merits of the applicant’s request regardless of the fact that it would have been submitted outside of the statutory time-limit, and having regard to the Constitutional Court’s jurisprudence, according to which a party which followed an incorrect information on legal remedies should not suffer any adverse consequences as a result. Even if the Administrative Court had declared such a request inadmissible as lodged out of time, the applicant could have lodged a

constitutional complaint against such a decision relying on the above-mentioned jurisprudence of the Constitutional Court.

58. In addition, the Government submitted that in his administrative action of 4 February 2005 the applicant had not relied on any of the constitutionally guaranteed rights, in particular the right to equal access to public service guaranteed by Article 44 of the Constitution. Had he done so, the Administrative Court would not have declared his action inadmissible but it would have treated it as a request for the protection of a constitutionally guaranteed right and examined it on its merits. However, since he had not done so, his action could not, either in form or in substance, be viewed as a request for the protection of a constitutionally guaranteed right within the meaning of section 66 of the Administrative Disputes Act, and therefore had to be declared inadmissible.

59. The applicant did not comment on this issue.

(b) The Court's assessment

60. The Court first notes that there is nothing in the text of the Administrative Court's decision of 16 March 2005 that would indicate, as suggested by the Government (see paragraph 57 above), that the applicant should have re-submitted his action brought under section 23 of the Administrative Disputes Act as a request for the protection of a constitutionally guaranteed right under section 66 of the same Act (see paragraph 9 above). Had he done so, his request would have been declared inadmissible for failure to comply with the statutory time-limit of thirty days. The Court further notes that the Constitutional Court dismissed the applicant's subsequent constitutional complaint lodged against the Administrative Court's decision (see paragraph 11 above). This suggests that the Constitutional Court considered the contested decision not to be contrary to its jurisprudence, according to which a party which followed an incorrect information on legal remedies should not suffer any adverse consequences as a result. Moreover, that jurisprudence was developed in respect of cases where the first-instance courts wrongly informed parties by indicating longer time-limits for lodging appeals against their decisions than those provided in the relevant legislation. In such cases the Constitutional Court held that their appeals could not be declared inadmissible as lodged out of time if they had been lodged within the time-limits indicated by the first-instance courts (see paragraph 13 above). However, the present case concerns a situation where the applicant was informed to use a different remedy from the one actually available under the relevant legislation, and the Court is unaware of any decision of the Constitutional Court that would sanction such erroneous information on legal remedies.

61. Furthermore, the Court is not convinced by the Government's argument that in his administrative action the applicant should have relied on a constitutionally guaranteed right, such as, for example, the right to

equal access to public service guaranteed by Article 44 of the Constitution, in which case the Administrative Court would have decided on the merits of his action, treating it, in substance, as a request under section 66 of the Administrative Disputes Act. In this connection the Court notes that while the case-law of the Administrative Court requires claimants to specify in their requests lodged under section 66 of the Administrative Disputes Act the constitutional right which has allegedly been violated by the contested decision (see paragraph 36 above), the same or similar requirement (see paragraph 28 above) does not exist in respect of administrative actions instituting administrative dispute proceedings brought under section 23 of the same Act, to which the applicant resorted to. Given that in the present case the State Attorneys Council had informed the applicant to bring such an action against its decision of 11 January 2005, instead of informing him to lodge a request for the protection of a constitutionally guaranteed right, the Court considers that he was not obliged to comply with the above-mentioned requirement.

62. It follows, in the light of the foregoing, that the Government's objection of failure to exhaust domestic remedies must also be dismissed.

63. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The arguments of the parties

64. The Government maintained that the applicant's right of access to court had not been violated. In so doing they relied on the same arguments summarised in paragraph 58 above.

65. The applicant maintained his view that by declaring his action inadmissible, despite the fact that the State Attorneys Council had wrongly informed him to resort to that remedy, the Administrative Court had violated his right of access to court.

2. The Court's assessment

66. The Court reiterates that the right of access to court is not absolute, but may be subject to limitations. These are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. However, these limitations must not restrict or reduce the access left to an individual in such a way or to such an

extent that the very essence of the right is impaired (see, for example, *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93).

67. Turning to the circumstances of the present case, the Court notes that the State Attorneys Council had wrongly informed the applicant on the legal remedies available against its decision of 11 January 2005. In particular, it informed him that administrative dispute proceedings could be instituted by bringing an action in the Administrative Court under section 23 of the Administrative Disputes Act (see paragraph 7 above), whereas the (only) available remedy was in fact a request for the protection of a constitutionally guaranteed right under section 66 of the same Act (see paragraphs 9 and 21 above). When the applicant eventually brought the action as informed, the Administrative Court declared it inadmissible and refused to review the contested decision on the merits. It did so because: (a) the contested decision did not constitute an administrative act within the meaning of section 6(2) of the Administrative Disputes Act, and (b) in his action the applicant had not relied on any right or freedom guaranteed by the Constitution and thereby prevented the Administrative Court from viewing his action, in substance, as a request for the protection of a constitutionally guaranteed right under section 66 of the Administrative Disputes Act (see paragraph 9 above).

68. The Court reiterates that it is in the first place for the national authorities, and notably the courts, to interpret and apply the domestic law. This applies in particular to the interpretation by courts of rules of a procedural nature. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see, for example, *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII, and *Pérez de Rada Cavanilles v. Spain*, 28 October 1998, § 43, *Reports* 1998-VIII).

69. In order to satisfy itself that the very essence of the applicant's right of access to court was not impaired, the Court must examine whether the Administrative Court's decision to declare his action inadmissible could be regarded as foreseeable having regard to the relevant legislation and the case-law and given the fact that the applicant was wrongly informed on legal remedies (see, *mutatis mutandis*, *Levages Prestations Services v. France*, 23 October 1996, § 42, *Reports* 1996-V, and *Osu v. Italy*, no. 36534/97, § 35, 11 July 2002).

70. In this connection the Court first notes that the State Attorneys Act had no provisions on remedies available against decisions of the State Attorneys Council on appointment of deputy state attorneys (see paragraph 20 above), and that therefore from its text it was not certain what the right remedy to be used was. This uncertainty was remedied by judicial interpretation on 17 November 2004 when the Administrative Court held for the first time that such decisions could only be challenged by a request for the protection of a constitutionally guaranteed right under section 66 of

the Administrative Disputes Act (see paragraph 21 above). While it is true that the above-mentioned decision of the Administrative Court was rendered some two months before the applicant brought his action in the same court, the Court does not consider that the applicant should have been aware of it and disregarded the explicit information on legal remedies contained in the decision of the State Attorneys Council he was contesting. This is so because in cases like the present one, where the remedy in question was the result of interpretation by the courts, it normally takes six months for such a development of the case-law to acquire a sufficient degree of legal certainty before the public may be considered to be effectively aware of the domestic decision which had established the remedy and the persons concerned be enabled and obliged to use it (see, *mutatis mutandis*, *Depauw v. Belgium* (dec.), no. 2115/04, ECHR 2007-V (extracts), and *Provide S.r.l. v. Italy*, no. 62155/00, § 18, ECHR 2007-VIII (extracts)).

71. In these particular circumstances the applicant might have reasonably expected, having regard to section 29(1) and (2) in conjunction with section 66 of the Administrative Disputes Act (see paragraphs 29-30 and 34 above), from the Administrative Court to first inform him that his action could only be examined as a request for a protection of a constitutionally guaranteed right, and to invite him to specify which constitutional right he considered to have been violated. Instead, the Administrative Court declared his action inadmissible outright. As a result, the applicant found himself in a situation, where he was prevented, through no fault of his own, from having the impugned decision of the State Attorneys Council examined on its merits (see, *mutatis mutandis*, *Société Anonyme Sotiris and Nikos Koutras Attee v. Greece*, no. 39442/98, §§ 21-23, ECHR 2000-XII; and *Platakou v. Greece*, no. 38460/97, §§ 39 and 49, ECHR 2001-I). In the Court's view, that situation impaired the very essence of the applicant's right of access to court as secured by Article 6 § 1 of the Convention.

72. There has accordingly been a violation of Article 6 § 1 of the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE EXCESSIVE LENGTH OF THE PROCEEDINGS

73. The applicant also complained that the length of the above proceedings had been incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention.

74. The Court notes that the proceedings complained of lasted some three years and three months, during which period the case was examined at three levels of jurisdiction. That being so, the Court considers, in the light of the criteria established in its case-law on the question of "reasonable time"

(the complexity of the case, the applicant's conduct and that of the competent authorities), and having regard to all the information in its possession, that such a period cannot be considered excessive. Consequently, the length of the proceedings in the present case was not unreasonable.

75. It follows that this complaint is inadmissible under Article 35 § 3 (a) of the Convention as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 thereof.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

77. The applicant claimed 243,896.37 euros (EUR) in respect of pecuniary damage sustained on account of loss of earnings. He also claimed EUR 60,000 in respect of non-pecuniary damage.

78. The Government contested these claims.

79. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

80. On the other hand, the Court finds that the applicant must have sustained non-pecuniary damage. In this connection the Court first reiterates that the most appropriate form of redress in cases where it finds that an applicant has not had access to court in breach of Article 6 § 1 of the Convention would, as a rule, be to reopen the proceedings in due course and re-examine the case in keeping with all the requirements of a fair hearing (see, for example, *Lungoci v. Romania*, no. 62710/00, § 56, 26 January 2006; *Yanakev v. Bulgaria*, no. 40476/98, § 90, 10 August 2006; and *Lesjak v. Croatia*, no. 25904/06, § 54, 18 February 2010). In this connection the Court notes that, having regard to section 60 of the Administrative Disputes Act (see paragraph 33 above), the applicant can now, relying on sections 25-59 of the same Act (see paragraph 32 above) in conjunction with section 428a of the Civil Procedure Act (see paragraph 39 above), file a petition for the reopening of the above proceedings in respect of which the Court has found a violation of Article 6 § 1 of the Convention. In these circumstances, ruling on an equitable basis, the Court awards the applicant EUR 3,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

81. The applicant did not submit any claim for costs and expenses incurred in the proceedings before the domestic courts or before this Court. The Court therefore considers that there is no call to award him any sum on that account.

C. Default interest

82. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning access to court admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Croatian kunas at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Anatoly Kovler
President