



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

THIRD SECTION

CASE OF POPIVČÁK v. SLOVAKIA

(Application no. 13665/07)

JUDGMENT

STRASBOURG

6 December 2011

FINAL

04/06/2012

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

In the case of Popivčák v. Slovakia,

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

Josep Casadevall, *President*,

Corneliu Bîrsan,

Egbert Myjer,

Ján Šikuta,

Ineta Ziemeļe,

Nona Tsotsoria,

Kristina Pardalos, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 8 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 13665/07) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovak national, Mr Peter Popivčák (“the applicant”), on 9 March 2007.

2. The applicant was represented by Mr T. Šafárik, a lawyer practising in Košice. The Government of the Slovak Republic (“the Government”) were represented by their Agent, Ms M. Pirošíková.

3. The applicant alleged, in particular, that he had not been provided with access to a court, in violation of his rights under Article 6 § 1 of the Convention, to bring a claim for damages in connection with undisputed malpractice by his lawyer.

4. On 23 June 2010 the Court decided to give notice of the above-mentioned part of the application 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 was born in 1950 and lives in Košice. He is a self-employed entrepreneur.

6. In his capacity as an entrepreneur, the applicant received a subsidy for the creation of a number of positions of employment deemed “socially desirable”. The subsidy was paid to him on terms specified in a contract with the District Employment Office (*Okresný úrad práce*).

A. Proceedings concerning the subsidy

7. In a decision of 28 November 1996 the Košice I. District Tax Authority (*Daňový úrad*) found that the applicant had breached the above-mentioned contract by failing to fill all the positions. The applicant was therefore ordered to return 430,000 Slovakia korunas (SKK) of the subsidy and to pay SKK 860,000 by way of a financial penalty.

8. The period for appealing against the decision was fifteen days from the date of service.

9. The written version of the decision was sent to the applicant through the postal service, to be served on him in person (*do vlastných rúk*).

However, after repeated attempts to do so had proved unsuccessful the decision was deposited with the local post office and a notice was left in the applicant’s mailbox to the effect that he could collect the decision there within three days.

Should the applicant not collect the decision within that period, as proved to be the case, it was to be deemed to have been served on him by force of a legal presumption on the date of expiry of the period.

10. The question of when the decision of 28 November 1996 became final and binding (*právoplatnosť*) was not subject to full administrative or judicial examination. However, the authorities took the view that it had become final and binding on 23 December 1996, by operation of the presumption mentioned in the preceding paragraph. At that time the applicant had no legal representation.

B. Legal assistance

11. Under a legal-assistance contract of 1 October 1997, the applicant retained the services of a lawyer to provide him with general legal assistance, including representation in litigation.

12. Being a member of the Slovakian Bar Association, the lawyer was under a duty conscientiously to defend her clients’ rights and diligently to apply all legal means available for the assertion of their interests and to have taken out and to maintain professional liability insurance (see paragraphs 40 and 42 below).

13. On 26 January 1998 the applicant paid a visit to the District Tax Authority, accompanied by his lawyer. It was on this occasion that the applicant obtained the decision of 28 November 1996 (see paragraph 7 above) by collecting it from the Tax Authority in person.

14. On 18 August 1998, through his lawyer, the applicant challenged the decision of 28 November 1996 by way of an administrative-law action (see paragraph 47 below).

15. Simultaneously, also through the lawyer, the applicant requested an extraordinary review of the impugned decision by the Central Tax Directorate (*Ústredné daňové riaditeľstvo*) outside the framework of appellate proceedings (see paragraph 51 below). In his request, the applicant argued, *inter alia*, that he had in fact complied with the terms on which he had been provided with the subsidy.

16. On 30 September 1998 the Central Tax Directorate modified the decision of 28 November 1996 in that it reduced the amount of the subsidy to be repaid to SKK 180,000 and the penalty payment to SKK 360,000. In the proceedings leading up to that decision the applicant's lawyer officially acted as his legal representative. Although it was open to her, the lawyer filed no administrative appeal against it on the applicant's behalf.

17. The District Tax Authority subsequently relieved the applicant of the duty to pay any more than SKK 160,000 in penalties.

18. On 10 November 1998 the Košice Regional Court (*Krajský súd*) declared the applicant's administrative-law action (see paragraph 14 above) inadmissible and discontinued the proceedings. In the proceedings leading up to that decision the applicant's lawyer officially acted as his legal representative.

19. The Regional Court found that the applicant had failed to fulfil the statutory admissibility requirement of exhausting ordinary remedies by lodging an administrative appeal (see paragraphs 48 and 50 below) and, as appropriate, by challenging the decision on the administrative appeal by way of a fresh administrative-law action (see paragraph 47 below).

20. In so far as there might have been any misgivings as to the way in which the impugned decision had been served on the applicant and, consequently, as to when the period for lodging an administrative appeal had expired, the Regional Court held:

“The court dealing with the action of 18 August 1998 cannot examine whether the defendant served the impugned decision [on the applicant] in accordance with Article 24 of the Code of Administrative Procedure. This question may be examined only by the appellate administrative agency, in the context of an [administrative] appeal against the decision of the defendant.

...

Should the [applicant] have been of the opinion that the decision by the defendant was not served on him through the postal service in accordance with Article 24 of the Code of Administrative Procedure, it was open to him to challenge that decision by means of an [administrative] appeal within the period for appealing, namely fifteen days from the collection of that decision in person from the defendant on 26 January 1998. The question whether the decision by the defendant was served on the applicant in accordance with Article 24 of the Code of Administrative Procedure and, as the

case may be, whether the [applicant] lodged his [administrative] appeal against the decision by the defendant within the statutory time-limit would have to be resolved by the administrative agency dealing with the appellate proceedings. Upon receipt of the decision of the appellate administrative agency on his appeal, it was open to the [applicant] to proceed as indicated above.”

C. Legal malpractice action

21. On 12 July 2000 the applicant lodged a civil action against the lawyer with the Košice I District Court (*Okresný súd*). He alleged that the lawyer had breached her duty of care by failing to use all remedies, in particular administrative appeals against the decisions of 28 November 1996 and 30 September 1998, followed – as the case may be – by administrative-law actions.

22. The applicant argued, *inter alia*, that, in a judgment of 20 February 1997 in an unrelated but similar case the Supreme Court (*Najvyšší súd*) had found for the plaintiff and had quashed the impugned decisions of the tax authorities.

23. The applicant sought an order for payment of SKK 540,000 in damages. This sum represented the total amount that he had to pay back to the tax authorities. In the course of the proceedings the applicant reduced his claim by SKK 200,000.

24. On 16 April 2004 the District Court dismissed the action and ordered the applicant to pay the defendant’s costs.

25. Referring to the Regional Court’s decision of 10 November 1998 (see paragraph 18 above), the District Court observed that the applicant’s lawyer had not lodged an administrative appeal against the decision of 28 November 1996 (see paragraph 7 above) and that, consequently, the Regional Court had no jurisdiction to deal with the applicant’s administrative-law action.

26. The District Court also noted that the applicant’s lawyer could have challenged the decision of 30 September 1998 by means of an administrative appeal, but had not done so.

27. The District Court concluded that the lawyer had indeed breached her professional duties in that she had failed to use all available legal means for the protection of the applicant’s interests.

28. However, no causal link could be established between that breach and the applicant’s loss since it was unknown how the case would have proceeded on the merits had all the ordinary remedies been applied.

An administrative appeal against the decision of 28 November 1996 fell to be determined by the Central Tax Directorate. An administrative-law action against the decision of 30 September 1998 fell to be determined by the Supreme Court sitting as an administrative tribunal. Relying on Article 135 § 2 of the Code of Civil Procedure, the District Court concluded that the

ordinary courts had no jurisdiction to take the place of these bodies and to pre-empt the outcome of the proceedings before them.

29. On 28 June 2005 the Regional Court upheld the judgment following the hearing of an appeal by the applicant. The Regional Court observed that the ordinary courts held no power of review as regards the substantive aspect of administrative decisions. It held that, similarly, the ordinary courts could not be a substitute for administrative agencies and tribunals by determining matters of substance within the latter's jurisdiction.

30. The Regional Court denied leave to appeal on points of law on the grounds that no issue of particular legal significance was involved and that the matter was the subject of well-established case-law, although this was not referred to in any detail.

D. Constitutional complaint and public prosecution service review

31. On 21 April 2006 the applicant lodged a complaint under Article 127 of the Constitution (see paragraph 37 below) with the Constitutional Court (*Ústavný súd*). He argued that the dismissal of his action for damages had violated his rights of access to a court under Article 6 § 1 of the Convention and to judicial or other legal protection under Article 46 § 1 of the Constitution (see paragraph 36 below).

32. On 4 May 2006 the Constitutional Court declared the complaint inadmissible. The decision was served on the applicant on 22 September 2006.

33. The Constitutional Court was of the view that the outcome of the applicant's action for damages hinged on a point of law that fell under the jurisdiction of the ordinary courts and had already been decided there. The ordinary courts, in particular the Regional Court, had supported the decision with exhaustive, relevant and sufficient reasoning. There was no appearance of any constitutionally relevant arbitrariness or irregularity and the applicant's complaint was accordingly manifestly ill-founded.

34. The applicant requested the Prosecutor General to exercise his discretionary powers to challenge the judgment of 28 June 2005 on the applicant's behalf by way of an extraordinary appeal on points of law on similar grounds to those raised in the applicant's constitutional complaint.

35. In a letter of 2 October 2006 the public prosecution service informed the applicant that it fully endorsed the ordinary court's reasoning and consequently, his request was dismissed.

II. RELEVANT DOMESTIC LAW

A. Constitution (Constitutional Law no. 460/1992 Coll., as amended)

36. The “right to judicial and other legal protection” is laid down in Section (*Oddiel*) Seven of Part (*Hlava*) Two, dealing with “basic rights and freedoms”. The relevant part of Article 46 provides as follows:

“1. Everyone shall be able to assert his or her rights in a procedure provided for by a statute before an independent and impartial court of law and, in cases defined by a statute, before another organ of the Slovak Republic.

...

4. Conditions and details of judicial and other legal protection shall be provided for by a statute.”

37. Article 127 provides:

“1. The Constitutional Court shall decide on complaints by natural or legal persons alleging a violation of their fundamental rights or freedoms ... unless the protection of such rights and freedoms falls within the jurisdiction of a different court.

2. If the Constitutional Court finds a complaint justified, it shall deliver a decision stating that a person’s rights or freedoms as set out in paragraph 1 have been violated by a final decision, specific measure or other act and shall quash such decision, measure or act. If the violation that has been found is the result of a failure to act, the Constitutional Court may order [the authority] which has violated the rights or freedoms to take the necessary action. At the same time it may remit the case to the authority concerned for further proceedings, order such authority to refrain from violating the fundamental rights and freedoms ... or, where appropriate, order those who have violated the rights or freedoms set out in paragraph 1 to restore the situation to that existing prior to the violation.

3. In its decision on a complaint the Constitutional Court may grant appropriate financial compensation to the person whose rights under paragraph 1 have been violated.”

38. Article 152 § 4 provides:

“The interpretation and application of constitutional laws, acts of parliament and other generally binding statutes must be in accordance with this Constitution.”

B. Civil Code (Law no. 40/1964 Coll., as amended)

39. The general rule on liability for damage is laid down in Article 420, paragraph 1 of which provides:

“Everyone shall be liable for any damage he or she causes by breach of statutory duty.”

C. 1990 Advocacy Act (Law no. 132/1990 Coll., as then in force)

40. Section 13 reads as follows:

“1. In the exercise of his or her profession, an advocate is bound to uphold the Constitution, acts of parliament and regulations issued for their implementation and, within their boundaries, to follow the client’s instructions.

2. An advocate is bound to protect the rights and lawful interests of the person he or she represents, to act conscientiously in doing so, diligently to use all legal means and to apply what he or she considers useful according to his or her conscience and the client’s instructions.

3. An advocate is bound to see to it that the legal assistance rendered is purposeful and economical.”

41. The relevant part of section 21 provides:

“1. An advocate is liable to his or her client for damage that he or she has caused in connection with the exercise of his or her profession; this liability extends to damage caused by his or her trainee advocate (*koncipient*) or employee.

...

4. An advocate shall be released from liability under subsection 1 if he or she shows that the damage could not have been prevented with all efforts that may be expected of him or her.”

42. Under section 22:

“Before the commencement of the exercise of his or her profession, the advocate is bound to furnish to the Bar a professional liability insurance policy. This insurance must be valid throughout the period of the exercise of the advocate’s profession.”

D. Code of Civil Procedure (Law no. 99/1963 Coll., as applicable at the relevant time)

43. Article 7 defines the jurisdiction of the ordinary courts. It provides:

“1. Courts in civil proceedings shall examine and decide upon disputes and other legal matters which stem from relations under civil law, labour law, family law, commercial law and economic law, provided that an act of parliament does not confer jurisdiction on other authorities.

2. Courts in civil proceedings shall also review the lawfulness of decisions of public administrative authorities and the lawfulness of decisions, measures and other actions by public-power authorities, provided that an act of parliament does not confer jurisdiction on other authorities.

3. Other matters may be examined and decided upon by courts in civil proceedings if an act of parliament so provides.”

44. Article 135 defines which decisions are binding upon courts in civil proceedings. It provides:

“1. A court shall be bound by a decision by the Constitutional Court as to the compatibility of a statute with the Constitution, an act of parliament or an international treaty binding upon the Slovak Republic ... A court shall also be bound by a decision of the Constitutional Court or the European Court of Human Rights which concerns a question of fundamental human rights or freedoms. Moreover, a court shall be bound by a decision of the competent authorities that a criminal offence, a minor offence or another administrative offence punishable under special statute has been committed and by whom, as well as by a decision concerning personal status, the inception and winding up of a company and the entry of [information on] registered capital [in the Commercial Register]; a court shall, however, not be bound by a decision taken in summary minor-offence proceedings (*blokové konanie*).

2. Other than that, questions falling to be decided by other authorities may be decided upon by a court directly. However, should such a question have been decided upon by the competent authority, the civil court shall adopt its decision (*vychádza z neho*).”

45. Under Article 228 § 1 (d), civil proceedings can be reopened where the Court has found a violation of the requesting party’s Convention rights and where serious consequences of the violation have not been adequately redressed by the award of just satisfaction.

46. In the new decision in a reopened matter, the court determines issues relating to the reimbursement of the costs that the parties incurred both in the original and in the reopened proceedings (Article 235 § 3).

47. Chapter (*Časť*) 5 governs the administrative judiciary. In accordance with its provisions, administrative tribunals review the lawfulness of decisions taken by public administrative authorities on the basis of administrative-law actions under Section (*Hlava*) 2 of that Chapter and administrative-law appeals under Section 3 of that Chapter.

48. Judicial review of administrative decisions and procedures by way of administrative-law actions under Section 2 of Chapter 5 necessitates that the matter be resolved by a decision that has become final and binding (*právoplatnosť*) upon the exhaustion of all ordinary remedies (Article 247 § 2).

E. Code of Administrative Procedure (Law no. 71/1967 Coll., as applicable at the relevant time)

49. The possibility of disregarding failure to comply with a time-limit is laid down in Article 28, the relevant part of which provides:

“1. The administrative authority may disregard a failure to comply with a time-limit (*lehota*) for serious reasons, provided that the party to the proceedings makes a request to that effect within fifteen days of the day when the reasons for the failure [to comply with the time-limit] cease to exist, and that [the party] rectifies the

omission within the same time-limit. The administrative authority may confer suspensive effect on such a request.

2. Failure to comply with a time-limit cannot be disregarded after a year has elapsed from the day when the action should have been taken.”

50. An administrative appeal is normally to be lodged within fifteen days of the day when the decision challenged is served (Article 54 § 2).

51. In the three years after an administrative decision becomes final and binding, it may be quashed or amended (Article 68 § 1) upon a review by an administrative agency at the nearest level above the agency that issued the decision, of the higher agency’s own motion or on an application by a third party (Article 65 § 1).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

52. The applicant complained that he had been effectively excluded from any possibility of claiming compensation from his lawyer in respect of a legal error indisputably committed by the latter.

The applicant relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

A. Admissibility

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

B. Merits

54. The Government recapitulated the domestic proceedings and relied on the domestic courts’ decisions in arguing that the applicant had had the benefit of proceedings compatible with the requirements of Article 6 § 1 of the Convention in that he had submitted his claim to the ordinary courts, which had determined it in a manner consonant with the requirements of that provision. In particular, the Government submitted that for the applicant’s compensation claim to be successful it had been imperative for

him to establish the causal link between the breach of his lawyer's duties and any pecuniary damage he might have suffered. It had, however, not been possible to establish what the outcome of the administrative proceedings would have been had the applicant's lawyer not breached her duties. His claim therefore had to be dismissed. In that connection, the Government pointed out that, even in respect of claims for compensation of pecuniary damage under the Convention, the causal link between the violation found and the damage alleged must be clearly established.

55. In reply, the applicant disagreed and reiterated his complaint. In particular, he submitted that there was nothing in Article 7 § 2 of the Code of Civil Procedure (see paragraph 43 above) or elsewhere to serve as a basis for removing from the jurisdiction of the ordinary courts the question of the existence and extent of the damage he had suffered and its causal link to his lawyer's malpractice. On the contrary, the ordinary courts had to be and in fact were bestowed with jurisdiction to deal with any question that was necessary to resolve a claim submitted to them.

56. The Court reiterates that, in accordance with Article 19 of the Convention, its duty is to ensure the observance of the obligations undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national court (see *Garçia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references). The Court's task under the Convention is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, for example, *Petrenco v. Moldova*, no. 20928/05, § 41, 30 March 2010).

57. As to the present case, the Court observes first of all that it arose in the context of a claim in tort of a private-law nature against the background of the applicant's commercial activities. The crux of the Article 6 complaint appears to be the domestic court's specific decision on the applicant's claim for damages.

58. For that matter, the Court also observes that the applicant's claim for damages was determined at two levels of ordinary jurisdiction, the decisions of which were ultimately reviewed by the Constitutional Court. It is in particular noted that the latter found that the ordinary courts had supported their decisions with exhaustive, relevant and sufficient reasoning and that there was no appearance of any arbitrariness or irregularity in their decisions. The ordinary courts' conclusions were furthermore fully shared by the Public Prosecution Service.

59. The Court notes that the domestic courts mainly relied on the provisions of Article 135 of the Code of Civil Procedure and held that as courts of ordinary jurisdiction they were not in a position to take the place of administrative agencies and tribunal, to pre-empt the outcome of the proceedings before them and to review substantive aspect of their decisions. The applicant was thus unsuccessful in establishing any actual damage, which was an essential component of his claim.

60. The Court considers that these reasons are not manifestly arbitrary, irregular or otherwise wrong. Moreover, the applicant was represented by a lawyer throughout the proceedings, the courts held a hearing and the applicant was provided with ample opportunity to state his arguments, to challenge the submissions made by the defendant and to submit any evidence he considered relevant to the outcome.

61. In addition, the Court finds it of relevance that, with the assistance of the defendant in the subsidy proceedings, the applicant was largely successful in that he obtained a reduction of the amount of the subsidy to be repaid from SKK 430,000 to SKK 180,000 and the amount of the penalty from SKK 860,000 to SKK 160,000. His subsequent claim against the lawyer was examined by the courts while neither Article 6 nor any other provision of the Convention can be interpreted as guaranteeing the right to a successful outcome of a private action in law (see *Ruiz-Mateos v. Spain* no. 12952/87, Commission decision of 6 November 1990, Decisions and Reports (DR) 67, p. 190).

62. In conclusion, in the light of all the material in its possession, the Court has found no elements supporting a conclusion that the applicant's right of access to a court or any other of his rights under Article 6 § 1 of the Convention have been disrespected.

63. There has accordingly been no violation of Article 6 § 1 of the Convention.

II. THE REMAINING COMPLAINT

64. On the basis of the same facts, the applicant also complained of a violation of his property rights under Article 1 of Protocol No. 1.

65. This complaint has, however, not been asserted before the Constitutional Court. It follows that it must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* by five votes to two that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 6 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Myjer and Šikuta is annexed to this judgment.

J.C.M.
S.Q.

DISSENTING OPINION OF JUDGE ŠIKUTA JOINED BY JUDGE MYJER

1. To my regret, I am unable to agree with the majority's conclusion that there has been no violation of Article 6 of the Convention, for the following reasons.

2. By way of introduction, I would summarise this case as follows. The applicant's lawyer made a professional mistake, which was recognised by the ordinary courts. As a result of the mistake, the applicant's original problem could not be dealt with by the domestic courts, which would otherwise have had jurisdiction to deal with it (the administrative judiciary).

Relying on unequivocal provisions of substantive law concerning professional liability of lawyers, the applicant then sued his lawyer for damages.

Although there nominally was a judge to entertain the action, it proved practically impossible for the action to succeed as it depended on elements that the judge had no jurisdiction to examine.

3. I have no difficulty in agreeing with the position of the domestic courts, and indeed the majority of the Chamber, that the right of access to a court does not imply the right to the successful outcome of the proceedings. However, as the situation of the applicant in the present case has shown, there appears to be a total structural and systemic impossibility for such claims as the one in the present case even to be argued before Slovakian courts, let alone to succeed.

4. I respectfully submit, and explain in detail below, that such a practical obliteration of any compensation claim, be it as a result of flaws in the interpretation or application of the law or as a result of the law itself, cannot be in keeping with Article 6 § 1 of the Convention and the rule of law in general.

5. For that matter, it may be useful to reiterate that the right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the principle of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see *Běleš and Others v. the Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX). In this way the right to a fair hearing embodies the "right to a court", one aspect of which is the right of access, that is the right to institute proceedings before courts in civil matters (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 43, ECHR 2001-VIII; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 116, ECHR 2005-X).

6. Thus, everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal (see, among many

other authorities, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 50, ECHR 1999-I).

7. A restrictive interpretation of the right of access to a court guaranteed by Article 6 § 1 would not be consonant with the object and purpose of the provision (see *De Cubber v. Belgium*, 26 October 1984, § 30, Series A no. 86).

8. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among many other authorities, *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93, and *Prince Hans-Adam II of Liechtenstein*, cited above, § 44).

9. As far as the present case goes, I would agree with the majority that, within the Court's limited power to scrutinise questions of compliance with domestic law (see, *mutatis mutandis*, *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I), the domestic courts' findings in terms of domestic law are not to be questioned.

10. However, contrary to the view of the majority, I consider that, even in such a state of affairs, the Court was required to examine the implications of the existing legislative situation and its implementation for the applicant's rights under Article 6 § 1 of the Convention, bearing in mind that the Convention is intended to guarantee rights that are practical and effective (see, for example, *Sabeh El Leil v. France* [GC], no. 34869/05, § 50, 29 June 2011).

11. In this context I would emphasise the constitutional importance of legal assistance from the point of view of effective exercise of the right of access to a court and indeed from the point of view of the effective functioning of the broader concept of the rule of law (see, for example, *Airey v. Ireland*, 9 October 1979, Series A no. 32). Noting the privileged relationship of confidence between the lawyer and the client, I consider that the lawyer's professional liability is an inherent key feature of that relationship and indeed of the legal service in a democratic society governed by the rule of law.

12. Applying the above general premises to the facts of the present case, I hold the view, unlike the majority, that this is not a fourth-instance case but rather a case of lack of access to a court in respect of legal malpractice lawsuits against a lawyer.

At the same time, I am of the view that this case reflects a general position in Slovakia and potentially in other Contracting States. It therefore concerns a structural and systemic problem.

13. It should be reiterated that the applicant's compensation claim had a clear basis in substantive law (see, in particular, paragraphs 39 and 41 of the judgment) and its relevance was strengthened by the fact that practising

lawyers in Slovakia are bound by statute to take out and maintain professional liability insurance (see paragraph 42 of the judgment).

14. The claim consisted of three components: (i) the breach of his lawyer's duty of care; (ii) the occurrence of damage; and (iii) the existence of a causal link between the former two components.

15. The first component was established before the ordinary courts and there has not been any argument to the contrary. Suffice it to recapitulate that, instead of lodging an administrative appeal against the decision of 28 November 1996 and, as appropriate, challenging the decision on the administrative appeal by way of an administrative-law action, the lawyer lodged an administrative-law action directly against the decision of 28 November 1996 (see paragraph 19 of the judgment). It should be added that the lawyer also failed to challenge the decision of 30 September 1998 by means of an administrative appeal (see paragraph 26 of the judgment), the decision on which could then, as appropriate, have been challenged by way of an administrative-law action.

16. The second and third substantive elements of the applicant's claim have proven more problematic. In particular, it was necessary for the applicant to establish the existence and extent of the damage suffered by him and the causal link between this damage and the breach of duties by his lawyer. In view of their nature, these elements were interlinked and depended on the hypothetical outcome of the administrative proceedings which the applicant's lawyer failed to pursue with the requisite care.

17. As mentioned above and in the judgment itself, the administrative proceedings, the hypothetical outcome of which the applicant was required to demonstrate, would in the normal course of events have taken place before an appellate administrative agency as far as the decisions of 28 November 1996 and 30 September 1998 are concerned, before a Regional Court (sitting as an administrative tribunal) in the event of a negative decision on the administrative appeal against the decision of 28 November 1996 and before the Supreme Court (sitting as an administrative tribunal) in the event of a negative decision on the administrative appeal against the decision of 30 September 1998.

18. However, relying on Article 135 of the Code of Civil Procedure, in respect of the applicant's legal malpractice claim, the ordinary courts at two levels of jurisdiction, the Constitutional Court and also the public prosecution service came to the conclusion that the ordinary courts had no jurisdiction and power of review as regards the substantive aspect of administrative decisions and that they could not take the place of the above mentioned administrative agencies and tribunals, pre-empt the outcome of the administrative proceedings before them and serve as a substitute for them by determining matters of substance within those bodies' jurisdiction.

19. In other words, as established by the domestic courts in the instant case, there was procedurally no way for the applicant to have the remaining

two elements of his claim examined and established on account of the domestic courts' lack of jurisdiction.

20. The ultimate result of the interpretation and application of the existing domestic rules, or, where appropriate, the non-existence of other rules, is that the applicant's compensation claim has been rendered practically incapable of being asserted before the courts. At the same time, it appears that the applicant alone has been made to bear the consequences of these deficiencies in interpretation, application and legislation.

21. The repercussions of the practical impossibility for the applicant to assert a malpractice compensation claim against his lawyer were all the more significant as, owing to his lawyer's error in the original administrative proceedings, the applicant had effectively been deprived of access to a judicial review of the impugned decisions of the tax authorities.

22. I am fully aware of the practical difficulties in establishing the extent of any real damage caused by a lawyer to his or her client, *inter alia* on account of the potentially differing levels of creditworthiness of the entity faced with the original claim and the lawyer sued for malpractice.

23. Moreover, I certainly do not mean to suggest that, in a situation such as that in the present case, the full amount of what was at stake in the original proceedings should be compensated by the lawyer at fault. After all, had the original proceedings not been hindered by the lawyer's mistake, they might still have had a negative outcome for the client.

24. While the devising of a viable compensation mechanism is a task for the legislature, I, for my part, could imagine that these difficulties could be surmounted, for example, by establishing the missing elements of the compensation claim by means of one or more expert opinions aimed at determining the client's relative likelihood of success in the original proceedings.

25. A comparative study of the existing practice in this area in the other Contracting States would certainly have shed light on possible solutions and, in my view, would have been appropriate in view of the significance of the problem.

26. Be that as it may, in the present case, within the existing legislative framework, there was no procedural forum for the applicant to make his claim and to address the difficulties mentioned above in any way, all this despite the existence of an ample substantive legal framework for legal assistance with professional liability at its heart.

27. At the same time, nothing has been adduced by the Government or established otherwise to justify the applicant's lack of access to a court as regards his legal malpractice compensation claim.

28. In particular, there is no indication that the applicant could have pursued any claim aimed at obtaining compensation in respect of his former lawyer's malpractice before the ordinary courts or in the context of disciplinary proceedings, or that he would have had any greater prospects of

success in seeking the settlement of his claims with any other entity such as, for example, his former lawyer's insurer than with the lawyer herself.

29. Moreover, in my view, on a conceptual level, the existing rules on liability, as applied in the present case, in practice amount to a general structural impossibility of asserting procedural malpractice claims against the lawyer concerned and, by implication, to pecuniary impunity on the lawyer's part, rendering the concept of professional liability of lawyers practically meaningless.

30. I consider that the results described above cannot be reconcilable with the spirit, object and purpose of the Convention.

Accordingly, the application was rightly declared admissible under Article 6 § 1 of the Convention, and in my opinion, there has been a violation of that provision.