



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

FOURTH SECTION

CASE OF ĐUKIĆ v. BOSNIA AND HERZEGOVINA

(Application no. 4543/09)

JUDGMENT

STRASBOURG

19 June 2012

FINAL

19/09/2012

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

In the case of Đukić v. Bosnia and Herzegovina,

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

Lech Garlicki, *President*,
David Thór Björgvinsson,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Ljiljana Mijović, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 29 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 4543/09) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a citizen of Bosnia and Herzegovina, Mr Miroslav Đukić (“the applicant”), on 5 January 2009.

2. The applicant was represented by Vaša Prava, a local non-governmental organisation. The Bosnian-Herzegovinian Government (“the Government”) were represented by their Deputy Agent, Ms Z. Ibrahimović.

3. The applicant complained of the non-enforcement of a domestic judgment of 25 March 2005 in his favour.

4. On 16 December 2010 the application was communicated 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 1954 and lives in Prijedor.

6. Before the 1992-95 war in Bosnia and Herzegovina, the applicant lived in Bosanska Krupa in a socially owned flat over which he had an occupancy right (the concept of “socially owned flats” is described below).

7. On 14 October 2002 the competent administrative authority confirmed the applicant’s occupancy right over the flat in Bosanska Krupa,

but stated, however, that the building in which the flat was located had been destroyed during the war.

8. On 25 November 2002 the applicant asked the local authority to allocate him a replacement flat. However, he did not receive any reply.

9. On 13 December 2004 the applicant initiated civil proceedings against the local authority before the Bosanska Krupa Municipal Court ("the Municipal Court"), seeking to be allocated a replacement flat. On 16 February 2005 the Municipal Court invited the local authority to submit a response to the applicant's claim. As they failed to do so, the Municipal Court adopted a judgment on 25 March 2005 without a hearing, in accordance with section 182 of the Civil Procedure Act 2003 (see paragraph 18 below). It held that the applicant was entitled to a replacement flat because his occupancy right over a destroyed flat had been confirmed by the competent administrative authority. Therefore, it ordered the local authority to allocate him a suitable replacement flat in Bosanska Krupa, in lieu of the one in respect of which he had had an occupancy right and which had been destroyed during the war. Pursuant to the aforementioned provision of the Civil Procedure Act 2003, that judgment became final on the same date (see paragraph 18 below).

10. On 1 June 2005 the Municipal Court rejected the local authority's request for *restitutio in integrum*. It would appear that they did not appeal to a higher court.

11. On 23 March 2006 the applicant initiated enforcement proceedings. On 4 May 2006 the Municipal Court refused to issue a writ of execution, stating that the judgment of 25 March 2005 was not enforceable because it did not contain any indication of the location and the surface area of the replacement flat. That decision was upheld by the Bihać Cantonal Court ("the Cantonal Court") on 20 December 2006.

12. On 16 March 2007 the applicant complained to the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") of the non-enforcement of the judgment of 25 March 2005. On 12 June 2008 the Constitutional Court upheld the rulings of the lower courts and instructed the applicant to start new civil proceedings against the local authority in order to establish the latter's precise obligation regarding the flat to be allocated to him. That decision was delivered to the applicant on 11 August 2008.

13. It would appear that the judgment of 25 March 2005 remains unenforced. It would also appear that the applicant did not start new civil proceedings against the local authority.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Socially owned flats

14. In the former Socialist Federal Republic of Yugoslavia practically all flats were built under the regime of “social ownership”. They were generally built by socially owned enterprises or other public bodies for allocation to their employees, who became “occupancy right holders”. The rights of both the allocation right holders (public bodies which nominally controlled the flats) and the occupancy right holders were regulated by law (the Housing Act 1984, which is still in force in Bosnia and Herzegovina¹).

15. In accordance with this Act, an occupancy right, once allocated, entitled the occupancy right holder to permanent, lifelong use of the flat against the payment of a nominal fee. When occupancy right holders died, their rights transferred, as a matter of right, to their surviving spouses or registered members of their family who were also using the flat (sections 19 and 21 of this Act). The concept of “social ownership” was abandoned during the 1992-95 war². As a result, socially owned flats were effectively nationalised (for more information about socially owned flats see *Dokić v. Bosnia and Herzegovina*, no. 6518/04, §§ 5-8, 27 May 2010).

B. Restitution of flats

16. The Restitution of Flats Act 1998³ prescribed the procedure for repossession of pre-war flats and the rights of occupancy right holders. Section 4 of that Act provides that claims for repossession should be submitted to the competent administrative authority.

17. Section 36 of the Instruction on Implementation of the Restitution of Flats Act 1998⁴ provides that the competent administrative authority shall

1. *Zakon o stambenim odnosima*, Official Gazette of the Socialist Republic of Bosnia and Herzegovina nos. 14/84, 12/87 and 36/89, Official Gazette of the Republic of Bosnia and Herzegovina no. 2/93, Official Gazette of the Federation of Bosnia and Herzegovina nos. 11/98, 38/98, 12/99 and 19/99, and Official Gazette of the Republika Srpska nos. 19/93, 22/93 and 12/99.

2. *Zakon o prenosu sredstava društvene u državnu svojinu*, Official Gazette of the Republika Srpska nos. 4/93, 29/94, 31/94, 9/95, 19/95, 8/96 and 20/98; *Zakon o pretvorbi društvene svojine*, Official Gazette of the Republic of Bosnia and Herzegovina no. 33/94.

3. *Zakon o prestanku primjene Zakona o napuštenim stanovima* Official Gazette of the Federation of Bosnia and Herzegovina nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01, 15/02, 24/03, 29/03 and 81/09.

4. *Uputstvo o primjeni Zakona o prestanku primjene Zakona o napuštenim stanovima u njegovoj izmjenjenoj i dopunjenoj formi*, Official Gazette of the Federation of Bosnia and Herzegovina nos. 43/99 and 56/01.

decide on claims for repossession of flats which were damaged or destroyed during the war. A decision accepting such a claim should contain confirmation of the claimant's occupancy right over the destroyed/damaged flat, as well as an instruction that the occupancy right holder is entitled to its repossession in the event that the flat is reconstructed (section 37 of the Instruction).

C. Civil Procedure Act 2003

18. In accordance with section 182(1) of the Civil Procedure Act 2003¹, if a defendant who has been duly served with a plaintiff's claim fails to submit a written response to it within the set time-limit, the court shall accept the claim, if it has been so requested, unless it is manifestly ill-founded. A claim is manifestly ill-founded if it evidently contravenes the facts on which it is based or if the facts from the claim contravene the evidence proposed by the plaintiff or well-known facts (section 182(2) of this Act). If a decision is taken in accordance with the aforementioned provision an appeal is not allowed (section 183(1) of this Act).

D. Enforcement Procedure Act 2003

19. Section 27(1) of the Enforcement Procedure Act 2003² provides that a judgment is not enforceable unless, among other things, it contains an indication of the object of its enforcement.

THE LAW

20. The applicant complained of the non-enforcement of the final judgment of 25 March 2005 in his favour. He relied on Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention.

Article 6, in so far as relevant, reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Article 1 of Protocol No. 1 reads as follows:

1. *Zakon o parničnom postupku*, Official Gazette of the Federation of Bosnia and Herzegovina nos. 53/03, 73/05 and 19/06.

2. *Zakon o izvršnom postupku*, Official Gazette of the Federation of Bosnia and Herzegovina nos. 32/03, 52/03, 33/06, 39/06 and 39/09.

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. Admissibility

1. *Compatibility ratione materiae*

21. The Government maintained that Article 6 § 1 was not applicable to the present case because the right which the applicant had sought to enforce did not have a basis in domestic law. They further submitted that in 2002 the Parliamentary Assembly of Bosnia and Herzegovina had adopted the Strategy for the Implementation of Annex VII to the Dayton Peace Agreement concerning the fund for the reconstruction of housing for the purpose of facilitating the return of internally displaced persons and refugees. According to an assessment carried out by the Ministry for Human Rights and Refugees of Bosnia and Herzegovina, approximately 300 million euros was needed for the fund covering the priority reconstruction of destroyed housing. A special fund had been established at the state level to coordinate projects that would provide financial help to returnees. The Instruction on the Procedure for Providing Financial Assistance for Reconstruction had been adopted in 2006 and published in the Official Gazette of Bosnia and Herzegovina (no. 48/06 of 26 June 2006). Funds with the same purpose had also been established in the Entities and in the Cantons. Public announcements calling for applications for financial assistance to reconstruct housing are published yearly. In 2008 the fund had allocated 350,000 convertible marks (BAM) for the reconstruction of housing in Bosanska Krupa Municipality, BAM 100,000 in 2009 and BAM 100,000 in 2010. The Government maintained that the applicant had failed to seek funding for the reconstruction of his pre-war flat through the fund. They further submitted that in giving the judgment of 25 March 2005 the Municipal Court had evidently misapplied the relevant civil law and had determined that the local authority had an obligation to provide the applicant with a replacement flat solely on the basis of their decision to confirm his occupancy right (see paragraph 7 above).

22. The applicant disagreed. He maintained that his civil rights had been established by the domestic court in the judgment of 25 March 2005, which remained unenforced.

23. The Court reiterates that Article 6 § 1 extends only to “disputes” over “civil rights and obligations” which can be said, at least on arguable grounds, to be recognised under domestic law. It does not in itself guarantee any particular content for “civil rights and obligations” in the substantive law of the Contracting States (see, *inter alia*, *James and Others v. the United Kingdom*, 21 February 1986, § 81, Series A no. 98; *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 36, Series A no. 172; *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 87, ECHR 2001-V; and *Ahtinen v. Finland*, no. 48907/99, § 38, 23 September 2008). The Court may not create through the interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X, and *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B). Article 6 § 1 will, however, apply to disputes of a “genuine and serious nature” concerning the actual existence of a right, as well as to the scope or manner in which it is exercised (see *Bentham v. the Netherlands*, 23 October 1985, § 32, Series A no. 97). In assessing whether there is a civil “right”, the Court’s starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (*Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A). It is necessary to look beyond the appearances and the language used and to concentrate on the realities of the situation (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 38, Series A no. 50, and *Roche v. the United Kingdom*, cited above, § 121). Furthermore, the Court has only limited power to deal with alleged errors of fact or law committed by the national courts, to which it falls in the first place to interpret and apply the domestic law (see, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I; *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports of Judgments and Decisions* 1998-II; and *Kopecký v. Slovakia* [GC], no. 44912/98, § 56, ECHR 2004-IX).

24. Turning to the present case, the Court notes that the relevant domestic law concerning the repossession of pre-war flats does not expressly stipulate a duty to allocate a replacement flat for those occupancy right holders whose flats were destroyed during the war (see paragraphs 16 and 17 above). Special funds have been created for the purpose of providing financial assistance to returnees, and as the Government submitted, the applicant did not seek assistance through the funds. However, the Court further notes that the applicant’s right to be allocated a replacement flat in lieu of the one which was destroyed during the war was established by the competent domestic court in a judgment of 25 March 2005. That judgment entered into force on the same date, and has not been declared void to this

day. Had the domestic court held that the applicant's claim was manifestly ill-founded it would have rejected it in accordance with the domestic law (see paragraph 18 above).

25. The Government argued that the Municipal Court had evidently misapplied the relevant law when it delivered the judgment of 25 March 2005. The Court, however, notes that the applicant's claim was also examined by the Constitutional Court (see paragraph 12 above), which did not take the view that the right the applicant had sought to enforce had no basis in domestic law, but rather that the duty of the local authority towards him had to be specified in further civil proceedings. Therefore, although the right the applicant claimed is not expressly stipulated in domestic law, it was recognised by the domestic courts. As already stated above, the Court also has to look at the interpretation of domestic law by the domestic courts when deciding whether a civil right exists or not.

26. Having regard to the above considerations, the Court concludes that Article 6 § 1 is applicable to the present case.

2. *Six-month rule*

27. The Government further argued that the application should be rejected as out of time, because an appeal to the Constitutional Court had not been an effective domestic remedy in the applicant's case. They contended that the Constitutional Court could not have examined the merits of his case, because the applicant had failed to start new civil proceedings before lodging a constitutional complaint, thereby clarifying the authority's precise obligation towards him. Therefore, the final domestic decision for the purpose of the six-month time-limit had been the decision of the Cantonal Court of 20 December 2006 (see paragraph 11 above).

28. The applicant disagreed.

29. Before bringing his case to this Court, the applicant complained of the non-enforcement of the judgment of 25 March 2005 to the Constitutional Court. However, it upheld the rulings of the lower courts that the judgment was not enforceable and held that the applicant should start new proceedings against the defendant (see paragraph 12 above). It should be noted that an appeal to the Constitutional Court is, in principle, an effective domestic remedy for raising a complaint about the non-enforcement of judgments (see *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006). The applicant could not have known that in his case this remedy would prove to be ineffective. The Government's objection must therefore be dismissed.

3. Conclusion

30. The Court notes that this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

31. In their submissions on the merits, the Government argued that the applicant had not possessed an adequate document for the purposes of enforcement, as the local authority's obligation had not been precise enough in the judgment which he had sought to have enforced. Nor had he taken proper steps to acquire such a document by initiating new civil proceedings in which the competent court could have rendered a decision which was capable of enforcement.

32. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal: in this way, it embodies the "right to court", of which the right of access, that is the right to institute proceedings before the courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 § 1 should describe in detail the procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions. To construe Article 6 as being concerned exclusively with access to the courts and the conduct of proceedings would indeed be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (see *Hornsby v. Greece*, 19 March 1997, § 40, *Reports* 1997-II, and *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 63, ECHR 1999-V).

33. As regards the Government's objection that the judgment of 25 March 2005 was unenforceable because it had not contained an indication of the object of enforcement, the Court recalls that one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that when the courts have finally determined an issue, their ruling should not be called into question (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII, and *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, § 44, ECHR 2006-XII). Requiring the applicant to pursue another set of civil proceedings after he has already obtained a final judgment in his favour would place an excessive burden on him (see, *mutatis mutandis*, *Metaxas v. Greece*,

no. 8415/02, § 19, 27 May 2004). It is clear that more than six years have passed since the domestic decision in issue became final and that the applicant has not yet been allocated a suitable flat. Accordingly, the Court concludes that there has been a breach of Article 6 of the Convention (see *Jeličić*, cited above, §§ 38-46 and 48-49, and *Milisavljević v. Bosnia and Herzegovina*, no. 7435/04, § 27, 3 March 2009).

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

A. Admissibility

1. *Compatibility ratione materiae*

34. The Government argued that, in line with their submissions as regards Article 6 § 1 of the Convention, Article 1 of Protocol No. 1 to the Convention was inapplicable to the present case as the applicant had not had a legitimate expectation under domestic law of securing a replacement flat. They relied, in particular, on *Kopecký v. Slovakia* (cited above).

35. The applicant disagreed.

36. Contrary to the Government's argument, the Court is of the opinion that the principle established by the *Kopecký* judgment cannot be applied to the present case. In that case the applicant's restitution claim was a conditional one from the outset and the question of whether or not he had complied with the statutory requirements was to be determined in the ensuing judicial proceedings. The courts had ultimately found that that was not the case. The Court therefore concluded that the applicant's claim in that case had not been sufficiently established to qualify as an "asset" attracting the protection of Article 1 of Protocol No. 1 (see *Kopecký*, cited above, § 58). In the present case, however, the applicant's "asset" within the meaning of Article 1 of Protocol No. 1 was established in the final judgment of the competent domestic court. The Government's objection must therefore be dismissed.

2. *Conclusion*

37. The Court notes that this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

38. The Court reiterates that an applicant's inability to obtain the execution of a final judgment in his or her favour constitutes an interference with his or her right to the peaceful enjoyment of possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see, among other authorities, *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III, and *Jeličić*, cited above, § 48). The final judgment under consideration in the present case undoubtedly created for the applicant a "legitimate expectation" protected by Article 1 of Protocol No 1 that it would be enforced.

39. For the reasons set out above in relation to Article 6, the Court further considers that the interference with the applicant's possessions was not justified in the circumstances of the present case.

Therefore, there has also been a violation of Article 1 of Protocol No. 1.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

40. The applicant also complained under Article 8 of the Convention that he had not been allocated a replacement flat in lieu of the one over which he had had an occupancy right and which had been destroyed during the war. However, the Convention does not guarantee a right to be provided with a home (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 99, ECHR 2001-I). The interests protected by the notion of a "home" within the meaning of Article 8 include the peaceful enjoyment of one's existing residence. Accordingly, this complaint is incompatible *ratione materiae* and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant primarily demanded that the judgment of 25 March 2005 be enforced. Alternatively, he claimed 29,250 euros (EUR) in respect of pecuniary damage (which he claimed represents the market value of a flat

of 65m² in Bosanska Krupa) and EUR 5,000 in respect of non-pecuniary damage.

43. The Government considered the amounts claimed to be excessive and unsubstantiated.

44. The Court points out that by Article 46 of the Convention the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, among other things, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible its effects (see, *Pralica v. Bosnia and Herzegovina*, no. 38945/05, § 19, 27 January 2009 and *Milisavljević*, cited above, § 31). Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment.

45. Accordingly, under Article 41 of the Convention the purpose of awarding sums by way of just satisfaction is to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied.

46. In the present case, the Court sees no reason to doubt that the Government will indeed, following this judgment, proceed by way of allocating a suitable flat to the applicant in a timely manner (see paragraph 33 above) or, in the alternative, awarding him appropriate compensation. Therefore, it deems it unnecessary to examine the applicant's alternative pecuniary claim.

47. On the other hand, the Court accepts that the applicant suffered distress, anxiety and frustration as a result of the respondent State's failure to fully enforce the final domestic decision in his favour. Making its assessment on an equitable basis, as required by Article 41 of the Convention, it awards the applicant EUR 3,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

48 The applicant did not claim costs and expenses.

C. Default interest

49. The Court considers it appropriate that the default interest rate 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 complaints concerning Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 of the Convention;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
4. *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 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into convertible marks 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President