



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

FOURTH SECTION

CASE OF STAKIĆ v. MONTENEGRO

(Application no. 49320/07)

JUDGMENT

STRASBOURG

2 October 2012

FINAL

02/01/2013

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

In the case of Stakić v. Montenegro,

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

Lech Garlicki, *President*,

David Thór Björgvinsson,

Päivi Hirvelä,

George Nicolaou,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 11 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 49320/07) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Montenegrin national, Mr Momir Stakić (“the applicant”), on 5 November 2007.

2. The applicant was represented by Mr Z. Đukanović, a lawyer practising in Zemun, Serbia. The Montenegrin Government (“the Government”) were represented by their Agent, Mr Z. Pažin.

3. The applicant complained about the length of civil proceedings as well as the lack of an effective domestic remedy in that regard.

4. On 6 January 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 1953 and lives in Zemun (Serbia).

A. Civil proceedings

6. On 21 February 1977 the District Court (*Okružni sud*) in Podgorica found X, Y and Z guilty of participating in a fight (*učestvovanje u tuči*) on 14 July 1973.

7. On 18 December 1978 the applicant instituted civil proceedings against X, Y and Z seeking compensation for an eye injury he had suffered in the fight and the subsequent loss of the sight in his right eye, and for loss of income caused by his reduced working capacity.

8. On 18 March 1980 the Municipal Court (*Opštinski sud*) in Podgorica ruled partly in favour of the applicant on the basis of his school certificates, his employment record, documents concerning his injury and medical treatment as well as two expert witnesses' statements. This judgment was partly upheld by the District Court (*Okružni sud*) in Podgorica on 30 December 1980. On 10 May 1983 the Supreme Court (*Vrhovni sud*) in Podgorica quashed the previous judgments and ordered a re-trial. There is no information in the case file as to how many hearings had been held and/or adjourned before the Supreme Court issued its ruling.

9. Between 10 May 1983 and 21 June 1990 five hearings were adjourned and one hearing was held. Between 23 September 1985 and 6 January 1986 the impugned proceedings had been stayed due to the applicant's absence from a prior hearing.

10. On 21 June 1990 the Court of First Instance (*Osnovni sud*) in Podgorica ruled partly in favour of the applicant. The judgment was based on the evidence previously adduced as well as on further documents relating to the applicant's health and employment, and another three expert witnesses' opinions. On 14 May 1991 the High Court (*Viši sud*) in Podgorica quashed the first-instance judgment and ordered another re-trial.

11. Between 14 May 1991 and 16 October 2008 seven more hearings were adjourned and one hearing was held.

12. On 16 October 2008 the Court of First Instance (*Osnovni sud*) in Podgorica ruled partly in favour of the applicant. The judgment relied on: the opinions of four experts given by November 1986, documents obtained by May 1993, the statements of four witnesses provided between March 1997 and April 2002, and the statements of the applicant, X and another expert witness made between 6 November 2005 and 19 November 2007.

13. On 18 September 2009, the High Court in Podgorica quashed this judgment and ordered another re-trial.

14. On 13 September 2010 the Court of First Instance decided that the case should be examined afresh given that it had been assigned to a new judge. The court requested another opinion of a financial expert. As for the remaining evidence, the parties agreed that the minutes from previous hearings could be read.

15. The next hearing was scheduled for 2 November 2010. There is no information in the case file as to whether this hearing took place or if there were any further developments in the case.

B. Other relevant information

16. By 3 March 2004, which is when the Convention entered into force in respect of the respondent State, the applicant had amended the amount of compensation he had sought on seven occasions, and nine hearings had been adjourned due to his absence or upon his request.

17. After the Convention had entered into force in respect of Montenegro the applicant amended the amount he sought on two further occasions.

18. On 19 January 2006 the applicant requested an additional financial expertise.

19. There is no information in the case file as to how many hearings in total were held and/or adjourned.

20. Y and Z died on 19 May 2007 and 14 May 1988, respectively.

II. RELEVANT DOMESTIC LAW

A. Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

21. Article 32 provides, *inter alia*, that everybody has the right to a fair and public trial within a reasonable time.

22. Article 149 of the Constitution provides that the Constitutional Court shall rule on a constitutional appeal lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

23. This Constitution entered into force on 22 October 2007.

B. Montenegro Constitutional Court Act (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

24. Section 48 provides that a constitutional appeal may be lodged against an individual decision of a state body, an administrative body, a local self-government body or a legal person exercising public authority, for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted.

25. Sections 49-59 provide additional details as regards the processing of constitutional appeals. In particular, section 56 provides that when the

Constitutional Court finds a violation of a human right or freedom, it shall quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body which rendered the quashed decision.

26. This Act entered into force in November 2008.

C. Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in OGM no. 11/07)

27. This Act provides, under certain circumstances, the possibility to have lengthy proceedings expedited by means of a request for review (*kontrolni zahtjev*), as well as an opportunity for claimants to be awarded compensation by means of an action for fair redress (*tužba za pravično zadovoljenje*).

28. Section 44, in particular, provides that this Act shall be applied retroactively to all proceedings from 3 March 2004, but that the duration of proceedings before that date shall also be taken into account.

29. This Act entered into force on 21 December 2007, but contained no reference to applications involving procedural delay already lodged with the Court.

D. Courts Act (Zakon o sudovima; published in the Official Gazette of the Republic of Montenegro - OG RM - nos. 05/02, 49/04, 22/08 and 39/11)

30. Section 7 provides that everyone is entitled to an impartial trial within a reasonable time.

E. Civil Procedure Act (Zakon o parničnom postupku, published in the OG RM nos. 22/04, 28/05 and 76/06)

31. Section 11 paragraph 1 provides, *inter alia*, for the obligation of the domestic courts to ensure that the proceedings are conducted without delays, and within a reasonable time.

THE LAW

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

32. The applicant complained, under Article 6 of the Convention, about the length of the above proceedings.

33. The relevant part of this Article 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 ...”.

A. Admissibility

1. Arguments of the parties

34. The Government submitted that the applicant had not exhausted all effective domestic remedies available to him. In particular, he had failed to lodge a request for review and an action for fair redress, which were provided by the Right to a Trial within a Reasonable Time Act (see paragraphs 27-29 above). He had also failed to make use of a constitutional appeal.

35. The second applicant contested these submissions.

2. Relevant principles

36. The Court recalls that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the alleged violations before they are submitted to the Court.

37. However, the only remedies which the Convention requires to be exhausted are those which relate to the breaches alleged and at the same time are available and sufficient (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999 V, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, ECHR 2010-...). The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198, and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I).

38. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from that requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

3. The Court's assessment

39. The Court has already held that it would be unreasonable to require an applicant to attempt to file a request for review on the basis of the Right to a Trial within a Reasonable Time Act in a case where the domestic

proceedings had been pending for a number of years before the introduction of this legislation and had still not been decided, and where no conclusions could be drawn from the Government's submissions about its effectiveness (see *Boucke v. Montenegro*, no. 26945/06, §§ 72-74, 21 February 2012). The Court, however, has reserved its right to reconsider its view if the Government demonstrate, with reference to specific cases, the efficacy of this remedy (see *Živaljević v. Montenegro*, no. 17229/04, § 66, 8 March 2011).

40. In view of the fact that the proceedings at issue had been pending for more than twenty eight years before the Right to a Trial within a Reasonable Time Act entered into force, of which more than three years and nine months elapsed after the Convention entered into force in respect of the respondent State, and that no recent case-law with regard to the efficacy of this particular remedy has been submitted, the Court sees no reason to depart from its previous finding and concludes, therefore, that the Government's objection must be dismissed.

41. The Court has also already held that an action for fair redress is not capable of expediting proceedings while they are still pending, and that a constitutional appeal cannot be considered an effective domestic remedy in respect of length of proceedings (see *Boucke v. Montenegro*, cited above, §§ 75-79). It sees no reason to depart from its finding in the present case. The Government's objection in this regard must, therefore, also be dismissed.

42. The Court notes that the applicant's 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

1. Arguments of the parties

43. The applicant reaffirmed his complaint. He also submitted that he had had to ask that some hearings be adjourned on account of his health.

44. The Government maintained that the impugned proceedings were both factually and legally complex, requiring a number of witnesses and expert witnesses to be heard. In particular, five expert opinions had been given during the period of the Court's competence *ratione temporis*, all of them upon the applicant's proposal. Secondly, the applicant himself had been mainly responsible for the length of the proceedings. In particular, he had amended and further particularised his claim on a number of occasions, two of which after the Convention had entered into force in respect of Montenegro; several hearings scheduled between 1983 and 2002 had been adjourned because of him; and the impugned proceedings had been stayed

between 23 September 1985 and 6 January 1986 due to his absence (see paragraphs 9, and 16-17 above). Thirdly, Y and Z had passed away in the meantime (see paragraph 20 above), which required that their legal successors be identified, which added to the overall length of the proceedings. Lastly, the impugned proceedings were of no vital importance to the applicant and, as such, did not require priority or any urgent action on the part of the courts. The courts issued seven decisions in total, two of which were rendered at two instances after the ratification of the Convention. It could not therefore be said that they were not active. The Government concluded that there was no violation of Article 6 of the Convention.

2. Relevant principles

45. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

46. In order to determine the reasonableness of the delay at issue, regard must be had to the state of the case on the date of ratification (see, *mutatis mutandis*, *Styrkowski v. Poland*, judgment of 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII).

3. The Court's assessment

47. The period to be taken into account began on 3 March 2004, which is when the Convention entered into force in respect of Montenegro (see *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 69, 28 April 2009). The impugned proceedings have thus been within the Court's competence *ratione temporis* for a period of more than eight years and six months and they are still pending at first instance, another twenty-four years having already elapsed before that date.

48. The Court observes that the present case concerns compensation for the injuries the applicant had suffered in a fight. The Court notes that four witnesses and five expert witnesses had been heard. However, contrary to the Government's submissions, it is clear from the case file that most of this evidence had been obtained before the Convention entered into force in respect of the respondent State (see paragraph 12 above). While it can be accepted that some compensation claims may be more complex than others, the Court does not consider the present one to be of such complexity as to justify proceedings of this length. Nor does the fact that the impugned proceedings do not require priority or urgent action justify a procedural

delay of such length, which length may even be considered a *de facto* denial of justice.

49. It is noted that the applicant indeed amended the exact amount of compensation he sought on two occasions after the ratification of the Convention by Montenegro. The Court, however, does not consider that this could have significantly contributed to the length of the proceedings as the claim was not amended in its substance. While some of the hearings scheduled before 3 March 2004 had been postponed at the request of the applicant, there is nothing in the case file to suggest that the procedural delay after the date of ratification resulted from his conduct but rather was caused by the failure of the authorities to act diligently.

50. The Court notes that the first decision after the respondent State's ratification of the Convention was given on 16 October 2008, which is more than four years and seven months later. After this decision had been quashed on 18 September 2009, the case has been pending before the first-instance court for almost three years, with only one hearing having taken place in the meantime (see paragraphs 12-15 above).

51. In view of the criteria laid down in its jurisprudence and the relevant facts of the present case, the Court is of the opinion that the length of the proceedings complained of has failed to satisfy the reasonable time requirement. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

52. The applicant also complained, under Article 13, that he had no effective domestic remedy at his disposal to expedite the impugned proceedings.

53. Article 13 provides as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

54. The Court notes that the applicant's complaint raises issues of fact and law under the Convention, the determination of which requires an examination of the merits. It also considers that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it cannot be rejected on any other ground. The complaint must therefore be declared admissible.

B. Merits

55. The Court notes that Article 13 guarantees an effective remedy before a national authority for an alleged breach of all rights and freedoms guaranteed by the Convention, including the right to a hearing within a reasonable time under Articles 6 § 1 (see, *inter alia*, *Kudla v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI).

56. It recalls, further, that a remedy concerning length is “effective” if it can be used either to expedite the proceedings before the courts dealing with the case, or to provide the litigant with adequate redress for delays which have already occurred (see *Sürmeli v. Germany* [GC], no. 75529/01, § 99, ECHR 2006-VII).

57. Finally, the Court emphasises that the best solution in absolute terms is indisputably, as in many spheres, prevention. Where the judicial system is deficient with regard to the reasonable-time requirement in Article 6 § 1 of the Convention, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy. Some States have fully understood the situation by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 183 and 186, ECHR 2006-V; and *Sürmeli v. Germany* [GC], cited above, §100).

58. However, as noted above, the existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see paragraph 37 above).

59. Turning to the present case, the Court notes that the Government averred in their preliminary objections that there were remedies available for the applicant’s complaint about the length of the proceedings under Article 6 § 1, which objections were rejected on the grounds described at paragraphs 39-41 above.

60. The Court concludes, for the same reasons, that there has been a violation of Article 13 taken together with Article 6 § 1 of the Convention on account of the lack of an effective remedy under domestic law for the applicant’s complaints concerning the length of civil proceedings (see *Stevanović v. Serbia*, no. 26642/05, §§ 67-68, 9 October 2007; see, also, *mutatis mutandis*, *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, §§ 84-85, 27 May 2008).

61. The Court would again observe that it might reconsider its view in this regard if the Government are able to demonstrate in future such

applications, with reference to specific cases, the efficacy of the said remedies (see paragraphs 39-40 above).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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

63. The applicant claimed in the application form EUR 120,000 for non-pecuniary damage. He made no claim in this regard in his observations.

64. The Government maintained that the claimed amount was unsubstantiated, inappropriately high and contrary to the case-law of the Court.

65. Even if not the subject of a specific claim in his observations, the Court accepts that the applicant in the present case has certainly suffered some non-pecuniary damage which cannot be sufficiently compensated by the sole finding of a violation (see, *mutatis mutandis*, *Garzičić v. Montenegro*, no. 17931/07, § 42, 21 September 2010; as well as *Staroszczyk v. Poland*, no. 59519/00, §§ 141-143, 22 March 2007; see, also, *mutatis mutandis*, *Mijušković v. Montenegro*, no. 49337/07, §§ 94-96, 21 September 2010). Furthermore, the Government have commented on the applicant's claim as set out in the application form. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 under this head.

B. Costs and expenses

66. The applicant claimed that he had incurred considerable costs before the domestic courts, but that he had not saved the relevant invoices as he had not known that he might need them. He made no claim with regard to the costs incurred before the Court.

67. The Government contested this claim.

68. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses for lack of substantiation.

C. Default interest

69. 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 application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 13 of 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 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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

Fatoş Aracı
Deputy Registrar

Lech Garlicki
President