



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

FOURTH SECTION

CASE OF NOVOVIĆ v. MONTENEGRO

(Application no. 13210/05)

JUDGMENT

STRASBOURG

23 October 2012

FINAL

23/01/2013

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

In the case of Novović 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,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 2 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 13210/05) 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 Miladin Novović (“the applicant”), on 2 April 2005.

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

3. The applicant complained, in particular, about the length of reinstatement proceedings.

4. On 28 June 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 1939 and lives in Sutomore.

6. On 25 June 1991 the applicant was made redundant.

7. On 29 June 1991 and on 2 December 1993 the applicant filed two claims seeking reinstatement and compensation, one against his former employer, and one against the institution which, in the meantime, had taken

over the functions from his former employer (*Republički zavod za geodetske i imovinskopravne poslove*; hereinafter “the Institution”).

8. On 28 February 1994 the Court of First Instance (*Osnovni sud*) in Bar ruled against the applicant upon his claim against the Institution.

9. On 27 May 1994 the High Court (*Viši sud*) in Podgorica overturned this judgment and ruled in favour of the applicant.

10. On 9 November 1994 the two sets of proceedings were joined into a single lawsuit. On the same day the Court of First Instance in Bar ruled in respect of the claim against the former employer, awarding the applicant damages. This judgment became final (*pravosnažna*) in January 1995. The proceedings against the Institution continued.

11. On 30 May 1995 the Supreme Court (*Vrhovni sud*) in Podgorica quashed the two judgments rendered in respect of the Institution (see paragraphs 8 and 9 above) and ordered a re-trial.

12. It would appear that on 8 December 1999 the Court of First Instance in Bar rendered a decision that the applicant’s claim had been withdrawn (*tužba povučena*), which decision was apparently quashed by the High Court in Podgorica on 16 May 2000.

13. On 27 February 2006 the Court of First Instance in Bar ruled against the applicant.

14. On 4 November 2008 the High Court in Podgorica upheld this judgment.

15. On 16 June 2009 the Supreme Court in Podgorica dismissed the applicant’s appeal on points of law (*revizija*).

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

16. 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.

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

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

18. 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.

19. 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.

20. This Act entered into force on 4 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)

21. 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*).

22. Section 33 § 3 provides, *inter alia*, that an action for fair redress shall be filed with the Supreme Court no later than six months after the date of receipt of the final decision rendered in the impugned proceedings.

23. 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.

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

D. Civil Procedure Act 1977 (Zakon o parničnom postupku; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 4/77, 36/77, 6/80, 36/80, 43/82, 72/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, and the Official Gazette of the Federal Republic of Yugoslavia nos. 27/92, 31/93, 24/94, 12/98, 15/98 and 3/02)

25. Section 434 provided that labour disputes were to be dealt with by the courts urgently.

E. Civil Procedure Act 2004 (Zakon o parničnom postupku; published in the Official Gazette of the Republic of Montenegro nos. 22/04, 28/05 and 76/06)

26. This Act entered into force on 10 July 2004 and thereby repealed the Civil Procedure Act 1977.

27. The text of section 434 of the Civil Procedure Act 2004 corresponds to section 434 of the Civil Procedure Act 1977.

F. Relevant domestic case-law

28. Between 1 January 2008 and 30 September 2009 twenty-two actions for fair redress were submitted, of which sixteen were dealt with and six were still being examined. In one case the courts awarded the plaintiff compensation for non-pecuniary damage in respect of the length of civil proceedings. Between 1 January 2010 and 30 April 2011 an additional fifteen actions for fair redress were examined, in three of which the courts awarded damages.

THE LAW

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

A. As regards the length of proceedings

29. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement, laid down in 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 ... hearing within a reasonable time by a ... tribunal...”

1. Admissibility

(a) Arguments of the parties

30. 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 provided by the Right to a Trial within a Reasonable Time Act (see paragraph 21 above). He had also failed to make use of a constitutional appeal (see paragraphs 16-20 above).

31. The applicant submitted belated comments, which, on that account, were not admitted to the file.

(b) Relevant principles

32. The Court reiterates 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.

33. 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; and *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010).

34. 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 of Judgments and Decisions* 1998-I).

35. 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 of that requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

36. The decisive question in assessing the effectiveness of a remedy concerning a complaint about the length of proceedings is whether or not it was possible for the applicant to be provided with direct and speedy redress, rather than with indirect protection of the rights guaranteed under Article 6 (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 195, ECHR 2006, and *Sürmeli v. Germany* [GC], no. 75529/01, § 101, 8 June 2006). In particular, a remedy of this sort shall be “effective” if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays which have already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157-159, ECHR 2000-XI; *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII; and *Sürmeli v. Germany* [GC], cited above, § 99).

37. The Court reiterates that the effectiveness of a particular remedy is normally assessed with reference to the date on which the application was lodged (see, for example, *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)), this rule, however, being subject to exceptions which may be justified by the specific circumstances of each case (see *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII).

(c) The Court's assessment

(i) As regards the request for review

38. The Court has already held that it would be unreasonable to require an applicant to try 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 piece of legislation and where no conclusions could be drawn from the Government's submissions about its effectiveness (see, *mutatis mutandis*, *Boucke v. Montenegro*, no. 26945/06, §§ 72-74, 21 February 2012, as well as *Živaljević v Montenegro*, no. 17229/04, §§ 60-65, 8 March 2011). The Court, however, reserved its right to reconsider its view if the Government demonstrated, with reference to specific cases, the efficacy of this remedy (see *Boucke*, cited above, § 71, and *Živaljević*, cited above, § 66).

39. In view of the fact that the proceedings here at issue had been pending for more than 16 years and 5 months before the Right to a Trial within a Reasonable Time Act entered into force, out of which more than three years and nine months had elapsed after the Convention had entered into force in respect of the respondent State, and that no recent case-law concerning the efficacy of this particular remedy has been submitted, the Court sees no reason to depart from its previous finding and considers that it would have been unreasonable to have required the applicant to try this avenue of redress (see *Boucke*, cited above, § 74; see, also, *Živaljević*, cited above, §§ 60-65). The Government's objection in this regard must, therefore, be dismissed.

(ii) As regards the action for fair redress

40. The Court notes that the applicant lodged his application on 2 April 2005, which was more than 2 years and 8 months before an action for fair redress was introduced by the Right to a Trial within a Reasonable Time Act (see paragraphs 1 and 24 above). Therefore, at the time when the applicant lodged his application with this Court, there was no available domestic remedy which would have enabled him to obtain redress for the past delay, the effectiveness of a particular remedy being assessed with reference to the date on which the application was lodged (see *Baumann v. France*, cited above, § 47).

41. While the Court has allowed for an exception to this rule, this was usually in cases where specific national legislation as regards the length of proceedings had been passed in response to a great number of applications already pending before the Court indicating a systemic problem in these States. These laws also contained transitional provisions bringing within the jurisdiction of domestic courts the cases already pending before this Court (see *Grzinčič v. Slovenia*, no. 26867/02, § 48, 3 May 2007; *Charzyński*

v. Poland (dec.), no. 15212/03, § 20, ECHR 2005-V; and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). Having regard to those considerations, the Court was of the opinion that these States should be afforded an opportunity to prevent or put right the alleged violation themselves and therefore allowed for an exception to the above rule.

42. Unlike in the above mentioned cases, the relevant legislation in Montenegro had not been passed in response to numerous applications pending before this Court, nor does it contain any transitional provision whatsoever with regard to applications already pending before this Court (see paragraph 24 above). Therefore, it is unclear whether the domestic courts would have ruled at all on the merits of the applicant's action for fair redress had he lodged one.

43. The Court also notes that the applicant cannot be required to avail himself of this avenue of redress at this stage, as its use had long become time-barred in his case (see paragraphs 15 and 22 above).

44. Having regard to the particular circumstances of the instant case as set out above, the Court considers that the applicant was not obliged to exhaust this particular avenue of redress (see, *mutatis mutandis*, *Vinčić and Others v. Serbia*, no. 44698/06 et seq. § 51, 1 December 2009, as well as *Cvetković v. Serbia*, no. 17271/04, § 41, 10 June 2008). The Government's objection must, therefore, be dismissed.

(iii) As regards the constitutional appeal

45. The Court has already held that a constitutional appeal cannot be considered an effective domestic remedy in respect of length of proceedings (see, *mutatis mutandis*, *Boucke*, cited above, § 79; see, also, *Mijušković v. Montenegro*, no. 49337/07, § 73-74, 21 September 2010). It sees no reason to hold otherwise in the present case. The Government's objection must, therefore, be dismissed.

(iv) Conclusion

46. 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.

2. Merits

47. The Government made no comment.

48. The applicant did not submit comments within the time-limit set by the Court (see paragraph 31 above).

49. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the

complexity of the case, the conduct of the parties and of the relevant authorities, and the importance of what is at stake for the applicant (see, among other authorities, *Mikulić v. Croatia*, no. 53176/99, § 38, ECHR 2002-I).

50. In assessing the reasonableness of the delay at issue, regard must also be had to the state of the employment dispute on the date of ratification (see, *mutatis mutandis*, *Styranski v. Poland*, 30 October 1998, § 46, *Reports of Judgments and Decisions* 1998-VIII).

51. The Court recalls that reinstatement proceedings are of “crucial importance” to plaintiffs and that, as such, they must be dealt with “expeditiously” (see *Guzicka v. Poland*, no. 55383/00, § 30, 13 July 2004, and *Georgi Georgiev v. Bulgaria*, no. 22381/05, § 18 *in fine*, 27 May 2010). Indeed, this requirement is reinforced additionally in respect of States where domestic law provides that such cases must be resolved with particular urgency (see, *mutatis mutandis*, *Borgese v. Italy*, 26 February 1992, § 18, Series A no. 228-B; see also paragraphs 25-27 above). The Court has already found a period of four years and one month for three levels of jurisdiction in proceedings concerning reinstatement excessive and in breach of Article 6 § 1 of the Convention (see *Simić v. Serbia*, no. 29908/05, §§ 16 and 21, 24 November 2009).

52. Turning to the present case, the Court notes that the impugned proceedings were within this Court’s competence *ratione temporis* for a period of five years and three months after the respondent State’s ratification of the Convention on 3 March 2004, another twelve years and eight months having already elapsed before that date.

53. The Court further observes that the nature of the applicant’s action was not particularly complex and there was nothing in the case file which would indicate that he contributed to the length of the impugned proceedings.

54. Having regard to the criteria laid down in its jurisprudence and the domestic law (see, in particular, paragraphs 49-51 and 25-27 above, in that order), as well as the circumstances of the present case, the Court considers that the overall length of the impugned proceedings has failed to satisfy the reasonable time requirement (see, *mutatis mutandis*, *Stanković v. Serbia*, no. 29907/05, § 35, 16 December 2008, and *Simić v. Serbia*, cited above, §§ 18 - 21).

55. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

B. As regards the outcome of the proceedings

56. Under Article 6 § 1 of the Convention the applicant implicitly also complained about the outcome of the above proceedings.

57. The Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I), nor is it its task to act as a court of appeal in respect of the decisions taken by domestic courts (see *Melnychuk v. Ukraine* (dec), no. 28743/03, ECHR 2005-IX).

58. It follows that this part of the application is manifestly ill-founded and must, as such, be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. 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.”

60. In his belated observations the applicant referred to the just satisfaction claim he had made in his application form: EUR 27,195 for damages and EUR 7,500 for costs and expenses incurred before the domestic courts.

61. The Government contested this claim.

62. In the Court’s letter of 4 November 2010 the applicant was invited to submit any claims for just satisfaction within the time-limit fixed for the submission of his observations on the merits, and was reminded that failure to do so entailed the consequence that the Chamber would either make no award of just satisfaction or else reject the claim in part. He was also informed that this applied even if the applicant had indicated his wishes in this respect at an earlier stage of the proceedings. Even though he was legally represented the applicant submitted a just satisfaction claim after the expiration of the envisaged time-limit. The Court, therefore, makes no award (see, *mutatis mutandis*, *Boucke v. Montenegro*, cited above, § 99).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the length of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Dismisses* the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 23 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Lech Garlicki
President