



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

FIRST SECTION

CASE OF DRAGAN KOVAČEVIĆ v. CROATIA

(Application no. 49281/15)

Art 6 § 1 (civil) • Access to court • Refusal to award high costs for making a complaint before the Constitutional Court concerning divestment of legal capacity, disproportionate to the aims of securing court's smooth functioning and protecting State budget • Social services not a participant to the formally one-party proceedings, meaning no risk of a chilling effect on the performance of their duties by awarding costs

JUDGMENT

STRASBOURG

12 May 2022

FINAL

12/08/2022

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

In the case of Dragan Kovačević v. Croatia,

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

Marko Bošnjak, *President*,

Péter Paczolay,

Krzysztof Wojtyczek,

Alena Poláčková,

Erik Wennerström,

Raffaele Sabato,

Davor Derenčinović, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 49281/15) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Dragan Kovačević (“the applicant”), on 28 September 2015;

the decision to give notice to the Croatian Government (“the Government”) of the complaints concerning access to a court and the peaceful enjoyment of possessions;

the parties’ observations;

Having deliberated in private on 22 February and 29 March 2022,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The case concerns the costs of proceedings before the Constitutional Court. The relevant authorities instituted proceedings with a view to divesting the applicant of his legal capacity and the civil courts ruled in their favour. Further to a constitutional complaint by the applicant, the Constitutional Court quashed the civil courts’ decisions but dismissed his claim for reimbursement of his costs. The ruling on costs was based on a provision of domestic law providing that each participant in proceedings before the Constitutional Court has to bear its own costs unless the court decides otherwise.

THE FACTS

2. The applicant was born in 1988 and lives in Slatina. He was represented first by Ms L. Kušan, a lawyer practising in Ivanić Grad, and then by Ms N. Owens, a lawyer practising in Zagreb.

3. The Government were represented by their Agent, Ms Š. Stažnik.

4. The facts of the case may be summarised as follows.

5. On 21 November 2012 the Slatina Social Welfare Centre instituted proceedings before the Slatina Municipal Court (*Općinski sud u Slatini*) to deprive the applicant of his legal capacity (*lišenje poslovne sposobnosti*).

6. On 30 November 2012 the Social Welfare Centre appointed, of its own motion, the applicant's mother to act as his guardian *ad litem* in the proceedings.

7. By a decision of 5 March 2013, the Municipal Court deprived the applicant of his legal capacity. It found that he suffered from a permanent mild to moderate intellectual disability and was therefore unable to take care of his rights and interests. It was also stated in the decision that the applicant's monthly income consisted of 1,250 Croatian kunas (HRK) in disability benefits, which was approximately 164 euros (EUR) at the time.

8. On 2 April 2013 the applicant, represented by an advocate, lodged an appeal against that decision. He argued, *inter alia*, that the decision was in breach of his rights guaranteed by Article 8 of the Convention.

9. By a decision of 23 January 2014, the Bjelovar County Court (*Županijski sud u Bjelovaru*) dismissed the applicant's appeal and upheld the first-instance decision.

10. On 19 March 2014 the applicant, represented by his advocate, lodged a constitutional complaint challenging the civil courts' decisions. He alleged that they were in breach of his constitutional and Convention rights to a fair hearing and to respect for his private and family life. He also relied on the Court's case-law. He enclosed copies of the contested first- and second-instance decisions with the constitutional complaint.

11. In his constitutional complaint the applicant also sought reimbursement of his costs of legal representation before the Constitutional Court, amounting to HRK 6,250, approximately EUR 815 at the time.

12. By a decision of 20 May 2015, the Constitutional Court allowed the applicant's complaint, finding a violation of his right to respect for his private and family life, and quashed the civil courts' decisions. However, it dismissed his claim for reimbursement of his costs, referring to section 23 of the Constitutional Court Act, which provides that, unless the court decides otherwise, each participant in proceedings before it has to bear its own costs (see paragraph 15 below). The relevant part of the Constitutional Court's decision reads:

"As regards the claim for the costs of the proceedings before the Constitutional Court, [the court] points out that under section 23 of the Constitutional Court Act, each participant in Constitutional Court proceedings has to bear its own costs, unless the Constitutional Court decides otherwise. Since, in the present case, the Constitutional Court did not decide otherwise, the complainant shall bear his own costs."

13. In resumed proceedings, by a decision of 29 September 2015 the Virovitica Municipal Court (*Općinski sud u Virovitici*) dismissed the Social Welfare Centre's request to deprive the applicant of his legal capacity. As regards the costs of the proceedings, the court noted that the applicant had not

asked for their reimbursement. It therefore decided that that each party should bear its own costs.

14. In the absence of an appeal, that decision became final on 12 November 2015.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. The Constitutional Court Act

1. *Relevant provisions*

15. The relevant provisions of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 99/99 with subsequent amendments – “the Constitutional Court Act”) governing the costs of proceedings read as follows:

Section 23

“Each participant in Constitutional Court proceedings shall bear its own costs, unless the Constitutional Court decides otherwise.”

Section 80

“The Constitutional Court may order that a complainant who has not succeeded with his or her constitutional complaint pay the costs of the proceedings before the Constitutional Court if he or she has caused them to be incurred through his or her own fault.”

16. The other relevant provisions of the Constitutional Court Act read as follows:

Section 34

“Unless otherwise provided by this Act, in proceedings before it the Constitutional Court shall apply *mutatis mutandis* the provisions of the relevant procedural laws of the Republic of Croatia as subsidiary rules.”

Section 62(1)

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

2. *Relevant practice*

17. The Government submitted several examples of domestic case-law in which the domestic courts, in resumed proceedings before the civil courts following a successful constitutional complaint by one of the parties, had awarded that party the costs of his or her constitutional complaint. In particular, they submitted a Supreme Court judgment (no. Revr 537/08-2 of 19 November 2008) adopted in civil proceedings concerning an employment dispute, a decision of the Osijek Municipal Court (no. R1-48/2014-6 of 21 March 2014) adopted in non-contentious proceedings instituted by a social welfare centre with a view to depriving the counterparty of his legal capacity, a decision of the Osijek Municipal Court (no. P-796/2012-17 of 27 May 2013) adopted in civil proceedings concerning the termination of a specially protected tenancy, and a decision of the Šibenik Municipal Court (no. P-1479/2015 of 27 June 2016) adopted in civil proceedings concerning a land ownership dispute.

3. *Other relevant documents*

18. The Constitutional Court's website contains a document entitled "Instructions for filling in a constitutional complaint form" (*Upute za ispunjavanje obrasca ustavne tužbe*). The relevant part, regarding complainants' representatives, reads:

"The representative does not have to be an advocate, but due to the special nature of the constitutional court procedure, it is always better to hire a professional."

B. Other relevant legislation and practice

19. The Family Act of 2003 (*Obiteljski zakon*, Official Gazette no. 116/03 with subsequent amendments), which was in force from 22 July 2003 until 1 November 2015, provided in sections 306 to 332 that proceedings for deprivation of legal capacity had to be conducted in accordance with the rules of non-contentious procedure. Section 272(1), which regulated the issue of costs in all proceedings concerning personal status, read as follows:

Section 272(1)

"In proceedings concerning personal status, the court shall decide on the costs of proceedings freely, taking into account the circumstances of the case and the outcome of the proceedings."

20. The Scale of Advocates' Fees (*Tarifa o nagradama i naknadi troškova za rad odvjetnika*, Official Gazette no. 142/12 with further amendments), which entered into force on 19 December 2012, provides that the costs of legal representation consist of services rendered by advocates, increased by VAT and the necessary expenses, and that clients are bound to pay them. It also provides that:

(i) submissions instituting proceedings before the Constitutional Court and other reasoned submissions containing factual and legal arguments are worth 500 points (section 27(1)); and

(ii) the value of one point is HRK 10 (section 50).

II. INTERNATIONAL LAW

21. The relevant Article of the United Nations Convention on the Rights of Persons with Disabilities, reads as follows:

Article 13 Access to justice

“1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

III. COUNCIL OF EUROPE INSTRUMENTS

22. The relevant part of Recommendation No. R (81) 7 on Measures Facilitating Access to Justice, adopted by the Committee of Ministers on 14 May 1981 at its 68th session, reads as follows:

“Considering that the rights of access to justice and to a fair hearing as guaranteed under Article 6 of the European Convention on Human Rights, is an essential feature of any democratic society;

Considering that court procedure is often so complex, time-consuming and costly that private individuals, especially those in an economically or socially weak position, encounter serious difficulties in the exercise of their rights in member states;

Bearing in mind that an effective system of legal aid and legal advice, as provided for under Resolution (78) 8 of the Committee of Ministers, may greatly contribute to the elimination of such obstacles;

...

Recommends the governments of member states to take or reinforce, as the case may be, all measures which they consider necessary with a view to the progressive implementation of the principles set out in the appendix to this recommendation.

Appendix to Recommendation No. R (81) 7

Principles

...

B. Simplification

...

4. No litigant should be prevented from being assisted by a lawyer ... Where, having regard to the nature of the matter involved, it would be desirable, in order to facilitate access to justice, for an individual to put his own case before the courts, then representation by a lawyer should not be compulsory.

...

D. Cost of justice

13. Particular attention should be given to the question of lawyers' and experts' fees in so far as they constitute an obstacle to access to justice. Some form of control of the amount of these fees should be ensured.

14. Except in special circumstances a winning party should in principle obtain from the losing party recovery of his costs including lawyers' fees, reasonably incurred in the proceedings."

THE LAW

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

23. The applicant complained that his right of access to a court had been violated because, even though the Constitutional Court had allowed his constitutional complaint, it had not awarded him his costs of legal representation. He 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

1. Submissions by the parties

(a) The Government

24. The Government submitted that the applicant had failed to exhaust domestic remedies.

25. In particular, they pointed out that, while the applicant in his application to the Court had given detailed reasons as to why the Constitutional Court should have awarded him the costs of the proceedings, in his constitutional complaint he had not done so. He had not even submitted any invoices or other evidence that he had actually paid the costs claimed.

26. The Government explained that in Croatia no court fees or any other costs were charged for lodging a constitutional complaint, and that there was no obligation to be represented by an advocate in proceedings before the Constitutional Court. Such wide access to the Constitutional Court was the

reason why the relevant legislation provided that each participant had to bear its own costs unless the Constitutional Court decided otherwise (see paragraph 15 above). Since the awarding of costs was thus an exception, complainants had to provide reasons justifying departure from the general rule. They had to explain why it had been necessary to obtain the assistance of an advocate and state the circumstances which could justify an award of costs (such as the complainant's personal circumstances, financial situation or specific characteristics of the proceedings).

27. Alternatively, the Government argued that, following the Constitutional Court's decision in his favour, the applicant could have sought reimbursement of the costs of his constitutional complaint in the resumed proceedings before the civil courts. However, he had not done so.

28. The Government explained that the domestic case-law had evolved since the Court's decision in *Bibić v. Croatia* ((dec.), no. 1620/10, 28 January 2014). In support of their argument they furnished examples, including a Supreme Court decision whereby claims for costs of constitutional complaints had been granted in resumed proceedings before the civil courts, following the Constitutional Court's decision in favour of the complainants (see paragraph 17 above).

(b) The applicant

29. The applicant replied that he had not been required to provide any reasons for his claim for costs and that there was no such requirement under the Constitutional Court Act or any other legislation. The exact amount of advocate's fees in proceedings before the Constitutional Court were fixed in accordance with the Scale of Advocates' Fees and he had been bound to pay them (see paragraph 20 above). Submitting invoices or other evidence that the fees had actually been paid had therefore also been unnecessary.

30. Furthermore, the applicant submitted that the Constitutional Court's decision to allow his constitutional complaint had been based on the arguments advanced therein (see paragraphs 10 and 12 above). His representation by an advocate had therefore evidently been necessary.

31. As regards the Supreme Court decision relied on by the Government (see paragraphs 17 and 28 above), the applicant submitted that the circumstances of that case had been different from his in one crucial aspect: the plaintiff in that case had not asked the Constitutional Court for reimbursement of the costs of his constitutional complaint.

32. In this regard, the applicant pointed out that in *Bibić* (cited above) the Court had declared the application inadmissible precisely because the applicant had not sought reimbursement of the costs of her constitutional complaint before the Constitutional Court, having only done so in resumed proceedings before the civil courts after her constitutional complaint had been allowed.

33. If the Government's argument that he should have sought reimbursement of his costs in the resumed proceedings before the civil courts (see paragraph 27 above) were to be accepted, the rule set out in section 23 of the Constitutional Court Act would be meaningless (see paragraph 15 above).

34. Lastly, the applicant saw no reason why a party to proceedings before the civil courts would have to reimburse the costs of a successful constitutional complaint by his or her opponent. Proceedings before the Constitutional Court were special proceedings with their own set of procedural rules and not a mere extension of proceedings before the civil courts with two opposing parties. Rather, their purpose was to review the constitutionality of decisions of the State (most often, judicial) authorities challenged by a constitutional complaint (see section 62(1) of the Constitutional Court Act cited in 16 above).

2. *The Court's assessment*

35. The Court first reiterates its finding in *Bibić* (cited above, § 31) that legal representation before the Constitutional Court cannot be considered unwarranted given that that court decides on complex questions concerning the protection of fundamental rights and freedoms, and that for persons without legal background and experience, such matters may be difficult to grasp (see also the Constitutional Court's own instruction, cited in paragraph 18 above, recommending prospective complainants to hire an advocate).

36. This applies *a fortiori* in the present case, where the applicant is a person suffering from a mental disability and therefore evidently a vulnerable individual who needed to be legally represented to effectively protect his rights (see, in this regard, Article 13 of the United Nations Convention on the Rights of Persons with Disabilities, cited in paragraph 21 above).

37. The Court further notes that the Constitutional Court did not dismiss the applicant's claim for costs as unsubstantiated, namely for lack of reasoning or for failure to submit the relevant supporting documents (see paragraph 12 above).

38. Against this background, the Court cannot accept the Government's non-exhaustion objection in so far as it is based on the argument that the applicant did not provide reasons for his claim for costs (see paragraphs 24-26 above).

39. As regards the Government's remaining argument (see paragraphs 27-28 above), the Court first reiterates that in *Bibić* it declared the application inadmissible because, instead of seeking reimbursement of the costs of her constitutional complaint before the Constitutional Court, the applicant had sought those costs in the resumed proceedings before the civil courts (see *Bibić*, cited above, §§ 31-35). Specifically, the Court established that the relevant provision of the

Constitutional Court Act (see paragraph 15 above) had vested the Constitutional Court with a clear prerogative on decisions concerning the costs incurred before it (see *Bibić*, cited above, § 33). With that provision in mind, the Court accepted the finding of the civil courts in the resumed proceedings that such costs could only have been awarded by the Constitutional Court (see *Bibić*, cited above, § 34).

40. The Government argued that the domestic case-law had evolved since the Court's decision in *Bibić* and that the applicant in the present case would have been able to have the costs of his constitutional complaint reimbursed in the resumed proceedings before the civil courts (see paragraphs 27-28 above). However, the Court cannot but note that the Constitutional Court did not dismiss the applicant's claim for costs on those grounds (see paragraph 12 above).

41. This means that, even if the possibility suggested by the Government existed, the applicant would have been in a situation where he could have sought reimbursement of his costs either from the Constitutional Court or from the civil courts in the resumed proceedings. However, in such a situation, where two potentially effective remedies would be available, the applicant would be required to use only one of them (see, for example, *Zustović v. Croatia*, no. 27903/15, § 77, 22 April 2021, and the cases cited therein), which he did.

42. Lastly, the Court finds it unlikely that the civil courts would have awarded the costs of the constitutional complaint to the applicant after the Constitutional Court had refused such a claim.

43. It follows that the Government's objection regarding the exhaustion of domestic remedies must be rejected.

44. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicant

45. The applicant submitted that his legal representation had been necessary because the Constitutional Court decided complex questions concerning the protection of fundamental rights and freedoms, which required specific legal expertise and knowledge of that court's practice and of the Court's case-law. In this regard, he referred to the Court's finding in *Bibić* (cited above, § 31). Without legal assistance by an advocate he, as a lay person with a minimal education, would not have even known that he had a right to lodge a constitutional complaint.

46. Furthermore, the case was of existential importance for the applicant as the decisions challenged by his constitutional complaint had deprived him of his legal capacity and thus concerned a fundamental aspect of his private life.

47. The Constitutional Court's decision and its practice not to award costs if complainants succeeded with their constitutional complaints, could, in many cases, discourage potential complainants, victims of human rights violations, from lodging constitutional complaints, and therefore restrict their access to the Constitutional Court.

48. Under the Scale of Advocates' Fees, the cost of drafting a constitutional complaint was HRK 6,250 (see paragraph 20 above) or EUR 815, which was more than the average salary in Croatia at the time. Those costs were thus a significant expense for the average citizen, and had been particularly significant for the applicant, as his monthly income had consisted of HRK 1,250 in disability benefits (see paragraph 7 above).

49. The applicant further emphasised that domestic law did not provide for the possibility of obtaining legal aid in proceedings before the Constitutional Court.

50. The above-mentioned practice of the Constitutional Court not to award costs (see paragraph 47 above) also meant that, regardless of success in proceedings, the costs of legal representation had to be borne by the complainant. This prevented potential complainants from hiring advocates under contingency fee agreements and financing their costs of legal representation in that way.

51. The foregoing facts (see paragraphs 48-50 above) strongly suggested that such practice thus represented a serious hindrance to access to the Constitutional Court, as the possibility of hiring an advocate depended on the financial situation of the complainants.

52. In this regard, the applicant submitted that the Court had itself remarked that high costs of litigation could constitute a serious impediment to the effective protection of human rights (relying on *Young, James and Webster v. the United Kingdom* (Article 50), 18 October 1982, § 15, Series A no. 55).

53. In conclusion, the applicant averred that it was fundamentally unjust that he, as someone who had already suffered a violation of his constitutional rights and had thus been forced to lodge a constitutional complaint in order to remedy that violation, had in the end been "punished" by having to bear the costs of his successful constitutional complaint. The Constitutional Court had not given any meaningful reasons for its decision to deny him those costs.

(b) The Government

54. The Government submitted that the fact that the applicant had had to bear the costs of his constitutional complaint had not amounted to a restriction of his right of access to the Constitutional Court. In particular, the applicant

had evidently had access because the Constitutional Court had allowed his constitutional complaint and quashed the civil courts' decisions. In the proceedings before the Constitutional Court, the applicant had not been required to pay any court fees or to be represented by an advocate.

55. Moreover, neither the Constitutional Court nor the civil courts had ordered the applicant to pay any costs of the proceedings. The present case thus significantly differed from the cases of *Klauz* and *Cindrić and Bešlić* (see *Klauz v. Croatia*, no. 28963/10, 18 July 2013, and *Cindrić and Bešlić v. Croatia*, no. 72152/13, 6 September 2016), where the applicants had been ordered to reimburse part of the costs of the civil proceedings to the State, which had significantly reduced the compensation awarded to them in those proceedings.

56. In the present case, the State had also ensured the appropriate representation for the applicant by appointing his mother to act as his guardian *ad litem* (see paragraph 6 above). She could therefore have also lodged the constitutional complaint on his behalf.

57. The only costs incurred by the applicant had been his advocate's fees, costs which he had himself considered necessary for the optimal outcome of the proceedings. However, such costs could not be seen as a State-imposed restriction of access to a court.

58. If the Court were to consider otherwise, the Government argued that the applicant's right of access to a court had not been unduly restricted as it had pursued a legitimate aim and had been proportionate to that aim.

59. In this regard, the Government first submitted that proceedings before the constitutional courts differed from those before the ordinary courts and that because of their special role, the States enjoyed a greater margin of appreciation in regulating their conduct, including the issue of costs.

60. The possibility for the Constitutional Court to award the costs of proceedings to a complainant who had succeeded with his or her constitutional complaint was provided for by the Constitutional Court Act as an exception and not a rule (see paragraph 15 above). The purpose of such an arrangement was to secure the proper functioning of the Constitutional Court by preventing it from becoming overburdened, and to protect the financial stability of the State budget.

61. As regards proportionality, the Government first reiterated their argument that access to the Constitutional Court was wide in Croatia compared to other Contracting States (see paragraph 26 above). They also pointed out that there was no generally accepted rule in the legal systems of the Contracting States that successful complainants had to be able to recover the costs of legal representation incurred in proceedings before the constitutional courts.

62. The Government further submitted that the issue of proportionality in the present case had to be considered in the light of the information and arguments presented by the applicant before the Constitutional Court. While

in his application to the Court the applicant had given detailed reasons as to why the Constitutional Court should have awarded him the costs of the proceedings – stating that he was poor, that the case was of existential importance for him, that he was suffering from a mental disability and that the proceedings before the Constitutional Court had been particularly complex – in his constitutional complaint he had not done so. The Constitutional Court could not have been expected to inquire about those personal circumstances of its own motion in order to decide whether or not to award him the costs of the proceedings.

63. Given that the applicant had been legally represented, his advocate should have known that the Constitutional Court only exceptionally awarded costs of constitutional complaints and that she therefore had to specify, explain and substantiate the claim for costs. Since she had done so in the application to the Court, nothing had prevented her from doing so before the Constitutional Court.

64. Despite this, the applicant argued that the Constitutional Court had not given any meaningful reasons for dismissing his claim for costs (see paragraph 48 above). In the Government's view, however, the Constitutional Court could not have provided any other reasons because the applicant had not properly reasoned his claim for costs.

65. Lastly, the Government reiterated their argument that the applicant could have claimed the costs of his constitutional complaint in the resumed proceedings before the Virovitica Municipal Court but failed to do so (see paragraphs 27-28 above).

66. In conclusion, in the light of the foregoing, the Government argued that there had been no violation of the applicant's rights guaranteed by Article 6 of the Convention in the present case.

2. The Court's assessment

(a) As to whether there was a restriction of the applicant's right of access to a court

67. The Court notes that the applicant in the present case had the possibility of bringing his case before the Constitutional Court. He availed himself of that possibility by lodging a constitutional complaint against the civil courts' decisions depriving him of his legal capacity (see paragraph 10 above). However, even though it ruled in his favour and quashed the contested decisions, the Constitutional Court nevertheless refused to award him the costs of his constitutional complaint (see paragraph 12 above).

68. The Constitutional Court's decision on costs was based on section 23 of the Constitutional Court Act, which provides that each participant in proceedings before that court has to bear its own costs, unless the court decides otherwise (see paragraph 15 above).

69. In the Court's view, such a rule cannot be regarded as incompatible *per se* with Article 6 § 1 of the Convention. It is not the Court's task to express a view on whether the policy choices made by the Contracting Parties defining the limitations on access to a court are appropriate or not; its task is confined to determining whether their choices in this area produce consequences that are in conformity with the Convention (see *Zubac v. Croatia* [GC], no. 40160/12, § 81, 5 April 2018). Therefore, what the Court needs to ascertain in the present case is whether the effects of the application of the rule in question are compatible with Article 6 § 1 of the Convention.

70. In this regard, the Court reiterates that the amount of costs assessed in the light of the particular circumstances of a given case is a material factor in determining whether or not a person enjoyed the right of access to a court guaranteed by Article 6 § 1 of the Convention, and that the imposition of a considerable financial burden after the conclusion of proceedings may constitute a restriction of that right (see *Stankov v. Bulgaria*, no. 68490/01, §§ 52 and 54, 12 July 2007, and *Klauz v. Croatia*, no. 28963/10, §§ 77 and 82, 18 July 2013).

71. The Court has also held that in disputes against the State arising from decisions of its organs in the exercise of public authority, *ex post facto* refusal to reimburse successful applicants' own costs may also constitute a restriction of their access to court (see *Zustović*, cited above, § 99, and *Černius and Rinkevičius v. Lithuania*, nos. 73579/17 and 14620/18, §§ 65-74, 18 February 2020). The proceedings in the applicant's case concerned such a dispute because under section 62(1) of the Constitutional Court Act, individual constitutional complaints are always lodged against a decision of a State authority, local or regional government, or legal person vested with public authority (see paragraph 16 above).

72. The Government did not contest the applicant's argument that the cost of drafting a constitutional complaint was HRK 6,250 or EUR 815, which was more than the average salary in Croatia at the time (see paragraph 48 above). That cost thus indeed constituted a significant financial burden even for the average citizen, let alone for the applicant whose monthly income had consisted of HRK 1,250 or EUR 164 in disability benefits (see paragraph 7 above).

73. Having regard to the Court's case-law (see paragraphs 70-71 above) and the applicant's particular situation, the Constitutional Court's refusal to award the applicant the costs of his constitutional complaint thus constituted a restriction of his right of access to a court.

74. As the Court has pointed out in a number of cases, a restriction of the right of access to a court 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, for example, *Zubac*, cited above, § 78).

(b) As to whether the restriction pursued a legitimate aim

75. The Court notes that, even though constitutional rights are those which individuals and private legal entities have against the State and other public entities, proceedings before the Croatian Constitutional Court initiated by a constitutional complaint are formally one-party proceedings. Those intending to lodge constitutional complaints thus do not run the risk, normally present in civil proceedings, that, if unsuccessful, they would have to bear not only their own costs but reimburse the costs of the opposing party. The absence of such a risk, together with the absence of an obligation to pay court fees (see paragraphs 26 and 54 above) in proceedings before the Constitutional Court, may thus result in that court becoming overburdened with a large number of unmeritorious constitutional complaints, which could jeopardise its proper functioning.

76. Furthermore, the Court has already held that decreasing State expenses could constitute a legitimate aim for limiting reimbursement of litigation fees (see *Černius and Rinkevičius*, cited above, § 69).

77. The Court is therefore ready to accept the Government's argument (see paragraph 60 above) that the aim behind the default rule contained in section 23 of the Constitutional Court Act, on which the decision on costs was based in the present case, was to secure that court's smooth functioning, and to protect the State budget.

78. It must however be noted that, even though that provision provides that each participant in proceedings before the Constitutional Court has to bear its own costs, it nevertheless allows that court to decide otherwise (see paragraph 15 above). This exception not only provides a necessary flexibility allowing the Constitutional Court to adapt its decisions on costs to the circumstances of each case, it also suggests that in certain cases application of the default rule may not be justified by the legitimate aims identified above (see paragraph 75).

(c) As to whether the restriction was proportionate

79. The Court agrees with the applicant (see paragraph 46 above) that the proceedings before the Constitutional Court were of existential importance for him as the impugned decisions of the civil courts had deprived him of his legal capacity. It reiterates in this regard that the applicant is a person suffering from a mental disability and therefore had to be legally represented to effectively protect his rights, it being understood that the assistance of an advocate before the Constitutional Court cannot be seen as unnecessary even for non-vulnerable individuals because that court decides on complex issues which, for any lay person, may be difficult to grasp (see paragraphs 35-36 above, with reference to *Bibić*, cited above, § 31).

80. The Court further refers to its above finding that the costs of the constitutional complaint the applicant had to pay to his advocate constituted

a significant financial burden even for an average citizen, let alone for a person of low income like him (see paragraph 72 above). In this regard, the Court is not persuaded by the Government's argument suggesting that the applicant had not brought this fact to the attention of the Constitutional Court (see paragraphs 62-64 above), as his monthly income was mentioned in the first-instance decision, a copy of which was enclosed with his constitutional complaint (see paragraphs 7 and 10 above, see also, by converse implication, *Liga Portuguesa de Futebol Profissional v. Portugal*, no. 4687/11, § 81, 17 May 2016, where nothing in the case suggested the applicant's financial vulnerability).

81. Furthermore, it cannot but be noted that the Government did not contest the applicant's argument that domestic law did not provide for the possibility of obtaining legal aid in proceedings before the Constitutional Court (see paragraph 47 above). In any event, the Court reiterates that legal aid is an individual right and not an obligation that has to be exercised and that it should not prevent applicants from choosing to be represented by an advocate (see *Černius and Rinkevičius*, cited above, § 70). Lastly, having regard to the legitimate aims identified above (see paragraph 75), the Court does not see any difference between the State advancing the costs of the applicant's legal representation through a legal aid scheme or reimbursing them afterwards because he succeeded with his constitutional complaint.

82. The Court is mindful that social services are often faced with difficult and delicate decisions, especially when, as in the present case, they must decide whether to initiate the relevant proceedings to deprive a person with a mental disability of the capacity to act. The Court is therefore aware that they might adopt a more defensive approach to their duties if, each time the judicial authorities did not agree with their initiative, they had to pay the costs of the proceedings to the counterparty. However, as indicated above (see paragraph 73 above), under Croatian law proceedings before the Croatian Constitutional Court initiated by a constitutional complaint are formally one-party proceedings. This means that if the Constitutional Court had awarded the costs of the constitutional complaint to the applicant, those costs would not have been paid by the Slatina Social Welfare Centre, which was not a participant in the proceedings before that court. Therefore, in the present case, there was no risk that the award of costs would have had a chilling effect on social services in the performance of their duties.

83. Lastly, the Court reiterates that Article 6 § 1 also obliges the courts to give reasons for their decisions, although the extent of this duty may vary according to the nature of the decision and can only be determined in the light of the circumstances of the case (see, among many other authorities, *Liga Portuguesa de Futebol Profissional*, cited above, § 80). In the Court's view, the circumstances of the present case, and in particular those highlighted in paragraphs 79-80 above, required the Constitutional Court to provide (a more substantial statement of) reasons for its decision on costs rather than merely

use the same wording as in section 23 of the Constitutional Court Act (see paragraphs 12 and 15 above). The Court thus agrees with the applicant that the Constitutional Court did not give any meaningful reasons for its decision to deny him the costs of his constitutional complaint (see paragraph 48 above).

84. The foregoing considerations (see paragraphs 67-82 above) are sufficient for the Court to conclude that, in the specific circumstances of the present case, the restriction of the applicant's right of access to a court was not justified by the legitimate aims pursued.

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

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

86. The applicant complained that the fact that he had to bear the costs of his successful constitutional complaint had also been in breach of his right to the peaceful enjoyment of his possessions as provided for in Article 1 of Protocol No. 1 to the Convention, which reads as follows:

“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.”

87. Having regard to the facts of the case, the parties' submissions and its findings under Article 6 § 1 of the Convention (see paragraphs 67-85 above), the Court considers that it has examined the main legal question raised in the present application and that it is not necessary to examine the admissibility and merits of this remaining complaint (see, for example, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, and *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

88. 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

89. The applicant claimed 6,250 Croatian kunas (HRK), which corresponded to the costs of his constitutional complaint (see paragraph 11 above), together with the accrued statutory default interest, in respect of pecuniary damage. He also claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

90. The Government contested these claims.

91. The Court has found that the Constitutional Court's refusal in its decision of 20 May 2015 to award the applicant the costs of his constitutional complaint was in breach of Article 6 § 1 of the Convention (see paragraphs 67-85 above). There is thus a sufficient causal link between the applicant's claim in respect of pecuniary damage and the violation found. The Court therefore awards him EUR 815 under that head of damage, plus any tax that may be chargeable to him on that amount.

92. As regards statutory default interest, the Court notes that the applicant did not specify the amount claimed, the relevant rate or the method by which such interest should be calculated within the period allowed for submission of his claim for just satisfaction. It therefore does not award him any sum on that account (see *Boljević v. Croatia*, no. 43492/11, § 53, 31 January 2017).

93. The Court also finds that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 3,000 under that head, plus any tax that may be chargeable.

B. Costs and expenses

94. The applicant also claimed EUR 4,840 for the costs and expenses incurred before the Court.

95. The Government contested that claim as excessive.

96. 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 were 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 considers it reasonable to award the sum of EUR 2,500 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

97. 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

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by five votes to two, that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*, by five votes to two, that it is not necessary to examine the admissibility and merits of the complaint under Article 1 of Protocol No. 1 to the Convention;
4. *Holds*, by five votes to two,
 - (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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 815 (eight hundred and fifteen euros), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (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*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 May 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Marko Bošnjak
President

DRAGAN KOVAČEVIĆ v. CROATIA JUDGMENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Wojtyczek and Sabato are annexed to this judgment.

M.B.

R.D.

JOINT DISSENTING OPINION OF JUDGES WOJTYCZEK AND SABATO

I. Introduction

1. We regret that we cannot share the majority's opinion that there has been a violation of Article 6 § 1 of the Convention in the present case (hereinafter "the judgment" or "*Kovačević*").

2. According to the majority, the Constitutional Court's refusal to award the applicant the costs of his constitutional complaint, based on the default rule contained in section 23 of the Constitutional Court Act ("the Act" – see paragraph 15 of the judgment), constituted a restriction of his right of access to a court (see paragraph 73 of the judgment) which, although pursuing a legitimate aim (see paragraphs 75 et seq. of the judgment), was not proportionate in the specific circumstances of the case (see paragraph 84 of the judgment).

3. The majority provided several reasons for their assessment: (a) the proceedings were of "existential importance" for the applicant, as they concerned his legal capacity (paragraph 79); (b) because of the complex issues involved, the assistance of an advocate before the Constitutional Court could be seen as necessary even for non-vulnerable individuals, and all the more so for a person with a mental disability like the applicant (*ibid.*); (c) the cost of a constitutional complaint was a significant financial burden for an average citizen, let alone for a person of low income like the applicant (paragraph 80); (d) bearing in mind that domestic law does not provide for legal aid before the Constitutional Court, the majority saw no difference between a legal aid scheme and the reimbursement of lawyers' fees incurred by a successful complainant (paragraph 81); (e) the award of costs was not apt to have any chilling effect on social services which had initiated proceedings for deprivation of capacity and which were often faced with difficult decisions, since constitutional complaints were formally one-party proceedings, so that social services – not being formally a party – would not have to bear the financial impact of the decision themselves (paragraph 82); (f) the Constitutional Court did not provide any reasons for its decision (paragraph 83).

II. The Court's case-law on equality of arms and unreasonable reduction of compensation does not support the majority's approach

4. We consider that the majority's assessment of non-proportionality is far removed from the Court's case-law which, hitherto, has never really intruded on States' discretion in regulating the allocation of lawyers' fees.

5. The majority's judgment relies almost exclusively, as we will try to show, on the authority of *Zustović v. Croatia* (no. 27903/15, 22 April 2021),

a judgment based on very particular circumstances which, probably for the first time, led the Court to state that a domestic law requiring (and not only allowing) that each party in litigation should bear its own costs was – where the litigation was against a State entity – in violation of Article 6. The case concerned administrative and judicial-review proceedings relating to the applicant’s disability pension, in which the relevant administrative court, while ruling in her favour on the merits, dismissed her claim for costs on the basis of the Administrative Disputes Act, which at the time provided that each party in judicial-review proceedings had to bear its own costs. That provision was later invalidated by the Constitutional Court as being incompatible with the Constitution.

6. Since the applicant relied on Article 6 § 1 on account of her inability to obtain reimbursement of the costs of the judicial-review proceedings in which the domestic courts had ruled in her favour, in *Zustović* we had no difficulty in concurring in finding a violation, by equating the specific situation (in which the domestic legislation prevented any possibility for the domestic courts to allocate lawyers’ fees to the other party – necessarily a State entity – even when they ruled in favour of the disability pension claimant) with a situation in which an unreasonable obstacle was created to gaining access to a court: indeed, it was not just access to a court in itself that was at risk, but equality of arms, since the legislative provision in question was likely to discourage justice-seekers from having recourse to experienced advocates.

7. We have to remember that *Zustović* (§§ 96-101) drew – again almost exclusively (if one does not consider pure “access” cases such as *Zubac v. Croatia* ([GC], no. 40160/12, 5 April 2018)) – on *Steel and Morris v. the United Kingdom* (no. 68416/01, ECHR 2005-II), a case which is no longer explicitly cited in *Kovačević*. *Steel and Morris* concerned – once more – a very particular domestic situation, not concerning the allocation of lawyers’ fees but the provision of legal aid. In this precedent, the availability of legal aid was deemed necessary by the Court to guarantee a fair hearing on the basis of the particular facts and circumstances (one of the longest cases in England’s legal history), where neither the sporadic help given by volunteer lawyers nor the extensive judicial assistance granted to the applicants as litigants in person was any substitute for competent and sustained representation by an experienced lawyer. The Court held that the denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with respect to the other party. In *Steel and Morris* (§ 60) the Court stated that “Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants” the right to equality of arms, and that “[t]he institution of a legal aid scheme constitutes one of those means but there are others”. The Court also provided an example of “other means” in § 60 of *Steel and Morris*, namely “simplifying the applicable procedure” (not

recovering lawyers' fees from the other party). Again, equality of arms was at risk, not access to a court as such.

8. In the light of the above we concurred in *Zustović*, because of the very particular situation in that case, where a legislative provision completely prevented, in general and *ex ante*, the recovery of lawyers' fees paid by one of the parties (an individual pension claimant) to litigate in a delicate area such as disability benefits against the other party (always a State entity).

9. Moreover, we consider that the Court has always been very prudent in the area of allocation of lawyers' fees. As in *Zustović*, in other precedents violations have been found only in the presence of legislation breaching in general and *ex ante* the principle of equality of arms or equivalent Convention values:

- In *Stankiewicz v. Poland* (no. 46917/99, ECHR 2006-VI), a violation was found because the prosecuting authorities enjoyed a privileged position with respect to the costs of civil proceedings. Having noted the complexity of the case and the substantial amount of money involved, the Court found that the applicants' decision to have professional legal representation could not be said to have been unwarranted.

- In *Musa Tarhan v. Turkey* (no. 12055/17, 23 October 2018), the issue to be determined was whether and to what extent the order for the applicant to meet part of the cost of the opposing party's legal representation – provided for by Turkish legislation for expropriation cases – amounted to an interference with his right to the peaceful enjoyment of his possessions (the case was not examined under Article 6 but under Article 1 of Protocol No. 1); the sum which the applicant had been required to pay towards the cost of representation had reduced the amount he received in compensation for the expropriation. The applicant had been party to a legal dispute with the State concerning the determination of the amount of compensation for expropriation, and the violation was found because of the order for the applicant to pay the cost of the expropriating authority's legal representation. This had imposed an excessive burden on him which upset the fair balance to be struck between the general interest of the community and the fundamental rights of the individual.

10. While we found it acceptable that the Court framed its ruling in *Zustović* on the basis of those precedents (both being, like *Zustović*, characterised by the presence of unreasonable domestic rules conferring privileges on the State and breaching equality of arms), we fear that in *Kovačević* this is impossible because of the above distinctions.

11. A number of additional distinctions might be emphasised in an area different from equality of arms. The majority themselves recognise (in paragraph 55 of *Kovačević*) that the present case also differs significantly from *Klauz v. Croatia* (no. 28963/10, 18 July 2013), and *Cindrić and Bešlić v. Croatia* (no. 72152/13, 6 September 2016), in which the issues at stake concerned orders under the applicable domestic legislation to reimburse part

of the costs of civil proceedings to the State, although the applicants' claims were partially meritorious, orders which significantly reduced the compensation to which they were entitled. Thus, these cases concerned the arbitrary reduction of compensation resulting from an unreasonable award of costs.

12. In sum, the majority's approach is not based on the Court's precedents: while the precedents concerned domestic legislation completely preventing the winner in civil proceedings from recovering lawyers' fees that he or she had paid, or court orders requiring that the winner bear the costs of the opposing State entity which had lost in the litigation (that is, blatantly arbitrary and unreasonable systems not consistent with a genuine concept of procedural fairness in the area of costs), in *Kovačević* we have what the majority may have considered a step forward. This could actually be – we fear – a misstep.

III. Some of the reasons provided by the majority do not support their proportionality assessment; in particular, the allocation of lawyers' costs is based on a different rationale from the one justifying legal aid

13. We should now proceed to comment on some of the specific reasons cited by the majority to support their (lack of) proportionality assessment (see paragraph 3 of this opinion).

14. Before doing that it is worth noting that, in the present case, the domestic legislation – section 23 of the Act – leaves the local court full discretion to depart from the default rule according to which each participant in proceedings must bear his or her lawyers' fee. What is most relevant, in our view, is not the mechanism of the default rule but the fact that, in each case, it is for the court deciding the case to also decide on costs, on the basis of section 23 of the Act. There is no *ex ante* general rule breaching equality of arms, because the court has discretion.

15. Since discretion is involved, we can express here our disagreement with the majority's view that the domestic courts should necessarily provide specific reasons for their decision (see paragraph 83 of the judgment). This is not usually the case in European judicial practice concerning the award of costs. What is relevant is not the provision of reasons or the lack thereof in an ancillary order: what is relevant is that no violation of the Convention occurs. A different rule applies, under the Court's case-law, to the obligation to give reasons for refusing legal aid and to handle requests for legal aid with diligence (see *Tabor v. Poland*, no. 12825/02, §§ 45-46, 27 June 2006, and *Saoud v. France*, no. 9375/02, §§ 133-36, 9 October 2007; see paragraphs 22 et seq. of this opinion for the differences between legal aid schemes and award-of-cost schemes).

16. From another point of view, we are not in a position here to speculate on whether or not the majority's stance according to which constitutional

complaints in Croatia give rise to what are formally one-party proceedings is correct (see paragraph 82 of the judgment). This is clearly a matter of domestic law, which we would leave for domestic lawyers to assess. We would simply consider the fact that, regardless of the formal procedural categories, the majority suggest that some other participant(s) in the proceedings, regardless of their status as parties, had to bear the costs incurred by the complainant. It should be noted that, in addition to section 23 of the Act, which suggests precisely that other participants in the proceedings may bear the complainant's costs (and – again – this is what the majority implicitly supports, which clarifies the fact that their reference to the one-party nature of the proceedings is immaterial), section 69 of the Act provides that the reporting judge in the proceedings invites “interested persons ... to respond to [the constitutional complaint]”. The same “interested persons”, whatever their formal standing before the Constitutional Court, may see the disputed lower court decision set aside under section 76 of the same Act, in which case a fresh set of proceedings has to start. In this situation, regardless of the formal nature of proceedings before the Constitutional Court, there are “interested persons” who may find themselves losing their previously favourable position in litigation and also, in theory, bearing the costs. In practice, they lose.

17. What matters therefore, in our view, is that – by finding a violation in this case – the Court (possibly taking a fourth-instance approach that it should avoid) is suggesting that, in the given circumstances, the lawyers' costs should necessarily have been borne by other “persons” “interested” in the proceedings.

18. The majority judgment does not clarify the identity of such “interested persons”. At any rate, it is obvious that they are State entities.

19. On this basis, the majority raise the question whether, because of their proposed recognition of a “right” for vulnerable private individuals to recover lawyers' costs from State entities, thereby facilitating access to a court by the same individuals, the access to court of possible other “interested persons” may be at risk. In this regard the majority (see paragraph 82 of the judgment) have rightly considered that, in the abstract, the rule they are supporting, obliging States to cover costs in similar circumstances, could have a “chilling effect” on social services, which are often faced with difficult decisions as to whether to initiate proceedings for deprivation of capacity. However, rather than leaving (as we would suggest) this kind of difficult balancing exercise to the domestic authorities, which are better placed than the Court to assess factual situations, the majority deem it opportune to solve the “abstract” problem by means of the “concrete” consideration that, in this case, the Slatina Social Welfare Centre would not directly bear the costs, which would be charged to whichever State entity – again, the identity is unclear – was the “interested person” in the formally one-party proceedings (see paragraph 82 of the judgment).

20. We regret that we are unable to agree with this argument: its fallacy is revealed if one simply considers that the social welfare centre – being certainly financed within the public sector – may well refrain from taking certain initiatives in court aimed at obtaining deprivation of capacity once there is a risk that procedural costs for the public sector at large may increase.

21. We consider that the role played jointly by social services and the courts (especially courts of protection or guardianship judges) in proceedings for deprivation of capacity is aimed at protecting, and not jeopardising, people who need to be given care and treatment or to be represented by a guardian. The actions of social services and the courts of protection may be criticised in some contexts, but their delicate role aimed at safeguarding the dignity and welfare of vulnerable persons in a democratic society remains. Checks on the care or treatment arrangements for those most in need are deemed essential by the Court's case-law, but human rights in Europe will not be guaranteed if excessive pressure (especially of a financial nature) is exerted on social services and the courts. The consequences for the levels of protection of vulnerable persons if bringing incapacity cases to courts becomes a costly exercise for the public sector are easily imagined.

22. This certainly does not mean that vulnerable persons should not have their lawyers' costs covered by means of appropriate arrangements: we wish only to emphasise that the allocation of lawyers' fees is one matter, ideally to be left to the court's discretion, and legal aid for vulnerable persons is quite another. In particular, low-income participants in proceedings will usually be granted legal aid (see paragraphs 79-80 of the judgment), while other vulnerabilities should be assessed on a case-to-case basis. It is a traditional, generally acknowledged concept in Europe that financial need or other vulnerable personal situations of litigants should in principle be addressed by legal aid schemes, financed by the State or otherwise (in modern times, the private funding of litigation may be accorded some role in the area of vulnerability support, sometimes with the involvement of insurance companies or financial organisations).

23. Economic analysts of the law, in studying the many European systems and the European Union framework, have shown the delicate functions of legal aid, which are very different from the various statutory or case-law arrangements aimed at the award of lawyers' costs.

24. Access to legal aid is usually subject to requirements aimed at ensuring equal treatment of applicants and at preventing public funds being used for non-meritorious claims. Therefore, income thresholds may apply; additionally, legal aid schemes rarely offer "blanket" cover, as procedures aimed at pre-assessing the merit of the claim are left in the hands of the authorities (see *Steel and Morris*, cited above, §§ 59-62).

25. The Court's case-law also affirms the principle that the existence of a legal aid scheme is not an absolute requirement under the Convention, as the

need to make it available depends on a number of factors (see *Steel and Morris*, cited above, § 61).

26. Comparing the Court's case-law on legal aid and the different principles at stake in the area of lawyers' costs, we have attempted to demonstrate above that only in *Zustović* – which dealt with very specific domestic legislation breaching equality of arms – did the Court somehow extend an approach that had originally been developed in the context of legal aid to the allocation of lawyers' costs. Otherwise, the rationale of the allocation of lawyers' costs is in itself extraneous to simplifying access to a court for persons with personal or financial vulnerabilities.

IV. Conclusions

27. On the basis of the above, we are in serious doubt as to whether the majority took a correct approach by equating in blanket fashion the rules concerning legal aid and those in the area of allocation of lawyers' costs (see paragraph 81 of the judgment). At most, on the basis of their reasons, they could have found a violation because of the lack of availability of a legal aid scheme before the Constitutional Court. While it is true that – as the majority argue in paragraph 81 of the judgment – in the specific case the State would at any rate bear the burden, it is by no means irrelevant to establish whether costs are covered by the operation of a legal aid scheme or they are recovered from another participant in the proceedings. Recognition of the need to support a vulnerable person usually presupposes admission to the relevant scheme, possibly some limits to it, and above all a standardised and non-discriminatory definition of vulnerability, a matter which is often the choice of legislatures and not of the courts, etc.; recovery of costs from a public entity which lost in litigation does not entail the above-mentioned characteristics.

28. Our doubts are even more serious because the majority's judgment concerns proceedings before a Constitutional Court, whose order on costs is – in addition – taken in isolation from the other orders on costs made in the phases of the proceedings which preceded and followed the Constitutional Court's ruling.

29. In particular, we consider that, in the Court's case-law, there is no precedent imposing an obligation on Constitutional Courts to rule on lawyers' costs; nor does it appear that such an obligation was found by the majority to stem from any other relevant European instruments which might contribute to construing the Convention (such as those originating from the European Commission for Democracy through Law – the Venice Commission).

30. Furthermore, the majority were reviewing Constitutional Court proceedings, which are not isolated from the previous and subsequent procedural developments: the majority should have better assessed the regime of costs overall, taking into account any awards of costs in the phases

preceding and following the Constitutional Court phase. The applicant only complained of the order in one segment of the litigation, while no complaints were made concerning the preceding and subsequent phases. In an overall assessment, even if no costs had been awarded in one segment, the possibility remains that fairness in the proceedings as a whole could be guaranteed on the basis of the other awards.