



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

SECOND SECTION

CASE OF MOSKALJ v. CROATIA

(Application no. 60272/21)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Constitutional Court's decision awarding compensation for excessive length of enforcement proceedings but refusing legal representation costs of constitutional complaint and length-of-proceedings remedies • Constitutional complaint's costs alone exceeded the compensation awarded • Absence of sufficiently convincing reasons • Litigation costs not unnecessary • Disproportionate restriction of access to a court

Prepared by the Registry. Does not bind the Court.

STRASBOURG

15 October 2024

FINAL

17/03/2025

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

In the case of Moskalj v. Croatia,

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

Arnfinn Bårdsen, *President*,

Jovan Ilievski,

Pauliine Koskelo,

Saadet Yüksel,

Diana Sârcu,

Davor Derenčinović,

Gediminas Sagatys, *judges*,

and Dorothee von Arnim, *Deputy Section Registrar*,

Having regard to:

the application (no. 60272/21) 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, Ms Alka Moskalj (“the applicant”), on 7 December 2021;

the decision to give notice of the application to the Croatian Government (“the Government”);

the parties’ observations;

Having deliberated in private on 17 September 2024,

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

INTRODUCTION

1. The application concerns the domestic courts’ decision to award the applicant compensation for the excessive length of proceedings but to refuse to award her the costs of her legal representation, which exceeded the amount of that compensation. The applicant complained of a violation of her rights under Article 6 § 1 and Article 13 of the Convention as well as Article 1 of Protocol No. 1 thereto.

THE FACTS

2. The applicant was born in 1971 and lives in Zagreb. She was represented by Ms B. Ivanišević, 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. By a judgment of 27 June 2013, the Zagreb Municipal Civil Court (*Općinski građanski sud u Zagrebu*), *inter alia*, (i) granted the applicant and her husband D.M. a divorce; (ii) decided that their son L.M., born in 2005, would live with the applicant; and (iii) granted D.M. access (contact) rights.

6. On 14 March 2020, after exercising his contact rights over a weekend, D.M. retained their son (then aged fourteen and a half) at his home and refused to return him to the applicant.

I. ENFORCEMENT PROCEEDINGS AND RELATED CIVIL PROCEEDINGS

A. Enforcement proceedings

7. On 24 June 2020 the applicant applied to the Zagreb Municipal Civil Court for enforcement of the above-mentioned judgment (see paragraph 5 above) by having the child returned to her.

8. On 19 October 2020 the Municipal Civil Court asked the relevant social welfare centre to appoint a special guardian for L.M. and submit a report on the expediency of the enforcement proceedings and how it could affect the child. The relevant social welfare centre did so on 3 and 5 November 2020 respectively.

9. On 19 November 2020 the court invited the special guardian to reply to the application for enforcement and inform it of the child's views. On 27 January 2021 the special guardian did so and informed the court that L.M. objected to being returned to the applicant but wished to have regular contact with her.

10. On 28 May 2021 the court issued a writ of execution (*rješenje o ovrsi*) ordering the handover of L.M. to the applicant. It then transferred the case to the Novi Zagreb Municipal Court (*Općinski sud u Novom Zagrebu*) for the writ to be executed because the child was living with his father at an address in its jurisdiction.

11. On 2 July 2021 the applicant's advocate informed that court that L.M. was at that time staying with his paternal grandmother in Zadar. On 6 July 2021 the advocate also informed the court of the two addresses at which L.M. was staying while in Zagreb.

12. An attempt to execute the writ at those two addresses on 14 July 2021 failed because the applicant's son could not be found. On 16 July 2021 the Novi Zagreb Municipal Civil Court transferred the case to the Zadar Municipal Court (*Općinski sud u Zadru*).

13. On 31 August 2021 the applicant requested a change in the method of enforcement to a threat of imprisonment against D.M. if he failed to comply with the writ of execution and hand L.M. over to her.

14. By a decision of 23 September 2022, which was upheld on 21 December 2022 by the Split County Court (*Županijski sud u Splitu*), the Zagreb Municipal Civil Court, dismissed that request holding that in the concurrent civil proceedings an interim measure temporarily changing L.M.'s residential parent had been issued (see paragraph 19 below).

15. On 5 November 2021 the relevant social welfare centre informed the court that it had interviewed L.M., who had stated that "the whole situation could be resolved if the mother respected his wishes and did not force him to live with her".

16. On 29 November 2021 the Zadar Municipal Court suspended the enforcement after the police established that the applicant's son was not staying with his grandmother in Zadar (see paragraph 11 above). The case was returned to the Zagreb Municipal Civil Court.

17. On 14 August 2023 L.M. turned eighteen and became an adult. Accordingly, the enforcement proceedings became devoid of purpose.

B. Civil proceedings

18. Meanwhile, on 22 July 2020 D.M. brought a civil action in the Zagreb Municipal Civil Court against the applicant, seeking to amend the judgment of 27 June 2013 (see paragraph 5 above) regarding the resident parent so that L.M. would live with him. He also sought an interim measure to that effect. He argued that the circumstances had changed, *inter alia*, because on 10 September 2019 L.M. and the applicant had had a verbal and physical altercation as a result of which they had both been convicted of a minor offence of domestic violence, whereupon L.M. no longer wished to live with her.

19. By a decision of 14 July 2022, the Municipal Court granted the interim measure sought by D.M. and decided that L.M. would temporarily live with him. The interim measure immediately became final because the parties waived their right to appeal.

20. By a judgment of 18 April 2023, the Municipal Court amended its judgment of 27 June 2013 (see paragraph 5 above). It decided that L.M. would live with D.M. and granted the applicant access (contact) rights. She appealed.

21. On 12 September 2023 the Pula County Court (*Županijski sud u Puli*) dismissed the applicant's appeal and upheld the Municipal Court's judgment.

II. PROCEEDINGS FOLLOWING THE USE OF REMEDIES FOR PROTECTION OF THE RIGHT TO A HEARING WITHIN A REASONABLE TIME

A. Purely acceleratory remedy under the 2013 Courts Act

22. Meanwhile, on 16 December 2020 the applicant, represented by an advocate, lodged a request for protection of the right to a hearing within a reasonable time – a purely acceleratory remedy under the 2013 Courts Act (see paragraphs 40-41 below) – and asked the President of the Zagreb Municipal Civil Court to expedite the above-mentioned enforcement proceedings (see paragraphs 7-9 above). She also sought reimbursement of her advocate's costs for drafting that request, which amounted to 1,250 Croatian kunas (HRK), equivalent to 165.90 euros (EUR).

23. By a decision of 24 December 2020, the court's President dismissed the applicant's request, finding that the enforcement proceedings complained of had not exceeded a reasonable time. The President also dismissed her claim for costs, finding that they had been unnecessarily incurred and that there was no legal basis for awarding them, having regard to the relevant provision of the Judicial Non-Contentious Procedure Act (see paragraph 45 below).

24. On 19 January 2021 the applicant appealed against that decision and sought reimbursement of her advocate's costs for drafting that appeal, which amounted to HRK 1,250 (EUR 165.90). She explained that as a layperson she could not have drafted the initial request or the appeal without the assistance of an advocate, and that the costs of those pleadings had therefore been necessarily incurred.

25. By a decision of 1 February 2021, the Zagreb County Court (*Županijski sud u Zagrebu*) dismissed the applicant's appeal. As regards the costs, the court held that the applicant was not entitled to have them reimbursed because both her initial request and her appeal had been unsuccessful.

B. First constitutional complaint

26. On 26 March 2021 the applicant lodged a constitutional complaint under section 63 of the Constitutional Court Act (see paragraph 35 below), complaining of the excessive length of the above-mentioned enforcement proceedings. She sought reimbursement of the costs of her legal representation incurred to date in pursuing the length-of-proceedings remedies under the 2013 Courts Act (see paragraphs 22 and 24 above) and the costs incurred in drafting the constitutional complaint, which amounted to HRK 6,125 (EUR 812.93).

27. By a decision of 2 June 2021, the Constitutional Court (*Ustavni sud Republike Hrvatske*) (i) found a violation of the applicant's right to a hearing within a reasonable time and of her right to respect for family life, both guaranteed by the Croatian Constitution; (ii) awarded her HRK 5,000 (EUR 663.61) in compensation; and (iii) ordered the Zagreb Municipal Civil Court to complete the enforcement within thirty days from the publication of its decision in the Official Gazette. However, it dismissed her claim for 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 36 below). The Constitutional Court's decision was published in the Official Gazette on 7 July 2021.

C. Complementary remedy under the 2013 Courts Act

28. On 15 October 2021 the applicant lodged a request with the Zagreb County Court for payment of appropriate compensation – a complementary

(combined compensatory and acceleratory) remedy under the 2013 Courts Act (see paragraphs 40 and 42 below). She complained that the Municipal Court had not complied with the time-limit set in the Constitutional Court's decision of 2 June 2021 (see paragraph 27 above) and asked the County Court to expedite the enforcement proceedings and award her appropriate compensation. On 18 October 2021 she also sought reimbursement of her advocate's costs for drafting that request, which amounted to HRK 1,250 (EUR 165.90), as well as the costs incurred in pursuing the other length-of-proceedings remedies under the 2013 Courts Act (see paragraphs 22-25 above).

29. The State participated in those proceedings as the counterparty, represented by the State Attorney's Office, which argued that the applicant's request be refused.

30. By a decision of 13 April 2022, the County Court found the applicant's request well-founded, ordered the Zagreb Municipal Civil Court to complete the enforcement within thirty days and awarded her HRK 2,500 (EUR 331.81) in compensation. It however dismissed her claim for costs, finding that, under the Judicial Non-Contentious Procedure Act, the costs were borne by the party in whose interest the proceedings were conducted (see paragraph 45 below).

31. The applicant lodged an appeal with the Supreme Court (*Vrhovni sud Republike Hrvatske*) against that decision, claiming that the amount of compensation was too low. She also complained about the decision on costs.

32. By a decision of 1 March 2023, the Supreme Court dismissed the applicant's appeal, holding that the compensation awarded was sufficient and that the decision on costs was in line with section 20 of the Judicial Non-Contentious Procedure Act (see paragraph 45 below).

D. Second constitutional complaint

33. Meanwhile, on 24 September 2021 the applicant lodged a second constitutional complaint under section 63 of the Constitutional Court Act, again complaining of the excessive length of the above-mentioned enforcement proceedings. She also complained of the breach of her right of access to a court and the right to the peaceful enjoyment of her possessions in that she had been forced to bear the costs of her earlier constitutional complaint, which had imposed an excessive financial burden on her. The applicant this time did not ask the Constitutional Court to award her the costs incurred in pursuing the length-of-proceedings remedies under the 2013 Courts Act (see paragraphs 22-25 above), but sought the costs incurred in drafting the second constitutional complaint, which amounted to HRK 6,125 (EUR 812.93).

34. On 10 January 2022 the applicant herself submitted a supplement to her constitutional complaint, in which she set out the chronology of the

enforcement proceedings in question and of the proceedings following the use of remedies for protection of the right to a hearing within a reasonable time, and enclosed the relevant documents.

35. By a decision of 20 December 2022, the Constitutional Court found a violation of the applicant's constitutional right to respect for family life and awarded her HRK 5,000 (EUR 663.61) in compensation. However, referring to section 23 of the Constitutional Court Act (see paragraph 36 below), it dismissed her claim for costs, holding that the case was not complex because she had complained about the length of the proceedings, in respect of which that court had already found a violation in its earlier decision.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW

A. The Constitutional Court Act

1. *Relevant provisions*

36. 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 a complainant who has been unsuccessful in his or her constitutional complaint to 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.”

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

Section 62

“(1) Anyone may lodge a constitutional complaint with the Constitutional Court if he or she considers that a decision of a State authority, local or regional government, or a legal person invested 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 ... guaranteed by the Constitution (‘constitutional right[s]’) ...”

Section 63

“(1) The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted if the relevant court has failed to decide within a reasonable time on the rights or obligations of a party [to the proceedings] or as regards suspicion or accusation of a criminal offence ...

(2) If it finds the constitutional complaint regarding failure to decide within a reasonable time referred to in paragraph 1 of this section well-founded, the Constitutional Court shall set a time-limit within which the relevant court must decide the case on the merits ...

(3) In the decision referred to in paragraph 2 of this section, the Constitutional Court shall award appropriate compensation to the complainant for the violation of his or her constitutional right ... to a hearing within a reasonable time. The compensation shall be paid from the State budget within three months of the date on which a request for payment is lodged.”

2. *Relevant practice*

38. According to the Constitutional Court’s practice at the relevant time, persons complaining of the excessive length of ongoing judicial proceedings could lodge a constitutional complaint under section 63 of the Constitutional Court Act only if they had first availed themselves of other length-of-proceedings remedies, notably those under the 2013 Courts Act (see paragraphs 40-42 below). It consistently declared such constitutional complaints inadmissible if the complainants had not made use of such remedies.

3. *Relevant documents*

39. The Constitutional Court’s website contains a document entitled “Instructions for filling in a constitutional complaint form” (*Upute za ispunjavanje obrasca ustavne tužbe*). At the material time, the relevant part, regarding complainants’ representatives, read as follows:

“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. Legislation concerning length-of-proceedings remedies

40. Sections 64 to 69 of the 2013 Courts Act (*Zakon o sudovima*, Official Gazette no. 28/13), which were in force between 14 March 2013 and 1 April 2024, provided for two length-of-proceedings remedies: (i) a purely acceleratory remedy as the primary remedy, and (ii) a combined compensatory and acceleratory remedy as a complementary remedy, which was made available only in limited circumstances. The text of those provisions is reproduced in *Novak v. Croatia* ((dec.), no. 7877/14, § 23, 7 July 2016).

41. In particular, under sections 65 to 67 a party to pending judicial proceedings who considered that they had been unduly protracted had the right to seek a purely acceleratory remedy, namely to lodge a “request for protection of the right to a hearing within a reasonable time” and to ask the president of the court before which the proceedings were pending to expedite them by setting a time-limit of a maximum of six months within which the judge hearing the case had to give a decision.

42. Sections 68 and 69 provided that a complementary remedy (combining compensatory and acceleratory elements), namely a “request for payment of appropriate compensation”, was available only in cases where the judge hearing the case had not complied with the time-limit for deciding the case specified by the court’s president when granting the request for the purely acceleratory remedy.

43. Section 64(2) provided that in proceedings concerning those remedies the rules of non-contentious procedure applied *mutatis mutandis*.

44. Other relevant domestic law and practice concerning length-of-proceedings remedies in Croatia is set out in *Mirjana Marić v. Croatia* (no. 9849/15, §§ 29-41, 30 July 2020).

C. Other relevant legislation and practice

1. Judicial Non-Contentious Procedure Act

45. Section 20(1) of the 1934 Judicial Non-Contentious Procedure Act (*Zakon o sudskom vanparničnom postupku*, Official Gazette of the Kingdom of Yugoslavia no. 175/34), which was applicable in Croatia from 4 February 1935 until 9 June 2023, provided that in non-contentious proceedings the costs were borne by the party in whose interests the proceedings were conducted, unless otherwise provided. Section 21 provided that in non-contentious proceedings the provisions of the Civil Procedure Act applied *mutatis mutandis*, unless otherwise provided by the Judicial Non-Contentious Procedure Act.

2. Civil Procedure Act

46. The relevant provisions of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/77 with subsequent amendments, and Official Gazette of the Republic of Croatia no. 53/91 with subsequent amendments, as in force at the material time, read as follows:

COSTS OF PROCEEDINGS

Section 151(1) and (2)

“(1) The costs of proceedings include disbursements made during or in relation to the proceedings.

(2) The costs of proceedings also include a fee for the services of an advocate and other persons entitled by law to receive a fee.”

Section 154(1)

“(1) A party who loses a case completely shall reimburse the costs of the opposing party ...”

Section 155

“(1) In deciding which costs shall be reimbursed to a party, the court shall take into account only those costs which were necessary for the conduct of the proceedings. When deciding which costs were necessary and their level, the court shall carefully consider all the circumstances ...

(2) If there is a prescribed scale of advocates’ fees or other costs, these costs shall be awarded in accordance with that scale.”

3. The Scale of Advocates’ Fees

47. 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, as in force at the material time, provided that the costs of legal representation consisted of the services rendered by advocates, increased by VAT (at the time 25%) and the necessary expenses, which clients were obliged to pay. It also provided that:

(i) submissions instituting non-contentious proceedings were worth 50 points (section 16(1)) in cases where the value of the claim was indeterminable, and appeals in such proceedings were worth 25% more (section 18(1));

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

(iii) the value of one point was HRK 10 (section 50).

II. COUNCIL OF EUROPE INSTRUMENTS

48. 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

49. The applicant complained that the Constitutional Court's refusal to award her the costs of her legal representation before that court and the inability to recoup the costs of legal representation which she had incurred in pursuing the length-of-proceedings remedies under the 2013 Courts Act, had had a deterrent effect on the exercise of her right of access to a court. She 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 within a reasonable time by [a] ... tribunal ..."

A. Scope of this complaint

50. It is to be noted that before the Court the applicant did not complain about the excessive length of the enforcement proceedings of which she had complained before the domestic courts. The Court therefore cannot examine any issue related to the length of those proceedings (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 109, 123 and 126, 20 March 2018).

51. The Court further notes that in her application to the Court, the applicant did not mention that she had lodged her second constitutional complaint (see paragraph 33 above). What is more, once the Government had brought that fact to the Court's attention, the applicant expressly stated in her observations of 16 October 2023 that she had decided not to submit an application to the Court concerning the second decision of the Constitutional Court (see paragraph 33 above).

52. The applicant did mention in her application that she had used the complementary (combined compensatory and acceleratory) remedy under the 2013 Courts Act (see paragraph 28 above). However, once the Zagreb County Court had decided on that remedy on 13 April 2022 (see paragraph 30 above), the applicant did not complain in her observations about that court's refusal to award her the costs of that remedy.

53. That being so, and given that it can base its decision only on the facts complained of (see, *Fu Quan, s.r.o. v. the Czech Republic* [GC], no. 24827/14, § 145, 1 June 2023; *Grosam v. the Czech Republic* [GC], no. 19750/13, § 90, 1 June 2023; and *Radomilja and Others*, cited above, §§ 120-121 and 124), the Court finds that the applicant's complaint (see paragraph 49 above) concerns only the Constitutional Court's refusal to award her the costs of her first constitutional complaint (see paragraph 26 above) and the inability to recoup the costs of legal representation which she had incurred in pursuing the purely acceleratory remedy under the 2013 Courts Act (see paragraphs 22-25 above).

B. Admissibility

1. Submissions by the parties

(a) The Government

54. In their observations of 31 August 2023 on admissibility and the merits, the Government argued that Article 6 was not applicable to the proceedings following the use of remedies for protection of the right to a hearing within a reasonable time (see paragraphs 14-32 above). They admitted that the right to a hearing within a reasonable time was a "civil" right within the meaning of that Article but argued that the proceedings in question had not involved a "dispute" over that right.

55. In the same observations, the Government further argued that in her constitutional complaints (see paragraphs 26 and 33 above) the applicant had not complained of a breach of her right of access to a court on account of the ordinary courts' refusal to award her the costs incurred in pursuing the length-of-proceedings remedies under the 2013 Courts Act (see paragraphs 22-25 above).

56. In their comments of 14 November 2023 on the applicant's claims for just satisfaction and additional observations, the Government argued that the applicant had not asked the Constitutional Court to quash the decisions of the ordinary courts refusing to award her those costs.

(b) The applicant

57. The applicant emphasised that in her first constitutional complaint she had sought reimbursement of the costs she had incurred to date in pursuing the length-of-proceedings remedies under the 2013 Courts Act (see paragraph 26 above). Admittedly, she had not specifically complained in that constitutional complaint that her right of access to court had been breached by the ordinary courts' refusal to award her those costs, but that had been because she had believed that if the Constitutional Court had found her constitutional complaint well-founded, it would have awarded her not only the costs of that complaint, but also the costs incurred in pursuing the length-of-proceedings remedies under the 2013 Courts Act beforehand.

2. The Court's assessment

(a) Applicability

58. The Court has found in a number of cases that Article 6 § 1 of the Convention is applicable to proceedings following the use of remedies for protection of the right to a hearing within a reasonable time which have features similar to those in the present case (see *Vaney v. France*, no. 53946/00, § 53, 30 November 2004; *Simaldone v. Italy*, no. 22644/03, §§ 48-56, 31 March 2009; *Veriter v. France*, no. 31508/07, §§ 81-87, 14 October 2010; *Belperio and Ciarmoli v. Italy*, no. 7932/04, §§ 39-48, 21 December 2010; *Gagliano Giorgi v. Italy*, no. 23563/07, §§ 67-76, ECHR 2012 (extracts)). It sees no reason to hold otherwise in the present case. The Government's objection as to the inapplicability of Article 6 (see paragraph 54 above) must therefore be dismissed.

(b) Exhaustion of domestic remedies

59. The Court first reiterates that applicants are only required to exhaust domestic remedies which are available in theory and in practice at the relevant time and which are accessible, capable of providing redress in respect of their complaints and offer reasonable prospects of success (see, for example,

Sejdovic v. Italy [GC], no. 56581/00, § 46, ECHR 2006-II, and *Glavinić and Marković v. Croatia*, nos. 11388/15 and 25605/15, § 61, 30 July 2020).

60. It notes that, under the Constitutional Court Act, that court can only award costs incurred in the proceedings before it (see paragraph 36 above). Furthermore, while it may quash a decision on costs which it finds to be in breach of rights guaranteed by the Constitution or the Convention and remit the case for fresh consideration, it may do so only following an ordinary constitutional complaint lodged under section 62 of the Constitutional Court Act (see paragraph 37 above).

61. However, in the present case the applicant lodged a constitutional complaint under section 63 of the Constitutional Court Act (see paragraph 37 above), which may not be lodged against decisions but only in situations where the relevant court has failed to decide within a reasonable time.

62. It follows that the constitutional complaint under section 63 of the Constitutional Court Act, which the applicant used to complain of the excessive length of the enforcement proceedings, was not effective for her access-to-court grievances in so far as they concerned the costs of the remedies under the 2013 Courts Act, as that type of constitutional complaint was not capable of providing redress in respect of those grievances (see paragraph 59 above). Consequently, contrary to the Government's suggestion (see paragraph 55 above), in order to exhaust domestic remedies the applicant was not required to complain of a breach of her right of access to a court in her constitutional complaint.

63. As regards the Government's argument that the applicant had not asked the Constitutional Court to quash the decisions of the ordinary courts refusing to award her those costs (see paragraph 56 above), the Court notes that this would have actually required her to combine the constitutional complaint about the excessive length of proceedings she lodged under section 63 of the Constitutional Court Act with a different remedy, namely an ordinary constitutional complaint under section 62 of that Act in which she would have complained that those decisions were in breach of her right of access to a court.

64. The Court further notes in this connection that this argument was advanced for the first time in the Government's additional observations of 14 November 2023, and that they are therefore estopped from raising it. In that regard, the Court reiterates that, under Rule 55 of the Rules of Court, any plea of inadmissibility, including the reasons given for the plea, must be raised by the respondent Contracting Party, in so far as the nature of the objection and the circumstances so allow, in its written or oral observations on the admissibility of the application (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 52, 15 December 2016, and *Mooren v. Germany* [GC], no. 11364/03, § 58, 9 July 2009). It does not therefore suffice for the Government to have pleaded non-exhaustion on different grounds in their initial observations of 31 August 2023 (see paragraph 55 above, and *Mooren*,

cited above). The Government did not provide any explanation for that delay and the Court finds no exceptional circumstance capable of exempting them from their obligation to raise their non-exhaustion objection with reference to that argument in their initial observations (*ibid.*).

65. Accordingly, the Government's objection as to the non-exhaustion of domestic remedies (see paragraphs 55-56 above) must also be dismissed.

(c) Conclusion

66. 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.

C. Merits

1. Submissions by the parties

(a) The applicant

67. The applicant submitted that she had been forced to hire an advocate because, as a layperson, she could not have drafted the request for the purely acceleratory remedy under the 2013 Courts Act or the constitutional complaint herself. Drafting such request or a constitutional complaint was not simple: there was no standard form and they had to be reasoned, linking the facts of the case with the relevant provisions, for which professional legal expertise was needed. The Government's arguments to the contrary (see paragraph 74 below) were unreasonable and undermined the role of advocates.

68. In reply to the Government's argument that she had overstated some of the costs incurred (see paragraph 76 below), the applicant pointed out that the relevant domestic courts could have awarded her a reduced amount if they had considered them too high, instead of refusing to award her any. Her monthly salary was HRK 7,497.90 (EUR 995.13) and having to bear those costs had therefore imposed a significant and disproportionate burden on her.

(b) The Government

69. The Government submitted that the Court's case-law that an *ex post facto* refusal to reimburse successful applicants' own costs in disputes against the State arising from decisions of its organs in the exercise of public authority could constitute a restriction of their access to a court (see *Dragan Kovačević v. Croatia*, no. 49281/15, § 71, 12 May 2022, and the cases cited therein) was not applicable in the present case. That was because the proceedings following the use of remedies for protection of the right to a hearing within a reasonable time had not arisen from a decision of State organs, but had been instituted on the applicant's initiative and in her favour.

70. Moreover, there was nothing to suggest that the Constitutional Court's refusal to award the applicant the costs of her legal representation before it or her inability to recoup such costs incurred in pursuing the purely acceleratory remedy under the 2013 Courts Act had deterred or discouraged her from using that remedy or a constitutional complaint and thereby exercising her right of access to a court: she had used both types of remedies provided for by that Act and had twice availed herself of a constitutional complaint (see paragraphs 23, 26, 28 and 33 above).

71. For those reasons, the Government submitted that there had been no restriction of the applicant's right of access to a court. If the Court were to find otherwise, the Government submitted that the restriction had pursued a legitimate aim and had been proportionate.

72. Relying on the Court's findings in *Dragan Kovačević* (cited above, §§ 75-78), the Government argued that the rules on costs contained in the Constitutional Court Act and the Judicial Non-Contentious Procedure Act (see paragraphs 36 and 45 above) pursued a legitimate aim. Proceedings before the Constitutional Court, like those following the use of the length-of-proceedings remedies under the 2013 Courts Act, were formally one-party proceedings. Therefore, those intending to initiate such proceedings did not run the risk, normally present in civil proceedings, that, if unsuccessful, they would have to bear not only their own costs but also those of the opposing party. The absence of such a risk, together with the absence of an obligation to pay court fees in either type of proceedings could therefore result in the relevant courts becoming overburdened with a large number of unmeritorious constitutional complaints or purely acceleratory remedies, which could jeopardise the proper functioning of those courts.

73. The restriction of the applicant's right of access to a court had been proportionate because (i) representation by an advocate had been neither necessary nor justified, (ii) it had been foreseeable for the applicant that she would not be able to recoup the costs of her legal representation, (iii) the costs she had allegedly incurred had not been higher than the compensation received, and (iv) having to bear those costs had not imposed a disproportionate financial burden on her.

74. Representation by an advocate had not been necessary because proceedings for protection of the right to a hearing within a reasonable time instituted under the 2013 Courts Act or section 63 of the Constitutional Court Act were rather simple as all relevant facts were established by the relevant courts of their own motion. Such proceedings therefore did not require the assistance of an advocate. Moreover, the applicant was a highly educated person who had even submitted a supplement to her second constitutional complaint herself, setting out all the relevant facts and enclosing the relevant evidence (see paragraph 34 above). Her representation by an advocate had therefore not been justified either.

75. The foreseeability of the restrictions had been evident from the relevant provisions of the Constitutional Court Act and Judicial Non-Contentious Procedure Act (see paragraphs 36 and 45 above) and from the resulting longstanding practice of the domestic courts.

76. The applicant had overstated and therefore miscalculated the costs incurred in pursuing the purely acceleratory remedy under the 2013 Courts Act, which was why the total costs of that remedy and the constitutional complaint had not exceeded the compensation the domestic courts had awarded her for the breaches of her right to a hearing within a reasonable time and of her right to respect for family life.

77. Lastly, the Government pointed out that the applicant was not a particularly vulnerable person and that her monthly income (see paragraph 68 above) had been above average and exceeded the costs of a constitutional complaint. Therefore, bearing the costs of her legal representation had not imposed a disproportionate financial burden on her.

78. In light of the foregoing, the Government argued that there had been no violation of Article 6 of the Convention in the present case.

2. The Court's assessment

79. The relevant principles emerging from the Court's case-law concerning the right of access to a court and, in particular, access to superior courts, are summarised in *Zubac v. Croatia* ([GC], no. 40160/12, §§ 76-86, 5 April 2018). Specifically, 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 (*ibid.*, § 78).

80. Imposition of a considerable financial burden after the conclusion of proceedings, whether in the form of court fees or the costs of legal representation, may constitute a restriction of the right of access to a court guaranteed by Article 6 § 1 of the Convention (see *Dragan Kovačević*, cited above, § 70; *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; see also the recommendation cited in paragraph 48 above suggesting that lawyers' fees may constitute an obstacle to access to justice).

81. As regards the costs of length-of-proceedings remedies the Court has held in *Cocchiarella v. Italy* ([GC], no. 64886/01, ECHR 2006-V):

"92. ... the Court finds it reasonable that in this type of proceedings where the State, on account of the poor organisation of its judicial system, forces litigants – to some extent – to have recourse to a compensatory remedy, the rules regarding legal costs may be different and thus avoid placing an excessive burden on litigants where their action is justified. It might appear paradoxical that, by imposing various taxes – payable prior to the lodging of an application or after the decision – the State takes away with one hand what it has awarded with the other to repair a breach of the Convention. Nor should the costs be excessive and constitute an unreasonable restriction on the right to lodge such an application and thus an infringement of the right of access to a tribunal ..."

82. In a number of cases under Article 6 § 1 of the Convention in which the applicants had won their cases domestically, the Court found a breach of their right of access to a court either because they had not been reimbursed the costs of their legal representation at all (see *Dragan Kovačević*, cited above, §§ 67-85; *Zustović v. Croatia*, no. 27903/15, §§ 98-111, 22 April 2021; and *Černius and Rinkevičius v. Lithuania*, nos. 73579/17 and 14620/18, §§ 65-74, 18 February 2020; see also in this connection the recommendation cited in paragraph 48 above suggesting that, 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) or because they had had to pay to their opponents costs which had exceeded the amount of compensation they had been awarded (see *Klauz*, cited above, §§ 76-97, and *Čolić v. Croatia*, no. 49083/18, §§ 39-60, 18 November 2021).

83. It is true that the first group of above-mentioned cases concerned disputes against the State arising from decisions of its organs in the exercise of public authority. However, contrary to the Government's argument (see paragraph 69 above), that case-law is not rendered inapplicable by the mere fact that, in the present case, the relevant proceedings did not arise from a decision of public authorities but from their inaction, namely the domestic courts' failure to enforce a judgment in the applicant's favour. That is because the risk of any mistake made by a public authority must be borne by the State itself and errors must not be remedied at the expense of the individuals concerned (see *Zustović*, cited above, § 100, and the cases cited therein), it being understood that the poor organisation of its judicial system constitutes such an error or mistake (see paragraph 79 above).

84. In the second group of above-mentioned cases (see paragraph 82 above), in which the costs exceeded the amount of compensation awarded, the Court held that that situation had led to an absurd outcome, making the litigation pointless and rendering the applicant's right to a court merely theoretical and illusory, and that particularly weighty reasons were required to justify such an outcome (see *Čolić*, cited above, §§ 46, 50-52 and 59-60).

85. The situation in the present case is similar because, even leaving aside the costs of pursuing the purely acceleratory remedy under the 2013 Courts Act, the costs of the applicant's constitutional complaint alone exceeded the compensation she was awarded for the breaches of her right to a hearing within a reasonable time and her right to respect for family life. In particular, she was awarded a total of HRK 5,000 (EUR 663.61) in compensation for those breaches (see paragraph 27 above) whereas, in accordance with the Scale of Advocates' Fees, the costs of drafting a constitutional complaint plus VAT at the time amounted to HRK 6,125 (EUR 812.93, see paragraphs 26 and 47 above).

86. In such situations, it is not necessary to examine whether bearing the costs of her legal representation imposed a disproportionate financial burden on the applicant, having regard to her income (see the Government's

argument in paragraph 77 above). That is because, as stated above (see paragraph 84 above), if there are no particularly weighty reasons to justify it, such a situation in itself makes the restriction of access to a court disproportionate as it renders the litigation pointless and the applicant's right to a court merely theoretical and illusory (see *Čolić*, cited above, §§ 46, 50-51 and 59-60).

87. Such a situation in the present case therefore 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 27 and 36 above, and compare *Dragan Kovačević*, cited above, § 83).

88. Likewise, the Government failed to put forward any sufficiently convincing reasons to justify that situation.

89. In particular, the Court is not convinced by their argument that the costs of the applicant's legal representation were not necessary or justified (see paragraph 74 above). That argument focuses on the relative simplicity of the relevant proceedings for protection of the right to a hearing within a reasonable time but fails to take into account that the role of an advocate is not limited to the actual drafting of a constitutional complaint or a request under the 2013 Courts Act and also includes legal advice as regards the availability of those remedies and the formal (procedural) requirements for their use.

90. As regards the costs of the constitutional complaint, the Court reiterates its findings in *Bibić v. Croatia* ((dec.), no. 1620/10, § 31, 28 January 2014) and *Dragan Kovačević* (cited above, § 35) 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 at the relevant time, cited in paragraph 39 above, recommending prospective complainants to hire an advocate).

91. As regards the costs of the length-of-proceedings remedies under the 2013 Courts Act, the Court finds that they cannot be considered unnecessary either. In particular, it would have been very difficult for the applicant as a layperson to grasp, without the professional legal advice of an advocate, the legal intricacies involved in the use of those remedies, such as, for example, the need to use them before lodging a constitutional complaint (see paragraph 38 above).

92. The Court also finds force in the applicant's argument that, instead of refusing to award her any costs, the relevant domestic courts could have awarded her a reduced amount (see paragraph 68 above).

93. Therefore, while the Court agrees that, for the reasons stated by the Government (see paragraphs 74-75 above), the restriction of the applicant's

access to a court pursued a legitimate aim and was foreseeable, it was not proportionate to that aim.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

95. The applicant raised the same complaint as that examined above (see paragraphs 49-94) under Article 13 of the Convention and Article 1 of Protocol No. 1 thereto.

96. Having regard to the facts of the case, the submissions of the parties and its findings above, the Court considers that it has dealt with the main legal question raised by the case and that there is no need to examine the same complaint under those Articles (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. 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

98. The applicant claimed 2,032 euros (EUR) in respect of pecuniary damage, which corresponded to the total costs incurred in the proceedings following the use of remedies for protection of the right to a hearing within a reasonable time (see paragraphs 22-35 above). She also claimed EUR 10,000 in respect of non-pecuniary damage.

99. The Government contested these claims.

100. The Court has found that the domestic courts’ refusal to award the applicant the costs incurred in using the purely acceleratory remedy under the 2013 Courts Act and her first constitutional complaint was in breach of Article 6 § 1 of the Convention (see paragraphs 50-53 and 79-94 above). There is thus a sufficient causal link between her claim in respect of pecuniary damage and the violation found. The Court therefore awards the applicant EUR 1,016 under that head, plus any tax that may be chargeable to her.

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

B. Costs and expenses

102. The applicant also claimed EUR 865 for the costs and expenses incurred before the Court.

103. The Government contested that claim.

104. 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 (see, among many other authorities, *L.B. v. Hungary* [GC], no. 36345/16, § 149, 9 March 2023). 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 full amount claimed in respect of costs and expenses, namely EUR 865, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the lack of access to a court admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there is no need to examine the complaints under Article 13 of the Convention and Article 1 of Protocol No. 1 thereto;
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, the following amounts:
 - (i) EUR 1,016 (one thousand and sixteen euros), plus any tax that may be chargeable to the applicant, 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 865 (eight hundred and sixty-five 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* the remainder of the applicant's claim for just satisfaction.

MOSKALJ v. CROATIA JUDGMENT

Done in English, and notified in writing on 15 October 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim
Deputy Registrar

Arnfinn Bårdsen
President

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

CONCURRING OPINION OF JUDGE KOSKELO

I have voted in favour of the finding of a violation of Article 6 in this case, but not without certain misgivings. While the complaint and the arguments raised by both parties were concerned solely with the costs incurred by the applicant on account of the proceedings brought by her, I am troubled by the fact that this incidental issue of costs has overshadowed another problem relating to the underlying circumstances of the case.

At the origin of the case was a situation in which the applicant, the mother of a teenage boy at the time, found herself in conflict with her son, who no longer wanted to live with her and moved out to live with his father. The applicant reacted by instituting proceedings to have the authorities enforce the judicial decision delivered several years earlier, which had ordered that the child – who was considerably younger at that time – was to live with his mother. Having obtained an enforcement order, what ensued was a series of efforts to implement the hand-over of the teenager to his mother against his will. In the end, those efforts were unsuccessful, prompting the applicant to bring further proceedings over the length of the enforcement process.

One cannot but wonder whether this type of litigation was a judicious and justified method for attempting to resolve a delicate family situation involving a child who had already reached an age at which his will and wishes should no longer have been disregarded. Under such circumstances, pursuing the enforcement of a judicial decision delivered several years earlier does not appear to sit well with the aim of safeguarding the child's best interests.

As matters stand, we know little about the background to the case. In any event, one is left with the impression that the process was not helpful for any of the parties involved – quite the contrary. A more conciliatory approach might have yielded better results.

Given the framing of the issue as presented before the Court, this underlying problem was not on the table. Nonetheless, I did not find it appropriate to simply let it pass without any mention at all.