CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF URUKALO AND NEMET v. CROATIA

(Application no. 26886/02)

JUDGMENT

STRASBOURG

28 April 2005

FINAL

28/07/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Urukalo and Nemet v. Croatia,

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

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 31 March 2005,

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

PROCEDURE

1. The case originated in an application (no. 26886/02) 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 two Croatian nationals, Mr Stojan Urukalo and Mrs Verica Nemet ("the applicants"), on 22 May 2002.

2. The Croatian Government ("the Government") were represented by their Agent, Ms L. Lukina-Karajković.

3. On 8 January 2004 the Court declared the application partly inadmissible and decided to communicate the complaint concerning access to a court to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants (husband and wife) were born in 1933 and 1953, respectively, and live in Virovitica, Croatia.

5. During a military operation undertaken during the Homeland War by the Croatian Army, in August 1995, the applicants' house in Karin Gornji, Croatia was destroyed.

6. On 10 September 1998 the applicants instituted civil proceedings in the Obrovac Municipal Court (*Općinski sud u Obrovcu*) against the State seeking damages for their destroyed property.

7. On 6 November 1999 the Amendments to the Civil Obligations Act ("the 1999 Amendments") entered into force. The amended legislation provided that all proceedings instituted against the State for damage caused by members of the Croatian Army and police in the performance of their official duties during the Homeland War in Croatia were to be stayed.

8. On 1 December 1999 the Obrovac Municipal Court dismissed the applicants' claim. The applicants appealed.

9. On 8 March 2000 the Zadar County Court (*Županijski sud u Zadru*) returned the case file to the first-instance court with an instruction to stay the proceedings pursuant to the above legislation.

10. On 23 March 2000 the Obrovac Municipal Court stayed the proceedings.

11. On 31 July 2003 new legislation on the liability of the State for damage caused by members of the Croatian Army and police in the performance of their official duties during the Homeland War ("the 2003 Liability Act") entered into force.

12. The Government submitted that the applicants' proceedings had resumed pursuant to the above legislation and that they are currently pending before the second-instance court.

The applicants submitted that they had received no decision to resume the proceedings.

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. Section 184 (a) of the Amendments to the Civil Obligations Act (*Zakon o dopunama Zakona o obveznim odnosima*, Official Gazette no. 112/1999 of 29 October 1999) ("the 1999 Amendments") provides that all proceedings instituted against the State for damage caused by members of the Croatian Army and police in the performance of their official duties during the Homeland War in Croatia from 7 August 1990 to 30 June 1996 are to be stayed. The 1999 Amendments also imposed an obligation on the Government to submit special legislation to Parliament regulating liability for such damage within six months of the Act entering into force.

14. The Act on the liability of the Republic of Croatia for damage caused by members of the Croatian army and police when acting in their official capacity during the homeland war (*Zakon o odgovornosti Republike Hrvatske za štetu uzrokovanu od pripadnika hrvatskih oružanih i redarstvenih snaga tijekom Domovinskog rata*, Official Gazette no. 117/2003 of 23 July 2003) ("the 2003 Liability Act") regulates the conditions under which the State is liable to pay compensation for damage caused by members of the army and the police during the Homeland War. It

also provides that all proceedings stayed pursuant to the 1999 Amendments are to be resumed.

15. The relevant part of section 63 of the Constitutional Act on the Constitutional Court (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 49/2002 of 3 May 2002) ("the Constitutional Court Act") reads as follows:

> "(1) The Constitutional Court shall examine a constitutional complaint whether or not all legal remedies have been exhausted if the court with jurisdiction fails to decide a claim concerning the applicant's rights and obligations or a criminal charge against him or her within a reasonable time ...
>
> (2) If a constitutional complaint ... under paragraph 1 of this section is upheld, the Constitutional Court shall set a time-limit within which the court with jurisdiction must decide the case on the merits...
>
> (3) In a decision issued under paragraph 2 of this section, the Constitutional Court shall assess appropriate compensation for the applicant for the violation of his or her constitutional rights ... The compensation shall be paid out of the State budget within three months from the date a request for payment is lodged."

16. Article 29 § 1 of the Constitution (*Ustav Republike Hrvatske*, Official Gazette no. 41/2001 of 7 May 2001) reads as follows:

> " In the determination of his rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law."

17. On 24 March 2004 the Constitutional Court gave decision no. U-III-829/2004 in the case of Mr N., who had filed a constitutional complaint under section 63 of the 2002 Constitutional Court Act alleging a breach of Article 29 § 1 of the Constitution. He complained about the length of proceedings and the lack of access to a court because his action in the domestic courts had been stayed by statute for an extended period. In its decision, the Constitutional Court held that there had been a violation of the constitutional rights to trial within a reasonable time and to access to a court. It ordered the court concerned to give a decision in Mr N.'s case within one year and awarded him compensation.

THE LAW

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

18. The applicants complained that the entry into force of the 1996 Amendment violated their right of access to a court as provided in Article 6 § 1 of the Convention, which in its relevant part reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing ... by [a] ... tribunal..."

19. The Government contested that argument.

A. Admissibility

1. Compatibility ratione temporis

20. The Government maintained that the domestic authorities were responsible only for events which occurred after 5 November 1997, the date on which the Convention entered into force in respect of Croatia.

21. The applicants did not comment on that issue.

22. The Court notes that the applicants' proceedings were *de facto* stayed on 6 November 1999, when the 1999 Amendments entered into force. Pursuant to the Amendments, the Obrovac Municipal Court was not able to continue the proceedings. It formally decided to stay the proceedings on 23 March 2000. The applicants' proceedings resumed on 31 July 2003, pursuant to the 2003 Liability Act. Accordingly, the Court has competence *ratione temporis* to examine the application.

2. The applicants' victim status

23. The Government submitted that the applicants could not claim to be victims within the meaning of Article 34 of the Convention since on 31 July 2003 the Liability Act, which provided that the proceedings stayed under the 1999 Amendments were to be resumed, entered into force.

24. The applicants did not comment on that issue.

25. The Court considers that an applicant's status as a victim may depend on compensation being awarded at domestic level on the basis of the facts about which he or she complains before the Court (see *Andersen v. Denmark*, no. 12860/87, and *Frederiksen and Others v. Denmark*, no. 12719/87, Commission decisions of 3 May 1988; *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001; and *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003) and on whether the domestic authorities have acknowledged, either expressly or in substance, the breach of the Convention. Only when those two conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 32, §§ 69 *et seq*., and *Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X).

26. The Court observes that the fact that the applicants were deprived of access to a court in the period between November 1999 and July 2003 was not disputed by the parties. However, the alleged violation was not

recognised by any decision of domestic courts, nor were the applicants awarded any compensation for it.

27. In such circumstances, the Court finds that the applicants may claim to be victims of a violation of their right of access to a court as guaranteed by Article 6 § 1 of the Convention. It follows that the Government's objection must be dismissed.

3. Exhaustion of domestic remedies

28. The Government invited the Court to reject the application on the ground that the applicants had failed to exhaust domestic remedies as required under Article 35 § 1 of the Convention.

29. They produced a copy of the decision of the Constitutional Court of 24 March 2004 where it was held that there had been a violation of the right of access to a court in a similar case (see paragraph 17 above). In the Government's opinion, the change in the Constitutional Court's case-law created a new domestic remedy for alleged violations of the right of access to a court.

30. The Government pointed out that the proceedings in the applicants' case were still pending and that consequently they could lodge a constitutional complaint in line with the new case-law. Since the latter permitted the Constitutional Court not only to award compensation but also to set a time-limit for the competent court to decide the case, the Government contended that it was an effective remedy and that the Court should make an exception to the general rule of exhaustion of domestic remedies (according to which an applicant is required to exhaust only the remedies available at the moment of the introduction of an application with the Court).

31. The applicants maintained that their application had been filed with the Court prior to the change in the Constitutional Court's case-law.

32. The Court reiterates that under Article 35 § 1 of the Convention it may only deal with a matter after all domestic remedies have been exhausted. The purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-IV). The obligation to exhaust domestic remedies requires that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. Remedies available to a litigant at domestic level are considered effective if they prevent the alleged violation or its continuation, or provide adequate redress for any violation that has already occurred (see *Mifsud v. France* (dec.) [GC], no. 57220/00, § 17, ECHR 2002-VIII).

33. Having regard to the developments in the domestic case-law to which the Government referred, the Court observes that, after 24 March

2004, the Constitutional Court may, in cases similar to the present one (see *Multiplex v. Croatia*, no. 58112/00, 10 July 2003), award compensation for the violation of the right of access to a court already sustained and set a time-limit for the competent court to decide the complainant's case. The Court is therefore satisfied that, for the purposes of these cases, a complaint to the Constitutional Court can be considered an effective remedy, which needs to be exhausted before the applicants address the Court with their complaints concerning lack of access to a court.

34. The Court reiterates, however, that the issue whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). This rule is subject to exceptions which may be justified by the specific circumstances of each case (see *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII).

35. In the instant case, the applicants did not file a constitutional complaint; instead, they lodged an application with the Court. It was not until two years later that the Constitutional Court held for the first time that there had been a violation of the right of access to a court in a similar case (see paragraph 17 above). Accordingly, the applicants cannot be expected to have filed such a complaint, which at that time did not offer them any reasonable prospect of success.

36. Therefore, as to the Government's proposal to depart from the general rule of non-exhaustion, the Court reaches the conclusion that – unlike in the *Nogolica* case and having regard to the subsidiary character of the Convention machinery – there are no special circumstances which would justify making an exception to that rule with regard to applications lodged with it before 24 March 2004.

37. It follows that the present application cannot be rejected for non-exhaustion of domestic remedies. Accordingly, the Government's objection must be dismissed.

4. Conclusion

38. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

39. The Government submitted that the applicants had had access to a court in that they had instituted civil proceedings for damages in the Obrovac Municipal Court. The fact that the proceedings were stayed pursuant to the 1999 Amendments did not put at risk the very essence of the

right of access to a court because the stay was only temporary. By the enactment of the 2003 Liability Act, the applicants were again granted access to a court.

40. The applicants contested those views. They maintained that the period in which the proceedings were stayed had been excessive.

41. The Court reiterates that Article 6 § 1 of the Convention embodies the "right to a court" of which the right of access, namely the right to institute proceedings before a court in civil matters, constitutes one aspect (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36).

42. However, this right is not absolute, but may be subject to limitations. These are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation 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 *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports of Judgments and Decisions* 1996-IV, § 50).

43. The Court further stresses that in the *Multiplex* case it found a violation of the applicants' right of access to a court, under Article 6 § 1 of the Convention, because, as a result of legislative intervention, the applicants' had been denied the possibility of having their claim determined by a court for a long period (see *Multiplex v. Croatia*, cited above).

44. In the instant case, the proceedings were stayed by virtue of the Obrovac Municipal Court's decision of 23 March 2000. However, they had been *de facto* stayed from 6 November 1999, the day on which the 1999 Amendments entered into force, until at least 31 July 2003, when the 2003 Liability Act entered into force, i.e. for a period of about three years and nine months.

45. The Court considers, in accordance with its case-law (see *Multiplex v. Croatia*, cited above; and *Aćimović v. Croatia*, no. 61237/00, ECHR 2003-XI), that the fact that the applicants were prevented by legislation for a prolonged period from having their civil claim determined by the domestic courts constitutes a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicants claimed 5,000 euros (EUR) each in respect of non-pecuniary damage.

48. The Government deemed the amount claimed by the applicants excessive.

49. The Court finds that the applicants sustained moral damage, which cannot be compensated by the mere finding of a violation of the Convention. Making its assessment on an equitable basis and having regard to the circumstances of the case and its constant case-law in this type of cases (see *Multiplex v. Croatia*, cited above, § 63), the Court awards the applicants jointly EUR 8,000 as compensation for non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

50. The applicants claimed compensation for costs and expenses incurred before the Court but invited the Court to assess its amount.

51. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, on the basis of the information in its possession, the above-mentioned criteria and its constant case-law in this type of cases (see *Multiplex v. Croatia*, cited above, § 65), the Court considers it reasonable to award the sum of EUR 500 for the proceedings before the Court, plus any tax that may be chargeable.

C. Default interest

52. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts which are to be converted into the national currency of the respondent State at a rate applicable at the date of settlement:

(i) EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage;

(ii) EUR 500 (five hundred euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 April 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President