



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

FIRST SECTION

CASE OF MIHAJLOVIĆ v. CROATIA

(Application no. 21752/02)

JUDGMENT

STRASBOURG

7 July 2005

FINAL

07/10/2005

*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 Mihajlović v. Croatia,

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

Mr C.L. ROZAKIS, *President*,

Mr P. LORENZEN,

Ms N. VAJIĆ,

Mrs S. BOTOUCHAROVA,

Mr A. KOVLER,

Mrs E. STEINER,

Mr K. HAJIYEV, *judges*,

and Mr S. QUESADA, *Deputy Section Registrar*,

Having deliberated in private on 16 June 2005,

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

PROCEDURE

1. The case originated in an application (no. 21752/02) 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, Ms Nevenka Mihajlović and Mr Milorad Mihajlović (“the applicants”), on 19 April 2002.

2. The applicants were represented by Ms T. Burjačenko Grubiša, a lawyer practising in Zagreb. The Croatian Government (“the Government”) were represented by their Agents, Ms L. Lukina-Karajković and subsequently Ms Š. Stažnik.

3. On 18 September 2003 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the right of access to a court and the existence of an effective remedy 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.

4. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

5. On 8 June 2004 the Government filed additional observations on the admissibility of the application. Following a decision of the Chamber of 8 July 2004, these observations were admitted to the file and sent to the applicants for comments (Rule 38 § 1). The applicants did not reply.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1932 and 1958, respectively, and live in Hrgovljani, Croatia.

7. On 12 February 1992 the applicants' house in Hrgovljani was blown up by unknown perpetrators.

8. On 9 February 1995 the applicants instituted civil proceedings in the Zagreb Municipal Court (*Općinski sud u Zagrebu*), seeking damages for their destroyed property from the State.

9. On 17 January 1996 Parliament introduced an amendment to the Civil Obligations Act ("the 1996 Amendment") which provided that all proceedings concerning actions for damages resulting from terrorist acts were to be stayed pending the enactment of new legislation. The new legislation was to be enacted within six months.

10. On 5 February 1996 the Zagreb Municipal Court stayed the proceedings pursuant to the above legislation.

11. On 14 July 2003 Parliament introduced the Act on Liability for Damage Resulting from Terrorist Acts and Public Demonstrations ("the 2003 Liability Act").

12. On 23 September 2003 the Zagreb Municipal Court resumed the proceedings.

13. On 5 May 2004 the court dismissed the applicants' claim finding that it no longer had jurisdiction in the matter.

14. On 18 June 2004 the applicants appealed against the above decision. It appears that the proceedings are still pending before the second instance court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. The relevant part of the Civil Obligations Act (*Zakon o obveznim odnosima* – Official Gazette, nos. 53/91, 73/91, 3/94, 7/96 and 112/99) provided as follows:

Section 180(1)

"Liability for loss caused by death or bodily injury or by damage or destruction of another's property, when it results from acts of violence or terror or from public demonstrations or manifestations, lies with the ... authority whose officers were under a duty, according to the laws in force, to prevent such loss."

16. The relevant part of the Act Amending the Civil Obligations Act (*Zakon o izmjeni Zakona o obveznim odnosima* – Official Gazette no. 7/1996; “the 1996 Amendment”) reads as follows:

Section 1

“Section 180 of the Civil Obligations Act (the Official Gazette nos. 53/91, 73/91 and 3/94) shall be repealed.”

Section 2

“Proceedings for damages instituted under section 180 of the Civil Obligations Act shall be stayed.

The proceedings referred to in sub-section 1 of this section shall be resumed after the enactment of special legislation governing liability for damage resulting from terrorist acts.”

17. 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; “the Constitutional Court Act”) reads as follows:

“(1) The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted in cases when a competent court has not decided within a reasonable time a claim concerning the applicant's rights and obligations or a criminal charge against him ...

(2) If the constitutional complaint ... under paragraph 1 of this Section is accepted, the Constitutional Court shall determine a time-limit within which a competent court shall decide the case on the merits...

(3) In a decision under paragraph 2 of this Article, the Constitutional Court shall fix appropriate compensation for the applicant in respect of the violation found concerning his constitutional rights ... The compensation shall be paid from the State budget within a term of three months from the date when the party lodged a request for its payment.”

18. Article 29 § 1 of the Constitution (*Ustav Republike Hrvatske*, Official Gazette no. 41/2001) 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.”

19. The Act on Liability for Damage Resulting from Terrorist Acts and Public Demonstrations (*Zakon o odgovornosti za štetu nastalu uslijed terorističkih akata i javnih demonstracija* – Official Gazette no. 117/2003; “the 2003 Liability Act”) provides that all compensation for damage to property resulting from terrorist acts is to be sought under the

Reconstruction Act. Section 10 provides that all proceedings stayed pursuant to the 1996 Amendment are to be resumed.

20. The Reconstruction Act (*Zakon o obnovi* – Official Gazette nos. 24/96, 54/96, 87/96 and 57/00) provides that the State shall grant reconstruction assistance to the owners of property damaged during the war. Any requests in this respect are to be filed with the competent administrative authority.

21. On 24 March 2004 the Constitutional Court gave a decision no. U-III-829/2004 in the case of Mr N., who had filed a constitutional complaint under Article 63 of the 2002 Constitutional Court Act, in connection with Article 29 § 1 of the Constitution. He complained about the length of the proceedings and lack of access to a court because his action had been stayed, due to legislative action, before the domestic courts over a long period of time. In this decision, the Constitutional Court established that there had been a violation of the constitutional rights to a trial within a reasonable time and to access to court, ordered the domestic court to render 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

22. The applicants complained that Parliament's enactment of the 1996 Amendment violated their right of access to a court as provided in Article 6 § 1 of the Convention, the relevant part of which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a... hearing within a reasonable time ... by [a] ... tribunal...”

A. Admissibility

1. *Compatibility* *ratione temporis*

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

24. The applicants claimed that they had no access to court in the moment when the Convention entered into force in respect of Croatia and that this situation continued until the enactment of the new legislation.

25. The Court notes that the applicants' proceedings were *de facto* stayed on 3 February 1996, when the 1996 Amendment entered into force.

Pursuant to the Amendment, the Zagreb Municipal Court was not able to continue the proceedings. It formally decided to stay the proceedings on 5 February 1996, and they resumed only on 23 September 2003, pursuant to the 2003 Liability Act. It follows that the situation of which the applicants complained continued after the ratification of the Convention by Croatia on 5 November 1997. Accordingly, the Court has competence *ratione temporis* to examine the application in so far as it concerns the stay of the applicants' proceedings after 5 November 1997. It follows that the Government's objection in this respect must be dismissed.

2. *The applicants' victim status*

26. The Government further claimed that the applicants could not claim to be victims within the meaning of Article 34 of the Convention since on 14 July 2003 Parliament enacted the 2003 Act which provided that the proceedings stayed under the 1996 Amendment were to be resumed.

27. The applicants disagreed with the Government. They maintained that the enactment of the 2003 Liability Act did not remedy the fact that they had no access to a court for a prolonged period of time.

28. 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).

29. In the present case, the applicants were deprived of access to a court in the period between February 1996 and September 2003. This was not recognised by any decision of domestic courts, nor were the applicants awarded any compensation for the alleged violation.

30. In such circumstances, the applicants may claim to be a victim of a violation of the rights guaranteed by the Convention.

31. Accordingly, the Government's objection must be dismissed.

3. *Exhaustion of domestic remedies*

32. The Government additionally invited the Court to reject the application because the applicants had failed to exhaust domestic remedies as required under Article 35 § 1 of the Convention.

33. 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. In the Government's opinion, the change in the case-law of the Constitutional Court created a new domestic remedy for alleged violations of the right of access to court. Moreover, the Government contended that the new case-law of the Constitutional Court could be regarded as a reason for the Court to make an exception from the general rule of exhaustion of domestic remedies.

34. The Court recalls that, in light of the new case-law referred to by the Government, a complaint to the Constitutional Court was to be regarded as an effective domestic remedy for issues of access to court, which needs to be exhausted before addressing the Court in all applications lodged subsequent to the first decision establishing such new practice (see *Lulić and Becker v. Croatia*, no. 22857/02, § 40, 24 March 2005). However, the Court also ruled that there existed no special circumstances which would justify the departure from the general non-exhaustion rule in respect of applications introduced prior to the occurrence of the new case-law (see *Lulić and Becker v. Croatia*, cited above, § 43). The Court sees no reason to depart from this conclusion.

35. In the present case the application with the Court was lodged on 19 April 2002, whereas the new domestic remedy became available only on 24 March 2004.

36. Accordingly, the Government's objection must be dismissed.

4. Conclusion

37. The Court notes that this complaint 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

38. The Government submitted that the applicants had had access to a court in that they had instituted civil proceedings for damages in the Zgareb Municipal Court. The fact that the proceedings were stayed pursuant to the 1996 Amendment 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.

39. The applicants contested those views. They maintained that, in the period in which the proceedings were stayed, they had not had an effective access to a court and that this period had been excessive.

40. 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).

41. 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).

42. The Court further stresses that in the *Kutić* 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 *Kutić v. Croatia*, no. 48778/99, § 33, ECHR 2002-II).

43. In the instant case, the applicants' proceedings were *de facto* stayed since 3 February 1996, when the 1996 Amendments entered into force. The proceedings resumed by the court's decision on 23 September 2003, after the enactment of the 2003 Liability Act. The applicants were therefore prevented from having their claim decided by the courts for seven and a half years, of which more than five years occurred after the ratification of the Convention by Croatia on 5 November 1997.

44. The Court considers, in accordance with its case-law (see *Kutić v. Croatia*, cited above, § 33 and *Kastelic v. Croatia*, no. 60533/00, § 32, 10 July 2003) that the long period for which the applicants were prevented from having their civil claim determined by domestic courts as a consequence of a legislative measure constitutes a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

45. The applicants also complained that the same legislation violated their right to an effective remedy guaranteed by Article 13 of the Convention which reads as follows:

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

46. The Government submitted that the complaint under Article 13 did not need to be examined separately as it was absorbed by the complaint under Article 6 § 1.

47. The applicants did not respond to that particular submission of the Government.

48. The Court notes that this complaint is linked to the one examined above and considers that it must therefore be declared likewise admissible.

49. Having regard to the finding relating to Article 6 § 1 (see paragraph 44 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 13 since its requirements are less strict than, and are here absorbed, by those of Article 6 § 1 (see, among other authorities, *Osu v. Italy*, no. 36534/97, § 43, 11 July 2002).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicants claimed 448,463.50 Croatian kunas (HRK) (approximately 60,600 euros (EUR)) in respect of pecuniary and HRK 150,000 (approximately EUR 20,270) in respect of non-pecuniary damage.

52. The Government considered the claimed amounts unfounded and, in any case, excessive.

53. The Court recalls that the violation found relates solely to the applicants' access to court and not to the destruction of their property. Consequently, no causal link has been established between the violation found and their claim for pecuniary damage. In particular, it is not for the Court to speculate what the outcome of the proceedings would be if they were in conformity with the requirements of Article 6 § 1 of the Convention (see, *inter alia*, *Göçer v. the Netherlands*, no. 51392/99, § 37, 3 October 2002). No award of pecuniary damage is therefore made.

54. On the other hand, the Court notes the long period for which the applicants were prevented from having their civil claims determined and considers that some feelings of frustration and anxiety must have arisen which justify an award of non-pecuniary damage. Making its assessment on an equitable basis and having regard to the circumstances of the case, the

Court awards the applicants jointly EUR 7,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

55. The applicants also claimed EUR 2,500 for the costs and expenses incurred before the Court.

56. The Government considered the claimed amount unfounded.

57. According to the Court's case-law, an applicant is entitled to reimbursement of 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, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 for the proceedings before the Court.

C. Default interest

58. 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* that there is no need to examine the complaint under Article 13 of the Convention;
4. *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 should be converted into Croatian kunas at the rate applicable at the date of settlement:
 - (i) EUR 7,000 (seven thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 1,500 (one thousand five hundred euros) in respect of costs and expenses; and
 - (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 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 7 July 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President