CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF NOGOLICA v. CROATIA (No. 2)

(Application no. 29052/03)

JUDGMENT

STRASBOURG

17 November 2005

FINAL

17/02/2006

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 Nogolica v. Croatia (No. 2),

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mr P. LORENZEN,
Ms N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr K. HAJIYEV,
Mr A. KOVLER, *judges*,
and Mr S. QUESADA, *Deputy Section Registrar*,

Having deliberated in private on 25 October 2005,

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

PROCEDURE

1. The case originated in an application (no. 29052/03) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Zvonko Nogolica ("the applicant"), on 1 August 2003.

2. The applicant was represented by Mrs M. Marić, a lawyer practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. On 19 October 2004 the Court decided to communicate the application. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1962 and lives in Zagreb.

5. On 5 October 1995 the applicant filed a civil action in damages with the Zagreb Municipal Court (*Općinski sud u Zagrebu*) against the weekly magazine G. ("the defendant"), claiming that it had published a libellous article about him.

6. The court scheduled the first hearing for 1 April 1996. That hearing, as well as the one scheduled for 11 March 1997, were adjourned at the applicant's request.

7. At the hearing on 17 April 1998 the defendant submitted its reply to the applicant's claim. On 13 April 1999 the court heard the applicant.

8. The hearings scheduled for 27 September 1999 and 26 November 1999 were adjourned because the witnesses summoned did not appear.

9. On 28 February 2000 the court heard one witness and concluded the main hearing. On the same day, it gave judgment dismissing the applicant's claim. The judgment was served on the applicant four months later.

10. On 6 June 2000 the applicant appealed against the first-instance judgment.

11. On 28 February 2001 the case-file was transferred to the Zagreb County Court (*Županijski sud u Zagrebu*) as the second-instance court. On 14 May 2002 that court returned the case-file to the Municipal Court because it lacked the power of attorney. Having obtained the missing document, the case-file was returned to the County Court on 27 September 2002. Subsequently, on 25 March 2003 the County Court quashed the first-instance judgment and remitted the case.

12. In the resumed proceedings, on 12 February 2004 the Zagreb Municipal Court held a hearing and decided to obtain additional witness statements. The hearings scheduled for 16 June and 23 November 2004 were adjourned because of improper summoning of the witnesses. The next hearing was scheduled for 14 April 2005. The proceedings are still pending before the first-instance court.

13. Meanwhile, on 10 December 2002 the applicant filed a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), complaining about the length of the proceedings. On 13 June 2003 the Constitutional Court declared the applicant's complaint inadmissible since the County Court had already decided on the case.

II. RELEVANT DOMESTIC LAW

14. 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."

THE LAW

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

15. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, provided in Article 6 § 1 of the Convention, 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..."

16. The Court notes that the proceedings started on 5 October 1995, when the applicant lodged his civil action, and are still pending. By this date, they have thus lasted more than ten years.

17. The period to be taken into consideration began on 6 November 1997, after the Convention had entered into force in respect of Croatia. It follows that a period of approximately eight years falls within the Court's competence *ratione temporis*.

18. However, in order to determine the reasonableness of the length of time in question, regard must be had to the state of the case on 5 November 1997 (see, among other authorities, *Styranowski v. Poland*, judgment of 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3376, § 46).

A. Admissibility

19. The Government invited the Court to reject the applicant's complaint for non-exhaustion of domestic remedies. It maintained that the applicant could have filed another constitutional complaint, after the Constitutional Court had dismissed his first one. Stressing that the Constitutional Court changed its practice in this respect, so as to comply with the Court's case-law, the Government claimed that a complaint under section 63 of the Constitutional Court Act would have been an effective remedy for the applicant's length complaint.

20. Furthermore, the Government maintained that, in view of the change in the Constitutional Court's case-law, the Court should make an exception from the general rule of non-exhaustion of domestic remedies and declare

this complaint inadmissible even though that change occurred only after the lodging of the application with the Court.

21. The applicant disagreed with the Government and contested the effectiveness of a constitutional complaint with respect to his length complaint.

22. 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.

23. The Court further reiterates, 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).

24. Turning to the present case, the Court observes that, by lodging a constitutional complaint under section 63 of the Constitutional Court Act, the applicant made normal use of the remedy which was declared to be an effective one in respect of his length complaint (see *Slaviček v. Croatia* (dec.), no. 20862/02, ECHR 2002-VII). He therefore offered the domestic bodies the opportunity of preventing or putting right the violation alleged. However, it is understandable that the applicant, seeing that his constitutional complaint had failed, did not lodge a second one. For the Court, this would overstretch the duties incumbent on an applicant pursuant to Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Unión Alimentaria Sanders S.A. v. Spain*, judgment of 7 July 1989, Series A no. 157, p. 14, § 35; *Ullrich v. Austria*, no. 66956/01, § 29, 21 October 2004).

25. As regards the Government's request to depart from the general rule of exhaustion and to declare the applicant's complaint inadmissible even though the alleged change in the case-law of the Constitutional Court occurred only after the lodging of his application, the Court points out that, unlike in the *Nogolica* case, the Government have not shown any specific circumstances which would justify such a departure (see, *mutatis mutandis*, *Pikić v. Croatia*, no. 16552/02, § 32, 18 January 2005).

In these circumstances, the Government's objection must be dismissed.

26. The Court further notes that the complaint under Article 6 of the Convention is not manifestly ill-founded within the meaning of

Article 35 § 3 of the Convention. It also notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

27. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

28. As to the complexity of the case, the Government claimed that the case was complex, due to the nature of the proceedings concerning defamation.

The Court is not persuaded by this argument.

29. As regards the conduct of the applicant, the Government submitted that he contributed to the length of the proceedings in that he requested adjournment of the hearings scheduled for 1 April 1996 and 11 March 1997. Moreover, the second-instance proceedings were prolonged by the failure of the applicant to submit a power of attorney. The applicant disagreed with the Government claiming that the power of attorney had been included in the case-file from the beginning of the proceedings and that it must have been misplaced by the courts.

The Court does not consider the two adjourned hearings relevant, since those facts occurred prior to the period which the Court is competent to examine *ratione temporis*. Moreover, it does not attach particular importance to the second argument raised by the Government, as the incident appears to have prolonged the proceedings only for a few months (form 14 May until 27 September 2002).

30. With regard to the conduct of the domestic authorities, the Government argued that the courts acted with due diligence in examining the applicant's case. The applicant disagreed.

The Court notes that the proceedings have been pending for eight years before two court instances, during which time the courts gave no final decision in the case. In addition, there appear to have existed several periods of inactivity, which are solely attributable to the authorities and which have not been explained by the Government (e.g. it took eight months to transfer the case-file from the Municipal Court to the County Court, further fourteen months for the County Court to establish that the power of attorney was missing from the file, and finally, following a remittal of the case, it took the Municipal Court almost a year to schedule a new hearing in the case).

31. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case. Having examined all the material submitted to it, the Court considers that

the Government have not put forward any fact or argument capable of persuading it that the present case was examined with due diligence. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

32. The applicant further complained that the constitutional complaint under section 63 of the Constitutional Court Act had not been an effective remedy in respect of his length complaint. He relied on 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."

33. The Government contested that argument, claiming that the Constitutional Court had meanwhile changed its practice in cases similar to the present one.

A. Admissibility

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

B. Merits

35. The Court recalls that in the *Debelić* case it has already found a violation of Article 13 in a case where the Constitutional Court declared a complaint inadmissible because the competent courts had meanwhile given a decision, since that court failed to deal with the substance of the applicant's length complaint (see *Debelić v. Croatia*, no. 2448/03, § 46, 26 May 2005). The Cout sees no reason to depart from such a conclusion.

There has accordingly been a violation of Article 13 of the Convention in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

38. The Government contested the claim.

39. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards award him EUR 4,200 under that head, plus any tax that may be chargeable on this amount.

B. Costs and expenses

40. The applicant also claimed 16,506.60 Croatian kunas (HRK) (approximately EUR 2,230) for the costs and expenses incurred before the Constitutional Court and before the Court.

41. The Government contested these claims.

42. 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, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,200 under all heads, plus any tax that may be chargeable on that amount.

C. Default interest

43. 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 Articles 6 § 1 and 13 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amount which should be converted into Croatian kunas at the rate applicable at the date of settlement:

(i) EUR 4,200 (four thousand two hundred euros) in respect of non-pecuniary damage;

(ii) EUR 1,200 (one thousand two 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;

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

Done in English, and notified in writing on 17 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President