



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

FOURTH SECTION

CASE OF KARANOVIĆ v. BOSNIA AND HERZEGOVINA

(Application no. 39462/03)

JUDGMENT

STRASBOURG

20 November 2007

FINAL

20/02/2008

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 Karanović v. Bosnia and Herzegovina,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr G. BONELLO,

Mr K. TRAJA,

Mr L. GARLICKI,

Ms L. MIJOVIĆ,

Mrs P. HIRVELÄ, *judges*,

and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 23 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 39462/03) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a citizen of Bosnia and Herzegovina, Mr Duško Karanović (“the applicant”), on 24 November 2003.

2. The applicant was represented by Mr Z.H. Hadžimuratović and Ms F.M. Hadžimuratović, lawyers practising in Sarajevo. The Government of Bosnia and Herzegovina (“the Government”) were represented by Ms M. Mijić, Agent, and by Ms Z. Ibrahimović, Deputy Agent.

3. The applicant complained about the failure to enforce a final and enforceable decision in his favour.

4. On 1 September 2006 the President of the Fourth Section of the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1928 and lives in Sarajevo.

6. In 1987 he was granted an old-age pension from the pension fund of the former Socialist Republic of Bosnia and Herzegovina.

7. In 1992 the applicant left his home in Sarajevo, in what is today the Federation of Bosnia and Herzegovina, and moved to what is today the Republika Srpska. While he was internally displaced, he received his pension from the Republika Srpska.

8. Upon his return to Sarajevo in 2000, the applicant unsuccessfully sought to receive his pension from the Federation of Bosnia and Herzegovina.

9. On 28 February 2002 he complained to the Human Rights Chamber.

10. On 6 January 2003 the Human Rights Chamber joined the applicant's case (no. CH/02/9364) and those of Mr Kličković and Ms Pašalić (nos. CH/02/8923 and CH/02/8924) and adopted a single decision. It was read out at a public hearing on 10 January 2003. Having been taken by the full Chamber, the decision became final immediately.

The Human Rights Chamber held that the applicant (together with Mr Kličković and Ms Pašalić) was discriminated against in his enjoyment of the right to social security as guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights. The reasons were set out in the decision which reads, in the relevant part, as follows:

“8. In the former Socialist Federal Republic of Yugoslavia (hereinafter “SFRY”), civilian pensions were administered by the six Socialist Republics under their own respective laws and institutions. In addition, the state-level Law on Basic Rights of Pension and Disability Insurance (OG SFRY no. 23/82, 77/82, 75/85, 8/87, 65/87, 87/89, 54/90, and 84/90) granted equal minimum rights to every SFRY citizen and regulated the rights of persons who moved from one Republic to another.

9. Following changes brought about by the armed conflict, pensions in Bosnia and Herzegovina came to be administered by three separate funds: the Social Fund of Pension and Disability Insurance of Bosnia and Herzegovina (hereinafter the “Sarajevo Fund”), the Bureau of Pension and Disability Insurance Mostar (hereinafter the “Mostar Fund”), and the Public Fund of Pension and Disability Insurance of Republika Srpska (hereinafter the “RS Fund”). The Sarajevo Fund and Mostar Fund subsequently merged, following a November 2000 decision by the High Representative, into the Federation PDI Institute (hereinafter the “Federation Fund”), which has been operational since 1 January 2002. Presently there is one pension fund in the Federation and one in the Republika Srpska, and all legislation directly concerning pension systems is made at the Entity level.

10. The basic calculation schemes for determining rights to pension and disability insurance are different in each entity. One result of this has been significantly lower pensions in the Republika Srpska. In March 2002, the average pension in the Federation was 190 [Bosnian markas (BAM)], and the average pension in the Republika Srpska was 120 [BAM]. The minimum pension payment prescribed by law in the Federation of Bosnia and Herzegovina is 140 [BAM], while the minimum pension in the Republika Srpska is 80 [BAM].

11. The system of pension insurance in Bosnia and Herzegovina, as inherited from the former SFRY, has been based on the “pay/go” principle that salary contributions from current workers support the current pensioners. Thus, money that comes into the system as contributions is immediately paid out as pensions, rather than becoming

interest-generating capital from which the interest is paid out as pensions. When the current workers retire, salary contributions from the future generation of workers will finance the current workers' pensions. Therefore, the pension system as a whole has had the character of a general social insurance system. This is also the case with the current Federation and RS Funds.

12. On 27 March 2000, the Mostar Fund, Sarajevo Fund, and RS Fund entered into the Agreement on Mutual Rights and Obligations in Execution of Pension and Disability Insurance (hereinafter the "Pension Agreement") (OG RS, no. 15/00, 5 June 2000; OG FBH, no 24/00, 30 June 2000), under which they agreed that the Fund that had made payments to pensioners before the Agreement came into force would continue to pay those pensions regardless of the pensioners' place of temporary or permanent residence. The Pension Agreement entered into force on 18 May 2000...

13. The RS Fund, with the authorisation of the Republika Srpska government, unilaterally terminated the Pension Agreement in March 2002 (OG RS, no. 10/02, 4 March 2002). According to a June 2002 report by the United Nations High Commissioner for Refugees (hereinafter "UNHCR"), despite its withdrawal from the Agreement, the RS Fund has continued to pay those pensioners already recognised as its beneficiaries. For its part, the Federation Fund has declared that it will continue to follow the Agreement and pay its beneficiaries now living in the Republika Srpska.

14. According to the June 2002 UNHCR report, the absence of harmonised legislation between the two Entities and the lack of state-level legislation regulating pension and other social benefits causes problems for displaced pensioners and returnees. Specifically, these problems arise from the different pension calculation schemes and different pension amounts in each Entity.

15. As a practical matter, a person who retired in Sarajevo and held a pension there before the armed conflict, but later began receiving pension payments from the RS Fund after displacement to the Republika Srpska, would continue, after returning to Sarajevo, to receive the lower pension payment from the RS Fund. Such a returnee, while receiving the smaller RS Fund pension, would also face a higher cost of living in Sarajevo than in the Republika Srpska. Moreover, such a returnee would receive a pension much lower than a person who had made similar pension contributions during their working life but remained in the Federation throughout the armed conflict.

16. Under various inter-state pension benefits agreements, some civil pensioners from the Federation of Bosnia and Herzegovina who moved to other countries during the armed conflict continue to enjoy their full pension rights from the Federation Fund. For example, under the Agreement on Social Insurance Between Bosnia and Herzegovina and the Republic of Croatia (OG BiH Supplement on International Agreements, No. 6/01, 11 October 2001), the responsible domestic insurer is obligated to pay full rights to a pension beneficiary, even if that person is residing in the other contracting state. According to UNHCR, no major problems are reported with regard to refugees from Bosnia and Herzegovina receiving their full pensions in Croatia. As of June 2002, similar agreements had been signed and implemented between Bosnia and Herzegovina and Austria and Turkey, while other such agreements were in the works. According to OHR, users of pensions from Bosnia and Herzegovina were receiving pensions in 23 countries (mostly in Croatia and Germany) in June 2002.

...

87. This disparity leaves no doubt that persons who were internally displaced during the armed conflict are, upon their return, treated differently. Each of the present applicants left Sarajevo in 1992 at the outset of the armed conflict. These applicants now receive smaller pensions simply because they left the Federation for a period of time, not on their own free will, to live in the Republika Srpska. Those who remained enjoy greater pension rights than those who left, even though they may have been identically situated before the armed conflict.

88. Indeed, it appears that the present applicants (and others who were internally displaced and have returned to the Federation) are in a worse position than Federation pensioners who moved to other countries during the armed conflict. Many Federation pensioners who moved to other countries during the armed conflict continue to enjoy full pension rights from the Federation Fund (see paragraph 16 above).

89. Moreover, the prospect of returning to live in the Federation (where the cost of living is higher than in the Republika Srpska) on a smaller RS Fund pension presents a significant obstacle to the return of displaced persons. The present applicants attest to these difficulties, and the Federation, in its observations, admits that they should have been aware of them (see paragraph 45 above). One of the important objectives of the settlement of the conflict in Bosnia and Herzegovina was to facilitate the return of displaced persons (see generally the General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7). The Chamber considers that displaced person status is a status relevant for the purposes of Article II § 2 (b) [of the Agreement on Human Rights] and further finds that the current situation regarding displaced persons' pensions is inimical to the goals of Annex 7. The only reason put forward for the different treatment is the Pension Agreement, which, by its terms, makes displaced person status the basis for different treatment. But displaced person status cannot serve as a justification for disparate treatment, especially where, as here, it carries with it a connotation of discrimination on ethnic grounds. Under the circumstances, the Chamber concludes that the different, poorer treatment of the applicants with regard to their pension payments has no objective justification."

The Human Rights Chamber made the following orders:

"98. The Chamber finds it appropriate to order the Federation of Bosnia and Herzegovina to take all necessary legislative and administrative actions by 10 July 2003 to ensure that the applicants are no longer discriminated against in their enjoyment of pension rights guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights, particularly in comparison to those pensioners who remained in the Federation during the armed conflict.

99. The Chamber further orders the Federation of Bosnia and Herzegovina to compensate each applicant for the difference between the pension that he or she would be due under the Pension Agreement between the pension funds and the amount the applicant would have received from the Federation Fund, from the date of his or her application to the Human Rights Chamber [*i.e.* from 28 February 2002] until the date of the Federation's compliance with the remedy ordered in paragraph 98 [immediately above]."

11. In 2003 (the exact date has not been indicated) the applicant received 1,033.15 Bosnian markas (which corresponds to 528.24 euros) by way of compensation from the Federation of Bosnia and Herzegovina.

12. The applicant still receives his pension from the Republika Srpska. Since the pension legislation has not yet been harmonised between the two Entities, pensions in the Republika Srpska are still generally lower than in the Federation of Bosnia and Herzegovina. Furthermore, pensioners in the Republika Srpska, as opposed to pensioners in the Federation of Bosnia and Herzegovina, do not receive the nominal amount of their pensions, but approximately 80 per cent thereof (this is owing to the financial difficulties of the Entity).

II. RELEVANT LAW AND PRACTICE

A. Agreement on Human Rights (Annex 6 to the 1995 General Framework Agreement for Peace)

13. The Agreement on Human Rights was signed by Bosnia and Herzegovina and its Entities on 14 December 1995, when it entered into force. The following are the relevant provisions:

Article I

“The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex...

Article II §§ 1 and 2

1. To assist in honoring their obligations under this Agreement, the Parties hereby establish a Commission on Human Rights (the ‘Commission’). The Commission shall consist of two parts: the Office of the Ombudsman and the Human Rights Chamber.

2. The Office of the Ombudsman and the Human Rights Chamber shall consider, as subsequently described:

a. alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, or

b. alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex, where such violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ.

Article XI § 6

The Parties shall implement fully decisions of the Chamber.”

14. On 10 November 2000 the Parties to the Agreement on Human Rights extended the mandate of the Human Rights Chamber until 31 December 2003. On the latter date the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina merged. Special chambers were created within the Constitutional Court on an interim basis with a mandate to decide on cases received by the former Human Rights Chamber. From 1 January 2004 until 31 December 2006, the special chambers were named the “Human Rights Commission within the Constitutional Court” (see the agreement of 25 September 2003 published in the Official Gazette of Bosnia and Herzegovina (“OG BH”) no. 35/03 of 12 November 2003). Although the special chambers continued operating thereafter, they were no longer named the “Human Rights Commission within the Constitutional Court” (see the agreement of 16 January 2007 published in OG BH no. 43/07 of 11 June 2007). The special chambers were also entrusted with a mandate to examine complaints about non-enforcement of the decisions of the former Human Rights Chamber and to issue declarations in this connection (see Rule 62 of the Rules of Procedure published in OG BH no. 23/05 of 19 April 2005 and Rule 56 of the Rules of Procedure published in OG BH no. 38/07 of 22 May 2007). The declarations at issue certify that a decision of the former Human Rights Chamber was not fully enforced without affording any redress.

B. Legislation of Bosnia and Herzegovina

15. In accordance with Article 239 of the Criminal Code 2003 (*Krivični zakon Bosne i Hercegovine*; published in OG BH nos. 3/03 of 10 February 2003 and 37/03 of 22 November 2003; amendments published in OG BH nos. 32/03 of 28 October 2003, 54/04 of 8 December 2004, 61/04 of 29 December 2004, 30/05 of 17 May 2005, 53/06 of 13 July 2006, 55/06 of 18 July 2006 and 32/07 of 30 April 2007), non-enforcement of a final and enforceable decision of the Human Rights Chamber amounts to a criminal offence:

“An official of the institutions of Bosnia and Herzegovina, of the Entities or of the Brčko District of Bosnia and Herzegovina, who refuses to enforce a final and enforceable decision of the Constitutional Court of Bosnia and Herzegovina, of the Court of Bosnia and Herzegovina or of the Human Rights Chamber of Bosnia and Herzegovina, or who prevents the enforcement of any such decision, or who frustrates the enforcement of the decision in some other way, shall be punished by imprisonment for a term between six months and five years.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

16. The applicant complained that a final and enforceable decision of the Human Rights Chamber in his favour had not been enforced. His complaint falls to be examined under Article 6 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

A. Admissibility

17. The parties disagreed as to whether an appeal to the Constitutional Court constituted an “effective” domestic remedy within the meaning of Article 35 § 1 of the Convention in the circumstances of the present case.

18. The general principles concerning the rule of exhaustion of domestic remedies were outlined in *Mirazović v. Bosnia and Herzegovina* ((dec.), no. 13628/03, 16 May 2006).

19. As opposed to complaints about non-enforcement of other judicial decisions (which are examined by the Constitutional Court in the normal procedure), those about non-enforcement of the decisions of the former Human Rights Chamber are dealt with by the Constitutional Court’s special chambers. This special procedure may lead to no more than an acknowledgment of the impugned state of affairs in the form of a declaration: the special chambers have no power to examine whether the impugned non-enforcement amounted to a separate breach of the Convention or to award damages in this connection. The Government did not submit any evidence of a practice of national authorities giving effect to the declarations at issue. In all the circumstances, the Court considers that the Government have failed to establish that an appeal to the Constitutional Court is sufficiently “effective” so as to be capable of providing the applicant with redress for his complaint, and so as to require exhaustion under Article 35 § 1 of the Convention (see, *a contrario*, *Mirazović*, cited above, concerning non-enforcement of a decision of a judicial body other than the former Human Rights Chamber).

20. The Government’s objection is thus dismissed.

21. 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

22. The parties further disagreed whether the impugned decision of the Human Rights Chamber had been fully enforced or not. The Government argued that the applicant's transfer from the Republika Srpska Pension Fund ("RS Fund") to the Federation of Bosnia and Herzegovina Pension Fund ("FBH Fund") was not required because the nominal amount of the applicant's RS Fund pension had surpassed, on 1 October 2002, the amount which he would have received in the Federation of Bosnia and Herzegovina. They further accepted that the RS Fund paid to the applicant less than the nominal amount of his pension. According to the applicant's calculations, the veracity of which the Government did not contest, this difference amounted to 2,000 euros. Nevertheless, the Government pleaded that the sum indicated in paragraph 11 above constituted full compensation.

23. The general principles concerning the obligation of the Contracting States to enforce decisions of their courts, including the Human Rights Chamber, were outlined in *Jeličić v. Bosnia and Herzegovina* (no. 41183/02, § 38, ECHR 2006-...).

24. The domestic Human Rights Chamber held in the present case that discrimination against the applicant in his enjoyment of the right to social security required that "legislative and administrative actions" be taken (in paragraph 98 of its decision). Given the current legislative and administrative arrangements (notably, the absence of harmonised legislation between the Entities and the lack of State-level legislation regulating pensions), the only conceivable interpretation of the paragraph 98 order is that it required the applicant's transfer from the RS Fund to the FBH Fund. The fact that the disparity between pension amounts in each Entity may have subsequently become smaller, as suggested by the Government, is of no relevance to the obligation of the respondent State to enforce decisions of its courts.

Furthermore, the amount so far paid to the applicant by way of compensation covered only the difference between the nominal amount of the applicant's RS Fund pension and what would have been the nominal amount of his FBH Fund pension. As it is undisputed that the applicant received from the RS Fund less than he was due to receive, the above amount does not constitute full compensation for the purposes of paragraph 99 of the impugned decision of the Human Rights Chamber. According to the applicant's calculations, he should have received another

2,000 euros. The Government did not contest the veracity of those calculations.

25. Since more than four years have passed since the impugned decision of the Human Rights Chamber became final and the applicant has not yet been transferred to the FBH Fund (as ordered in paragraph 98 of the decision) and has not yet received full compensation (as ordered in paragraph 99 of the decision), the Court concludes that the essence of the applicant's right of access to court, as protected by Article 6 of the Convention, was impaired (see *Jeličić*, cited above, §§ 38-46). There has accordingly been a breach of that Article.

II. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

26. Article 46 of the Convention provides:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

27. The violation of the applicant's right guaranteed by Article 6 concerns a failure of the authorities to eliminate discrimination from the pension legislation regardless of an order of the Human Rights Chamber in that direction. The facts of the case thus disclose the existence, within the national legal order, of a shortcoming affecting a whole class of citizens (namely, pensioners living in the Federation of Bosnia and Herzegovina who were internally displaced in the Republika Srpska during the armed conflict). The fact that they are all potential applicants represents a threat to the future effectiveness of the Convention machinery.

28. Before examining the applicant's individual claims for just satisfaction under Article 41 of the Convention and in view of the circumstances of the instant case, the Court wishes to consider what consequences may be drawn for the respondent State from Article 46 of the Convention. It reiterates that by virtue of Article 46 the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers of the Council of Europe. It follows, among other things, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the

violation found by the Court and to redress so far as possible the effects (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Broniowski v. Poland* [GC], no. 31443/96, § 192, ECHR 2004-V).

Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed (see *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I, and *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II).

29. Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention (see *Broniowski*, cited above, § 193), the violation found in the instant case, by its very nature, does not leave any real choice as to the measures required to remedy it (see paragraph 24 above).

30. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the impugned situation, the Court considers that the respondent State must secure the enforcement of the Human Rights Chamber's decision at issue by way of transferring the applicant to the FBH Fund as well as paying the applicant 2,000 euros (EUR).

B. Article 41 of the Convention

31. 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.”

1. Damage

32. The applicant claimed EUR 1,500 in respect of non-pecuniary damage which the Government considered to be excessive.

33. It is clear that the applicant sustained some non-pecuniary loss arising from the violation of the Convention found in the present case, for which he should be compensated. Making its assessment on an equitable basis, as required by Article 41 of the Convention, it awards the amount claimed by the applicant (EUR 1,500) plus any tax that may be chargeable.

2. Costs and expenses

34. The Court notes that the applicant was granted legal aid under the Court's legal-aid scheme in the amount of EUR 850. He sought reimbursement of additional expenses in the amount of EUR 500, but he failed to submit evidence, such as itemised bills and invoices, that those expenses had been actually incurred. Accordingly, the Court rejects that claim.

3. Default interest

35. 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 of the Convention;
3. *Holds*
 - (a) that the respondent State, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, is to secure the enforcement of the impugned decision of the Human Rights Chamber by way of:
 - (i) transferring the applicant to the Federation of Bosnia and Herzegovina Pension Fund; and
 - (ii) paying the applicant EUR 2,000 (two thousand euros) which should be converted into Bosnian markas at the rate applicable at the date of settlement;
 - (b) that the respondent State, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, is to pay the applicant EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage, which should also be converted into Bosnian markas at the rate applicable at the date of settlement, plus any tax that may be chargeable on that amount;
 - (c) 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 20 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President