



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

SECOND SECTION

CASE OF POPOVIĆ v. SERBIA

(Application no. 38350/04)

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 Popović v. Serbia,

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

Mrs F. TULKENS, *President*,

Mr A.B. BAKA,

Mr I. CABRAL BARRETO,

Mr R. TÜRMEŖ,

Mr M. UGREKHELIDZE,

Mr V. ZAGREBELSKY,

Mr D. POPOVIĆ, *judges*,

and Mrs F. ELENŠ-PASSOS, *Deputy 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. 38350/04) against the Republic of Serbia 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 Milovan Popović (“the applicant”), on 7 October 2004.

2. The applicant was represented by Mrs A. Pejović, a lawyer practising in Beograd. The Serbian Government (“the Government”) were represented by their Agent, Mr. S. Carić. The Government of Bosnia and Herzegovina did not make use of their right to intervene (Article 36 § 1 of the Convention).

3. On 30 August 2006 the Court decided to give notice of the application to the Government. 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 1939 and lives in Bijela Brda.

5. On 9 April 1984 the applicant brought a civil action in the Beograd Third Municipal Court against a certain N.D., seeking repayment of a loan.

6. Having heard the applicant in person at a hearing on 20 June 2002, on 5 November 2002 the court gave a judgment accepting the applicant's claim. On 26 November 2003 the Beograd District Court quashed that judgment

for factual shortcomings and remitted the case. In its decision, the District Court instructed the first-instance court to hear and confront the parties, as well as to hear the other witnesses proposed by the applicant with a view to establishing, *inter alia*, whether the loan had been made to N.D. or to his father, whether a part of it had in the meantime been repaid and whether the claim was time-barred.

7. In the resumed proceedings, the court held a hearing on 16 November 2004, which the applicant did not attend although duly summoned. On that occasion, his lawyer informed the court that the applicant was in poor health and needed surgery. Therefore, the applicant would not be able to attend court hearings, but maintained all his claims, as previously stated in his oral and written submissions to the court.

8. On 1 April 2005 the applicant submitted a medical certificate, stating that he suffered from paranoid psychosis with signs of hypochondria, and that he was unable to attend court hearings.

9. The court appears to have held further hearings on 17 June and 7 October 2005, both attended by the applicant's lawyer. It also obtained an expert opinion on 27 May 2005.

10. The court subsequently ordered the applicant's lawyer to inform it of the exact date and place where the applicant would be medically treated. It further contacted the medical institution which had issued the certificate of 1 April 2005, requesting its opinion on whether the applicant's health allowed him to be a party to the proceedings. It would appear that none of the court orders has ever been complied with.

11. At the hearing held on 26 September 2006 the applicant's lawyer specified the claim, whereas the respondent submitted that, if the applicant was ill, the court could not continue the proceedings.

12. The proceedings are still pending before the first-instance court.

II. RELEVANT DOMESTIC LAW

A. Relevant provisions of the Judges Act and the Obligations Act

13. The relevant provisions of this legislation are set out in the *V.A.M. v. Serbia* judgment (no. 39177/05, §§ 70-72, 13 March 2007).

B. Civil Procedure Act (*Zakon o parničnom postupku*; published in OG RS 125/04)

14. The relevant provisions of this Act (hereafter referred to as the “CPA”) provide as follows:

Section 77 (1)

“During the course of the proceedings, the court shall *ex officio* verify whether the person appearing as a party may be party to the proceedings and whether he or she has the capacity to act...”

Section 78 (1)

“Should the court establish that the person appearing as party cannot be party to the proceedings, and that this obstacle cannot be eliminated, it will invite the plaintiff to undertake the necessary amendments to the claim...”

Section 262

“1. Relevant facts may also be established by hearing the parties.

2. The court shall decide to hear the parties when there is no other evidence or when, despite the presentation of other evidence, the court deems it necessary with a view to establishing relevant facts.”

Section 263

“... 2. The court may decide to hear only one of the parties, if the other party refuses to give a statement or does not appear [at the hearing] despite the court summons.

3. If a party dies in the course of the proceedings, or his or her repeated examination becomes impossible for some other reason, the court will read the minutes containing that party's statement.”

Section 264

“The party may be heard through another court only if he or she cannot come to the court in person due to obstacles which cannot be eliminated or at extremely high costs.”

Section 267

“1. The court may not use any compelling measures in respect of the party which did not appear at the scheduled court hearing [for the examination of the parties], nor can a party be forced to give a statement.

2. In light of all the circumstances of the case, the court shall assess the party's failure to appear or refusal to give a statement.”

Section 317

“If a hearing is held before a new formation [of judges], the main hearing must recommence, but the chamber may, having consulted the parties, decide not to hear

witnesses and expert witnesses or hold an on-site inspection again, but instead read the minutes of the evidence already taken.”

C. The Court of Serbia and Montenegro and the succession of the State Union of Serbia and Montenegro

15. The relevant provisions concerning the Court of Serbia and Montenegro and the succession of the State Union of Serbia and Montenegro are set out in the *Matijašević v. Serbia* judgment (no. 23037/04, §§ 12, 13 and 16-25, 19 September 2006).

D. Criminal Code 1977 (Krivični zakon Republike Srbije; published in OG SRS nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, 21/90 and OG RS nos. 16/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03, 67/03 and 85/05)

16. Sections 242, 243 and 245 of this Code define “abuse of office” (*zloupotreba službenog položaja*), “judicial malfeasance” (*kršenje zakona od strane sudije*) and “official malfeasance” (*nesavestan rad u službi*) as separate criminal offences.

E. Relevant constitutional provisions

17. Article 25 of the Serbian Constitution (*Ustav Republike Srbije*), published in the Official Gazette of the Socialist Republic of Serbia (OG SRS - no. 1/90), provided as follows:

“Everyone shall be entitled to compensation for any pecuniary and non-pecuniary damages suffered due to the unlawful or improper conduct of a State official, a State body or a public authority, in accordance with the law.

Such damages shall be met by the Republic of Serbia or the public authority [in question].”

18. This Constitution was repealed on 8 November 2006, which is when the “new” Constitution (published in OG RS no. 98/06) entered into force.

19. The substance of Article 35 § 2 of the new Constitution corresponds, in its relevant part, to the above-cited text of the previous Article 25.

20. Article 170 of the new Constitution provides that a constitutional complaint may be lodged against the acts of public entities violating human and minority rights and liberties guaranteed by the Constitution.

21. Section 9 of the Constitutional Act on the Implementation of the Constitution (OG RS 98/06) provides that the election of Constitutional Court judges shall be finalised before the end of the first National Assembly.

THE LAW

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

22. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement, laid down 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...”

A. Admissibility

23. The Government submitted that the applicant had not exhausted all effective domestic remedies. In particular, he had failed to complain about the delay in question to the president of the competent court, the president of the directly higher court or to the Supreme Court's Supervisory Board (see paragraph 13 above). Further, the applicant had not brought a separate civil action under sections 199 and 200 of the Obligations Act and Article 25 of the Constitution (see paragraphs 13 and 17 above); nor had he filed a criminal complaint under sections 242, 243 and 245 of the Criminal Code 1977 (see paragraph 16 above). Finally, he had not made use of the complaint procedure before the Court of Serbia and Montenegro (see paragraph 15 above); nor had he lodged a constitutional complaint under Article 170 of the new Serbian Constitution (see paragraph 20 above).

24. The applicant contested the effectiveness of these remedies.

25. As regards the possibility of lodging a constitutional complaint, it is observed that the new Serbian Constitution indeed envisaged the possibility of lodging an individual constitutional complaint against acts of public entities violating the individual's human rights (see above paragraph 20). However, the Court notes that the said provision is of a general nature and requires further implementation – the election of judges and the establishment of the Constitutional Court, as well as the adoption of legislation regulating its structure and rules of procedure. None of these conditions have been fulfilled to date; the respondent State has not elected judges, nor has it adopted the necessary legislation. In these circumstances, a constitutional complaint cannot be considered to have been available to the applicant or a remedy which needed to be exhausted in the circumstances of the present case.

26. In respect of the remainder of the remedies put forward by the Government, the Court has already held that they could not be deemed effective within the meaning of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *V.A.M. v. Serbia*, cited above, §§ 85-88 and 119,

13 March 2007, and *EVT Company v. Serbia*, no. 3102/05, §§ 39 and 41, 21 June 2007). It sees no reason to depart from those findings in the present case and concludes, therefore, that the Government's objections must be rejected.

27. 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

1. Arguments of the parties

28. The Government argued that, even though the case was not complex, the applicant significantly contributed to its length by failing to appear at numerous hearings. The second-instance court having ordered that the parties again be heard with a view to determining certain facts, it had been crucial for the applicant to appear in court in person. The applicant also amended his claim several times, the last time at the hearing on 26 September 2006. The Government further submitted that, since the applicant lives in another country, the diplomatic service of the court letters required additional time. Lastly, the Government pointed out that the applicant's illness additionally aggravated the situation because the issue of his capacity to act had been put in question.

29. The applicant disagreed with the Government. He submitted that his health did not allow him to travel to Belgrade, but that his lawyer was present at every court hearing. The applicant further stressed that he had given all relevant information concerning the merits of his claim when he had been heard by the court in 2002, and that he had had nothing to add to that statement. He also submitted that he had proposed to the court to read to the record his previous statement instead of insisting on questioning him again.

2. Period to be taken into account

30. The Court notes that the proceedings started on 9 April 1984 when the applicant filed his civil action. According to the information available in the case file, they were still pending on the date of adoption of the present judgment. Consequently, they have lasted more than twenty three years and seven months before one court instance.

31. However, the period falling within the Court's jurisdiction began on 3 March 2004, when the Convention entered into force in respect of Serbia, and has not yet ended. It has thus lasted over three years and eight months for one level of jurisdiction.

32. Nevertheless, in order to determine the reasonableness of the length of time in question, regard may also be had to the state of the case on 3 March 2004 (see, among other authorities, *Styranowski v. Poland*, judgment of 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3376, § 46). By that date, the case had already been pending almost twenty years.

3. The Court's assessment

33. 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).

34. Turning to the present case, the Court cannot accept the Government's allegation that the protracted character of the proceedings had been mainly imputable to the applicant. Under the domestic law, hearing the parties is only to be undertaken if there is no other available evidence or if it does not suffice to establish the relevant facts (section 262 of the CPA). Once it was established that the applicant was unable to attend court due to his poor health, it was not the court's task to enquire about his capacity to act. However, since the applicant's lawyer was present at every hearing, there were no procedural obstacles to continuing the case and taking other evidence, as indicated in the District Court's decision. Moreover, the court could have read to the record the applicant's statement given in 2002 (section 263 of the CPA), or invited him to submit any other information in writing, if this had been vital for deciding the merits of the case. Finally, it was for the court to assess the applicant's failure to give a statement in the proceedings (section 267 of the CPA). Consequently, the Court concludes that the applicant's inability to be heard should not have caused the proceedings to last, following their remittal, over four years at one level of jurisdiction.

35. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (see *Frydlender*, cited above).

36. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, and in particular the fact that the proceedings are still pending at first-instance with no prospects of a speedy conclusion, the Court considers that 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. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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

38. The applicant claimed 3,000 euros (EUR) in respect of pecuniary damage and EUR 7,000 in respect of non-pecuniary damage.

39. The Government contested these claims.

40. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 1,200 in respect of non-pecuniary damage.

B. Costs and expenses

41. The applicant also claimed costs and expenses incurred before the Court. However, he failed to submit itemised particulars of his claim or any relevant supporting documents, although he was invited to do so.

42. The Government contested this claim.

43. The Court observes that the applicant failed to comply with the requirements set out in Rule 60 § 2 of the Rules of Court. In these circumstances, it makes no award under this head (Rule 60 § 3).

C. Default interest

44. 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 applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,200 (one thousand two hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(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 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.

F. ELEN-PASSOS
Deputy Registrar

F. TULKENS
President