CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF PERIĆ v. CROATIA

(Application no. 34499/06)

JUDGMENT

STRASBOURG

27 March 2008

FINAL

27/06/2008

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 Perić v. Croatia,

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

Christos Rozakis, *President,*
Nina Vajić,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 6 March 2008,

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

PROCEDURE

1. The case originated in an application (no. 34499/06) 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, Mrs Ilonka Perić ("the applicant"), on 8 August 2006.

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

3. On 10 April 2007 the Court decided to communicate the complaint concerning the applicant's right to a fair trial 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

THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1919 and lives in Opatija.

5. On 23 October 2002 the applicant brought a civil action in the Opatija Municipal Court (*Općinski sud u Opatiji*) against D. K. and J. K., seeking termination of a contract for lifelong maintenance (*ugovor o doživotnom uzdržavanju*). She enclosed a copy of the contract in question, drawn up on 3 August 1993, and its annex of 30 November 1999. The contract stipulated that the defendants were to care for the applicant until her death in order to

acquire all her property *post mortem*. She also asked that two witnesses, E. P. and Š. T., be heard. The defendants submitted receipts for monthly payments for the applicant's maintenance and asked that four witnesses be heard.

6. At the hearing held on 6 February 2003 the Municipal Court heard evidence from the parties and after that, in the presence of the applicant's counsel, scheduled the next hearing for 17 March 2003. The applicant's counsel fell ill and had to be hospitalised pending urgent surgery. On 11 March 2003 he sent a fax to the Municipal Court excusing himself from the hearing scheduled for 17 March and asked for an adjournment of the hearing. However, the Municipal Court proceeded with the hearing and heard two witnesses, Lj. M. and Š. M., the parents of one of the defendants. It also scheduled a further hearing for 23 April 2003 and ordered that two other witnesses, also called on behalf of the defendants, be heard. Neither the applicant nor her counsel were notified of the hearing.

7. The counsel did attend the hearing of 23 April 2003, which he had learned about by chance when at the Opatija Municipal Court on that day for other reasons. The Municipal Court heard two witnesses for the defendants, A. A. and I. P., as scheduled, but refused the proposal of the applicant's counsel that five other witnesses be heard. The relevant parts of the transcript of the hearing read as follows:

> "Counsel for the plaintiff asks that the plaintiff's neighbours M. C., S. R., V. G., N. I. and N. Z. be heard as witnesses about the circumstances of the applicant's daily life and the care she has received from them in the past two years and in particular in the period of four months following her release from a hospital, when she was immobile.
>
> ...
>
> Counsel for the plaintiff withdraws his request that E. P. be called as a witness since, according to the plaintiff, that person is not able to attend a hearing at the court.
>
> The judge decides that evidence is not to be heard from Š. T., E. P., M. C., S. R., V. G., N. I. and N. Z. and no further evidence is to be presented."

The Municipal Court proceeded by closing the proceedings and pronouncing its judgment, dismissing the applicant's claim. The relevant part of the judgment read as follows:

> "In view of the above, the court considers that the factual background has been fully established on the basis of the parties' testimony and in particular in the contract for lifelong maintenance and its annex and the enclosed receipts for payment. For that reason the court declined to hear evidence from the witnesses called on behalf of the plaintiff, because these witnesses cannot tell the court anything of influence on its judgment, save for the fact that they, owing to the plaintiff's age, have been increasingly assisting her on a daily basis. For precisely that reason the court is not relying on the evidence heard from the witnesses Lj. M., Š. M. and A. A."

8. A subsequent appeal by the applicant was dismissed by the Rijeka County Court (*Županijski sud u Rijeci*) on 10 December 2003.

9. On 12 February 2004 the applicant lodged a constitutional complaint alleging, *inter alia*, that her right to a fair trial had been infringed, because the hearing of 17 March 2003 had been held in the absence of her counsel who had duly excused himself due to his urgent hospitalisation and that she had thus been prevented from questioning two witnesses. Furthermore, neither she nor her counsel had been notified of the hearing scheduled for 23 April 2003. Although her counsel did attend the hearing, which he had learned about by chance on the very same day, he had not been able to prepare himself to question the two further witnesses who had been heard at that hearing. Thus, she had been prevented from questioning any of the four witnesses, all of whom had been heard on behalf of the defendants. Finally, she complained that the Opatija Municipal Court had refused to hear any of her seven witnesses. On 21 June 2006 the Constitutional Court (*Ustavni sud Republike Hrvatske*) dismissed the complaint as ill-founded.

THE LAW

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

10. The applicant complained that the civil proceedings instituted by her were unfair, relying on Article 6 § 1 of the Convention which reads as follows:

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

11. The Government contested that argument.

A. Admissibility

12. 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

13. The applicant contended that in the civil proceedings instituted upon her action the Opatija Municipal Court had refused to hear any of her six witnesses while it had heard four witnesses on behalf of the defendants. She further argued that she had been prevented from questioning two witnesses, Lj. M. and Š. M, heard on behalf of her opponents, and also that she had not

been adequately represented at the hearing held on 23 April 2003 since neither she nor her counsel had been notified of the date of the hearing. Although her counsel had attended the hearing, of which he had learned by chance, having been at the Opatija Municipal Court on that date for other reasons, he had not known that two witnesses were to be heard at that hearing and therefore he had had no chance to prepare himself properly to question those witnesses.

14. The Government asserted that the applicant had enjoyed the benefits of a fair trial, stressing that the trial court had accepted the following as evidence from the applicant: her own testimony and a copy of the contract for lifelong care with its annex; while on behalf of the defendants it had heard four witnesses and had seen the receipts for payment of monthly sums for the applicant's maintenance. They further contended that the relevant domestic law empowered trial courts to decide what evidence to admit. In the proceedings at issue the trial court had established relevant facts from the evidence heard by the parties and the documents submitted. Hence, there had been no need to hear the witnesses called on behalf of the applicant. Furthermore, the trial court had given adequate reasons for dismissing the applicant's further evidence.

15. As to the applicant's contention that she had not been given an opportunity to question two witnesses, namely Lj. M. and Š. M, the second defendant's parents, the Government maintained that the trial court had expressly stated that its judgment had not relied on the evidence heard from these witnesses.

16. As to the applicant's allegations that neither she not her counsel had been duly informed of the hearing held on 23 April 2003, the Government submitted that the applicant's counsel had nevertheless attended the hearing in question, questioned the witnesses and asked that five further witnesses be heard, which showed that the applicant had been sufficiently and adequately represented at that hearing.

17. The Court reiterates that while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45-46, and *Garcia Ruiz v. Spain* [GC] no. 30544/96, ECHR 1999-I, § 28). Similarly, it is in the first place for the national authorities, and notably the courts, to interpret domestic law and the Court will not substitute its own interpretation for theirs in the absence of arbitrariness. This principle applies, *inter alia*, to the application of procedural rules concerning the nomination of witnesses by parties (see *Tamminen v. Finland*, no. 40847/98, § 38, 15 June 2004). In this connection, the Court further reiterates that it is not within its province to substitute its own assessment of the facts for that of the national courts.

However, under the Court's case-law, the requirements of fairness of the proceedings include the way in which the evidence is taken and submitted. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken and submitted, were fair within the meaning of Article 6 § 1 (see*, inter alia*, *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, pp. 18,19, § 31.).

18. The requirements inherent in the concept of fair hearing are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law (see, *mutatis mutandis*, *Albert and Le Compte v. Belgium*, judgment of 10 February 1983, Series A no. 58, p. 20, § 39), the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases (see *Pitkänen v. Finland*, no. 30508/96, § 59, 9 March 2004).

19. Nevertheless, certain principles concerning the notion of a fair hearing in cases concerning civil rights and obligations emerge from the Court's case-law. Most significantly for the present case, it is clear that the requirement of equality of arms, in the sense of a fair balance between the parties, applies in principle to such cases as well as to criminal cases (see *Feldbrugge v. the Netherlands*, judgment of 29 May 1986, Series A no. 99, p. 17, § 44 and *Dombo Beheer*, cited above, p. 19, § 33). In that connection the Court considers that as regards litigation involving opposing private interests, equality of arms implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. It is left to the national authorities to ensure in each individual case that the requirements of a fair hearing are met (see *Dombo Beheer*, cited above, p. 19, § 33).

20. As to the present case, the Court notes that the applicant initially, when bringing her civil action, proposed that evidence be heard from two witnesses, E. P. and Š. T. Later on, at the hearing held on 23 April 2003, the applicant withdrew her request that E. P. be heard, and proposed that the court hear evidence from further five witnesses, M. C., S. R., V. G., N. I. and N. Z. She stated that the relevance of their evidence was that they could provide information on the care provided to her by persons other than the defendants, who had undertaken an obligation to care for the applicant in order to acquire all her property *post mortem*. Thus, the evidence heard from these witnesses would, in the applicant's view, show that the defendants had failed to provide her with adequate care and hence had failed to fulfil their

contractual obligations, which entitled the applicant to seek the termination of the contract in question.

21. As to the reasons given by the domestic courts for not admitting the evidence adduced by the applicant, the Court notes that, even though a domestic court has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, an authority is obliged to justify its activities by giving reasons for its decisions (see *Suominen v. Finland*, no. 37801/97, § 36, 1 July 2003).

22. In the instant case the Opatija Municipal Court justified its refusal to hear evidence from six witnesses called on behalf of the applicant by saying that the factual background of the case had been sufficiently established from the parties' statements and the supporting documents, namely the contract for lifelong maintenance and its annex and the receipts for payments made by the defendants to the applicant. In this connection, the Court notes that the contract in question together with its annex was submitted by the applicant as an enclosure when her civil action was lodged on 23 October 2002. The receipts for payment were submitted by the defendants at the beginning of the trial and the parties' evidence was heard at the hearing held on 6 February 2003.

23. Thus, according to the Opatija Municipal Court's arguments, the facts had already been sufficiently established on 6 February 2003, which was the only reason for not admitting any further evidence proposed by the applicant. The Court notes however that after that date four more witnesses called on behalf of the defendants were heard as follows: at the hearing held on 17 March 2003, in the absence of the applicant and her counsel, Lj. M. and Š. M., the parents of one of the defendants, were heard, while on the hearing held on 23 April 2003 R. P. and A. A. were heard.

24. The Court notes that, while refusing to hear any of the six witnesses called on behalf of the applicant, the trial court nevertheless heard four witnesses called on behalf of the defendants even after it considered that the factual background of the case had already been fully established. In this connection the Court observes that, although it is not its task to examine whether the court's refusal to admit the evidence submitted by the applicant was well-founded, in its assessment of compliance of the procedure in question with the principle of equality of arms which is a feature of the wider concept of a fair trial (see *Ekbatani v. Sweden*, judgment of 26 May 1988, Series A no. 134, p. 14, § 30), significant importance is attached to appearances and to the increased sensitivity of the public to the fair administration of justice (see *Borgers v. Belgium*, judgment of 30 October 1991, Series A no. 214-B, p. 31, § 24).

25. Bearing in mind the above considerations viewed in the light of the applicable principles, the Court finds that the applicant did not have a fair trial in the proceedings in question, in so far as the trial court refused to hear

evidence from any of the six witnesses called on behalf of the applicant, for reasons which contradicted the trial court's agreement to hear evidence from four witnesses called on behalf of the defendants.

There has therefore been a violation of Article 6 § 1.

26. In view of the above findings the Court does not need to examine the remainder of the applicant's complaints of fairness of proceedings.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

27. The applicant complained that she had had no effective remedy in respect of her Article 6 complaints. She 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."

28. The Court notes that the applicant was able to lodge an appeal against the first instance judgment and a constitutional complaint whereby she was able to advance the same complaints that she is now presenting before the Court The fact that the remedies used by the applicant were unsuccessful does not render them ineffective for the purposes of Article 13 of the Convention.

29. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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

31. The applicant claimed 100,000 Croatian kunas (HRK) in respect of non-pecuniary damage.

32. The Government deemed the sum claimed excessive and unfounded as there had been no causal link between the violations complained of and the applicant's financial expectations.

33. The Court cannot speculate about the outcome of the trial had it been in conformity with Article 6 and therefore, an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of that Article. The Court, accepting that the lack of such

guarantees has caused the applicant non-pecuniary damage which cannot be made good by the mere finding of a violation, awards her 2,000 euros (EUR) in that respect.

B. Costs and expenses

34. The applicant also claimed HRK 4,392 for the costs and expenses incurred before the domestic courts and HRK 13,505 for those incurred before the Court.

35. The Government made no comments in this respect.

36. 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 are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 1,800 for the proceedings before the Court.

C. Default interest

37. 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 complaint concerning the applicant's right to a fair trial admissible and the remainder of the application inadmissible;

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, the following amounts which are to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;

(ii) EUR 1,800 (one thousand eight 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 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 27 March 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos ROZAKIS
President