



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

SECOND SECTION

CASE OF CVETKOVIĆ v. SERBIA

(Application no. 17271/04)

JUDGMENT

STRASBOURG

10 June 2008

FINAL

01/12/2008

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 Cvetković v. Serbia,

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

Françoise Tulkens, *President*,

Antonella Mularoni,

Ireneu Cabral Barreto,

Danutė Jočienė,

Dragoljub Popović,

Nona Tsotsoria,

Işıl Karakaş, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 20 May 2008,

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

PROCEDURE

1. The case originated in an application (no. 17271/04) against the State Union of Serbia and Montenegro, lodged with the Court, under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), by, at that time, a citizen of the State Union of Serbia and Montenegro, Mr Milorad Cvetković (“the applicant”), on 19 April 2004.

2. As of 3 June 2006, following the Montenegrin declaration of independence, Serbia remained the sole respondent in the proceedings before the Court.

3. The applicant was represented by Mr V. Biljić, a lawyer practicing in Belgrade. The Government of the State Union of Serbia and Montenegro and, subsequently, the Government of Serbia (“the Government”) were represented by their Agent, Mr S. Carić.

4. On 16 May 2007 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

5. The applicant was born in 1934 and lives in Leskovac, Serbia.

6. The facts of the case, as submitted by the parties, may be summarised as follows.

7. On 6 December 1988 the applicant, a labour inspector (*inspektor rada*), was declared redundant by the Municipality of Leskovac, which decision entered into force on 29 December 1990.

8. On 22 February 1991 the applicant therefore filed a claim with the Labour Court (*Osnovni sud udruženog rada*) in Vranje, seeking reinstatement or severance pay as provided for in the relevant domestic legislation.

9. Following a remittal, on 3 September 1991 this court relinquished jurisdiction in favour of the Municipal Court (*Opštinski sud*) in Leskovac.

10. Between 2 June 1992 and 5 January 1998 a total of fourteen separate decisions were adopted by the Municipal Court, at first instance, the District Court (*Okružni sud*) in Leskovac, on appeal, and the Supreme Court (*Vrhovni sud Srbije*) at third instance.

11. Following a remittal, on 16 March 1998 the Municipal Court again ruled in favour of the applicant.

12. On 5 June 1998 the District Court upheld this judgment on appeal and it thereby became final.

13. On 18 March 1999 the Municipal Court issued a separate decision, ordering the enforcement of this judgment.

14. On 21 November 2000, however, the same court accepted the respondent's request for the re-opening of the labour dispute.

15. On 21 February 2001 and 23 May 2002 the District Court and the Supreme Court, respectively, upheld this decision.

16. On 21 November 2002 the Municipal Court therefore re-opened the proceedings in question.

17. The hearing scheduled for 21 April 2004 was adjourned because of the presiding judge's illness.

18. On 3 March 2005 the President of the Municipal Court appointed another presiding judge to deal with the case, the reason being that the applicant had, in the meantime, filed a criminal complaint against the former.

19. On 18 April 2005 and 18 May 2005 two separate hearing were held.

20. On 24 May 2005 the Municipal Court appointed a financial expert and ordered him to calculate the amount of salary arrears sought by the applicant.

21. On 5 April 2006 the Municipal Court appointed another financial expert to carry out this order.

22. On 19 July 2006 the Municipal Court ruled partly in favour of the applicant. It awarded him most of the salary arrears and severance pay requested, but refused his claim for reinstatement since he had reached retirement age in the meantime.

23. On 1 December 2006 the District Court quashed this judgment on appeal and remitted the case to the Municipal Court.

24. On 24 January 2007 the Municipal Court again ruled partly in favour of the applicant.

25. On 26 April 2007, however, the District Court rejected the applicant's claims in their entirety.

26. On an unspecified date thereafter the applicant filed an appeal on points of law. According to the information made available to the Court by the parties to date, the case is apparently still pending before the Supreme Court.

27. It would appear that throughout the above proceedings the applicant had represented himself.

II. RELEVANT DOMESTIC LAW

A. Constitution of the Republic of Serbia 2006 (Ustav Republike Srbije; published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/06)

28. The relevant provisions of the Constitution read as follows:

Article 32 § 1

“Everyone shall have the right to ... [a hearing before a] ... tribunal ... within a reasonable time ... [in the determination] ... of his [or her] rights and obligations ...”

Article 170

“A constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed.”

Article 172 §§ 1, 2 and 3

“The Constitutional Court shall have fifteen judges who shall be elected or appointed for a period of nine years.

Five judges of the Constitutional Court shall be elected by the National Assembly, another five shall be appointed by the President of the Republic, and another five shall be appointed at the general session of the Supreme Court of Cassation ...

The National Assembly shall elect five judges of the Constitutional Court from among ten candidates proposed by the President of the Republic, the President of the Republic shall appoint five judges of the Constitutional Court from among ten candidates proposed by the National Assembly, and the general session of the Supreme Court of Cassation shall appoint five judges from among ten candidates

proposed at the general session by the High Judicial Council and the State Prosecutors' Council."

Article 175 § 1

"The Constitutional Court shall adjudicate by the majority of votes cast by all judges of the Constitutional Court."

B. Constitutional Act on the Implementation of the Constitution of the Republic of Serbia (Ustavni zakon za sprovođenje Ustava Republike Srbije; published in OG RS no. 98/06)

29. In accordance with Article 9 § 3 the Constitutional Court shall be deemed constituted when two thirds of the total number of judges have been elected or appointed.

C. Constitutional Court Act (Zakon o Ustavnom sudu; published in OG RS no. 109/07)

30. The relevant provision of this Act read as follows:

Article 7 § 1

"The decisions of the Constitutional Court shall be final, enforceable and binding."

Article 10 § 1

"The Constitutional Court shall have its Rules of Procedure ... which shall regulate, in greater detail, the organisation ... [and the functioning of the Constitutional Court] ... as well as the proceedings ... [before it] ..."

Article 27 §§ 1 and 2

"... [T]he Constitutional Court shall have a Registry.

The organisation, the tasks, and the functioning of the Registry shall be regulated, in greater detail, by ... the Constitutional Court."

Article 82 § 1 and 2

"A constitutional appeal may be lodged against an individual decision or an action of a State body or an organisation exercising delegated public powers which violates or denies human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies have already been exhausted or have not been prescribed or where the right to their judicial protection has been excluded by law.

A constitutional appeal may be lodged even if all available remedies have not been exhausted in the event of a breach of an applicant's right to a trial within a reasonable time."

Article 83 § 1

"A constitutional appeal may be lodged by any individual who believes that any of his or her human or minority rights or freedoms guaranteed by the Constitution has been violated or denied by an individual decision or an action of a State body or an organisation exercising delegated public powers."

Article 84 § 1

"A constitutional appeal may be lodged within thirty days of receipt of the individual decision or the date of commission of the actions ... [in question] ..."

Article 89 § 2 and 3

"When the Constitutional Court finds that an ... individual decision or action has violated or denied a human or minority right or a freedom guaranteed by the Constitution, it shall annul the ... decision in question or ban the continuation of such action or order the implementation of other specific measures as well as the removal of all adverse consequences within a specified period of time.

The decision of the Constitutional Court accepting a constitutional appeal shall constitute a legal basis for requesting compensation or the removal of other adverse consequences before a competent body, in accordance with the law."

Article 90

"... [An applicant who has obtained a Constitutional Court decision in his or her favour] ..., may lodge a compensation claim with the Commission for Compensation in order to reach an agreement in respect of the amount ... [of compensation to be awarded] ...

If the Commission for Compensation does not rule favourably in respect of a compensation claim or fails to issue a decision within thirty days from the date of its submission, the applicant may file a civil claim for damages before the competent court. If only partial agreement has been achieved, a civil claim may be filed in respect of the remainder of the amount sought.

The composition and operation of the Commission for Compensation shall be regulated by the Minister of Justice."

Article 116

"The Constitutional Court shall, within ninety days as of the date of entry into force of this Act, adopt its Rules of Procedure and ... [further regulate the organisation and functioning of its Registry] ..."

The Minister of Justice shall, within ninety days as of the date of entry into force of this Act ... [regulate the composition and the operation of the Commission for Compensation] ...”

**D. Rules of Procedure adopted by the Constitutional Court
(Poslovnik o radu Ustavnog suda; published in OG RS no. 24/08)**

31. Articles 72 and 73 provide additional details as regards the processing of the appeals lodged with the Constitutional Court.

E. Entry into force of the above legislation

32. The new Constitution of the Republic of Serbia, as well as the Constitutional Act on its implementation, entered into force in November 2006.

33. The Constitutional Court Act entered into force in December 2007.

34. The Rules of Procedure of the Constitutional Court entered into force in March 2008.

THE LAW

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

35. The applicant invoked Articles 2, 3 and 6 of the Convention. In substance, however, he complained about the length, as well as the overall fairness, of the proceedings in question.

The Court considers that both complaints fall to be examined under Article 6 § 1 only, which, in its relevant part, reads as follows:

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

A. As regards the length of the proceedings

1. Admissibility

(a) Compatibility *ratione materiae*

36. The Government submitted that the application should be rejected as being incompatible *ratione materiae* with the provisions of the Convention. In this respect, they referred to the Court’s case-law (*Pellegrin v. France*

[GC], no. 28541/95, § 67, ECHR 1999-VIII) and maintained that disputes relating to the career of civil servants were outside the scope of Article 6. Finally, the Government noted that the present case was distinguishable from the Court's judgment in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007) since it concerned primarily the applicant's dismissal.

37. The applicant maintained that Article 6 was applicable.

38. The Court notes that it has recently found that the functional criterion adopted in *Pellegrin* must be developed. In *Eskelinen* it thus held that it is for the Contracting States, in particular the competent national legislature, and not the Court, to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way. If a domestic system bars access to a court, the Court will verify that the dispute is indeed such as to justify the application of the exception to the guarantees of Article 6. If it does not, then there is no issue and Article 6 § 1 will apply irrespective of whether the applicant seeks reinstatement or some other form of pecuniary redress (*ibid.*, §§ 61-62; see also *Efendiyeva v. Azerbaijan*, no. 31556/03, § 42, 25 October 2007). In the present case, the applicant clearly had access to a court to challenge the lawfulness of the decision to make him redundant. The Court therefore finds that Article 6 of the Convention is applicable and dismisses the Government's objection in this regard.

(b) Exhaustion of domestic remedies

39. The Government submitted that the applicant had not exhausted all effective domestic remedies. In particular, he had failed to lodge an appeal with the Constitutional Court which had become operational as of 24 November 2007 (see paragraph 29 above).

40. The applicant contested the effectiveness of this remedy, stating that the court in question has yet to rule in respect of a constitutional appeal, or, indeed, even become fully operational.

41. The Court reiterates that the issue of 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)).

42. In the present case, the application was lodged on 19 April 2004. On 24 November 2007 the Constitutional Court was to have become operational. Accordingly, and irrespective of the said court's effectiveness within the meaning of Article 35 § 1, the applicant could not have been expected to file a constitutional appeal more than three years and seven months after the submission of his application to the Court. Therefore the Court concludes that in the present case and indeed as regards, at the very least, all applications lodged before 24 November 2007 there are no special

circumstances which would justify a departure from the general rule of exhaustion of domestic remedies (see, *mutatis mutandis*, *Pikić v. Croatia*, no. 16552/02, §§ 30-33, 18 January 2005).

43. It follows that the Government's objection must be dismissed in its entirety.

(c) Conclusion

44. The Court considers that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and finds no other ground to declare it inadmissible. The complaint must therefore be declared admissible.

2. Merits

(a) Arguments of the parties

45. The Government noted, in the first place, that the impugned proceedings began on 21 November 2002, when the case was reopened.

46. Secondly, they pointed out that these proceedings fall within the Court's competence *ratione temporis* as of 3 March 2004 only, which is when the Convention entered into force in respect of Serbia.

47. Thirdly, the Government observed that the applicant was a retired person with regular income and that his livelihood was thus not related to the outcome of the proceedings in question.

48. Fourthly, the Government maintained that the applicant had contributed to the delay complained of and argued that the case was very complex.

49. Lastly, the Government concluded that, for the above reasons, there has clearly been no violation of the reasonable time requirement contained in Article 6 § 1 of the Convention.

50. The applicant reaffirmed his complaint.

(b) Relevant principles

51. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case, the conduct of the parties and of the relevant authorities, as well as the importance of what is at stake for the applicant (see, among other authorities, *Stevanović v. Serbia*, no. 26642/05, § 53, 9 October 2007). It is further noted that reinstatement proceedings, as such, must be dealt with "expeditiously" (see *Stevanović v. Serbia*, cited above, § 55) and that the repeated re-examination of a single case following remittal may, in and of itself, disclose a serious deficiency in the respondent

State's judicial system (see *Pavlyulynets v. Ukraine*, no. 70767/01, § 51, 6 September 2005).

(c) The Court's assessment

52. The Court observes that the labour case is apparently still pending at third instance (paragraph 26 above). Since the respondent State ratified the Convention on 3 March 2004, it has thus been within the Court's competence *ratione temporis* for a period of more than four years and two months, as of the date of the adoption of the present judgment.

53. The Court recalls that, in order to determine the reasonableness of the delay at issue, regard must be had to the state of the case on the date of ratification (see, *mutatis mutandis*, *Styranski v. Poland*, judgment of 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII) and notes that on 3 March 2004 it had already been pending for more than thirteen years, the proceedings prior to and following the re-opening having been considered jointly (see, *mutatis mutandis*, *Ivanova v. Russia* (dec.), no. 74705/01, 1 April 2004).

54. In view of the criteria laid down in its jurisprudence and the relevant facts of the present case, the Court is of the opinion that the length of the proceedings complained of has failed to satisfy the reasonable time requirement. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

B. As regards the fairness of the proceedings

55. Given that the proceedings at issue are apparently still pending, the Court finds that the applicant's complaints about fairness are premature and, as such, inadmissible for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

56. The applicant further complained, under Article 13 of the Convention, that he had no means to expedite the proceedings in question or obtain compensation for the past delay.

Article 13 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."

A. Admissibility

57. The Court notes that this complaint raises issues of fact and law under the Convention, the determination of which requires an examination of the merits. It also considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it cannot be declared inadmissible on any other grounds. The complaint must therefore be declared admissible.

B. Merits

58. Both the Government and the applicant relied on their respective arguments described at paragraphs 39 and 40 above.

59. Having regard to its findings in respect of Article 6 § 1 (see paragraph 42 above), as well as its prior judgments on the issue (see, among many others, *Ilić v. Serbia*, no. 30132/04, 9 October 2007), the Court considers that, at the relevant time, there was no effective remedy under domestic law for the applicant's complaint about the length of the proceedings in question. There has, accordingly, been a violation of Article 13, taken together with Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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

61. The applicant claimed a total of 90,000 euros (EUR) for pecuniary and non-pecuniary damages. As regards the former, he referred to lost earnings and unpaid social security contributions, while, concerning the latter, he stated that he had suffered considerable mental anguish as a result of the length of the proceedings in question.

62. The Government contested these claims.

63. The Court notes that the impugned proceedings are still pending and finds, therefore, that the applicant's pecuniary claim must be rejected in its entirety. However, making an assessment on an equitable basis and having regard to the circumstances of the case, the Court awards the applicant EUR 2,400 in respect of the non-pecuniary damage suffered.

B. Costs and expenses

64. The applicant also claimed EUR 45,000 for the costs incurred before the domestic courts as well as EUR 2,850 for the costs and expenses incurred in respect of “his Strasbourg case”.

65. The Government contested these claims.

66. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were also reasonable as to their quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

67. In the present case, regard being had to the information in its possession and the above criteria, the Court rejects, as unsubstantiated, the applicant’s claim for costs before the domestic courts (see, *inter alia*, paragraph 27 above), but considers it reasonable to award him the sum of EUR 600 for the costs and expenses incurred in the proceedings before this Court.

C. Default interest

68. 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 has been a violation of Article 13 of the Convention, taken together with Article 6 § 1, as regards the absence of an effective domestic remedy for procedural delay;
4. *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 sums, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement:

- (i) EUR 2,400 (two thousand four hundred euros) in respect of the non-pecuniary damage suffered, plus any tax that may be chargeable,
 - (ii) EUR 600 (six hundred euros) for costs and expenses, plus any tax that may be chargeable to the applicant;
 - (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;
 - (c) that the respondent State shall ensure that the proceedings at issue are concluded as speedily as possible, taking into account the requirements of the proper administration of justice;
5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 June 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President