



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

SECOND SECTION

CASE OF MILOŠEVIĆ v. SERBIA

(Application no. 31320/05)

JUDGMENT

STRASBOURG

28 April 2009

FINAL

28/07/2009

This judgment may be subject to editorial revision.

In the case of Milošević v. Serbia,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Nona Tsotsoria, *judges*,

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 7 April 2009,

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

PROCEDURE

1. The case originated in an application (no. 31320/05) 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 national of the State Union of Serbia and Montenegro, Mr Slaviša Milošević (“the applicant”), on 17 August 2005.

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 N. Radosavović, a lawyer practising 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. The applicant alleged that he had suffered a breach of Article 5 § 3 of the Convention, as well as a violation of Article 2 of Protocol No. 4.

5. On 16 April 2007 the President of the Second Section decided to give notice of the application to the Government. Applying Article 29 § 3 of the Convention, it was also decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1972 and lives in Belgrade.

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

8. On 28 October 1999 the Fifth Municipal Public Prosecutor's Office (*Peto opštinsko javno tužilaštvo*) in Belgrade filed a request for the opening of a judicial investigation (*zahtev za sprovođenje istrage*) against the applicant, alleging that he had committed numerous offences of theft under Article 166 § 1 of the Criminal Code.

9. On 16 December 1999 the investigating judge of the Fifth Municipal Court in Belgrade (*Peti opštinski sud u Beogradu*, hereinafter "the Municipal Court") instituted a judicial investigation (*doneo rešenje o sprovođenju istrage*) in respect of these charges.

10. On 18 January 2000 the same court's investigating judge found that the applicant's whereabouts were unknown and issued a warrant, ordering his detention for a period of up to one month.

11. On 16 April 2002 the Municipal Court, acting *ex officio*, appointed a lawyer to represent the applicant in the proceedings.

12. On 20 January 2005, at 4 p.m., the applicant was arrested by the police and taken to the District Prison (*Okružni zatvor*) in Belgrade. This arrest was carried out on the basis of the Municipal Court's detention order of 18 January 2000.

13. On 21 January 2005 the Municipal Court attempted to contact the applicant's lawyer, but he could not be reached. On 24 January 2005, therefore, the court appointed another lawyer to represent the applicant.

14. Since the newly appointed lawyer was unable to go to the District Prison on 25 January 2005, the applicant's hearing was re-scheduled for 27 January 2005.

15. On 27 January 2005, at 9.30 a.m., the applicant, in his lawyer's presence, was heard by the investigating judge of the Municipal Court, on which occasion, *inter alia*, he denied all charges and explicitly waived his right to file an appeal against the detention order of 18 January 2000. It would appear that the applicant considered that he had little chance of being released on appeal and preferred instead to be tried as soon as possible.

16. On 3 February 2005 the Fifth Municipal Public Prosecutor's Office issued an indictment against the applicant.

17. On 4 February 2005 the three-judge panel of the Municipal Court extended the applicant's detention for another 30 days, without having heard him or his lawyer in person.

18. On 11 February 2005 the applicant filed an appeal against this decision, pointing out, *inter alia*, that he had not been brought promptly before a judge, “in breach of Article 5 § 3 of the Convention”.

19. On 18 February 2005 the District Court (*Okružni sud*) in Belgrade rejected this appeal, ruling again in the absence of the applicant and his lawyer. It also failed to consider the applicant’s specific complaint made under Article 5 § 3 of the Convention.

20. The applicant’s trial began on 2 March 2005, but his detention had been extended.

21. On 18 May 2005 the applicant was found guilty by the Municipal Court, sentenced to one year and two months in prison and released from detention.

22. On 19 December 2005 the District Court quashed the impugned judgment and ordered a retrial.

23. On 16 February 2007 the Municipal Court, based on a somewhat amended indictment, found the applicant guilty and sentenced him to eight months in prison.

24. On 5 April 2007 the applicant seems to have filed an appeal against this judgment with the District Court in Belgrade.

II. RELEVANT DOMESTIC LAW

A. Constitutional Charter of the State Union of Serbia and Montenegro (Ustavna povelja državne zajednice Srbija i Crna Gora; published in the Official Gazette of Serbia and Montenegro - OG SCG - no. 1/03)

25. Article 10 stated that the “provisions of international treaties on human and minority rights applicable in ... [the State Union of] ... Serbia and Montenegro shall be directly enforceable”.

B. Code of Criminal Procedure (Zakonik o krivičnom postupku, published in the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - nos. 70/01 and 68/02, as well as in the Official Gazette of the Republic of Serbia - OG RS - nos. 58/04, 85/05 and 115/05)

26. Article 229 regulates police detention, providing, *inter alia*, that it can last up to 48 hours, which is when the suspect must be brought before the investigating judge who can, in accordance with Article 228, either order his release or have him placed in “judicial detention”.

27. Articles 143-145 concern “pre-indictment detention”, that is judicial detention following any police detention until the defendant’s indictment by

the public prosecutor. Under these provisions, the investigating judge, in addition to conducting the investigation, is also authorised to order the defendant's detention. The defendant whose detention was so ordered in his absence shall be served with this order upon arrest or, at the latest, within 24 hours thereafter. The defendant shall then have the right to lodge an appeal against this order, which appeal must be filed within 24 hours and considered by a three-judge panel of the same court within another 48 hours. The defendant and his counsel have no right to be heard in person on this occasion but the three-judge panel, if it so decides, may invite them to appear and state their views orally (see, also, Article 262). The investigating judge can order detention for up to one month. Throughout the judicial investigation stage of the proceedings, the defendant is not explicitly entitled to request his release, but the investigating judge may release the defendant with the consent of the competent public prosecutor. If there is disagreement between the two, the issue shall be resolved by a three-judge panel of the same court, within 48 hours. The defendant and his counsel have no right to be heard in person on this occasion (*ibid.*). The three-judge panel may also extend the defendant's pre-indictment detention for another two months, without having heard him or his counsel in person (*ibid.*). The defendant and his counsel can lodge an appeal against this decision to a higher court, but again have no right to be present when this appeal is being considered (see, also, Articles 401 and 402 § 1, as well as Article 375 §§ 1 and 2). As regards crimes punishable by more than five years' imprisonment, the three-judge panel of the Supreme Court can extend the defendant's detention for an additional period of three months, without having heard him or his counsel in person (see, also, Article 262). The defendant and his counsel can lodge an appeal against this decision to another panel of the same court but, again, have no right to be present when this appeal is being considered (see, also, Articles 401 and 402 § 1, as well as Article 375 §§ 1 and 2). After these three months, the defendant has to be indicted or released. Domestic law, therefore, provides that pre-indictment detention cannot last more than 6 months in all.

28. Under Article 146, following the indictment of the defendant until the adoption of the judgement at first instance, detention is a matter for the trial chamber to decide, during the hearings themselves, or, indeed, for the same court's three-judge panel in-between those hearings. Apart from that, "post-indictment detention" is automatically reviewed every thirty days until the indictment is confirmed and every two months following this confirmation until the adoption of the judgement at first instance. The accused and defence counsel have no explicit right to be heard in person by the said three-judge panel or to be present when their appeal against the decision rendered within the "automatic review mechanism" is being considered by a higher court (*ibid.*).

29. Pursuant to Article 152, the situation of persons detained on remand is regularly monitored by the president of the competent court or a judge appointed by the president who cannot be an investigating judge. The president of the court and the investigating judge, however, may visit persons detained on remand at any time, speak with them and receive their complaints.

30. Lastly, Article 419 provides, *inter alia*, that the competent public prosecutor “may” (*može*) file a Request for the Protection of Legality (*zahtev za zaštitu zakonitosti*) against a “final judicial decision”, on behalf of or against the defendant, if the relevant substantive and/or procedural “law has been breached” (*ako je povređen zakon*).

C. Court Organisation Act (Zakon o uređenju sudova; published in OG RS nos. 63/01, 42/02, 27/03, 29/04, 101/05 and 46/06)

31. The relevant provisions of this Act read as follows:

Article 7

“A party or another participant in the court proceedings shall have the right to complain about the work of a court when they consider the proceedings delayed, improper, or that there has been an [untoward] influence on their course and outcome.”

Article 51

“The President of a higher instance court shall have the right to monitor the court administration of a lower instance court, and the President of a directly higher court shall have the authority to adopt an act from within the competence of the President of a lower instance court, if the latter omits to perform his duty.

The President of a higher instance court may request from the lower instance court information regarding the implementation of existing legislation, information concerning any problems about trials and all information regarding the work of the court.

The President of a higher instance court may order a direct inspection of the work of a lower instance court.”

Article 52

“When a party to a case or another person taking part in the proceedings files a complaint, the President of the court must, having considered it, inform the complainant about his views concerning its merits as well as any measures taken in this respect, within 15 days of receipt of the complaint.

If a complaint was filed through the Ministry of Justice or through a higher instance court, the Minister and the President of a higher court shall be informed of the merits of the complaint and of any measures taken in this respect.”

D. Rules of Court (Sudski poslovnik; published in OG RS nos. 65/03, 115/05 and 4/06)

32. Under Article 8, *inter alia*, the President of a court must ensure that the court’s work is carried out in a timely manner. He or she shall also look into every complaint filed by a party to the proceedings in respect of delay and respond within 15 days, giving his or her decision and, if necessary, ordering that steps be taken to remedy the situation.

33. Article 4, *inter alia*, provides that the Ministry of Justice shall supervise the work of the courts in terms of their timeliness. Should certain problems be identified, the Ministry shall “propose” specific measures to be undertaken within a period of 15 days.

E. Judges Act (Zakon o sudijama; published in OG RS nos. 63/01, 42/02, 60/02, 17/03, 25/03, 27/03, 29/04, 61/05 and 101/05)

34. The relevant provisions of this Act read as follows:

Article 40a §§ 1 and 2

“The Supreme Court of Serbia shall set up a Supervisory Board [“*Nadzorni odbor*”] (“the Board”).

This Board shall be composed of five Supreme Court judges elected for a period of four years by the plenary session of the Supreme Court of Serbia.”

Article 40b

“In response to a complaint or *ex officio*, the Board is authorised to oversee judicial proceedings and look into the conduct of individual cases.

Following the conclusion of this process, the Board may initiate, before the High Personnel Council, proceedings for the removal of a judge based on his unconscientious or unprofessional conduct, or propose the imposition of other disciplinary measures.”

F. Obligations Act (Zakon o obligacionim odnosima; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia - OG SFRY - nos. 29/78, 39/85, 45/89, 57/89 and OG FRY no. 31/93)

35. Articles 199 and 200 of the Obligations Act provide, *inter alia*, that anyone who has suffered fear, physical pain or, indeed, mental anguish as a consequence of a breach of his “personal rights” (*prava ličnosti*) is entitled, depending on their duration and intensity, to sue for financial compensation in the civil courts, as well as to request other forms of redress “which might be capable” of affording adequate non-pecuniary satisfaction.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

36. The applicant complained about not being brought promptly and in person before a judge with the power to release him, in breach of Article 5 § 3 of the Convention.

37. The relevant part of Article 5 reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. Admissibility

1. The six-month time-limit

38. The Government claimed that the applicant had failed to submit his application to the Court within six months as of 27 January 2005, which is

when he had first been heard by the investigating judge (see paragraph 15 above).

39. The applicant did not comment.

40. The Court reiterates that Article 35 § 1 of the Convention provides that it may only deal with a complaint which has been introduced within six months from date of the final decision rendered in the process of exhaustion of domestic remedies. Where no effective remedy is available to the applicant, the time-limit expires six months after the date of the acts or measures complained of, or after the date of knowledge of that act or its effect on the applicant (see *Younger v. the United Kingdom* (dec.), no. 57420/00, ECHR 2003-I). In the case of a continuing situation, however, the time-limit expires six months after the end of the situation concerned (see, *mutatis mutandis*, *Ječius v. Lithuania*, no. 34578/97, § 44, ECHR 2000-IX).

41. The Court observes that in the present case the applicant's complaint under Article 5 § 3 of the Convention relates to an alleged deficiency in the respondent State's Code of Criminal Procedure, as construed by the domestic courts and applied to him, which had given rise to a continuing situation. In particular, the investigating judge who had heard the applicant on 27 January 2005 had had no obligation under domestic law to review his detention or the power to independently order his release (see paragraphs 15 and 27 above). Moreover, it was not until 2 March 2005, when the first trial hearing had been held, that the applicant had been brought in person "before a judge" authorised to release him (see paragraphs 17-20, 27 and 28 above). The Court therefore concludes that it was on that date that the situation which had begun with the applicant's arrest had come to an end for the purposes of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Radoslav Popov v. Bulgaria*, no. 58971/00, §§ 39 and 40, 2 November 2006).

42. Accordingly, the time-limit for the submission of the applicant's complaint expired six months after 2 March 2005. Since the applicant introduced his application on 17 August 2005, it follows that the Government's objection must be dismissed.

2. *Exhaustion of domestic remedies*

43. The Government submitted that the applicant had not exhausted all effective domestic remedies. In particular, he had failed to refer to Article 10 of the Constitutional Charter or the Convention before the domestic courts (see paragraph 25 above). The applicant had also not filed a separate civil lawsuit under Articles 199 and 200 of the Obligations Act (see paragraph 35 above) and had omitted to urge the public prosecutor to submit a Request for the Protection of Legality on his behalf in respect of the District Court's decision of 18 February 2005 (see paragraph 30 above). Lastly, the applicant had neither made use of Article 152 of the Code of Criminal Procedure nor complained to the President of the Municipal Court,

the President of the District Court, the Minister of Justice or the Supreme Court's Supervisory Board, respectively (see paragraphs 29 and 31-34 above).

44. The applicant maintained that all of the above-mentioned remedies were irrelevant and/or ineffective.

45. The Court reiterates that, according to Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted (see, for example, *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, p. 18, § 33; *Remli v. France*, judgment of 23 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 571, § 33). It further recalls that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy in question was available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11–12, § 27; *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38). Moreover, a remedy cannot be deemed effective if it depends on the benevolence of a public official (see, *mutatis mutandis*, *Malfatti v. the Slovak Republic*, no. 38855/97, Commission decision of 1 July 1998; *V.S. v. the Slovak Republic*, no. 30894/96, Commission decision of 22 October 1997; see, also, *X v. Ireland*, no. 9136/80, Commission decision of 10 July 1981, *Decisions and Reports* (DR). 26, p. 242).

46. As regards the present case, the Court firstly notes, concerning the Government's submission that the applicant should have filed a civil claim pursuant to Article 200 of the Obligations Act, that the rights guaranteed under Article 5 § 3 are to be distinguished from the right to receive compensation for a violation thereof, which is why a civil action for damages cannot be deemed effective in respect of the applicant's complaint (see, among many other authorities, *Włoch v. Poland*, no. 27785/95, § 90, ECHR 2000-XI). Secondly, even assuming that all of these remedies can be considered relevant, the Government have failed to provide any domestic jurisprudence indicating that, in a case such as the applicant's, it was indeed possible to obtain any other detention-related redress under Article 199 of the Obligations Act, Article 152 of the Code of Criminal Procedure or, for that matter, on the basis of legislation described at paragraphs 31-34 above. Thirdly, the Court finds that it was only the public prosecutor who could have filed a Request for the Protection of Legality on behalf of the applicant and, moreover, the former had full discretion in respect of whether to do so. This remedy was thus also ineffective as understood by Article 35 § 1 of the Convention (see *Lepojić v. Serbia*, no. 13909/05, § 54, 6 November 2007). Finally, it is observed that in his appeal of 11 February 2005, the applicant had specifically complained about not being brought promptly before a judge, in breach of Article 5 § 3 of the Convention.

47. In view of the above, the Court concludes that the applicant's complaints cannot be declared inadmissible for non-exhaustion of domestic remedies under Article 35 § 1 of the Convention. Accordingly, the Government's objection in this respect must be dismissed.

3. Conclusion

48. The Court considers that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further considers that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

49. The Government argued that there had been no violation of Article 5 § 3 of the Convention. In particular, the detention at issue had been in accordance with the law and ordered by a court, not the police or a public prosecutor. Further, the applicant had appeared before the investigating judge less than seven days following his arrest, some of the prior delay being attributable to the applicant's own lawyer rather than the respondent State's judiciary. Finally, the Government maintained that the applicant's first trial had ended quickly and observed that he had been released immediately thereafter.

50. The applicant reaffirmed his complaint.

51. The Court reiterates that an individual lawfully arrested or detained on suspicion of having committed a criminal offence must, under Article 5 § 3 of the Convention, be protected by a certain judicial control. That control must satisfy the requirement of promptness (see *McKay v. the United Kingdom* [GC], no. 543/03, § 33, ECHR 2006-...), be "automatic", that is not dependent on a previous application by the person concerned (*ibid.*, § 34), and the detainee must be brought in person before "a judge or [an]other officer authorised by law" to determine whether to order his or her release pending trial (*ibid.*, § 35).

52. The Court further recalls that even where the initial detention was ordered by a domestic court this does not preclude the subsequent application of the said "promptness requirement" if, *inter alia*, the defendant was not heard when his detention was being considered. For example, an interval of fifteen days between the applicant's placement in custody, based on a court order, and his hearing in person before a judge was deemed inconsistent with Article 5 § 3 in the case of *McGoff v. Sweden* (judgment of 26 October 1984, § 27, Series A no. 83).

53. In view of the above jurisprudence and as regards the present case, the Court observes that there is no evidence in the case file which would suggest that the applicant's arrest and/or his subsequent detention had been in breach of Article 5 § 1 (c) of the Convention. The Court further notes,

however, that, given the relevant provisions of the Code of Criminal Procedure and its prior findings (paragraphs 27, 28 and 41 above), the applicant had not been brought in person before a judge who had both an obligation to review his detention and the necessary power to order his release until, at best, 2 March 2005, more than forty-one days following his arrest (see also paragraphs 12-21 above).

54. There has accordingly been a breach of Article 5 § 3 of the Convention (see, *mutatis mutandis*, *Vrenčev v. Serbia*, no. 2361/05, §§ 64-68, 23 September 2008).

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 4

55. The applicant further complained that, as a consequence of the violation of Article 5 § 3 of the Convention, the respondent State's authorities had also breached his right to liberty of movement, as guaranteed under Article 2 of Protocol No. 4.

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

57. However, having regard to its findings under Article 5 § 3 above, the Court considers that it is not necessary to examine whether, in this case, there has also been a separate violation of Article 2 of Protocol No. 4 (see, among other authorities, *Bozano v. France*, 18 December 1986, § 63, Series A no. 111).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed 10,000 euros (EUR) in respect of the non-pecuniary damage suffered.

60. The Government contested that claim.

61. The Court considers that the applicant has suffered non-pecuniary damage which cannot be sufficiently compensated by its mere finding of a violation of the Convention. Having regard to the character of the violation found in the present case and making its assessment on an equitable basis, the Court therefore awards the applicant EUR 3,000 under this head (see, *mutatis mutandis*, *Vrenčev v. Serbia*, cited above).

B. Costs and expenses

62. The applicant also claimed EUR 500 for the costs and expenses incurred before the Court.

63. The Government contested that claim.

64. 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. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award in full the sum sought by the applicant for the proceedings before it.

C. Default interest

65. 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 5 § 3 of the Convention;
3. *Holds* that there is no need to examine separately the applicant's complaint under Article 2 of Protocol No. 4;
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 Serbian dinars at the rate applicable on the date of settlement:
 - (i) EUR 3,000 (three thousand euros) in respect of the non-pecuniary damage suffered, plus any tax that may be chargeable,
 - (ii) EUR 500 (five 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;

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

Done in English, and notified in writing on 28 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President