



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

1959 · 50 · 2009

THIRD SECTION

CASE OF GASPARI v. SLOVENIA

(Application no. 21055/03)

JUDGMENT

STRASBOURG

21 July 2009

FINAL

10/12/2009

This judgment may be subject to editorial revision.

In the case of Gaspari v. Slovenia,

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

Josep Casadevall, *President*,

Elisabet Fura-Sandström,

Boštjan M. Zupančič,

Alvina Gyulumyan,

Ineta Ziemeļe,

Luis López Guerra,

Ann Power, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 30 June 2009,

Decides not to hold a hearing on the admissibility and merits of the case,

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

PROCEDURE

1. The case originated in an application (no. 21055/03) against the Republic of Slovenia, lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Slovenian national, Mrs Alenka Blaž (“the applicant”) on 11 June 2003. The applicant later changed her surname to Gaspari.

2. The applicant was represented by Mr R. Završek, a lawyer practising in Ljubljana. The Slovenian Government (“the Government”) were represented by their Agent, Mr L. Bembič, State Attorney-General.

3. The applicant alleged, in particular, that the domestic proceedings had been unfair and that she had not had the opportunity to participate in the proceedings before the Constitutional Court. She alleged that there had been a violation of Articles 6 § 1, 13 and 14 of the Convention and of Article 1 of Protocol No. 1 and Article 5 of Protocol No. 7 to the Convention.

4. On 29 August 2006 the President of the Chamber to which the case had been assigned decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1947 and lives in Ljubljana.

6. On 6 January 1992 the applicant and her then husband F.B., who had decided to get divorced, entered into an agreement on the partition of their joint property. The agreement stipulated, *inter alia*, that F.B. would transfer to her, within one year, the ownership of premises on Zaloška Street, unless they agreed on a different location. The agreement further stipulated that if the stated obligations were not fulfilled, the applicant could terminate the agreement and claim a share of the joint property in accordance with the relevant domestic law. On 24 April 1992 the applicant and F.B. divorced.

7. Subsequently, F.B. did not transfer the ownership of premises on Zaloška Street to the applicant. However, on 24 September 1992 the applicant accepted the keys of certain premises on Trubarjeva Street. After F.B. had bought the latter premises, on 6 November 1992, he offered the applicant the possibility of signing a supplement to the agreement. According to the supplement, the applicant would receive forty per cent of the premises on Trubarjeva Street as a form of alternative performance of the relevant part of the agreement. The applicant refused to sign the supplement to the agreement.

8. On 3 May 1993 she instituted proceedings in the Ljubljana Basic Court (*Temeljno sodišče v Ljubljani*) seeking termination of the agreement and partition of the joint property.

9. On 16 November 1993 F.B. died and his heirs, J.B.J., B.E.B. and M.B., took over his capacity in the proceedings.

10. On 9 November 1995 the court issued a partial judgment terminating the relevant agreement and rejecting the counter-claim lodged by J.B.J., B.E.B. and M.B. (“the heirs”).

11. On 11 April 1996 the Ljubljana Higher Court (*Višje sodišče v Ljubljani*) quashed the first-instance court’s judgment and remitted the case for re-examination. The applicant then challenged that decision in an appeal on points of law, but that was rejected by the Supreme Court on 22 May 1997.

12. In the re-examination proceedings, on 14 September 1998, the (renamed) Ljubljana District Court (*Okrožno sodišče v Ljubljani*) issued a new judgment rejecting the applicant’s claim. The court considered that the relevant agreement was not a “fixed contract” (*fiksna pogodba*) which could be terminated without allowing additional time for its performance. Moreover, from F.B.’s conduct it had not been apparent that he was not going to honour his obligation. The applicant should therefore have offered an additional time-limit to F.B. In addition, the court found that F.B. had in

large part fulfilled his obligations and that the applicant, by accepting the keys to the premises on Trubarjeva Street, had agreed to an alternative performance of the agreement.

13. On 31 March 1999 the Ljubljana Higher Court upheld the first-instance court's judgment. It, however, amended certain parts concerning the payment of costs and expenses.

14. On 13 May 1999 the applicant lodged an appeal on points of law with the Supreme Court (*Vrhovno sodišče*). She supplemented the appeal on 25 May 1999.

15. On 19 April 2000 the Supreme Court upheld the applicant's appeal to the extent that it concerned the application of law by the lower courts, but dismissed the remainder. The Supreme Court considered that the interpretation of the relevant agreement concerned the application of the law. It then concluded that F.B. had not fulfilled his obligations by offering the applicant only a share of the premises on Trubarjeva Street. In addition, the applicant had not consented to the alternative performance nor had F.B. showed an intention to fulfil his obligations. The Supreme Court consequently varied the lower courts' judgments and terminated the relevant agreement. As far as the partition of the joint property was concerned, the Supreme Court remitted the case to the first-instance court.

16. Two of the heirs (J.B.J. and B.E.B.) lodged a constitutional appeal complaining, *inter alia*, of the arbitrariness of the Supreme Court's judgment and of a breach of the provision guaranteeing equal protection of rights (Article 22 of the Constitution). On 30 January 2001 the Constitutional Court (*Ustavno sodišče*) accepted the appeal for consideration, which is equivalent to declaring it admissible. On 10 May 2001 it upheld the appeal by five votes to three, quashed the Supreme Court's judgment and remitted the case to the Supreme Court for re-examination (decision no. Up-232/00). It would appear that the applicant was informed of that decision (see paragraph 22 below), but there is no document in the case file certifying as to when.

17. The Constitutional Court found that the Supreme Court's decision was based on the interpretation of the parties' motivation and of the content of the agreement. In its view, such interpretation constituted an interference with the facts established by the lower courts. However, according to the domestic legislation, the Supreme Court, when deciding on an appeal on points of law, had jurisdiction only for the determination of legal issues. The Constitutional Court found that the Supreme Court's decision was obviously erroneous and therefore arbitrary. This, and the fact that the Supreme Court had exceeded its jurisdiction, represented an interference with the appellants' right to equal protection of rights.

18. In the re-examination proceedings, the Supreme Court, on 17 December 2001, again varied the lower courts' judgments by terminating

the relevant agreement and remitting the case to the first-instance court to determine the partition of the joint property.

19. After accepting for consideration the relevant part of the heirs' further constitutional appeal on 17 June 2002, the Constitutional Court, on 12 December 2002, quashed the Supreme Court's judgment, dismissed the applicant's appeal on points of law and upheld the Ljubljana Higher Court's judgment of 31 March 1999. The decision was adopted by six votes to two (decision no. Up-140/02).

20. The Constitutional Court found that the Supreme Court had again dealt with questions of fact – a matter over which it had no jurisdiction; that it had failed to provide reasons for its decision, which was different from previous decisions adopted in other cases concerning the same issue; and that it had disregarded the instructions given by the Constitutional Court. The latter therefore again found a violation of the right to equal protection of rights. Using the special power afforded in section 60 of the Constitutional Court Act and because of the already lengthy duration of the proceedings, the Constitutional Court, in order to secure effective judicial protection, decided on the merits of the case itself and upheld the Higher Court's judgment of 31 March 1999.

21. The Constitutional Court's decisions of 10 May 2001 and 12 December 2002 noted, under paragraph 3, as follows:

“in accordance with the provisions of sections 6 and 56 of the Constitutional Court Act, the Constitutional Court served the constitutional appeal on the Supreme Court, on the opposite party (plaintiff) to the proceedings [the applicant] and on the third defendant in the proceedings. None of them replied to the constitutional appeal.”

22. According to the applicant, she had not received a copy of the first constitutional appeal. On 4 July 2001, a note was prepared by an official in this connection on the Constitutional Court's premises. The note, which appeared to be part of the file no. Up 232/00, mentioned that the constitutional appeal and admissibility decision of 30 January 2001 had been handed over to the applicant.

23. In addition, the applicant submitted to the Court copies of receipts relating to the attempt to serve the process by the Constitutional Court, concerning the file no. Up 140/02. It would appear that this process included a copy of the second constitutional appeal, the admissibility decision and a letter informing the applicant that the constitutional appeal had been accepted for consideration and that that the applicant should submit her comments within eight days. It transpires from the receipts that the process was sent by the Constitutional Court on 21 June 2002 but had not been served on the applicant. The address referred to in the receipts and the letter is different from the applicant's address as mentioned in her claim and in the decisions issued in the domestic proceedings, including in the last

Supreme Court judgment. According to the applicant, the address used to serve the process was actually the address of one of the other parties to the proceedings.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitutional Court Act

24. The Constitutional Court Act (*Zakon o Ustavnem sodišču*, Official Gazette no. 15/94) provides, in so far as relevant, as follows:

Section 6

“For procedural questions which are not governed by this Act, the Constitutional Court shall apply the relevant provisions of legislation concerning [ordinary] court proceedings, taking into consideration the nature of the matter.”

Section 56

“After being accepted, a constitutional appeal shall be referred to the body which issued the decision against which the constitutional appeal is lodged, in order for that body to reply to the constitutional appeal within a given time-limit.”

Section 60

“1. If the Constitutional Court quashes a decision, it may also decide on a relevant right or freedom if such procedure is necessary in order to bring to an end consequences that have already occurred on the basis of the quashed decision, or if so required by the nature of the constitutional right or freedom, and provided that a decision can be given on the basis of information in the file.

....”

25. On 30 May 2007 the Slovenian Parliament adopted amendments to the Constitutional Court Act (Official Gazette no. 51/2007). Section 56 was amended to read:

“1. If the Constitutional Court accepts a constitutional appeal for consideration, it shall inform the body which issued the decision against which the constitutional appeal is lodged accordingly. A Constitutional Court judge can request the body ... to submit information or an explanation necessary for the decision on the constitutional appeal.

2. In the above circumstances, the constitutional appeal should be sent to the persons who participated in the proceedings leading to the decision challenged in the appeal if that decision concerned one of their rights, obligations or legal interests, so that they can reply to it within a certain time-limit.”

B. The Civil Procedure Act

26. Paragraph 3 of section 370 of the Civil Procedure Act (*Zakon o pravdnem postopku*, Official Gazette no. 26/1999, in force since 14 July 1999) provides that an appeal on points of law is not allowed in respect of an alleged erroneous or insufficient establishment of the facts.

27. Under section 394 of the Civil Procedure Act, proceedings which have been finally concluded by a court decision (*pravnomočno končan*) can be reopened at the request of a party to the proceedings, if, *inter alia*, that party did not have an opportunity to give testimony in court, due to some illegality, in particular lack of service. The final conclusion of the proceedings in principle refers to the final decision against which no ordinary appeal lies; that would normally be a decision of a first-instance court, or if an appeal has been lodged, that of a second-instance court.

28. Section 142 of the same act provides that certain documents (such as statements of claim, notices of extraordinary remedies or judgments which can be appealed against) should be served on parties in person. If the party is not found at his or her address, the server should leave a note informing him or her of a new date on which he or she is to be served with the process. If the party is not found at his or her address on that date, the server will serve the process on, *inter alia*, an adult family member, who will be required to accept the process. If that is not possible, the server will return the process to the court or leave it at a local post office. The server will leave a note at the party's address informing him or her of the process and the fifteen-day deadline for its collection. The note shall also state the reasons why the process was left at the post office or the court and the date of that event. Under the above conditions and, as the case may be, after the expiry of the deadline, the process will be considered to have been effectively served on the addressee (sections 140-142).

C. The Constitutional Court's decisions concerning requests for reopening of the proceedings before it

29. The Government submitted six decisions by which the Constitutional Court had decided on requests for reopening of the proceedings before it. Two of them (decision no. U-I-18/99 of 4 October 2001 and decision no. U-I-217/02 of 17 March 2005) concern proceedings by which the constitutionality and legality of a statutory act were being challenged (*postopek za oceno ustavnosti in zakonitosti*). In both of them, the Constitutional Court found that neither the Constitutional Court Act nor any other legislation provided for the possibility of reopening such proceedings.

30. In the oldest of the remaining four decisions concerning proceedings in which a constitutional appeal had been dismissed (decision no. Up-95/95 of 26 February 1998), the panel of three members of the Constitutional

Court (that is a formation in which a decision on admissibility is normally taken) dismissed the request for reopening. It explained that the appellant had not invoked any of the grounds which would justify reopening under the relevant provision of the Civil Procedure Act and section 6 of the Constitutional Court Act. Likewise, in all the remaining decisions (decision no. Up-189/01 of 21 November 2001, decision no. Up-524/01 of 13 January 2003 and decision no. Up-550/02 of 7 March 2006) the Constitutional Court found that the appellants had not demonstrated any grounds which could justify reopening under section 6 of the Constitutional Court Act and the relevant provisions of the legislation concerning court proceedings. It therefore rejected the requests, but added that this decision was taken “without considering the issue whether the reopening of the proceedings before the Constitutional Court was actually possible”.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF NON-COMMUNICATION OF THE CONSTITUTIONAL APPEALS TO THE APPLICANT

31. The applicant complained that she had not had an opportunity to participate in either of the two sets of proceedings before the Constitutional Court (Up-232/00 and Up-140/02) since she had not been informed about the proceedings, nor had she received copies of the constitutional appeals in order to reply to them.

32. The relevant part of Article 6 § 1 reads as follow:

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

A. Admissibility

1. Compliance with the six-month time-limit

33. The Government argued that the application had been lodged outside the six-month time-limit. In this connection, they referred to the Court’s incoming stamp on the application form, which bore the date 19 June 2003 and the fact that the final decision in the domestic proceedings had been adopted on 12 December 2002. They also argued that the first set of proceedings before the Constitutional Court (Up-232/00) had ended on

10 May 2001, which was well outside the six-month time-limit set by Article 35.

34. The applicant contested the Government's arguments. She maintained that the proceedings in question had ended with the Constitutional Court's decision of 12 December 2002, which was the last decision in the proceedings and which was served on the applicant subsequent to that date. The application had been lodged on 11 June 2003, which was within the six-month time-limit.

35. The Court notes that the proceedings in question ended with the last decision of the Constitutional Court, which was a decision of 12 December 2002, by which the dispute between the parties, as set out in the claim of 3 May 1993, was finally determined. Although the application might have been received by the Court only on 19 June 2003, it is obvious from the postmark on the envelope that it was posted at the post office on 11 June 2003, which was within six months following the relevant decision. The applicant therefore complied with the six-month rule provided in Article 35 § 1 of the Convention and this objection by the Government must be dismissed (see *Arslan v. Turkey* (dec.), no. 36747/02, ECHR 2002-X (extracts))

2. Exhaustion of domestic remedies

36. The Government argued that the applicant had failed to exhaust domestic remedies, as she had not lodged a request for reopening of the Constitutional Court proceedings, a remedy available to her under section 6 of the Constitutional Court Act read together with section 394 of the Civil Procedure Act. The Government submitted that the second constitutional appeal considered in the proceedings Up-140/02 had been sent to a wrong address on 21 June 2002 and had been returned to the Constitutional Court with the note "not taken" (*ni dvignil*). The Constitutional Court had not therefore realised that a mistake had been made in the address and had assumed that the appeal had been effectively served on the applicant, in accordance with section 142, read together with sections 140 and 141, of the Civil Procedure Act. According to the Government, it had been open to the applicant to request reopening of the proceedings on grounds of non-participation. In support of this argument, they submitted that similar requests had been considered by the Constitutional Court before but had been rejected on the grounds that the conditions for reopening were not met (see paragraphs 29 and 30 above).

37. The applicant argued that the Government had failed to show that the remedy they referred to had been available to her in theory and in practice, that it had formed part of the normal process of redress or that it would have had a reasonable prospect of success.

38. The applicant disagreed with the Government's interpretation of the domestic law. In her submission, there were no grounds in the

Constitutional Court Act or Civil Procedure Act for the assumption that reopening was possible also in the proceedings before the Constitutional Court, nor was there any established case-law to that effect. As regards the decisions submitted by the Government, none of the requests for reopening had been successful.

39. In any event, referring to a provision in the Civil Procedure Act which required a party to proceedings concerning extraordinary remedies to be represented by a qualified lawyer, the applicant submitted that she had not been legally represented in the domestic proceedings and could not have afforded such representation for the purpose of lodging a request for reopening.

40. Finally, the applicant submitted that had she lodged a request for reopening instead of applying to the Court, she would have missed the six-month time-limit. Moreover, a requirement to use that remedy for purposes of exhaustion would also be incompatible with the Court's established case-law to the effect that the relevant provisions of the Convention did not apply *ratione materiae* to proceedings instituted with a view to obtaining the reopening of a case.

41. The Court notes that under Article 35 normal recourse should be had by an applicant to remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Belinger v. Slovenia* (dec.), no. 42320/98, 2 October 2001).

42. It is incumbent on the Government pleading non-exhaustion to demonstrate to the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden of proof has been discharged, it falls to the applicant to establish that the remedies advanced by the Government were in fact exhausted or were for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV).

43. The Court observes that in the present case, the Government argued that the applicant could have obtained the reopening of the proceedings before the Constitutional Court had she lodged a request to that effect. This legal avenue was, in the Government's submission, an effective and available remedy.

44. In this connection, the Government referred to section 6 of the Constitutional Court Act providing that legislation concerning ordinary court proceedings should be applied *mutatis mutandis* for questions of a procedural nature in the Constitutional Court's proceedings (see

paragraph 24 above). They argued that this provision should be read together with section 394 of the Civil Procedure Act providing for the possibility of requesting the reopening of finally concluded civil proceedings, which would normally mean first-instance or second-instance proceedings (see paragraph 27 above). The Court notes, however, that unlike the Government, the Constitutional Court has not adopted such an interpretation. In none of the four decisions, which concerned proceedings on a constitutional appeal, did the panel of three judges of the Constitutional Court decide in favour of the claimant seeking reopening. What is more, in the three most recent decisions, when dismissing the requests, the panel explicitly stated that no position was adopted by the Constitutional Court as to the issue of whether the reopening of the proceedings before it was actually possible (see paragraph 30 above).

45. Having regard to the foregoing, the Court considers that the Government failed to demonstrate that the existence of the remedy they referred to, namely a request for reopening of the proceedings before the Constitutional Court, was sufficiently certain in theory and in practice at the material time. In view of this finding, the Court does not consider it necessary to address the remaining arguments relied on by the applicant.

3. Conclusion

46. As this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds, it must be declared admissible.

B. Merits

1. The parties' arguments

47. The applicant submitted that although she had had a strong interest in the outcome of the proceedings before the Constitutional Court, which had been decisive for her pecuniary claim, she had had no opportunity to participate in them. She had not been informed that the constitutional appeals had been lodged or that they had been declared admissible and had thus been unable to reply to them. The applicant further submitted that despite the special nature of the Constitutional Court proceedings, she should have had a genuine opportunity to be involved. The failure to provide her with such an opportunity disclosed a serious breach of Article 6.

48. The Government submitted that the decision of 27 June 2002 concerning the admissibility of the constitutional appeal and the notice of appeal together with a letter inviting the applicant to reply had been sent to the wrong address. The process had been returned to the Constitutional Court on 9 July 2002 with the note "not taken".

49. In the Government's submission, it was normal in cases where the address was incorrect for a process-server's note to state that the person had moved or that that he or she could not be identified at the address mentioned. As the Constitutional Court had received the note "not taken", it had understandably believed that the process had been sent to the correct address.

2. The Court's assessment

50. The Court reiterates that the concept of a fair hearing implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to have made known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision (see *Nideröst-Huber v. Switzerland*, 18 February 1997, § 24, *Reports* 1997-I, and *K.S. v. Finland*, no. 29346/95, § 21, 31 May 2001). This requirement may apply also to the submissions filed in proceedings before the Constitutional Court (see *Milatová and Others v. the Czech Republic*, no. 61811/00, ECHR 2005-... (extracts)).

51. The Court notes that in the present case the constitutional appeals lodged by the other party to the proceedings had not been communicated to the applicant. It also has not been disputed that this occurred for reasons which could not be attributed to the applicant. The Court further observes that both appeals were declared admissible and were subsequently upheld. The last one led to a final decision on the applicant's claim which was adopted by the Constitutional Court itself.

52. The Court considers that the applicant indeed had a legitimate interest in receiving copies of the appeals so as to be able to reply to them. In this connection it is noteworthy that the Court has held on many occasions that it does not need to be determined whether the omission to communicate a document caused the applicant actual prejudice; the existence of a violation is conceivable even in the absence of prejudice. It was for the applicant to judge whether or not a document called for her comments (see, among other authorities, *Milatová and Others*, cited above, § 65, and *H.A.L. v. Finland*, no. 38267/97, § 47, 27 January 2004).

53. The Court further considers that, regardless of whether or not the applicant had a theoretical right of access to the appeals which the Constitutional Court had failed to communicate to her, the onus was on the Constitutional Court to ensure the applicant's proper participation in the proceedings and thus to afford her an opportunity to comment on the constitutional appeals prior to its decisions (see, *H.A.L. v. Finland*, cited above, § 45, and *Milatová and Others*, cited above, § 65).

54. In this connection, the Court observes that there was an explicit provision in section 56 of the Constitutional Court Act requiring communication of a constitutional appeal to the authority concerned.

Although the Constitutional Court would seem to have established a practice of communicating constitutional appeals also to other parties to the proceedings, based on its interpretation of section 6 of the Act, no legislative provision requiring such communication existed at the material time. The Court therefore notes with satisfaction that section 56 was amended in 2007 to require communication of the constitutional appeal also to the persons affected by the decision that was being challenged (see paragraph 25 above). This amendment, however, could not have had any impact on the applicant's situation as it was enacted only in 2007.

55. Having said that, the Court notes that in the present case the mere lack of legislative provision does not appear to have played a significant role in the Constitutional Court's failure to communicate the constitutional appeals to the applicant. It would appear that the non-communication in the instant case occurred as a result of the Constitutional Court serving process at the wrong address. The Government have not explained what happened with the first process, which was not served on the applicant. It transpires from the case file, however, that the applicant, after being informed of the Constitutional Court's decision of 10 May 2001, complained to the Constitutional Court in this respect and was then provided with the related admissibility decision and the constitutional appeal. As far as the second constitutional appeal was concerned, the Government explained that because of a misleading statement on the process-server's note (see paragraph 49 above), the Constitutional Court could not have known that the address had been wrong.

56. As regards that argument of the Government, the Court reiterates that it was the Constitutional Court's responsibility to ensure that the applicant was notified of the constitutional appeals and related decisions on admissibility. It notes that, despite her complaint following the non-communication of the first constitutional appeal, the Constitutional Court did not take appropriate measures to ensure that the applicant's address was correct once it saw that the process containing the second constitutional appeal had been returned.

57. Having regard to the above, the Court finds that the procedure followed in the present case did not enable the applicant to participate properly in the proceedings before the Constitutional Court and thus deprived her of a fair hearing within the meaning of Article 6 § 1 of the Convention. There has therefore been a violation of that provision.

II. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

58. The applicant complained that the proceedings before the first-instance and second-instance courts, ending with the latter's judgment of 31 March 1999, had been unfair since the courts had wrongly applied the

law. This error had been cured by the Supreme Court's decisions which, however, had then been quashed by the Constitutional Court.

59. She also complained that the Constitutional Court's decision of 12 December 2002 had been arbitrary and had lacked reasoning. The Constitutional Court, when rejecting her appeal on points of law, did not address her arguments but merely relied on the premise that the Supreme Court's conclusions had not been sufficiently explained.

60. Finally, the applicant complained that the Constitutional Court had not been a competent body established by law to determine her civil rights. In this connection, she submitted that the requirements of section 60 of the Constitutional Court Act, affording the Constitutional Court special power to decide on the merits of the claim, were not met in her case.

61. As in respect of the complaint concerning the non-communication of the constitutional appeals to the applicant, the Government at the outset argued that the remaining complaints under Article 6 § 1 were lodged outside the six-month time-limit. They also argued that the complaints relating to the proceedings before the first- and second-instance courts, should have been lodged within six months from the date on which the proceedings were finally concluded by the second-instance court's judgment of 31 March 1999.

62. The Court recalls its above findings concerning the compliance with the six-month rule in respect of the complaint about non-communication of the constitutional appeals and notes that they equally apply to the remaining complaints under Article 6 § 1 (see paragraph 35 above).

63. The Government further argued that the applicant's complaint that the first-instance and second-instance courts had wrongly applied the law concerned the outcome of the proceedings and did not raise any issue under the Convention. The applicant did not comment further on this issue.

64. The Court reiterates that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. It is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 35, ECHR 1999-III; *Schenk v. Switzerland*, 12 July 1988, § 45, Series A no. 140). It further reiterates that although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see *Van de Hurk v. the Netherlands*, 19 April 1994, § 61, Series A no. 288). In the instant case, the Court considers that there is no indication of unfairness in the manner in which these proceedings were conducted. The reasons on which the first-instance and second-instance courts based their decisions are sufficient to exclude any claim that the way in which they applied the law in the case was arbitrary.

65. As regards the complaint concerning the alleged inadequate reasoning in the second Constitutional Court decision, the Government argued that it was wholly unsubstantiated.

66. The applicant argued that the Constitutional Court had not explained why it considered it appropriate to quash the Supreme Court's judgment. In addition, the Constitutional Court had not responded to the arguments adduced by the parties in their submissions to the Supreme Court.

67. Having regard to the reasons advanced in the Constitutional Court's decision which quashed the Supreme Court's judgment and upheld the lower courts' decisions, the Court considers that it cannot be said that they were insufficient such as to be in breach of Article 6, nor did they appear arbitrary (see, *mutatis mutandis*, *García Ruiz v. Spain* [GC], no. 30544/96, § 29, ECHR 1999-I).

68. As to the complaint that the Constitutional Court had not been a competent body established by law to determine the applicant's civil rights, the Government argued that this complaint concerned merely a question of procedural options available to the Constitutional Court. The latter had been in the best position to decide whether the case should have been remitted to the lower court or not. The Constitutional Court had explained its decision to rule on the merits of the claim, had had a legal basis to do so and had not acted arbitrarily. The Government submitted copies of decisions adopted in five unrelated cases in which the Constitutional Court had used these same powers.

69. The applicant argued that the conditions under which the Constitutional Court was allowed to make a final decision on the claim had not been met. The Constitutional Court should safeguard human rights and not deal with the facts and law of a particular case.

70. The Court notes that there is no doubt that there was a legal basis, namely section 60 of the Constitutional Court Act, under which the Constitutional Court could take a final decision on the merits of the claim. It was primarily for the Constitutional Court to interpret this provision in each particular case and the Court does not consider that the manner in which it did so in the instant case could in itself be considered a breach of Article 6 of the Convention.

71. It follows that the above complaints, in so far as they can be separated from the issue of non-communication to the applicant of the constitutional appeals, are manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 TAKEN ALONE AND OF ARTICLE 14 READ TOGETHER WITH ARTICLES 6 AND 13 OF THE CONVENTION

72. In her later submissions the applicant alleged that the Constitutional Court's decision should also have been considered as being in breach of Article 13 of the Convention as it had not addressed her arguments but had merely relied on the fact that the Supreme Court's conclusion had not been sufficiently explained. She alleged that, as a result, the remedy in respect of the second-instance judgment, namely the appeal on points of law, had become ineffective. The applicant, relying on the same Article, also complained that no appeal lay against the second Constitutional Court decision. In addition, she alleged that compared to other persons in a similar situation and her late ex-husband's heirs, she had been discriminated against in her enjoyment of the rights set forth in Articles 6 and 13. In particular, she alleged that her arguments had only been considered at two levels of jurisdiction, while her late ex-husband's heirs could have used remedies at four levels of jurisdiction.

73. The Court does not need to address the issue of whether these complaints, which were formulated later in the proceedings, comply with the six-month rule, as in any event it considers – in the light of all the material in its possession, and in so far as the matters complained of are within its competence – that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. They are therefore manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 AND ARTICLE 5 OF PROTOCOL No. 7 TO THE CONVENTION

74. Lastly, the applicant complained under Article 1 of Protocol No. 1 that the first-instance and the second-instance court, which had refused to terminate the agreement between the applicant and her late ex-husband, had deprived her of an equal share of the joint property. Their judgments had been erroneous. Moreover, after the agreement had been terminated by the Supreme Court, the Constitutional Court had again endorsed the agreement in its decision of 12 December 2002, which had failed to meet the requirements of Article 6. By doing so, the applicant alleged in her later submission, the courts had also violated her right under Article 5 of Protocol No. 7 to the Convention.

75. The Court, referring to its above conclusion concerning complaints under Article 6 § 1 other than the non-communication of the constitutional appeals to the applicant (see paragraphs 58-71 above), and having regard to the material in its possession, finds that, in so far as these complaints are

within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is also manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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

77. The applicant claimed approximately 3,000,000 euros (EUR) in respect of pecuniary damage. This amount consisted of half of the total value of the property owned by the applicant and her late ex-husband prior to their divorce. As the finding of a violation would not give the applicant a right to reopen the domestic proceedings, she asked to be awarded full restitution for her loss in the domestic proceedings or, at least, an amount which was in a reasonable proportion to the value of the property to which she was entitled. She also submitted to the Court a list of the property concerned and related documents showing its value. In the applicant's submission, there was a causal link between the violations alleged and the amount thus claimed.

78. As regards the non-pecuniary damage, the applicant claimed EUR 50,000. She alleged that she had suffered pain and mental injury as a result of unlawful domestic proceedings.

79. The Government contested the claim. They argued that there was no causal link between the alleged violation of Article 6 and her claim for pecuniary damage. Awarding the applicant the requested sum would, in substance, mean upholding the claim she had pursued in the domestic proceedings. In addition, the applicant had obviously based her claim for damage on the grounds that there had been an interference with her right to property, including deprivation of her possessions. As regards her claim for non-pecuniary damage, the Government likewise submitted that it was unsubstantiated.

80. The Court considers that there is no causal link between the violation of the Convention found and the applicant's claim in respect of pecuniary damage. In particular, it is not for the Court to speculate as to what the outcome of the proceedings would have been if they had been in conformity with the requirements of Article 6 § 1 of the Convention (see, for example,

Milatová and Others, cited above, § 70). The Court, however, notes that the most appropriate form of redress in respect of a violation of Article 6 is to ensure that the applicant as far as possible is put in the position he or she would have been had the requirements of Article 6 not been disregarded. This would in the present case be best achieved, if the domestic legislation provided for a possibility to reopen the proceedings and re-examine the case in keeping with all the requirements of a fair hearing (see, *mutatis mutandis*, *Yanakiev v. Bulgaria*, no. 40476/98, §§ 89- 90, 10 August 2006). Whatever the case may be, the Court considers that the lack of Article 6 guarantees in the proceedings at issue caused the applicant distress which cannot be made good by the mere finding of a violation (see, for example, *H.A.L.*, cited above, §56 and *K.S.*, cited above, §§ 28 and 29). Making its assessment on an equitable basis, the Court therefore awards her EUR 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

81. The applicant also claimed EUR 3,000 for the costs and expenses incurred before the Court, in particular her lawyer's fees, which she claimed were calculated on the basis of statutory domestic rates.

82. The Government argued that this claim was excessive.

83. 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 reasonable as to quantum. With regard to the applicant's Convention costs, the Court reiterates that it does not consider itself bound by domestic scales and practices, although it may derive some assistance from them (see, among many other authorities, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 77, Series A no. 316-B, and *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 98, ECHR 1999-IV). In the present case, regard being had to the information in its possession, to the fact that the applicant was represented only in the part of the proceedings following communication of the application to the Government, and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

C. Default interest

84. 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

1. *Declares* by a majority the complaint under Article 6 § 1 of the Convention, concerning non-communication to the applicant of the constitutional appeals, admissible and *declares* unanimously the remainder of the application inadmissible;
2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention on account of the failure to communicate the constitutional appeals to the applicant;
3. *Holds* unanimously
 - 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:
 - (i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) 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 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (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* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 July 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President