



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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 61237/00  
by Ljubomir AĆIMOVIĆ  
against Croatia

The European Court of Human Rights (First Section), sitting on  
7 November 2002 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,

Mrs F. TULKENS,

Mr G. BONELLO,

Mr P. LORENZEN,

Mrs N. VAJIĆ,

Mr V. ZAGREBELSKY,

Mrs E. STEINER, *judges*,

and Mr S. NIELSEN, *Deputy Section Registrar*,

Having regard to the above application lodged on 16 August 2000,

Having regard to the observations submitted by the respondent  
Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

## THE FACTS

The applicant, Mr Ljubomir Aćimović, is a Croatian citizen, who was born in 1927 and lives in Zagreb. He is represented before the Court by Ms Melita Šimić, a lawyer practising in Crikvenica, Croatia. The respondent Government are represented by their Agent Ms Lidija Lukina-Karajković.

### A. The circumstances of the case

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

From 1 August 1992 until 31 August 1995 the Croatian Army used the applicant's cottage in Gospić, Croatia, for their military needs. When the members of the Army left, the applicant found the house devastated and his possessions taken away.

On 20 March 1996 the applicant instituted civil proceedings for damages with the Zagreb Municipal Court, against the Republic of Croatia.

At the preliminary hearing on 18 November 1997 the applicant submitted an application to be exempted from the payment of the court fees. The court heard the applicant who stated that he lived with his daughter, son-in-law and a grandchild in a flat in Zagreb which he owned. He stated also that he owned a small cottage and that his pension amounted to 1,624 Croatian Kunas (HRK) per month. The court rejected the applicant's request for exemption of the payment of the court fees and invited him to pay within sixty days court fees in the amount of 6,780 HRK.

On 21 November 1997 the applicant appealed against the above decision to the Zagreb County Court (*Županijski sud u Zagrebu*). He submitted a written copy of the appeal to the Zagreb Municipal Court. In the appeal he stated that his pension was his only income and that he supported his daughter. Furthermore, the applicant's possessions were of no great value since his cottage had been devastated by the members of the Croatian Army. By paying the fees imposed, he would have jeopardised his own means of subsistence and those of the persons whom he supported.

However, the Zagreb Municipal Court has not forwarded the appeal to the Zagreb County Court as the appellate court because there existed no written court decision on the applicant's request to be exempted from the court fees which was a prerequisite for an appeal. On 31 December 1998 the statutory limitation for payment of the court fees expired and the issue thus became irrelevant.

On 6 November 1999 Parliament introduced a change of the Civil Obligations Act which provided that all proceedings concerning actions for damages resulting from acts of members of the Croatian army or police when acting in their official capacity during the Homeland War in Croatia were to be stayed.

On 28 November 2000 the proceedings were stayed.

On 24 August 2000 the applicant filed a constitutional complaint challenging the constitutionality of the above legislation. The Constitutional Court has not yet adopted any decision.

The applicant also filed a constitutional complaint complaining about the length of the proceedings.

On 18 December 2000 the Constitutional Court rejected the applicant's claim finding that the applicant's right to have his civil claim decided within a reasonable time was not violated as the courts were not in a position to proceed with his case due to the changes in legislation.

## **B. Relevant domestic law**

Section 184 (a) of the Act on Changes of the Civil Obligations Act (*Zakon o dopunama Zakonu o obveznim odnosima*, Official Gazette no. 112/1999) provides that all proceedings instituted against the Republic of Croatia for damages caused by the members of the Croatian army or police when acting in their official capacity during the Homeland War in Croatia from 7 August 1990 to 30 June 1996 are to be stayed.

The Act also imposed an obligation on the Government to submit to Parliament special legislation, regulating the responsibility for such damages, at the latest within six months from the entry into force of the Act.

## **COMPLAINTS**

1. The applicant complains under Article 6 § 1 of the Convention that he has no right of access to a court.

2. Furthermore, the applicant complains under Article 1 of Protocol No. 1 that he is prevented from obtaining any damages for his destroyed property.

3. Finally he complains under Article 14 of the Convention that his right to have his civil claim examined before the courts without discrimination has been violated.

## THE LAW

1. The applicant complains the legislation from 1999 prevented him from having the case decided on the merits and thus deprived him of his right of access to court. He relies on Article 6 § 1 of the Convention, the relevant parts of which read as follows:

“1. 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. The Government submit that the applicant has failed to exhaust domestic remedies because his constitutional claim is still pending.

The applicant argues that a constitutional complaint challenging the constitutionality of certain legislation is not a remedy to be exhausted.

The Court observes that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see, among other authorities, the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 65). The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (*ibid.*).

It recalls that in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was 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 (*ibid.*, p. 1211, § 68).

In addition, the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up (*ibid.*, § 69). Accordingly, the Court has recognised that Article 35 § 1 (formerly Article 26) must be applied with some degree of flexibility and without excessive formalism (see, for example, the *Cardot v. France* judgment of 19 March 1991, Series A no. 200, p. 18, § 34). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see, for

example, the *Van Oosterwijk v. Belgium* judgment of 6 November 1980, Series A no. 40, p. 18, § 35). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see the *Akdivar* judgment cited above, p. 1211, § 69).

The Court notes that on 24 August 2000 the applicant filed a constitutional claim challenging the constitutionality of the 1999 legislation which ordered that all proceedings for war-related damages be stayed pending new legislation on that matter. Meanwhile, no legislation has been enacted and the Constitutional Court has not resolved the constitutionality issues.

The Court considers that the decision of the Constitutional Court, which would rule on the constitutionality of legislation is not a means by which a possible violation of the applicant's right of access to court would be addressed. If the Constitutional Court accepts the applicant's claim and finds the challenged legislation unconstitutional a likely consequence of such a decision would be enactment of different legislation by the Parliament, but the fact that the proceedings concerning the applicant's claim for damages have been stayed for a prolonged period of time will remain unchanged.

In these circumstances, the Court considers that the applicant's complaints cannot be rejected for failure to exhaust domestic remedies.

b. In the alternative the Government invite the Court to conclude that the application does not disclose any appearance of a violation of Article 6 § 1 of the Convention. In this connection they submit that the applicant does enjoy access to court because he instituted civil proceedings for damages before the Zagreb Municipal Court. The fact that the court stayed proceedings pursuant to the 1999 legislation does not affect the applicant's right of access to court because the proceedings are stayed only temporarily until the enactment of new regulation on the war-related damage.

In their further arguments the Government rely on the Court's case-law and state that in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws.

The applicant argues that, although the 1999 Act obliged the Government to enact new legislation regulating liability for war-related damage at the latest within six months from the entry into force of that Act, no such legislation has been enacted so far and that there are no indications that it will be.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the

determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant further complains that the fact that he could not obtain compensation for his destroyed property violates his rights under Article 1 of Protocol No. 1, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The Government firstly submit that the proceedings concerning the applicant’s claim for compensation are still pending and that therefore, this part of the application is premature.

In the alternative they argue that Article 1 of Protocol No. 1 is not applicable to the present case because the general provisions of civil law do not apply to the damage liability for war-related damage. The rules of international law also do not oblige a State to provide compensation for such damage.

Furthermore, the applicant’s expectation to obtain compensation is not legitimate as it has not been established before the domestic courts that the applicant’s house was damaged by members of the Croatian Army.

The Government further argue that there has been no interference with the applicant’s right to peaceful enjoyment of his possession because his inability to obtain compensation is only temporary, pending new legislation on that matter.

Even if the Court finds that there has been an interference, its purpose was the protection of public interest.

The applicant contends that the damage on his property was not war-related, but only happened between 1991 and 1995, a period which is usually called Homeland War in Croatia although no war had ever been formally declared. Furthermore, his house was situated in a zone where no war operations had taken place. All damage was caused by negligent and reckless acts of some members of the Croatian Army.

The Court does not find it necessary to examine all the issues raised by the Government because the application is in any event inadmissible for the following reasons.

The Court firstly has to ascertain whether, and to what extent, it is competent *ratione temporis* to deal with the application. It reiterates that in

accordance with the generally recognised rules of international law, the Convention only governs, for each Contracting Party, facts subsequent to its entry into force with regard to that Party (see, for example, *X. v. Portugal*, application no. 9453/81, Commission decision of 13 December 1982, Decisions and Reports (DR) 31 pp. 204, 208 and *Kadikis v. Latvia* (dec.), no. 47634/99, 29 June 2000).

The Court recalls that Croatia recognised the competence of the Court to receive applications “from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by Croatia of the rights recognised in the Convention through any act, decision or event occurring after 5 November 1997.” Accordingly, the Court is not competent to examine the present application in so far as it refers to facts occurring before the date of the ratification of the Convention.

The Court notes that the applicant alleges that his property was destroyed between 1 August 1992 and 31 August 1995, before Croatia ratified the Convention. The Court considers that the destruction of property is an instantaneous act which does not create any continuous situation.

The Court notes further that although the legislative interference took place after the Convention entered into force in respect of Croatia it was so closely related to the events that gave rise to the applicant’s claim that divorcing the two would amount to giving retroactive effect to the Convention which would be contrary to general principles of international law. At the same time it would render Croatia’s declaration recognising the Court’s competence to receive individual applications nugatory (the *Stamulakatos v. Greece* judgment of 30 September 1993, Series A no. 271, p. 14, § 33 and *Multiplex v. Croatia*, (dec.), no. 58112/00, 26 September 2002, unreported).

It follows that this part of the application is incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

3. The applicant also complains that he has been discriminated against because he is deprived of his right to have his civil claim examined before a tribunal, relying on Article 14 of the Convention, which reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The Court recalls that a possible violation of Article 14 of a Convention must entail a difference in treatment based on one of the grounds expressly established in the text of that provision.

As to the present case, the Court notes that there has been no indication of a difference in treatment in respect of the applicant on any such ground as

the legislation in question has been equally applied to all persons in the applicant's position.

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

For these reasons, the Court unanimously

*Declares* admissible, without prejudging the merits, the applicant's complaint concerning his right of access to court;

*Declares* the remainder of the application inadmissible.

Søren NIELSEN  
Deputy Registrar

Christos ROZAKIS  
President