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

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Reservists who served in the Yugoslav Army in 1999 complaining about payment of allowances should have properly exhausted national remedies

In today's Grand Chamber judgment in the case of **Vučković and Others v. Serbia** (application nos. 17153/11, 17157/11, 17160/11, 17163/11, 17168/11, 17173/11, 17178/11, 17181/11, 17182/11, 17186/11, 17343/11, 17344/11, 17362/11, 17364/11, 17367/11, 17370/11, 17372/11, 17377/11, 17380/11, 17382/11, 17386/11, 17421/11, 17424/11, 17428/11, 17431/11, 17435/11, 17438/11, 17439/11, 17440/11 and 17443/11), which is final[1], the European Court of Human Rights held, by fourteen votes to three, that:

it could not consider the merits of the applicants' complaint under the European Convention on Human Rights.

The case concerned the payment of allowances to all reservists who had served in the Yugoslav Army during the North Atlantic Treaty Organisation's intervention in Serbia between March and June 1999.

The Grand Chamber recalled that it can examine issues relating to the admissibility of an application and, even at the merits stage, may reconsider a previous decision to declare an application admissible. It also recalled that a fundamental feature underpinning the entire Convention system is that it is subsidiary to the national system safeguarding human rights. In other words, States do not have to answer to an international body before they have had an opportunity to put matters right through their own legal system. Those who wish to complain to the European Court against a State therefore have to first use remedies provided for by the national legal system. In the applicants' case, the Grand Chamber found that, although they had turned to the civil courts for redress, they had done so improperly, and had further not raised the discrimination complaint before the Constitutional Court, either expressly or in substance. Therefore, although the civil and constitutional remedies had been sufficient and available to provide redress in respect of the applicants' discrimination complaint, they had failed to exhaust national remedies with the result that the Serbian courts had not been given an opportunity to fulfil their fundamental role in the Convention protection system. The Grand Chamber thus upheld the Government's preliminary objection concerning the applicants' failure to exhaust national remedies and held that it could not consider the merits of the applicants' complaint.

There are almost 5,500 similar applications, which are currently still pending before the Court.

Principal facts

The applicants are 30 Serbian nationals who mostly live in the Niš region (Serbia). They were all reservists drafted by the Yugoslav Army during NATO's intervention in Serbia. As such, they were entitled to a per diem for their service between March and June 1999.

1 Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

After demobilisation the Serbian Government allegedly refused to honour their obligation to the reservists, including the applicants. The reservists organised a series of public protests and, following protracted negotiations, on 11 January 2008 the Government accepted to pay allowances to some of the reservists, notably those residing in seven municipalities considered to be “underdeveloped”.

In March 2009 the applicants, who were not residents of those municipalities, brought civil claims seeking payment of the allowances before the Serbian courts based on the Rules on Travel and Other Expenses in the Yugoslav Army and on two decisions adopted by its Chief of Staff. They alleged, among other things, discrimination resulting from the 2008 agreement.

The applicants’ claims were rejected in July 2010 – and then on appeal in November 2010 – on the ground that they had failed to comply with the applicable three-year and five-year national prescription rules, the courts considering that the time-limit for making their claims had started to run from their demobilisation.

In January 2011 the applicants, relying on Articles 32 and 36 of the Constitution (which guarantee, respectively, the right to a fair hearing and the right to equal protection before the Serbian courts) and on Article 6 (right to a fair trial) of the European Convention, lodged an appeal with the Constitutional Court challenging the application of the prescription rules in their cases. They specifically challenged the decision on appeal of November 2010, which in their view had been erroneous and inconsistent with that made by certain other national courts.

In December 2012, the Constitutional Court ruled in favour of the applicants as regards their complaints of judicial inconsistency in the application of the statutory time-limitation. It ordered this decision to be published in the Official Gazette of the Republic of Serbia, considering this to be sufficient redress.

In the meantime in a number of similar cases adjudicated between 2002 and early March 2009, the first-instance and appellate courts across Serbia upheld certain reservists’ claims which had not been declared time-barred.

Complaints, procedure and composition of the Court

Relying on Article 1 of Protocol No. 1 (protection of property), Article 14 (prohibition of discrimination) and Article 1 of Protocol No. 12 (general prohibition of discrimination), the applicants complained of discrimination concerning the payment of war per diems following the agreement of January 2008.

The applications were lodged with the European Court of Human Rights on 14 February 2011.

In its Chamber judgment of 28 August 2012 the Court held, among other things, by six votes to one that there had been a violation of Article 14 read in conjunction with Article 1 of Protocol No. 1. It concluded that there had been no “objective and reasonable justification” for the applicants being treated differently merely on the basis of their place of residence. In particular, the Court found that the allowances had clearly been per diems, not social benefits, and that the Serbian Government’s response to the entire situation had been arbitrary since the reservists from the seven "underdeveloped" municipalities had never been under any obligation to prove their indigence.

The Court also indicated, under Article 46 (binding force and execution of judgments), that – as there were thousands of similar applications pending before it – Serbia had to ensure, within six months from the date of the Chamber judgment becoming final, non-discriminatory payment of the war per diems to all those entitled. In the meantime, the Court adjourned all similar pending applications.

On 26 November 2012 the Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) [2]. On 11 February 2013 the panel of the Grand Chamber accepted that request and a hearing took place on 15 May 2013.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Josep **Casadevall** (Andorra),
Ineta **Ziemele** (Latvia),
Mark **Villiger** (Liechtenstein),
Alvina **Gyulumyan** (Armenia),
Khanlar **Hajiyev** (Azerbaijan),
David Thór **Björgvinsson** (Iceland),
Ján **Šikuta** (Slovakia),
Dragoljub **Popović** (Serbia),
Päivi **Hirvelä** (Finland),
Nona **Tsotsoria** (Georgia),
Kristina **Pardalos** (San Marino),
Ganna **Yudkivska** (Ukraine),
Vincent A. **De Gaetano** (Malta),
Helen **Keller** (Switzerland),
Aleš **Pejchal** (the Czech Republic),
Ksenija **Turković** (Croatia),

and also Michael **O'Boyle**, *Deputy Registrar.*

Decision of the Court

First the Court reiterated that a case referred to the Grand Chamber embraces all aspects of the application previously examined by the Chamber, the only limit being that the Grand Chamber cannot examine an issue previously declared inadmissible by the Chamber. Like the Chamber therefore, the Grand Chamber can examine issues relating to the admissibility of an application and, even at the merits stage, may reconsider a decision to declare an application admissible.

Non-exhaustion of national remedies

The Court recalled that a fundamental feature underpinning the entire Convention system is that it is subsidiary to the national system safeguarding human rights. The task of ensuring respect for the rights and freedoms guaranteed by the Convention lies primarily with the Contracting States. The Court is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of national jurisdictions. In other words, States do not have to answer to an international body before they have had an opportunity to put matters right through their own legal system. Those who wish to complain to the Court against a State therefore have to first use remedies provided for by the national legal system. This rule of exhaustion of national remedies (under Article 35 § 1 – admissibility criteria) is based on the assumption that there is an effective remedy, available in theory and in practice at the relevant time, in respect of the alleged violation.

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[2] Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

The Court observed that reservists who had served in the army between March and June 1999 could have brought proceedings before the civil courts against the authorities and claimed compensation on account of any non-payment of *per diems* due under the Rules on Travel and Other Expenses in the Yugoslav Army and the two separate decisions adopted by its Chief of Staff. It was also possible to challenge any discriminatory practices in respect of such payments under Article 21 of the Constitution (which prohibits discrimination). As from 7 April 2009 a victim of discrimination could in addition make use of section 43 of the Prohibition of Discrimination Act, which provided for various forms of injunctive and/or declaratory relief to victims of discrimination.

The civil courts thus had full jurisdiction to examine claims such as those that were at issue in the applicants' case. Indeed, in a number of comparable cases adjudicated between 2002 and early March 2009, where the claims in question had not been declared time-barred, the first-instance and appellate courts across Serbia had upheld the reservists' claims.

The Court was satisfied that at the relevant time an appeal to the civil courts had constituted an effective remedy for the purposes of Article 35 § 1 of the Convention and that the applicants had made use of this possibility. Although they had alleged discrimination resulting from the 2008 Agreement in their civil claims, they had not relied on any anti-discrimination provision, national or international. According to the interpretation given by the civil courts, the applicants had further failed to comply with the applicable national prescription rules, which is one of the conditions that should normally be fulfilled in order to meet the requirement of exhaustion of national remedies under Article 35 § 1 of the Convention.

Furthermore, the Grand Chamber, unlike the Chamber, was not convinced that the constitutional remedy would not also have been effective in the applicants' case. Although the applicants had mentioned the 2008 Agreement in their constitutional appeal, and had done so against the background of their previous proceedings before the civil courts in which they had alleged discrimination, they had not raised their discrimination complaint before the Constitutional Court, either expressly or in substance. It was also quite understandable that the Constitutional Court had not examined the matter of its own motion.

The Court noted in particular three decisions by the Constitutional Court in comparable cases it handed down in February 2011, March 2012 and February 2013. In none of those cases did the Constitutional Court decline jurisdiction to examine the complaints made as to the allegedly discriminatory effects of the 2008 Agreement under Article 21 of the Constitution.

In the Grand Chamber's view, there was therefore nothing to show that the constitutional remedy would not have offered a reasonable prospect of success in respect of the applicants' discrimination complaint had they sought to properly raise it before the Constitutional Court. Indeed, where legal systems provide constitutional protection of fundamental human rights and freedoms, it is in principle up to the aggrieved individual to test the extent of that protection and allow the national courts to develop those rights by way of interpretation. The existence of mere doubts as to the prospects of success of a particular remedy is not a valid reason for failing to exhaust that avenue of redress.

Consequently, the Court found that, although the civil and constitutional remedies had been sufficient and available to provide redress in respect of the applicants' discrimination complaint, they had failed to exhaust these remedies.

Nor did the Court consider that there were any special circumstances to exempt the applicants from the requirement to exhaust national remedies. On the contrary, had the applicants complied with that requirement, they would have given the Serbian courts the opportunity to determine the issue of whether the measures in question were compatible with the European Convention. The European Court would then have had the benefit of the national courts' view on the matter should the applicants nonetheless have pursued their complaint before it. Thus, the applicants had failed to

take the appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system.

The Grand Chamber thus upheld the Government's preliminary objection concerning the applicants' failure to exhaust national remedies and held that it could not consider the merits of the applicants' complaint.

Separate opinion

Judges Popović, Yudkivska and De Gaetano expressed a joint dissenting opinion which is annexed to the judgment.

The judgment is available in English and French.

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