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

SECOND SECTION

DECISION

Application no. 77742/13
Leonardo BILOGLAV
against Croatia

The European Court of Human Rights (Second Section), sitting on 20 September 2016 as a Chamber composed of:

Işıl Karakaş, *President,*
Julia Laffranque,
Nebojša Vučinić,
Valeriu Griţco,
Ksenija Turković,
Jon Fridrik Kjølbro,
Georges Ravarani, *judges,*

and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to the above application lodged on 2 December 2013,

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

1. The applicant, Mr Leonardo Biloglav, is a Croatian national who was born in 1965 and lives in Zagreb. He was represented before the Court by Mr M. Čaržavec, a lawyer practising in Zagreb.

2. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

A. The circumstances of the case

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

4. The applicant was a soldier in the Croatian Army. He was wounded in the war in 1991 but continued to serve in the army until he was honourably discharged in 2013.

1. Administrative proceedings concerning assessment of the applicant's fitness for military service

5. On 11 September 2012 a medical board of the Ministry of Defence (*Ministarstvo obrane Republike Hrvatske*) declared the applicant medically unfit for military service. The decision was based on his medical records. He was informed that he could appeal against that decision to the Ministry's second-instance medical board.

6. The applicant appealed. On 3 October 2012 he was summoned to appear before the second-instance medical board and to submit further medical documentation concerning his condition. The applicant failed to appear and did not provide any further medical documentation.

7. On 10 January 2013 the second-instance medical board dismissed his appeal as unfounded, on the grounds that given his failure to appear before the board and in view of the available documentation, there was no reason to call into question the existing medical assessment of his condition. The applicant was informed that he could challenge the Ministry's decision by lodging an administrative action with the Administrative Court, which, however, did not have suspensive effect.

8. The decisions of the Ministry's medical board became final and enforceable on 21 January 2013.

9. On 11 February 2013 the applicant lodged an administrative action with the Zagreb Administrative Court (*Upravni sud u Zagrebu*) challenging the decision of the Ministry's medical board of 10 January 2013. He argued that the Ministry's assessment of his fitness for military service was flawed and unfounded. He contended in particular that he had never been properly summoned or examined by the Ministry's medical board and that their findings contradicted the fact that he had carried out all his military assignments efficiently and had even participated in a mission to Afghanistan.

10. On 13 September 2013, after hearing the parties' arguments and examining further submissions from them, the Zagreb Administrative Court declared the applicant's administrative action inadmissible on the grounds that the Ministry's medical board was not a public authority against whose decisions an administrative action could be lodged, and that the applicant could only lodge an action against the Ministry's decision to terminate his employment in the army.

11. The applicant then lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) complaining, in particular, that he did not have access to court concerning the assessment of his fitness for military service.

12. On 30 October 2013 the Constitutional Court declared the applicant's constitutional complaint inadmissible as manifestly ill-founded. That decision was served on the applicant on 18 November 2013.

2. The administrative proceedings concerning the applicant's discharge from the army

13. On 12 February 2013 the Ministry's department for human resources terminated the applicant's service in the army by an honourable discharge. It ordered that the discharge would take effect on 20 February 2013. The Ministry relied on section 189(1) of the Military Service Act, providing that military service would terminate *ex lege* thirty days after the decision of a medical board declaring a soldier medically unfit for military service became final (see paragraph 19 below).

14. The decision on the applicant's discharge from the army was confirmed on appeal by a second-instance administrative body within the Ministry on 21 June 2013.

15. On 30 July 2013 the applicant lodged an administrative action in the Zagreb Administrative Court challenging the decision on the termination of his military service. He contended in particular that he had not been able to participate effectively in the proceedings before the Ministry's medical board concerning the assessment of his fitness for military service. He also reiterated his complaints concerning the alleged failures of the medical board to properly assess his medical condition.

16. During the proceedings, the Zagreb Administrative Court heard the applicant and obtained the parties' further written submissions on the matter of the termination of the applicant's employment in the army. Concerning the applicant's allegations of inadequacy of the assessment of his fitness for military service, the Administrative Court heard B.B., who had presided over the Ministry's first-instance medical board. B.B. was also questioned by the applicant and his representative. He explained the methodology and procedures applied for the assessment of the applicant's fitness for military service, and stressed that the available medical documentation in the applicant's case had suggested that he was not medically fit for military service.

17. On 5 December 2014 the Zagreb Administrative Court dismissed the applicant's administrative action. It examined in detail the manner in which the applicant's unfitness for military service had been established and found that there was nothing in the procedure or findings of the medical board which would raise doubt as to the necessity of the applicant's discharge from the army.

B. Relevant domestic law and practice

1. Relevant domestic law

18. The relevant Military Service Act (*Zakon o službi u oružanim snagama Republike Hrvatske*, Official Gazette nos. 33/2002, 58/2002, 175/2003, 136/2004, 76/2007, 88/2009 and 124/2009) provided in section 188(1) that the military service could terminate only in the following circumstances: (1) *ex lege* under the conditions provided for in that Act; (2) on the basis of a personal request; (3) by the expiry of a term for which an individual was recruited; (4) by dismissal; (5) by the expiry of the probationary period; and (6) on the basis of an agreement.

19. In section 189(1) the Military Service Act provided:

> "(1) Military service shall terminate *ex lege* ... by a decision of a medical board declaring [a soldier] medically unfit for military service – thirty days after the decision becomes final."

2. Relevant practice

20. The Government provided several decisions of the Administrative Courts declaring inadmissible administrative actions against decisions of the Ministry's medical board on the assessment of appellants' fitness for military service (Us-894/2002-5 of 20 November 2002; Us-3009/2003-6 of 8 March 2007; UsI-3938/12-8 of 28 March 2013 and UsI-709/13-4 of 3 March 2014).

21. These decisions of the Administrative Courts are based on findings that the Ministry's medical board was not a public authority against whose decisions an administrative action could be lodged, and that further administrative actions could be lodged against any further administrative decisions based on the findings of the medical board.

22. The parties also provided several decisions of the Administrative Courts upholding the findings of the Ministry's medical board in administrative proceedings against decisions terminating appellants' employment in the army (Us-2993/2002-5 of 20 November 2002; UsI-2619/13-10 of 25 February 2014 and UsI-2543/13-7 of 28 May 2014).

COMPLAINTS

23. The applicant complained, under Article 6 § 1 of the Convention, that he had not had access to court concerning the assessment of his unfitness for military service which had led to his discharge from the army.

24. He also complained, under Article 13 of the Convention, that he had not had an effective domestic remedy for his complaints.

THE LAW

25. Complaining of a lack of access to court, the applicant relied on Articles 6 and 13 of the Convention. Being the master of the characterisation to be given in law to the facts of the case, and noting that as far as the issue of access to court is concerned, the guarantees under Article 13 are absorbed by those of Article 6 § 1 of the Convention (see, for example, *Ernst and Others v. Belgium*, no. 33400/96, § 80, 15 July 2003), the Court considers that the applicant's complaints fall to be examined under Article 6 § 1 of the Convention only.

26. The relevant part of Article 6 § 1 of the Convention reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' arguments

27. The Government contended that the applicant's complaint of lack of access to court could not be examined before the termination of the proceedings before the Zagreb Administrative Court concerning the applicant's administrative action against the Ministry's decision terminating his service in the army. The Government stressed that the applicant had had access to a court which was competent to examine the merits of the decision determining his civil rights and obligations. In particular, he had had the opportunity to challenge the decision terminating his service in the army and thus, in the Government's view, no issue of access to court arose with regard to his inability to challenge in court the findings of the Ministry's medical board. This is particularly true given that the decisions of the medical board had only served as a basis for a further decision on the applicant's status in the army, and had not constituted a meritorious determination of the applicant's employment rights. The Government also considered that it was within the State's margin of appreciation to decide whether to provide a single or a two-tier system of administrative proceedings when securing access to court in matters related to military service. They stressed that the practice of the domestic administrative courts had been consistent as to the manner in which the decisions of the Ministry's medical board could be challenged in court, and thus no issue arose with regard to the erroneous instruction to the applicant that he could lodge an administrative action against the decision of the Ministry's second-instance medical board. Lastly, the Government argued that the applicant had been given an effective opportunity to participate in the proceedings before the Ministry's medical board but had failed to appear and had not provided any medical documentation concerning his condition. There had therefore been nothing placing in doubt the relevant findings of the Ministry's medical board.

28. The applicant contended that the administrative proceedings concerning the termination of his military service had been a separate set of proceedings, which should be examined separately from the issue that he had not had access to court concerning the adverse decisions of the Ministry's medical board. The applicant pointed out that although he had been instructed by the Ministry's medical board that he could institute administrative proceedings in the competent Administrative Court, the latter had declined to examine his case and had thus arbitrarily denied him judicial protection of his rights. The applicant also contended that his medical condition had not been assessed in accordance with the relevant substantive and procedural requirements and that he had not been given an effective opportunity to provide arguments concerning his medical condition. In the applicant's view, the findings of the Ministry's medical board had been erroneous and contradictory to his true medical condition. Likewise, the applicant considered that the judgment of the Zagreb Administrative Court of 5 December 2014 had been unclear and incorrect.

B. The Court's assessment

29. To the extent that an issue may arise with regard to the applicability of Article 6 of the Convention concerning the dispute related to the assessment of the applicant's fitness for military service and his subsequent discharge from the army (see, for instance, *Sukût v. Turkey* (dec.), no. 59773/00, 11 September 2007), the Court notes that it is uncontested between the parties that there was a dispute over a right recognised under Croatian law, namely the right not to be unfairly dismissed from one's employment (see paragraph 18 above), that the dispute was genuine and serious, and that the outcome of the proceedings before the Zagreb Administrative Court was directly decisive for the right concerned. The fact that the dispute revolved around the question whether the applicant was fit to perform military service does not detract from that conclusion (see *Fazliyski v. Bulgaria*, no. 40908/05, § 52, 16 April 2013).

30. With regard to the "civil" nature of that right within the meaning of Article 6 § 1 of the Convention, the Court refers to its *Eskelinen* test (see *Vilho Eskelinen and others v. Finland* [GC], no. 63235/00, ECHR 2007-II, and, most recently, *Baka v. Hungary* [GC], no. 20261/12, §§ 112-119, 23 June 2016). In this connection the Court notes that although the applicant's access to court was restricted concerning his challenge of the Ministry's medical board's decision on his fitness for the military service, he had access to court concerning the decision on his discharge, which was based on the fact that he had been declared unfit for military service. The applicant's legal challenge to his discharge, including the question of his fitness for military service, was in fact examined by the Zagreb Administrative Court (see paragraphs 13-17 above). It cannot therefore be

held that the applicant's access to court was "expressly excluded" under the relevant domestic law, as provided under the first condition of the *Eskelinen* test. This is sufficient for the Court to conclude that Article 6 § 1 of the Convention, under its civil limb, was applicable to the proceedings at issue (see *Baka*, cited above, § 118; see also *Fazliyski*, cited above, §§ 54-55).

31. It should be pointed out at the outset that, according to Article 19 of the Convention, the Court's duty is to ensure the observance of the commitments undertaken by the Contracting Parties to the Convention. The Court is not a court of appeal from the national courts (see, for instance, *Yordanova and Toshev v. Bulgaria*, no. 5126/05, § 65, 2 October 2012), and it is not its function to deal with errors of fact or law allegedly committed by those courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among many others, *Letinčić v. Croatia*, no. 7183/11, § 47, 3 May 2016). It follows that the Court cannot determine whether the Zagreb Administrative Court's rulings in relation to the applicant's dismissal were correct in terms of Croatian law. The Court's task is confined to examining whether the proceedings before the Zagreb Administrative Court complied with the requirements of Article 6 § 1 of the Convention.

32. In carrying out this examination, the Court will have regard to the fact that in discharging the applicant the Ministry was not exercising its discretion. Under section 189(1) of the Military Service Act, the Ministry was bound to discharge a soldier found to be unfit for military service (see paragraph 19 above). Thus the lawfulness – or otherwise – of the applicant's discharge was entirely predicated on his being certified as being unfit for military service by the Ministry's medical board. It was therefore crucial to secure some form of effective review by a court of the Ministry's medical board's decisions, as required under Article 6 of the Convention (see *Fazliyski*, cited above, §§ 59-61, and *Letinčić*, cited above, §§ 46 and 64-67).

33. In this connection the Court notes that the Ministry's medical board's decisions were not of themselves subject to direct review by a court. Indeed, according to the constant practice of the domestic administrative courts, the Ministry's medical board was not a public authority against whose decisions an administrative action could be lodged, and there was also a further administrative action available against any administrative decisions based on the findings of the medical board (see paragraphs 10 and 20-22 above).

34. Accordingly, in the applicant's case, although the Zagreb Administrative Court refused a direct review of the medical board's decisions finding the applicant unfit for military service, the applicant had an effective opportunity to have those decisions reviewed by the Zagreb Administrative Court in the context of his challenge to the Ministry's

decision on his dismissal predicated by the medical board's findings (see, by contrast, *Fazliyski*, cited above, §§ 59 and 61).

35. During the proceedings, the Zagreb Administrative Court heard the applicant and obtained further written submissions from the parties on the matter of the discharge of the applicant from military service. That court also, in connection with the applicant's accusation of inadequacy of the assessment of his fitness for military service, heard B.B., who had presided over the Ministry's first-instance medical board. Moreover, the applicant and his representative had an effective opportunity to question B.B. on the matters of the methodology and procedures applied for the assessment of the applicant's fitness for military service (see paragraph 16 above).

36. It was on the basis of such an examination of the relevant evidence that the Zagreb Administrative Court dismissed the applicant's administrative action challenging the decision to discharge him. It thereby examined in detail the manner in which the applicant had been found unfit for military service, and found that there was nothing in the procedure or findings of the competent medical board which would raise doubt as to the need for the applicant to be discharged from military service (see paragraph 17 above).

37. In view of the above, the Court considers that it cannot be said that under a procedural arrangement of this kind, when given an adequate opportunity to challenge the reasons for his dismissal, including the medical assessment of his fitness for military service, the applicant was deprived of access to a court capable of providing an effective judicial review of the administrative authorities' decisions, as required under Article 6 § 1 of the Convention.

38. The Court therefore finds that the applicant's complaints must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 13 October 2016.

Hasan Bakırcı
Deputy Registrar

Işıl Karakaş
President