

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

FIRST SECTION

CASE OF BAGOJE v. MONTENEGRO

(Application no. 2890/21)

JUDGMENT

STRASBOURG

15 February 2024

This judgment is final but it may be subject to editorial revision.



In the case of Bagoje v. Montenegro,

The European Court of Human Rights (First Section), sitting as a Committee composed of:

Krzysztof Wojtyczek*, President*,
Ivana Jelić,
Erik Wennerström*, judges*,
and Attila Teplán, *Acting Deputy Section Registrar,*

Having regard to:

the application (no. 2890/21) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 17 December 2020 by a Croatian national, Mr Zlatko Bagoje ("the applicant"), who was born in 1965, lives in Gruda, Croatia, and was represented by Mr Z. Begović, a lawyer practising in Podgorica, Montenegro;

the decision to give notice of the complaint concerning inconsistent practice of domestic courts to the Montenegrin Government ("the Government"), represented by their Agent, Ms. V. Pavličić, and to declare inadmissible the remainder of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the Croatian Government, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 23 January 2024,

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

SUBJECT MATTER OF THE CASE

1. The present case concerns the applicant's complaint under Article 6 of the Convention about inconsistent practice of domestic courts.

2. Between 3 October and 12 December 1991, during the war in the former Socialist Federal Republic of Yugoslavia, the applicant, then a Croatian soldier, was held as a prisoner of war in Montenegro. In 2014 he instituted civil proceedings against the State seeking compensation for non-pecuniary damage caused by ill-treatment he had suffered there. On 9 February 2015 the Court of First Instance in Podgorica awarded him 9,199.77 euros (EUR) in respect of non-pecuniary damage for "mental anguish and physical pain caused by torture, inhuman and degrading treatment". That judgment became final on 23 April 2015.

3. On 24 February 2017 the applicant instituted another set of civil proceedings seeking compensation for non-pecuniary damage, *inter alia*, "for suffered and future physical pain, and for suffered fear" (*za pretrpljene i buduće fizičke bolove i za pretrpljeni strah*). He claimed EUR 4,000 in total in that regard. On 24 September 2018 the Court of First Instance in Cetinje

found that the compensation awarded by the judgment of 9 February 2015 had included the compensation in question and rejected that part of the applicant's claim as *res iudicata*. The High Court in Podgorica upheld this judgment on 17 March 2020. On 18 June 2020 the Constitutional Court rejected the applicant's constitutional appeal. On 30 June 2020 the Supreme Court rejected the applicant's request for leave to lodge an appeal on points of law as the value of his claim had not exceeded EUR 4,000, as required by the relevant statutory provision (see paragraph 10 below).

4. Between 25 March 2017 and 21 January 2020 the first instance courts rejected the same kind of claims of at least ten other claimants on the same grounds. Those judgments were upheld by the High Courts in Podgorica and Bijelo Polje between 6 February 2019 and 20 October 2020.

5. Between 18 May 2018 and 11 July 2019 the first-instance courts ruled in favour of four other claimants and awarded them the compensation in question, even though they had already obtained compensation for mental anguish and physical pain caused by the torture and ill-treatment suffered in the same camp. Those judgments were upheld by the High Courts in Podgorica and Bijelo Polje between 16 October 2018 and 6 March 2020.

6. Between 17 June 2020 and 17 March 2021 the Supreme Court allowed and accepted the appeals on points of law in at least ten cases in which the claims had been rejected as *res iudicata* (see paragraph 4 above). The court quashed the relevant parts of the disputed High Court judgments and ordered re-opening in that regard. In all cases, the value of the relevant claims exceeded EUR 5,000.

7. Between 5 November 2020 and 26 May 2021, following the Supreme Court's rulings, the Court of First Instance ruled in favour of at least five claimants and awarded them the compensation in question.

8. The applicant submitted, and the Government did not contest, that in about 150 similar cases in total, the claimants had obtained compensation in question even though they had been previously awarded compensation for mental anguish and physical pain caused by the torture and ill-treatment suffered in the camp. There is no information in the case file on how many claims were satisfied without the claimants making use of an appeal on points of law before the Supreme Court and how many following a successful appeal on points of law.

9. Article 124 of the Constitution provides that the Supreme Court shall ensure the uniform application of the law (*obezbjeđuje jedinstvenu primjenu zakona*).

10. Section 397 of the Civil Procedure Act provides that an appeal on points of law is not allowed in cases in which the value of the disputed part of the claim does not exceed EUR 20,000. Section 397a provides that, exceptionally, an appeal on points of law can be allowed in cases where there is inconsistent case-law among the second-instance courts and the Supreme

Court has not yet taken its position on the issue, but only if the value of the disputed part of the claim exceeds EUR 4,000.

11. The applicant complained under Article 6 of the Convention about the inconsistent practice of domestic courts in that only his claim in respect of suffered and future physical pain and suffered fear had been rejected.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. The parties' submissions

1. The Government

12. The Government contested the applicant's complaint. They did not dispute that the submitted decisions could indicate that the case-law of the High Courts had been inconsistent. They maintained, however, that it was for the domestic courts to establish facts and interpret the legislation, and that certain divergencies in the courts' rulings were acceptable. They also submitted that, in any event, there had been a mechanism to ensure consistency of domestic case-law, namely proceedings before the Supreme Court. They submitted that in all the cases where an appeal on points of law had been allowed the Supreme Court had quashed the High Court decisions and ordered re-opening. It had thus ensured that there had been no "profound and long-standing" divergencies in the case-law, given that in the re-opened cases the courts had ruled in favour of claimants wherever the expert witness's additional findings had justified it. The Supreme Court had rejected the applicant's request for leave to lodge an appeal on points of law because the value of the disputed part of the claim, which had been specified by his own representative, had not met the relevant threshold requirement. The Government maintained that this could not be characterised as arbitrary. They also submitted that the fact that 150 other claimants had been awarded the compensation in question had actually proved that there had been no profound and long-standing differences, but that the applicant's case had been an isolated one.

13. The Government contested the third party's submissions and maintained that the international reports referred to by them were irrelevant as none of the reports had concerned the present case (see paragraph 15 below).

2. The applicant

14. The applicant maintained that the domestic courts had wrongly interpreted the relevant domestic law and that the Supreme Court had arbitrarily rejected his request for leave to lodge an appeal on points. It had

thus failed to ensure the uniform application of the law, contrary to Article 124 of the Constitution. He agreed with the third-party submissions outlined below.

3. The third party

15. The Croatian Government submitted that the applicant's rights under Article 6 had been breached given that the relevant practice of the domestic courts had been obviously inconsistent without a reasonable justification. They also referred to the 2021 and 2022 European Union Progress Report on Montenegro and 2021 United States State Department Country Reports on Human Rights Practices – Montenegro, the latter of which had noted that inconsistent court practices had diminished public confidence in the efficiency and impartiality of the judiciary.

B. The Court's assessment

1. Admissibility

16. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

17. The Court reiterates the relevant principles which are set out in *Nejdet Şahin and Perihan Şahin v. Turkey* [GC] (no. 13279/05, §§ 49-58, 20 October 2011). In particular, the criteria in assessing whether conflicting decisions in similar cases stemming from the same court are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing: (1) whether "profound and long-standing differences" exist in the relevant case-law; (2) whether the domestic law provides for machinery for overcoming these inconsistencies; and (3) whether that machinery has been applied and, if appropriate, to what effect (ibid., § 53).

18. Turning to the present case, the Court notes that in at least four similar cases the domestic courts ruled in favour of claimants and awarded them the compensation in question, whereas in at least eleven other, similar cases, including the applicant's, the domestic courts rejected the relevant claims (see paragraphs 3-4 above). The Government did not dispute that the submitted decisions could indicate that the case-law of the High Courts had been inconsistent (see paragraph 12 *in limine* above). It also appears that there were about 150 similar cases in total, all of which were eventually concluded in favour of claimants (see paragraph 8 above).

19. The Court also observes that the national legislation provides for a mechanism for overcoming inconsistencies before the second-instance courts, namely an appeal on points of law before the Supreme Court, but only

if the value of the relevant claim exceeds EUR 4,000 (see paragraph 10 above). The Court notes that in at least ten cases, in all of which the value of the claim exceeded EUR 4,000, the Supreme Court allowed for an appeal on points of law and quashed the relevant High Court judgments, following which the courts awarded the claimants compensation in question (see paragraphs 6-7 above).

20. The applicant's request for leave to lodge an appeal on points of law was rejected by the Supreme Court on the ground that it had not met the relevant threshold criterion, namely the value of the claim had not exceeded EUR 4,000 (see paragraph 3 *in fine* above). There is no indication that the Supreme Court interpreted and applied the admissibility criterion in the applicant's case in an arbitrary manner (see *Stoilkovska v. the former Yugoslav Republic of Macedonia*, no. 29784/07, § 66, 18 July 2013), given the sufficiently clear wording of the relevant provision and the Supreme Court's case-law in that regard (see paragraphs 10 and 4 *in fine* above). The fact remains, however, that the mechanism for overcoming the disputed inconsistencies among the second-instance courts could not be applied in the applicant's case given the fact that the Supreme Court, owing to the operation of the rules on admissibility *ratione valoris*, lacked jurisdiction to examine the applicant's case on the merits (see *Stoilkovska*, cited above, § 48). In the absence of a mechanism to remove the inconsistency in the application of domestic law that the applicant was faced with, the Court finds a violation of Article 6 of the Convention (ibid., § 49).

II. OTHER COMPLAINTS

21. The Court notes that, after the respondent Government had been given notice of the application, the applicant repeated other complaints initially made to the Court under Articles 6 and 14 of the Convention and Article 1 of Protocol No. 12, notably about: (a) a lack of access to court, (b) the length of the second set of civil proceedings, and (c) having been discriminated against.

22. The Court notes that on 18 February 2022 the Government were given notice of some of the applicant's complaints, whereas the remainder of the application, which included the complaints specified in paragraph 21, was declared inadmissible by the President of the Section, sitting in a single-judge formation. That being so, the Court no longer has jurisdiction to examine these complaints (see *KIPS DOO and Drekalović v. Montenegro*, no. 28766/06, § 139, 26 June 2018).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. In the Registry's letter of 12 October 2022, the applicant was invited to submit any claims for just satisfaction within the time-limit fixed for the submission of his observations on the merits, and was reminded that failure

to do so entailed the consequence that the Court would either make no award of just satisfaction or else reject the claim in part. He was also informed that this applied even if the applicant had indicated his wishes in this respect at an earlier stage of the proceedings. Even though he was legally represented, the applicant submitted a just satisfaction claim only after the expiration of the envisaged time-limit. The Court, therefore, makes no award (see, *mutatis mutandis*, *Boucke v. Montenegro*, no. 26945/06, § 99, 21 February 2012, and *Novović v. Montenegro and Serbia*, no. 13210/05, § 62, 23 October 2012).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning inconsistent practice of domestic courts admissible;

2. *Holds* that there has been a violation of Article 6 of the Convention;

3. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 February 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Attila Teplán Acting Deputy Registrar	Krzysztof Wojtyczek President