

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

FOURTH SECTION

CASE OF BOŠNJAČKI v. SERBIA

(Application no. 37630/19)

JUDGMENT

STRASBOURG

30 April 2024

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



In the case of Bošnjački v. Serbia,

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

Anne Louise Bormann*, President*,
Branko Lubarda,
Sebastian Răduleţu*, judges*,
and Branimir Pleše, *Acting Deputy Section Registrar,*

Having regard to:

the application (no. 37630/19) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 25 June 2019 by a Serbian national, Mr Aleksandar Bošnjački ("the applicant"), who was born in 1970, lives in Ruma and was represented by Ms D. Zlatanović, a lawyer practising in Novi Sad;

the decision to give notice of the application to the Serbian Government ("the Government"), represented by their Agent, Ms Z. Jadrijević Mladar;

the parties' observations;

the Government not having objected to the examination of the application by a Committee;

Having deliberated in private on 9 April 2024,

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

SUBJECT MATTER OF THE CASE

1. The application concerns the applicant's right of access to a court in the context of misdemeanour proceedings related to a traffic offence. In particular, the domestic courts dismissed the applicant's request for judicial review because he had not signed the penalty notice (*prekršajni nalog*) issued by the police.

2. On 25 June 2018 police officers from the Ruma Police Department served the applicant with a penalty notice containing a fine in the amount of 5,000 Serbian dinars – approximately 42 euros (EUR) at that time – for the illegal parking of his motor vehicle. The applicant, however, did not sign the penalty notice in the space designated for this purpose. On the back of the penalty notice, it was furthermore specified that if a person did not accept responsibility for the misdemeanour at issue he or she had the right to request a judicial review of the case by submitting the penalty notice to the Misdemeanours Court within a period of eight days, in accordance with the Article 174 of the Misdemeanours Act. It was lastly stated that an unpaid fine could, *inter alia*, also be replaced by an effective prison term.

3. Article 174 of the Misdemeanours Act, which was in force at the material time, provided, *inter alia*, that a person who did not accept responsibility for the misdemeanour in question had the right to submit a

request for judicial review, by forwarding the signed penalty notice to the relevant court.

4. On 28 June 2018 the applicant submitted a separate and signed request for judicial review with the Ruma Misdemeanours Court. In this submission, he contested the allegations from the penalty notice and requested a hearing. The applicant also attached the unsigned penalty notice.

5. On 6 July 2018 the Ruma Misdemeanours Court dismissed the request for judicial review on the grounds that the applicant had failed to sign the penalty notice, as required by Article 174 of Misdemeanours Act.

6. On 16 July 2018 the applicant lodged an appeal against that decision. Therein he referenced, *inter alia*, the earlier case-law of the Misdemeanours Court of Appeals which had allegedly stated that the signature of a penalty notice was not mandatory if it was submitted together with another signed document.

7. On 28 August 2018 the Misdemeanours Court of Appeal rejected the applicant's appeal and upheld the decision rendered at first instance.

8. On 18 April 2019 the Constitutional Court also ruled against the applicant (Už. no. 11919/2018) and in so doing found that he had suffered no significant disadvantage because of the amount of the fine imposed.

9. On 6 April 2023, following the communication of the application giving rise to the proceedings in the present case to the respondent Government, the Constitutional Court addressed a case similar to the one brought by the applicant. In its decision (Už. no. 7921/2019), the Constitutional Court opined as follows:

> "Bearing in mind that the ... case [of] *Bošnjački v. Serbia* was ... [communicated] ... to the Republic of Serbia with a reference to the appropriate practice of the ECtHR regarding the violation of [one's] access to a court, and that that case [in hand] concerns a substantially similar factual and legal situation ..., the Constitutional Court has decided to reconsider its previous practice ... with regard to the disputed legal issue – the unsigned misdemeanour notice and the right of access to a court..."

10. The Constitutional Court then went on to rule in favour of the appellant and find a violation of his right to a fair trial based on excessive formalism.

11. The applicant complains under Article 6 § 1 of the Convention that he was deprived of his right of access to a court given that his request for the judicial review of his case was rejected by the national courts merely on the grounds that he had not signed the penalty notice itself.

THE COURT'S ASSESSMENT

I. ADMISSIBILITY

A. Whether there has been an abuse of the right of individual petition

12. The Government submitted, without raising a formal objection to this effect, that in his appeal which he had lodged with the Misdemeanours Court of Appeals the applicant had "completely misrepresented" the case-law of that court. In the same vein, the Government argued that the applicant had also "falsely claimed" in his application before the Court itself that the Misdemeanours Court of Appeals had previously ruled that the signing of a penalty notice had not been deemed obligatory if submitted together with another signed document. According to the Government, the applicant thus attempted to "mislead the Court" by providing it "with false evidence."

13. The applicant offered no comments in this respect.

14. The Court recalls that an application may be rejected as abusive under Article 35 § 3 (a) of the Convention if, *inter alia*, it was knowingly based on untrue facts and false declarations. The submission of incomplete and thus misleading information may also amount to an abuse of the right of application. However, even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty (see, *Paun Jovanović v. Serbia*, no. 41394/15, §§ 41 and 42, 7 February 2023). Moreover, the absence of a Government's formal abuse objection in this connection does not preclude the Court from the examination of the matter *proprio motu* (see, for example, *Zarubica v. Serbia* (dec.), no. 35044/07 and two other applications, 26 May 2015, with further references).

15. Turning to the present case, the Court observes that regardless of the nature of the applicant's submissions to the national courts, this occurred within the context of domestic proceedings (see paragraph 6 above) rather than in his communication with or with reference to this Court. It follows that the Government's suggestions in this regard are of no relevance in the context of the applicant's alleged abuse of the right of individual application (see *Paun Jovanović*, cited above, § 50).

16. It is furthermore understood that, despite the Government's submissions the contrary, the applicant did not rely on or even mention the said domestic case-law in his application form lodged with the Court. At the same time, its mere inclusion among other documents which were attached to the application cannot in itself be considered as an attempt to mislead the Court.

17. In view of the foregoing, the Court is of the opinion that the applicant's conduct did not constitute an abuse of the right of individual application within the meaning of Article 35 § 3 (a) of the Convention.

B. Compatibility *ratione materiae*

18. The Court considers that the traffic-related offence in question concerned "a criminal charge" against the applicant within the meaning of Article 6 § 1 of the Convention and that as such it clearly attracted the guarantees of that provision (see, *mutatis mutandis*, *Mesesnel v. Slovenia*, no. 22163/08, §§ 28, 6 and 7, in that order, 28 February 2013, with further references; see also paragraph 2 above as regards the fine and its possible conversion into an effective prison term).

C. Whether the applicant suffered a significant disadvantage

19. The Government submitted that the applicant's complaint should be declared inadmissible since he had not suffered a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention (see paragraph 2 above).

20. The applicant contested this objection and referred to the Court's relevant case-law.

21. Irrespective of the financial impact of the fine imposed on the applicant, the Government's objection cannot be accepted since the issue of access to a court in criminal matters is, by its very nature, of particular significance regarding the proper functioning and fairness of a given State's criminal justice system. There is hence an issue of general interest which cannot be considered trivial, or, consequently, something that does not deserve an examination on the merits (see, *mutatis mutandis*, *Juhas Đurić v. Serbia*, no. 48155/06, § 56, 7 June 2011; see also the Constitutional Court's own decision described in paragraphs 9-10 above).

22. In view of the foregoing, the Government's objection must be dismissed.

D. Conclusion

23. The Court notes that the applicant's complaint is also 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.

II. MERITS

24. The relevant principles emerging from the Court's case-law concerning the right of access to a court and, in particular, the situations in which a restriction of that right amounts to "excessive formalism" are summarised in *Zubac v. Croatia* ([GC], no. 40160/12, §§ 76-79 and 96-99, 5 April 2018).

25. Under Article 174 of the respondent State's Misdemeanours Act, which was in force at the material time, a judicial review of a penalty notice

issued by the police could only be requested by submitting a signed penalty notice to the relevant court.

26. In the Court's view, the requirement to sign the penalty notice – which was not incompatible *per se* with Article 6 § 1 of the Convention – constituted also a restriction of the right of access to a court which pursued the legitimate aim of ensuring legal certainty and the proper administration of justice. The only issue in the present case is thus whether the way in which the domestic courts applied this rule was proportionate to the aim pursued.

27. In this regard, the Court observes at the outset that the instructions provided to the applicant on the back of the penalty notice explicitly stated that if an individual did not accept responsibility for a misdemeanour, he or she had the right to request judicial review within a period of eight days in accordance with Article 174 of the Misdemeanours Act (see paragraph 2, above). Although the instructions did not specifically mention the need for a signature on the penalty notice itself, the applicant was referred to the relevant legal provisions in this connection. The restriction imposed on his right of access to a court was therefore regulated in an arguably foreseeable albeit indirect manner. Similarly, the lack of the applicant's signature on the penalty notice can be imputed to the applicant personally.

28. However, as regards the criterion of excessive formalism, the Court notes that by jointly submitting two documents to the relevant national judicial authority, that is the unsigned penalty notice and the signed separate request for a judicial review, the applicant unequivocally expressed his intention to contest the penalty imposed by the police and seek its review before a court of law. Indeed, the Government themselves never made any arguments to the contrary, and, moreover, the additional examination of the one-page long separate request cannot either be considered as having amounted to an undue burden for the domestic court in question.

29. Lastly but very importantly, the Court notes that the Constitutional Court itself recently changed its case-law in similar instances, recognizing that the prior practice amounted to excessive formalism in the restriction of the appellant's access to a court within the meaning of the right to a fair trial as guaranteed by the Serbian Constitution (see paragraph 8 above).

30. In the light of the foregoing, the Court finds that the way in which the domestic courts applied the relevant procedural rules in the present case cannot be considered proportionate to the aim which those rules sought to achieve.

31. There has accordingly been a violation of Article 6 § 1 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. The applicant claimed EUR 42 euros in respect of pecuniary damage. In addition to that, he claimed EUR 2,000 for the non-pecuniary damage and EUR 1,800 as regards the costs and expenses.

33. The Government contested these claims.

34. The Court notes that the applicant has not shown the existence of a causal link between the procedural violation found and the pecuniary damage alleged; it therefore rejects that claim in its entirety.

35. On the other hand, it is understood that in order for the applicant to be, in so far as possible, put in the position in which he would have been had the requirements of Article 6 § 1 not been disregarded, the most appropriate form of redress would, in principle, be the reopening of the proceedings in question if requested (see, for example, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV, and *Popov v. Russia*, no. 26853/04, § 263, 13 July 2006). However, in the specific circumstances of the present case there are some doubts as to the feasibility of obtaining a retrial domestically. Notably, while Articles 280 and 281 of the Misdemeanours Act envisage the possibility of having the impugned proceedings reopened based on the Court's judgment (see also, in this context, the Constitutional Court's recent decision IUz-25/2018 of 7 April 2022), it is not certain that in the present case this would indeed be possible given that the prosecution for the traffic offence in question may have become statute barred in the meantime. It follows that the finding of a violation of the Convention cannot in and of itself constitute sufficient just satisfaction for any non-pecuniary damage sustained by the applicant. The Court is also of the opinion that, in any event, the applicant has certainly suffered some non-pecuniary damage. Given the nature of the violation found in the present case and making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the amount of EUR 2,000 in this connection, plus any tax that may be chargeable.

36. As to the applicant's claim for costs and expenses, the Court reiterates that an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and were also reasonable as to their quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,800, covering costs and expenses under all heads, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts, which are to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,800 (one thousand eight hundred 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 April 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Branimir Pleše	Anne Louise Bormann
Acting Deputy Registrar	President