

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

THIRD SECTION

CASE OF JANKOVIĆ v. SERBIA

(Application no. 23915/15)

JUDGEMENT

STRASBOURG

16 May 2017

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



In the case of Janković v. Serbia,

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

Pere Pastor Vilanova, *President,*
Branko Lubarda,
Georgios A. Serghides, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 25 April 2017,

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

PROCEDURE

1. The case originated in an application (no. 23915/15) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Živa Janković ("the applicant"), on 4 May 2015.

2. The Serbian Government ("the Government") were initially represented by their former Agent, Ms V. Rodić, being more recently substituted by their current Agent, Ms N. Plavšić.

3. On 1 September 2015 the application was communicated to the Government.

4. The Government objected to the examination of the application by a Committee. After having considered the Government's objection, the Court rejects it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1957 and lives in Bela Crkva.

6. He was employed by "*Betonjerka"- DP*, a socially-owned company based in Bela Crkva (hereinafter "the debtor").

A. First set of civil and enforcement proceedings

7. On 20 May 2003 the Bela Crkva Municipal Court ordered the debtor to pay the applicant specified amounts on account of salary arrears and social insurance contributions, plus the costs of the civil proceedings. On the same day this judgment became final.

8. On 14 October 2003 upon the applicant's request to that effect, the Bela Crkva Municipal Court ordered the enforcement of the said judgment and further ordered the debtor to pay the applicant the enforcement costs.

9. The Government in its observations maintained that the said judgment had been fully enforced by the domestic decisions of 2 December 2004, 4 November 2005 and 19 May 2006 respectively. The applicant did not contest this submission.

B. Second set of civil and enforcement proceedings

10. On 10 February 2009 the Bela Crkva Municipal Court ordered the debtor to pay the applicant other specified amounts on account of salary arrears and social insurance contributions. In addition the domestic court ordered each party to pay its own costs of the civil proceedings. This judgment became final on 18 February 2009.

11. On 30 April 2009 upon the applicant's request to that effect, the Bela Crkva Municipal Court ordered the enforcement of the said judgment and further ordered the debtor to pay the applicant the enforcement costs.

12. The said decision remains unenforced to the present date.

C. Insolvency proceedings

13. On 12 May 2009 the Pančevo Commercial Court opened insolvency proceedings in respect of the debtor.

14. On 22 September 2009, upon a submission to that effect, the Pančevo Commercial Court recognized the applicant's respective claims.

15. On 27 August 2012 the Pančevo Commercial Court terminated the insolvency proceedings against the debtor, having decided to continue with the insolvency action against the debtor's estate.

16. The insolvency proceedings are still pending.

D. The proceedings before the Constitutional Court

17. On 8 August 2013 the applicant lodged a constitutional appeal complaining firstly about the fairness of the insolvency proceedings. Further, he requested the Constitutional Court to adopt a decision obliging the respondent State to pay from its own funds his unpaid salaries. In particular, the applicant had referred only to the judgment which had been adopted in his favour on 10 February 2009. In so doing, the applicant also relied on the Court's case-law related to the non-enforcement of domestic court decision rendered against socially-owned companies in Serbia.

18. On 31 March 2015 the Constitutional Court dismissed the applicant's appeal finding that it is not vested with the power of the

insolvency court to enable the payments of the claims recognized in the insolvency proceedings.

II. RELEVANT DOMESTIC LAW

19. The relevant domestic law concerning the status of socially-owned companies, as well as the enforcement and insolvency proceedings, is outlined in the cases of *R. Kačapor and Others v. Serbia*, nos. 2269/06 *et al*., §§ 57-64 and 71-76, 15 January 2008 and *Jovičić and Others v. Serbia* (dec.), no. 37270/11, §§ 88-93, 15 October 2013. Furthermore, the case-law of the Constitutional Court in respect of socially-owned companies, together with the relevant provisions concerning constitutional redress is outlined in the admissibility decision in *Marinković v. Serbia* (dec.), no. 5353/11, §§ 26-29 and 31-44, 29 January 2013, the judgment in *Marinković v. Serbia*, no. 5353/11, §§ 29-31, 22 October 2013, and the decision in *Ferizović v. Serbia* (dec.), no. 65713/13, §§ 12-17, 26 November 2013. Lastly, relevant domestic law concerning the proceedings before the Constitutional Court is outlined in the case *Pop-Ilić and Others v. Serbia*, nos. 63398/13 and seq. §§ 23-30, 14 October 2014.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION AND OF ARTICLE 1 OF PROTOCOL No. 1

20. The applicant complained of the respondent State's failure to enforce the final court judgments rendered in his favour and of the lack of an effective remedy in that connection. He relied on Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1, which, in so far as relevant, read as follows:

Article 6 § 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."

Article 1 of Protocol No. 1

"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."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

1. The parties' submissions

21. The Government maintained that the applicant had failed to exhaust domestic remedies: (a) he had failed to properly raise his complaint before the Constitutional Court, which in any event was premature given that the insolvency proceedings were still ongoing at the relevant time; and (b) he had failed to make use of a remedy for the protection of the right to trial within a reasonable time (*zahtev za zaštitu prava na suđenje u razumnom roku*), which had been available as of 22 May 2014.

22. The applicant reaffirmed his complaint.

2. The relevant principles

23. The Court reiterates that the purpose of Article 35 § 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, inter alia, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI). Whereas Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of effective remedies designed to challenge decisions already given. It normally requires also that the complaints intended to be brought subsequently before the Court should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among other authorities, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200, and *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, §§ 604 and 605, 13 November 2003).

The Court's conclusion

(a) The constitutional appeal

(i) complaint with regard to the decision of 20 May 2003

24. Quite apart from the fact that the Government maintained that the said judgment had been fully enforced, the Court notes that the applicant

had failed to raise this complaint before the Constitutional Court. Accordingly, this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

(ii) The complaint with regard to the decision of 10 February 2009

25. Firstly, in respect of the Government's objection that the constitutional appeal was premature given that the insolvency proceedings were still ongoing at the relevant time, it had to be noted that the Court has already considered similar arguments and rejected them (see, for example, *DOO Brojler Donje Sinkovce v. Serbia,* no. 48499/08, §§ 45-47, 26 November 2013). It sees no reason to depart from that approach in the present case. Therefore, the Government's objection must be rejected.

26. It further observes that, in his constitutional appeal, the applicant had expressly relied on the Court's case-law related to the non-enforcement of domestic court decisions rendered against socially-owned companies in Serbia, notably *R. Kačapor and Others v. Serbia,* cited above, and *Crnišanin and Others v. Serbia,* nos. 35835/05, 43548/05, 43569/05 and 36986/06, 13 January 2009. He had also referred to the judgment which had been adopted in his favour on 10 February 2009 and which has remained unenforced to date. Finally, the applicant had asked the Constitutional Court to adopt a decision obliging the respondent State to pay his salary arrears from its own funds.

27. In these circumstances, even though the applicant's constitutional complaint could have been somewhat more specific, it cannot but be concluded that he had in fact expressed his grievances in a manner which leaves no doubt that it was the same complaint which was subsequently submitted to the Court itself. By therefore having raised in substance the same issue at the domestic level, the applicant had provided the national authorities with the opportunity which is in principle intended to be afforded to Contracting States under Article 35 § 1 of the Convention. The Government's objection in this regard must therefore be dismissed.

(b) The remedy for the protection of trial within reasonable time

28. The Court notes that the applicant have attempted to obtain redress before the Constitutional Court and could not in addition have reasonably been expected to make use of yet another remedy which in any event had not been available at the time of lodging of the constitutional appeal. Moreover, the Constitutional Court had not obliged the applicant to use this remedy given the fact that the constitutional appeal had not been dismissed due to the non-exhaustion of the relevant remedy, even though the Constitutional Court adopted its decision after the said remedy had already been available. Therefore, the Government's objection in this respect must also be rejected.

29. The Court further notes that since the applicant's complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds, it must be declared admissible.

B. Merits

30. The Court notes that the domestic judgment of 10 February 2009 has remained unenforced to date.

31. The Court observes that it has frequently found violations of Article 6 of the Convention and/or Article 1 of Protocol No. 1 to the Convention in cases raising issues similar to those raised in the present case (see *R. Kačapor and Others*, cited above, §§ 115-116 and § 120, *Crnišanin and Others v. Serbia*, nos. 35835/05 et seq., §§ 123-124 and §§ 133-134, 13 January 2009).

32. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing argument capable of persuading it to reach a different conclusion in the present case. There have, accordingly, been violations of Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1.

33. Having reached this conclusion, the Court does not find it necessary to examine essentially the same complaint under Article 13 of the Convention (see *mutatis mutandis*, *Kin-Stib and Majkić v. Serbia*, no. 12312/05, § 90, 20 April 2010).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

35. The applicant requested that the Respondent State be ordered to pay, from its own funds: (i) the sums awarded by the final judgment rendered in his favour on 10 February 2009 as well as the established costs of the enforcement proceedings and (ii) 4,000 euros (EUR) in respect of non-pecuniary damage. The applicant did not specify any claim for costs and expenses.

36. The Government contested these claims.

37. Having regard to the violations found in the present case and its own case-law (see *R. Kačapor and Others,* cited above, §§ 123-126, and

Crnišanin and Others, cited above, § 139), the Court considers that the applicant's claims for pecuniary damage concerning the payment of the outstanding judgment debt must be accepted. The Government shall therefore pay the applicant the sums awarded in the final domestic judgment adopted on 10 February 2009, as well as the established costs of the enforcement proceedings, less any amounts which may have already been paid in respect of the said judgment.

38. As regards the non-pecuniary damage, the Court considers that the applicant sustained some non-pecuniary loss arising from the breaches of the Convention found in this case. Further, the Court observes that in cases similar to the present one, it awards EUR 2,000 jointly for non-pecuniary damage, costs and expenses (see *Stošić v. Serbia*, no. 64931/10, §§ 66-68, 1 October 2013). Since the applicant did not specify any claim for costs and expenses, the Court awards the applicant EUR 1,900 in respect of the non-pecuniary damages suffered, less any amounts which may have already been paid in that regard at the domestic level.

39. Since the applicant did not specify any claim for costs and expenses, the Court considers that there is no call to award him any sum on that account.

B. Default interest

40. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints related to non-enforcement of final court judgment adopted on 10 February 2009 admissible, and reminder of the application inadmissible;

2. *Holds* that there have been violations of Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1;

3. *Holds* that there is no need to examine separately the complaint under Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, from its own funds and within three months, the sums awarded in the court judgment rendered in his favour on 10 February 2009, as well as the established

costs of the enforcement proceedings, less any amounts which may have already been paid in this regard;

(b) that the respondent State is to pay the applicant, within the same period, EUR 1,900 (one thousand and nine hundred euros) less any amounts which may have already been paid in that regard at the domestic level, in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant, which is to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(c) 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;

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

Done in English, and notified in writing on 16 May 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Pere Pastor Vilanova
President