

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

SECOND SECTION

DECISION

Application no. 42716/11
Dragana JOVIČIĆ
against Serbia

The European Court of Human Rights (Second Section), sitting on 12 February 2013 as a Committee composed of:
Paulo Pinto de Albuquerque, *President,*
Dragoljub Popović,
Helen Keller, *judges*
and Françoise Elens-Passos, *Deputy Section Registrar,*
Having regard to the above application lodged on 19 March 2011,
Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Dragana Jovičić, is a Serbian national, who was born in 1972 and lives in Gornji Milanovac.

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

A. The Conviction and Sentencing

On 23 April 2008 the District Court (*Okružni sud*) in Čačak convicted the applicant of drug trafficking and sentenced her to three-year imprisonment and mandatory drug addiction treatment. This verdict was confirmed on appeal by the Supreme Court (*Vrhovni sud*) judgment of 28 October 2008.

On unspecified date after 10 June 2008 the applicant absconded and settled in Montenegro.

On 4 September 2009 the Municipal Court in Gornji Milanovac issued a warrant for her arrest.

On 8 March 2010 the applicant gave birth to her daughter.

On 7 May 2010 the applicant was arrested, separated from her daughter, and taken to prison to serve the sentence.

On the same date she had filed a request seeking to postpone serving of the sentence (*zahtev za odlaganje izdržavanja kazne zatvora*) for the reason that she was breastfeeding, and carrying for her two-month-old baby. On 10 May 2010 the First Instance Court dismissed the request.

The applicant then filed a request for the suspension of her sentence (*molba za prekid izdržavanja kazne zatvora*), for the same reason, which request was finally rejected by the Ministry of Justice decision of 27 September 2010. The applicant indicated that she had not instituted judicial review proceedings against this decision.

On 10 February 2010 the applicant lodged an initiative to the Public Prosecutor to file a request for the protection of legality (*inicijativa za podizanje zahteva za zaštitu zakonitosti*) against the verdict.

Finally, the applicant stated that she had not lodged a constitutional appeal.

B. Relevant Domestic Law

1. *Criminal Procedure Code* (Zakonik o krivičnom postupku, *published in Official Gazette of the Federal Republic of Yugoslavia – OG FRY nos. 70/01 and 68/02, and Official Gazette of the Republic of Serbia – OG RS nos. 58/04, 85/05, 115/05 and 49/07*)

Article 419 provided, *inter alia*, that the competent public prosecutor "may" (*može*) file a request for the protection of legality (*zahtev za zaštitu zakonitosti*) against a "final judicial decision", on behalf of or against the defendant, if the relevant substantive and/or procedural "law has been breached" (*ako je povređen zakon*).

Article 428 provided, *inter alia*, that the defendant sentenced to a term of imprisonment may file an appeal on points of law ("*zahtev za ispitivanje zakonitosti pravosnažne presude*").

On the basis of the above request or appeal, under Articles 425, 426 and 432 the competent court could uphold the conviction at issue or reverse it. It could also quash the impugned judgment, in its entirety or partly, and order a re-trial before the lower courts. However, if the court deciding on the request for the protection of legality, found that there had been a violation of the law in favour of the defendant, it was only authorised to declare so but the final judgment would remain standing.

2. Administrative Disputes Act (Zakon o upravnim sporovima*, published in the OG RS no. 111/09*)

Article 14 provides that an administrative dispute may only be instituted against an "administrative act", which is, *inter alia*, an act/decision adopted by a State body in the determination of one's rights and obligations concerning "an administrative matter".

3. Other relevant domestic law

The remainder of the relevant domestic law is set out in *Vinčić and Others v. Serbia*, nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, 1 December 2009.

COMPLAINTS

The applicant invoked Articles 3, 6 and 13 of the Convention. In substance, however, she complained about the outcome of the criminal proceedings, the violation of her right to family life by being separated from her baby-daughter during the critical age, and a lack of an effective remedy in that respect.

THE LAW

This Court has already held that a request for the protection of legality ("*zahtev za zaštitu zakonitosti*") is not an effective remedy (*Lepojić v. Serbia*, no. 13909/05, §§ 54 and 57, 6 November 2007).

The Court further observes that an appeal on points of law, when available, is, in principle, an effective remedy in the domestic criminal proceedings within the meaning of Article 35 § 1 of the Convention (see *mutatis mutandis, Mamudovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 49619/06, 10 March 2009).

The Court also notes that the constitutional appeal should, in principle, be deemed effective within the meaning of Article 35 § 1 of the Convention in respect of all applications against the Respondent State introduced as of 7 August 2008 (see *Vinčić and Others*, cited above, § 51). Further, it is up to the applicant to prove that an appropriate and effective domestic remedy was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case (see for example, *Selmouni*

v. France [GC], no. 25803/94, § 76, ECHR 1999-V), or that there existed special circumstances absolving the applicant from the requirement (see for example, *Sejdovic v. Italy* [GC], no. 56581/00, § 55, ECHR 2006-II).

Turning to the present case, the applicant failed to substantiate that she had lodged an appeal on points of law against the Supreme Court judgment of 28 October 2008, or to provide factual and legal arguments proving that this legal remedy was inadequate or ineffective in the particular circumstances of her case. The applicant indicated that she had not filed a lawsuit against the Ministry of Justice decision of 27 September 2010, as authorized by virtue of Article 14 of the *Administrative Disputes Act*, and that she had also failed to lodge a constitutional appeal, without providing any sound reason for so doing.

Accordingly, the application must be rejected on the ground that domestic remedies have not been exhausted as required by Article 35 § 1 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos
Deputy Registrar

Paulo Pinto de Albuquerque
President