

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

SECOND SECTION

DECISION

Application no. 75381/10
Zoran KOMATINOVIĆ
against Serbia

The European Court of Human Rights (Second Section), sitting on 29 January 2013 as a Chamber composed of:

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 25 November 2010,

Having regard to the observations submitted by the respondent Government,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Zoran Komatinović, is a Serbian national, who was born in 1953 and lives in Niš. He was represented by Mr V. Ilić, a lawyer practising in the same town.

The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

A. The circumstances of the case

1. Version initially submitted by the applicant

On 7 June 2006 the applicant lodged a claim with the Niš Municipal Court (*Opštinski sud*), seeking the annulment of a decision to dismiss him from his employment and his reinstatement, as well as his legal costs.

Following a remittal, on 13 October 2008 the Municipal Court ruled in favour of the applicant.

On 19 February 2009 the Niš District Court (*Okružni sud*) reversed that judgment and rejected the applicant's claim.

On 14 October 2009 the Supreme Court (*Vrhovni sud*) rejected a further appeal by the applicant on points of law (*revizija*).

As evidenced by a certificate of service (*dostavnica za lično dostavljanje pismena*), the applicant received that judgment on 14 December 2009.

On 12 January 2010 the applicant lodged a constitutional appeal.

On 17 March 2010 the Constitutional Court dismissed his appeal as out of time (*kao neblagovremenu*). In doing so, it held that the relevant judgment had been served on the applicant on 7 December 2009 and that therefore the constitutional appeal had been lodged outside the statutory thirty-day time-limit (see Article 84 of the Constitutional Court Act under B.2 of "Relevant domestic law and practice" below).

The applicant's representative was served with the decision on an unspecified date in August 2010.

On 21 August 2010 the applicant requested the Constitutional Court to withdraw its initial decision and to examine his constitutional appeal on its merits. For that purpose, he provided the court with a copy of the relevant certificate of service proving that his lawyer V.I. had received the Supreme Court's judgment on 14 December 2009, whereas 7 December 2009 appeared to be the date when the opposing party's lawyer Ž.T. had received it.

2. Version submitted by the Government

The Government did not dispute the facts submitted by the applicant. However, they provided additional information concerning the proceedings before the Constitutional Court, as follows.

On 16 June 2011 the Constitutional Court, following extraordinary proceedings based on its opinion of 2 June 2011 (see under B.5 of "Relevant domestic law and practice" below), decided to revise and overturn its decision of 17 March 2010. At the same time, it decided on the merits of the applicant's constitutional appeal and found no violation of the applicant's right to a fair trial.

On 18 October 2011 the Editorial Commission of the Constitutional Court proofread and validated the decision of 16 June 2011.

The applicant's representative was served with the decision on 14 November 2011.

B. Relevant domestic law and practice

1. *The Constitution of the Republic of Serbia 2006 (*Ustav Republike Srbije*; published in the Official Gazette of the Republic of Serbia (OG RS) no. 98/06)*

Article 170

"A constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed."

2. *Constitutional Court Act (*Zakon o Ustavnom sudu*; published in OG RS no. 109/07)*

Article 7(1)

"The decisions of the Constitutional Court shall be final, enforceable and binding."

Article 84(1)

"A constitutional appeal may be lodged within thirty days of receipt of the individual decision or the date of commission of the actions ... [in question] ..."

3. *Constitutional Court Rules of Procedure (*Poslovnik o radu Ustavnog suda*; published in OG RS no. 24/08, 27/08 and 76/11)*

Rule 91: Request for the rectification of an adopted decision

"The Constitutional Court shall place on its agenda a reasoned written request by its President, a judge or a working body, for the rectification of an adopted decision (*odluka, rešenje ili zaključak*), provided that the decision has not already been dispatched ... [to the appellant]...

A fresh new court's session shall be scheduled to examine whether rectification of the original decision is necessary."

Rule 93: Publication of an amended or supplementary legal opinion

"An amended opinion of the Constitutional Court shall be recorded in the minutes taken at the Constitutional Court's regular session upon its adoption. Such ... [an opinion] ... and ... [its] ... reasoning shall be cited in the first Constitutional Court decision or ruling given ... [thereafter] ..."

4. Opinion adopted at the Constitutional Court's session of 5 February 2009

A party to proceedings is to be notified that, pursuant to Article 166 § 2 of the Constitution of the Republic of Serbia, all decisions of the Constitutional Court are final, enforceable and binding, and that there is no legal basis to lodge a complaint, appeal or constitutional appeal against the decisions of the Constitutional Court.

If a party submits a request for rectification of an adopted decision, this does not lead to the opening of a new application. After the request has been reviewed by a judge rapporteur, the interested party will be informed of the above rules by way of a letter signed by the court registrar.

5. Supplementary opinion of 2 June 2011

In exceptional circumstances, the Constitutional Court may revise its decision on a constitutional appeal, even after it has been dispatched to the appellant, in a manner and in accordance with the rules prescribed by Rule 91 of the Rules of Procedure (see under C.3 above) if the original decision was based on a manifest error of the court that cannot otherwise be rectified.

COMPLAINTS

The applicant complained under Articles 6 and 13 of the Convention that he had unlawfully been denied access to the Constitutional Court.

THE LAW

The Government argued that the applicant had failed to provide the Court with all the facts relevant to his complaint. In particular, he had omitted to inform the Court about the Constitutional Court's re-examination of his constitutional appeal on 16 June 2011. The Government suggested, therefore, that the applicant had abused his right of petition. In the alternative, the Government maintained that the applicant had lost his victim status and that the fact that he had had no success before the domestic courts

could not be used as a reason to find a violation of the right to a court under Article 6 § 1 of the Convention.

The applicant's observations, following the communication of his case to the Government, were submitted after the expiry of the time-limit set by the Court. The President of the Chamber therefore decided, in accordance with Rule 38 § 1 of the Rules of Court, that the observations should not be included in the case file for the Court's consideration (see also paragraph 20 of the Practice Direction on Written Pleadings).

The Court reiterates that the concept of "abuse", within the meaning of Article 35 § 3 of the Convention, must be understood as any conduct of an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and that impedes the proper functioning of the Court or the proper conduct of the proceedings before it (see *Miroļubovs and Others v. Latvia*, no. 798/05, §§ 62 and 65, 15 September 2009). An application is likely to be dismissed on this ground if has been established that (a) it is knowingly based on untrue facts and false declarations (see, for example, *Bagheri and Maliki v. the Netherlands* (dec.), no. 30164/06, 15 May 2007, and *Poznanski and Others v. Germany* (dec.), no 25101/05, 3 July 2007), or that (b) significant information and documents have been deliberately omitted, either where they were known from the outset (see *Kerechashvili v. Georgia* (dec.), no. 5667/02, 2 May 2006, and contrast *Al-Nashif v. Bulgaria*, no. 50963/99, § 89, June 20, 2002) or where new significant developments have occurred during the procedure (see *F. v. Spain* (dec.), no. 13524/88, 12 April 1991; *Predescu v. Romania*, no. 21447/03, §§ 25-27, 2 December 2008; and *Tatalović and Dekić v. Serbia*, no. 15433/07, 29 May 2012). Incomplete and therefore misleading information may amount to an abuse of the right of application, especially if the information in question concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information (see *Hüttner v. Germany* (dec.), no. 23130/04, 9 June 2006; *Poznanski and Others*, cited above; and *Predescu*, cited above, §§ 25-26). Lastly, a deliberate attempt to mislead the Court must always be established with sufficient certainty, as mere suspicion will not be sufficient to declare the application inadmissible as an abuse of the right of application (see, *mutatis mutandis*, *Melnik v. Ukraine*, no 72286/01, §§ 58-60, 28 March 2006, and *Nold v. Germany*, no 27250/02, § 87, 29 June 2006).

Turning to the present case, the Court notes that in his application lodged on 25 November 2010, the applicant complained that his right to a court had been violated because the Constitutional Court had erroneously viewed his constitutional appeal as having been lodged outside the relevant time-limit. The Court observes that on 16 June 2011 the Constitutional Court re-examined the applicant's constitutional appeal on its merits. On 23 January 2012, before learning about the Constitutional Court's decision of 16 June 2011, the Court communicated the applicant's complaint to the respondent

Government. The Court only learned of the re-examination of the applicant's constitutional appeal from the Government's observations of 7 May 2012.

The Court acknowledges that the relevant decision was adopted after the application had been lodged with the Court, and that the applicant could not have clearly anticipated that the Constitutional Court would re-examine its earlier decision in view of the relevant law and practice at that time (see "Relevant domestic law and practice" at C.3 and C.4 above). However, the applicant received the relevant decision on 14 November 2011. The Court points out that by Rule 47 § 6 of the Rules of Court, "applicants shall keep the Court informed of ... all circumstances relevant to the application". Applicants are by no means expected to set out all possible information about a case in their application. It is their duty, however, to present, at least, the essential facts at their disposal which are clearly of significant importance for the Court to be able to assess the case properly. In the present case, the applicant, despite being represented by counsel in the proceedings before the Court, not only omitted to inform the Court of the decision in question, but furthermore did not even provide a timely explanation for his failure to do so.

At a time when the Court is called upon to deal with an enormous number of cases raising particularly serious human rights issues, it cannot afford to waste its efforts on matters which have obviously been resolved by the respondent State itself and which are therefore incompatible with its real mission, which is to ensure the observance of the solemn, Convention-related engagements undertaken by the States Parties. The Court finds that the applicant's omission to inform it of a fact of crucial importance for the determination of his case amounted to an abuse of the right of petition.

Accordingly, this application as a whole must be rejected as an abuse of the right of individual petition pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stanley Naismith Registrar	Guido Raimondi President