

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

SECOND SECTION

DECISION

Application no. 39275/12
Andrea MIHAILOVIĆ
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 13 June 2012,
Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Andrea Mihailović, is a Serbian national, who was born in 1997 and lives in Zemun. She was represented before the Court by Ms S. Mihailović, her mother.

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

A. The proceedings concerning the applicant's absence from school

In the 2010/2011 school year the applicant was enrolled in the seventh grade of elementary school. During the fall semester, she had attended all of the classes and took all of the exams. During the spring semester, the applicant was absent for medical reasons.

On 17 June 2011 the School Board decided not to accept the medical certificates in justification of absence, and to refer the applicant to the final exams ("*razredni ispit*"). The applicant and her mother were orally informed about this decision on 28 June 2011.

On 11 July 2011 the applicant's mother requested the school to organize the preparatory lectures for the applicant and to allow her to take the exams at home. Both of the requests were rejected by 1 August 2011.

On 22 August 2011 the School Board determined that the applicant had failed to appear at the examination and consequently, had failed the seventh grade.

Following two internal controls, on 7 September 2011 the competent education inspector found that the School Board decision of 22 August 2011 was out of scope, and ordered it to quash the decision and to determine the applicant's education status in line with the law. It would appear that the school had quashed the decision of the School Board of 22 August 2011, but continued to implement it, without undertaking other measures as ordered by the education inspector.

On 23 September 2011 the Ministry of Health confirmed that the applicant's absence from school was justified for medical reasons.

The applicant further claims that she attended the 2011/2012 school year classes organized for the eighth grade, but that she did not obtain any certificate of attendance or completion.

On 20 December 2011 the Ombudsman ("*Zaštitnik građana*") found that the school had failed to undertake adequate measures prescribed by law to provide the applicant with the education, as well as to protect her from neglect, and issued certain recommendations in that respect.

The applicant indicated that she had not used the constitutional appeal, arguing that the school is not a State-institution, due to which this remedy would be ineffective in her case.

B. Relevant domestic law

1. *Education Act* (Zakon o osnovama sistema obrazovanja i vaspitanja, *published in the Official Gazette of the Republic of Serbia - OG RS - nos. 72/09 and 52/11*) and *Elementary Education Act* (Zakon o osnovnoj školi; *published in the OG RS nos. 50/92, 53/93, 67/93, 48/94, 66/94, 22/02, 62/03, 64/03, 101/05 and 72/2009*)

Articles 7 and 10 of the *Education Act* and Article 1 of the *Elementary Education Act* provide that the schools are institutions exercising delegated public powers in providing education.

Article 111 of the *Education Act* further provides that a pupil, parent or legal guardian who considers any of his or her rights to education provided for in the law breached, may lodge a request for the protection of the pupil's

rights (*zahtev za zaštitu prava učenika*) to the competent Ministry. If the request is justified, the Ministry shall warn the school and set the deadline for rectifying the breaches of the law, failing which the Ministry will decide on the request on merits.

Articles 147 and 148 of the *Education Act* prescribe the competences and the authorities of the education inspectors, which include, *inter alia*, the authority to order the school to rectify irregularities and inadequacies in the implementation of the law with respect to the fulfilment of the rights of the children, pupils, their parents and legal guardians.

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

Article 14 provides that an administrative dispute may 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. *The Ombudsman Act (*Zakon o zaštitinku građana*, published in the OG RS nos. 79/05 and 54/07)*

Article 17 of the Ombudsman Act provides that the Ombudsman supervises the respect of the rights of citizens and determines the breaches of the law.

Article 31 stipulates that, when it finds irregularities in the performance of an administrative body, the Ombudsman will issue the recommendation; if the administrative body fails to abide by the recommendation, the Ombudsman may inform the public, the Assembly and the Government about it, and may also recommend an assessment of liability of the responsible head of the administrative body.

4. *Constitutional Court Act* (Zakon o Ustavnom sudu; *published in OG RS nos. 109/07 and 99/11)*

Article 82 of the *Constitutional Court Act* provides that a constitutional appeal may be lodged against "an individual decision or an action of a State body or an organisation exercising delegated public powers which violates or denies human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies have already been exhausted or have not been prescribed or where the right to their judicial protection has been excluded by law."

COMPLAINTS

Under Article 2 of Protocol No. 1 to the Convention, the applicant complains about being denied education by the failure of the School Board to allow her to pass the exams and to issue her the certificates of completion.

THE LAW

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against the State before an international judicial organ to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 85, Reports of Judgments and Decisions 1998-VIII).

The Court further notes that 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).

Finally, the Court observes that it has already held 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 v. Serbia*, nos. 44698/06 et seq., § 51, 1 December 2009).

Turning to the present case, the Court notes that the applicant raised her complaint with an education inspector and the Ombudsman, but she failed to exhaust the remedies provided for by the *Education Act* as well as by the *Administrative Disputes Act* (see B.1 and B.2 above). Even assuming that the applicant's recourse to the education inspector and/or the Ombudsman could be considered an effective domestic remedy for the purposes of Article 35 § 1 of the Convention, in any event she failed to avail herself of the constitutional appeal, which has already been established is an effective domestic remedy, as noted above. The Court also notes that, pursuant to the relevant domestic law, and contrary to the applicant's submissions, the schools are institutions exercising delegated public powers in providing

education and therefore their decisions or actions could be the subject of the examination in the constitutional appeal proceedings (see B.1 and B.4 above).

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