CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 63412/00
by Sefket SAHINI
against Croatia

The European Court of Human Rights (First Section), sitting on 11 October 2002 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr E. LEVITS,
Mr A. KOVLER,
Mr V. ZAGREBELSKY, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application lodged on 22 January 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Sefket Sahini, is a citizen of the Former Yugoslav Republic of Macedonia, who was born in 1944 and lives in Moosburg, Germany. The respondent Government are represented by their Agent Ms Lidija Lukina-Karajković.

A. The circumstances of the case

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

1. Proceedings for disturbance of peaceful possession of the applicant's property

On 18 June 1990 the applicant filed a civil action against I.R. for disturbance of peaceful possession of leased premises before the Rijeka Municipal Court (*Općinski sud u Rijeci*). He claimed that I.R. disturbed the peaceful possession of his business premises - a tailors' workshop in Rijeka in that she had forcefully evicted the applicant and his son from the premises.

Before the period to be taken into consideration (i.e. 6 November 1997) several hearings were held and several adjourned.

On 29 September 1994 I.R. died.

The proceedings were continued against her legal successors.

The hearing scheduled for 5 October 1999 was adjourned on the applicant counsel's request.

At the hearing on 22 November 1999 the proceedings were concluded and the court rejected the applicant's request. The applicant did not appeal against that decision and it became final on 10 February 2000.

2. Proceedings concerning the applicant's claim for damages

On 19 December 1990 the applicant filed a civil action seeking payment of damages from I.R., before the Rijeka Municipal Court.

Before the period to be taken into consideration by the Court, several hearings were held and several adjourned.

At the hearing on 20 October 1998 the applicant's counsel asked the court to allow him to submit further evidence within thirty days.

On 25 April 2000 the applicant's counsel asked the court to schedule a hearing and to request relevant documentation from the Rijeka Revenue Administration (*Uprava Prihoda, Ispostava Rijeka*).

The case was then transferred to another judge. On 5 October 2001 she requested the documentation from the Rijeka Revenue Administration.

On 21 January 2002 the Rijeka Revenue Administration submitted the requested documentation.

It appears that the proceedings are pending before the court of first instance.

B. Relevant domestic law

Section 26 of the Constitutional Act on the Changes of the Constitutional Act on the Constitutional Court (entered into force on 15 March 2002, published in the Official Gazette no. 29 of 22 March 2002 - hereinafter "The Act of 15 March 2002" - *Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu Republike Hrvatske*) introduced a new Section 59 (a), which subsequently became Section 63 of the 2002 Constitutional Act on the Constitutional Court. The relevant parts of that Section read as follows:

> (1) The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted in cases when a competent court has not decided within a reasonable time a claim concerning the applicant's rights and obligations or a criminal charge against him ...
>
> (2) If the constitutional complaint ... under paragraph 1 of this Section is accepted, the Constitutional Court shall determine a time-limit within which a competent court shall decide the case on the merits...
>
> (3) In a decision under paragraph 2 of this Article, the Constitutional Court shall fix appropriate compensation for the applicant in respect of the violation found concerning his constitutional rights ... The compensation shall be paid from the State budget within a term of three months from the date when the party lodged a request for its payment.

COMPLAINT

The applicant complains under Article 6 § 1 of the Convention about the length of two sets of the proceedings.

THE LAW

The applicant complains that two sets of civil proceedings instituted by him before the Rijeka Municipal Court have not been concluded within a reasonable time as required under Article 6 § 1 of the Convention, the relevant parts of which read as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

a. The Government contend firstly that the part of the application relating to the events which took place prior to 5 November 1997, when the Convention entered into force in respect of Croatia, is outside the Court's competence *ratione temporis*.

They argue that particularly the first set of proceedings as a whole do not fall into the Court's competence *ratione temporis* because the events on which the applicant's claim before the domestic courts' was based took place prior to 5 November 1997. Although the subsequent proceedings continued after that date all decisions taken referred to the prior events such as the alleged fact of disturbance which happened in 1991 and I.R.'s death in 1994.

The Court recalls that Croatia recognised the competence of the Court to receive applications "from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by Croatia of the rights recognised in the Convention through any act, decision or event occurring after 5 November 1997." It follows that the period to be taken into consideration by the Court starts on 6 November 1997. However, in order to determine the reasonableness of the length of time in question the Court will have regard to the state of the case on that date (see, among other authorities, *Rajak v. Croatia,* (dec.), no. 49706/99, 12 October 2000, unreported).

Furthermore, the Court notes that, although the events that were examined in the proceedings for disturbance of the applicant's possession of his tailors' workshop did happen prior to 5 November 1997, the subject matter of the applicant's complaint under Article 6 of the Convention is the length of the proceedings before the domestic courts and not the act of disturbance or I.R.'s death. The Court notes that the proceedings in question continued after the Convention entered into force in respect of Croatia and were concluded on 22 November 1999. Thus, the period of two years and sixteen days does fall within the Court's competence *ratione temporis*.

b. The Government further submit that Article 6 is not applicable to the proceedings for disturbance of the applicant's possession of the tailors' workshop. They argue that in the proceedings of such nature the courts provide protection of the last factual possession ordering restoration of possession and prohibition of repeated or similar disturbance. In the Government's opinion, such proceedings do not involve determination of any of the applicant's civil right or obligation because the applicant has not sought protection of his right to possession of the workshop in question, but only protection of his factual possession.

According to the principles laid down in the Court's case-law (see, amongst other authorities, the Zander v. Sweden judgment of 25 November 1993, Series A no. 279-B, p. 38, § 22), the Court has first to ascertain whether there was a dispute ("contestation") over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its

exercise; and, finally, the result of the proceedings must be directly decisive for the right in question.

The Court notes that in the civil proceedings instituted by him the applicant asked domestic courts to establish that I.R. had disturbed his peaceful possession of the tailors' workshop and to order restoration of his possession and prohibit any further disturbances.

This "contestation" was genuine and serious, and concerned the actual existence of the right asserted by the applicant, namely not to be disturbed in his possession of the workshop. The outcome of the relevant proceedings before the domestic courts was capable of leading to reinstatement of the applicant to the workshop in question where he would be able to continue his work, it was thus directly decisive for the right in issue.

Therefore, the Government's objection as to the applicability of Article 6 § 1 of the Convention must be rejected.

c. Furthermore, the Government contend that the applicant is not a victim in respect of the proceedings for disturbance of his possession of the tailors' workshop because his possession ceased to exist many years ago.

The Court notes that the applicant complains about the length of the proceedings before the domestic courts and that it has been established that these proceedings involved determination of the applicant's civil rights. The applicant claims that the length of proceedings in question was unreasonable, contrary to Article 6 of the Convention. It follows that the applicant may claim to be a victim of such a violation.

d. As to the exhaustion of domestic remedies the Government submit that on 15 March 2002 Parliament introduced changes of the Constitutional Act on the Constitutional Court which allows that a complaint about the length of proceedings be submitted to the Constitutional Court without any further requirements (see Section 63 of the Act).

The applicant argues that the fact that some laws were amended in Croatia had no bearing on his case.

The Court recalls that in the Horvat case (see *Horvat v. Croatia* no. 51585/99, 26 July 2001, §§ 41-43, 45, ECHR - 2002...), it found that the proceedings pursuant to Section 59(4) of the 1999 Constitutional Court's Act could not be considered as an effective remedy in respect of complaints concerning the length of proceedings.

The Court notes that, following the Horvat judgment, on 15 March 2002 the Croatian Parliament enacted the Act on Changes of the Constitutional Court's Act, which was published in the Official Gazette no. 29 of 22 March 2002. It introduced a new Section 59(a) which later became Section 63 of the 2002 Constitutional Act on the Constitutional Court.

The Court recalls that in the Slaviček case (see *Slaviček v. Croatia* (dec.), no. 20862/02, 4 July 2002, ECHR - 2002...), it found that the above provision represented an effective domestic remedy in respect of alleged unreasonable length of proceedings.

The Court notes that the applicant in the present case has not lodged such a complaint. It is true that he introduced the application with the Court on 22 January 2000, while the legislation providing for an effective remedy in respect of his complaints under Article 6 of the Convention was he question therefore arises whether under Article 35 § 1 of the Convention it can be required that the applicant exhausts this remedy before this Court examines his complaint.

The Court recalls that the issue whether domestic remedies have been exhausted shall normally be determined by reference to the date when the application was lodged with the Court. This rule is however subject to exceptions which might be justified by the specific circumstances of each case (see *Baumann v. France*, no 33592/96, 22 May 2001, § 47, unreported). The Court has found in respect of a large number of applications against Italy raising similar issues that there were special circumstances justifying a departure from the general rule (see *Brusco v. Italy*, (dec.), no. 69789/01, ECHR 2001-IX).

Subsequently, on 5 September 2002 in the Nogolica case, the Court found that there existed a number of elements militating in favour of an exception also in respect of the Croatian cases (see *Nogolica v. Croatia* (dec.), no. 77784/01, 5 September 2002, ECHR - 2002...).

In the light of these circumstances and recalling the subsidiary character of the Convention machinery, the Court considers that the applicant has to address himself firstly to the Constitutional Court with a complaint pursuant to Section 63 of the 2002 Constitutional Court's Act in respect of the proceedings that are still pending before the domestic courts.

It follows that the complaint relating to the second set of proceedings which is still pending, must be rejected under Article 35 §§ 1 et 4 of the Convention for non-exhaustion of domestic remedies.

However, the Court notes that the first set of the proceedings was concluded on 22 November 1999 and that, therefore, the applicant was not able to complain about the length of these proceedings before the Constitutional Court because, at that time, there was no domestic remedy that would adequately address the issue of the length of proceedings.

In these circumstances, the Court considers that the applicant's complaint about the length of the first set of proceedings cannot be rejected for failure to exhaust domestic remedies.

e. In the alternative, the Government invite the Court to conclude that the application does not disclose any appearance of a violation of Article 6 of the Convention in respect of the complaint raised.

In respect of the proceedings concerning the applicant's claim for disturbance of his peaceful possession of the tailors' workshop the Government submit that the subject matter of the applicant's case did not call for particular urgency in deciding it. They refer to the Court's case-law, arguing that the cases that do call for special urgency are those that relate to family-law matters or to payment of damages to the victims of road accidents, those that involve the interests of a great number of persons and cases concerning dismissal from work.

As to the applicant's behaviour within the period to be taken into consideration by the Court, the Government assert that the applicant's counsel asked the court to adjourn the hearing of 5 November 1999 because he wanted to consult the applicant.

With respect to the behaviour of the domestic authorities, the Government claim that the domestic courts did show diligence in the conduct of the proceedings. In particular, the Government point out that in the civil proceedings the courts are limited in their activity as they may not take procedural steps on their own initiative but mostly according to the requests of the parties.

The applicant disagrees with the Government.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court by a majority

Declares admissible, without prejudging the merits, the applicant's complaint concerning the length of the first set of proceedings;

Declares inadmissible the remainder of the application.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President