

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

THIRD SECTION

DECISION

Application no. 19728/08
Divna TORDAJ
against Serbia

The European Court of Human Rights (Third Section), sitting on 19 September 2017 as a Chamber composed of:

Luis López Guerra, *President,*
Branko Lubarda,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking, *judges,*

and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 19 April 2008,

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

1. The applicant, Ms Divna Tordaj, is a Serbian national, who was born in 1938 and lives in Belgrade. She was represented before the Court by Ms B. Zarić, a lawyer practising in Belgrade.

2. The Serbian Government ("the Government") were initially represented by their former Agent, Ms V. Rodić, and subsequently by their current Agent, Ms N. Plavšić.

A. The circumstances of the case

3. On 13 November 2003 the applicant instituted private prosecution proceedings against P.A. for defamation, claiming that he had falsely accused her of extortion and nuisance in a letter to some local authorities.

4. On 25 February 2004 the Belgrade Municipal Court ordered the applicant to submit some additional information, which she did on 13 April 2004.

5. On 9 March 2006 the applicant applied to the criminal court to speed up the proceedings in view of the short limitation period in respect of defamation claims (see paragraph 10 below).

6. On 14 March 2006 the criminal court responded that the proceedings would become statute-barred in August 2007 and that it would take all necessary measures to prevent that.

7. On 17 July 2006 a hearing to attempt a friendly settlement was held. The defendant expressed his readiness to make an apology to the applicant, since he had had no intention of insulting her. The applicant did not accept his apology.

8. On 29 March 2007 the Municipal Court found the defendant guilty of defamation. However, the Belgrade District Court quashed that judgment and remitted the case for a retrial on 28 June 2007.

9. On 30 August 2007 the Municipal Court discontinued the proceedings as statute-barred. The District Court upheld that decision on 24 October 2007.

B. Relevant domestic law and practice

1. Criminal Code 2005 (Krivični zakonik; published in the Official Gazette of the Republic of Serbia – OG RS - nos. 85/05, 88/05, 107/05, 72/09 and 111/09)

10. In the present case, although the alleged defamation had taken place in 2003, the domestic courts applied the Criminal Code 2005 because its provisions were more lenient for the defendant in respect of punishment. Article 104 of the Code provides that the time-limit for criminal prosecution for defamation expires four years after the commission of the offence.

11. Since January 2013 defamation has no longer been considered as a criminal offence (OG RS no. 121/2012).

2. *Obligations Act 1978 (Zakon o obligacionim odnosima, published in the Official Gazette of the Socialist Federal Republic of Yugoslavia – OG SFRY – no. 29/78, amendments published in OG SFRY nos. 39/85, 45/89 and 57/89; in OG FRY no. 31/93; and in OG SCG 1/2003)*

12. Articles 157, 199 and 200 of the Obligations Act, taken together, provide, *inter alia*, that anyone who has suffered fear, physical pain or mental anguish as a consequence of a breach of his reputation, personal integrity, liberty or of his other personal rights (*prava ličnosti*) is entitled to seek injunctive relief, sue for financial compensation and request other forms of redress "which might be capable" of affording adequate non-pecuniary satisfaction.

COMPLAINTS

13. The applicant complained under Articles 6 § 1 and 13 of the Convention that she had been unable to obtain a decision on her claim in criminal proceedings because negligence on the part of the judicial authorities had led to the discontinuation of those proceedings under the statute of limitations.

THE LAW

14. The relevant parts of Articles 6 § 1 and 13 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 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. The parties' submissions

15. The Government argued, *inter alia*, that the applicant had not been deprived of the right to access to a court, because she could have, but had not, pursued civil proceedings against P.A. for defamation. They submitted that the domestic legal system provided two avenues of redress for

defamation, criminal and civil proceedings, of which the latter presented more adequate means to accomplish damage compensation. The Government concluded that the applicant's aim was to convict accused for a criminal act, since she had not lodged a civil claim in the criminal proceedings nor did she request compensation in the course of civil proceedings.

16. The applicant acknowledged that she had not lodged a civil claim in the criminal proceedings, but maintained that she had pursued the criminal proceedings in order to protect her good reputation instead of initiating civil proceedings because that was the more common practice in Serbia in defamation cases.

B. The Court's assessment

17. The procedural guarantees laid down in Article 6 secure to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal. The Court has held that this right of access to a court includes not only the right to institute proceedings but also the right to obtain a "determination" of the dispute by a court (see *Kutić v. Croatia*, no. 48778/99, §§ 24 and 25, ECHR 2002-II, and *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II).

18. Article 6 § 1 does not guarantee the right to have third parties prosecuted or sentenced for a criminal offence (see, among many other authorities, *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), but it guarantees the right of access to a court for the determination of civil disputes. Where the domestic legal order provides litigants with an avenue of redress, such as a civil claim in the context of criminal proceedings, the State is under an obligation to ensure that they enjoy the fundamental guarantees laid down in Article 6 § 1 (see *Anagnostopoulos v. Greece*, no. 54589/00, § 32, 3 April 2003, and *Dinchev v. Bulgaria*, no. 23057/03, § 50, 22 January 2009).

19. The Court has already ruled that the right to good reputation as such constitutes a civil right (see *Gorou v. Greece* (no. 3), no. 21845/03, § 21, 22 June 2006).

20. The Court first notes that it is not disputed that the applicant had the right to have her civil claim determined by a court.

21. At the relevant time the applicant had two avenues of redress for a civil defamation claim. One avenue was to lodge a civil claim in the context of the criminal proceedings which she initiated on 13 November 2003. The other avenue which she could have pursued, independently of criminal proceedings as Serbian law does not require the results of criminal proceedings to be available before a civil action can be pursued, was to bring civil proceedings for damages or some other form of

satisfaction, such as publication of a court decision or an apology (see paragraph 12 above).

22. Unlike in the cases of *Anagnostopoulos* and *Dinchev* (both referred to above) the applicant did not bring a civil claim for damages in the criminal proceedings which she brought, limiting herself to a purely criminal action.

23. Accordingly, the Court finds that the respondent State's authorities did not prevent the applicant from having her civil claim determined by the domestic courts, since she had two legal avenues at her disposal and she failed to make use of either of them. It follows that the application is manifestly ill-founded and must be rejected under Article 35 §§ 3(a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 12 October 2017.

Stephen Phillips
Registrar

Luis López Guerra
President