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

SECOND SECTION

DECISION

Application no. 36158/10
Anđelka VELIČKOVIĆ
against Serbia

The European Court of Human Rights (Second Section), sitting on 10 September 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 15 June 2010,

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 Anđelka Veličković, is a Serbian national, who was born in 1961 and lives in Velika Plana. She was represented before the Court by Mr S. Stanojević, a lawyer practising in Velika Plana.

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

A. The circumstances of the case

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

1. The proceedings brought by the applicant

4. The applicant is a neuropsychiatrist employed with the State-run Health Care Centre (*Dom zdravlja*) in Velika Plana (hereinafter "the HCC"). She is also a certified forensic expert (*stalni sudski veštak*).

5. On 20 March 2009 the applicant filed a request with the HCC, seeking permission for a subspecialisation (*uža specijalizacija*) in forensic psychiatry.

6. On 23 March 2009 the HCC gave its approval, and on 28 May 2009 issued a formal decision (*rešenje*) to that effect.

7. On 10 June 2009 the Public Health Institute (*Zavod za javno zdravlje*) in Požarevac adopted an opinion endorsing the applicant's request.

8. On 24 August 2009 the Director of the HCC issued yet another decision (*odluka*) authorising the subspecialisation sought by the applicant.

9. On the same date, the HCC also addressed the Ministry of Health (*Ministarstvo zdravlja*), seeking its consent (*saglasnost*) in this regard.

10. On 19 November 2009 the applicant personally sent a letter to the Ministry. She explained that she had informally learned of the fact that her request had been rejected, but had never received a formal, written decision so stating. The applicant stressed that the Ministry was obliged to provide her with the decision in question so that she could then exercise her right to bring a judicial review case against it.

11. On 25 November 2009 the Ministry sent an information note (*obaveštenje*) to the applicant, stating that the HCC's decision regarding her subspecialisation was not in accordance with the general priorities set for 2009. The Ministry further noted that in such circumstances there was no need to formally consider whether its consent would be warranted.

12. On 8 December 2009 the applicant filed an appeal with the Constitutional Court (*Ustavni sud*).

13. On 4 February 2010 the Constitutional Court refused to consider this appeal on its merits (*odbacio ustavnu žalbu*) since the applicant had had no pre-existing entitlement to a subspecialisation of her own choice. The Ministry's decision of 25 November 2009 therefore could not be challenged based on Article 170 of the Constitution (see paragraph 19 below).

2. Other relevant facts

14. In 2009 the Serbian Public Health Institute (*Institut za javno zdravlje Srbije*) adopted a Plan of Specialisations and Subspecialisations for that year (see paragraph 22 below).

15. The Government maintained that the said plan provided for no subspecialisation in forensic psychiatry in respect of primary health care institutions, which included health care centres.

16. The applicant submitted that medical doctors employed with health care centres as well as those employed by hospitals had, in fact, been equally able to enrol in and complete the subspecialisation in question.

B. Relevant domestic law and jurisprudence

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

17. Article 32 § 1 provides that "[e]veryone shall have the right to ... [a fair hearing before a] ... tribunal ... [in the determination] ... of his [or her] rights and obligations ...".

18. Article 36 § 2 provides that "everyone shall have the right to an appeal or another legal remedy against a decision concerning the determination of his [or her] rights, obligations or lawful interests".

19. Article 170 provides that 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. *The Health Care Act (Zakon o zdravstvenoj zaštiti; published in OG RS no. 107/05)*

20. Article 181 provides, *inter alia*, that "professional development" (*stručno usavršavanje*) shall include specialisation and subspecialisation (*specijalizaciju i užu specijalizaciju*).

21. Article 182 provides, *inter alia*, that health care providers, including medical doctors, shall have the right and the obligation to professional development. Health care institutions shall facilitate such programmes in accordance with the law.

22. Article 183 provides, *inter alia*, that all health care institutions shall harmonise their professional development programmes in accordance with the general priorities set by the Ministry of Health.

23. Article 184 §§ 4-7 provides, *inter alia*, that local health care institutions shall decide upon all requests concerning professional development. A subsequent decision on this issue shall also be issued by the directors of these institutions personally. The Minister of Health shall, ultimately, either grant or withhold consent (*saglasnost*) on the issue through a formal decision (*rešenjem*). The said decision shall be final (*konačno*), and may be challenged by means of a judicial review procedure (*može se pokrenuti upravni spor*).

3. The General Administrative Proceedings Act (Zakon o opštem upravnom postupku; published in the Official Gazette of the Federal Republic of Yugoslavia – OG FRY – nos. 33/97 and 31/01)

24. Article 208 § 1 provides, *inter alia*, that in simple matters an administrative body shall be obliged to issue a decision within one month as of when the claimant had lodged his or her request. In all other cases, the administrative body shall render a decision within two months thereof.

25. Article 208 § 2 enables the claimant whose request has not been decided within the periods established in the previous paragraph to lodge an appeal as if his or her request has been denied. Where an appeal is not allowed, the claimant shall have the right to directly initiate an administrative dispute before the competent court of law.

4. The Administrative Disputes Act (Zakon o upravnim sporovima; published in OG FRY no. 46/96)

26. Article 6 provides that an administrative dispute may only be instituted against an "administrative act", which is an act/decision adopted by a State body in the determination of one's rights and obligations concerning "an administrative matter".

27. An "administrative act" shall be rendered as a formal decision, *rešenje*, on the matter in question (*see Komentar Zakona o opštem upravnom postupku i Zakona o upravnim sporovima*, Svetislav Vuković, Poslovni biro, Belgrade, 2006, p. 173).

28. Articles 8 and 24 provide, *inter alia*, that a claimant who lodged a request with an administrative body shall have the right to institute an administrative dispute before a court in the following situations:

(i) Should an appellate body fail to issue a decision upon his or her appeal within sixty days the claimant may repeat the request, and if the appellate body declines to rule within an additional period of seven days the claimant may institute an administrative dispute.

(ii) In accordance with the conditions set out under (i) above, should a first instance administrative body fail to issue a decision and there is no right to an appeal, the claimant may directly institute an administrative dispute.

(iii) Should a first instance administrative body fail to issue a decision upon the claimant's request within sixty days, in matters where an appeal has not been excluded, the claimant shall have the right to lodge the said request with the appellate administrative body. Should that body render a decision, the claimant shall have the right to institute an administrative dispute against it, and should it fail to rule the claimant shall be entitled to institute an administrative dispute in accordance with the conditions set out under (i) above.

29. Article 41 § 5 provides that where an administrative dispute has been brought under Article 24 the court shall, should it rule in favour of the claimant, order the administrative body in question to decide upon the claimant's original request.

30. Articles 63 provides, *inter alia*, that should the said administrative body fail to comply with this instruction within a period of thirty days, the claimant shall be entitled to request the enforcement of the court's decision. Should the administrative body fail to respond to this request within a period of seven days, the claimant may petition the court to decide his or her case on the merits, i.e. to adopt the necessary decision in the administrative body's stead. The court shall then request information from the administrative body as to the reasons for its failure to comply with the court's order. Should the administrative body fail to respond within a period of seven days or should its explanation fail to satisfy the court, the court itself shall decide on the claimant's original request.

31. Articles 41 §§ 1-4, 61 and 62 provide details as regards other situations in which a claimant's request may be decided on its merits.

5. The decision of the Supreme Court of Serbia Uvp. 202/77 of 16 November 1978

32. An information note, regardless of its formal deficiency, shall be considered as an "administrative act" in the judicial review context if it amounts to a decision effecting a claimant's rights or obligations (see also, *mutatis mutandis*, the decision of the Supreme Court of Serbia, *Vrhovni sud Srbije*, U. 3660/04 of 27 January 2005).

6. The decision of the Supreme Court of Serbia U. 1384/88 of 31 January 1989

33. An information note shall not be considered as an "administrative act" within the meaning of the Administrative Disputes Act, nor shall it hence be open to a challenge through a judicial review procedure, if there has been no determination of one's rights or obligations.

7. Relevant commentary as regards whether an information note may be considered as an "administrative act" in the judicial review context

34. Every "act" which is of a decisive character in respect of a claimant's rights or obligations, having become final, may be challenged by means of an administrative dispute (see *Komentar Zakona o upravnim sporovima sa sudskom praksom*, *Prof. dr Zoran Tomić*, *Službeni glasnik*, 2010, p. 224).

8. The relevant commentary as regards Article 24 of the Administrative Disputes Act

35. There is no deadline for the institution of an administrative dispute in accordance with Article 24 of the Administrative Disputes Act (see *Komentar Zakona o opštem upravnom postupku i Zakona o upravnim sporovima*, cited above, p. 219).

9. The Opinion of the Administrative Division of the Supreme Court of Serbia 4/66 of 26 January 1966 (republished in the said court's Bulletin no. 4/08, p. 466)

36. The Supreme Court of Serbia held that a court of law shall be bound to consider the merits of a claim filed on the basis of what in the context of the present case would have been Article 24 of the Administrative Disputes Act.

10. The Administrative Court's case-law

37. In its decisions of 5 September 2012 and 2 November 2012 the Administrative Court (*Upravni sud*), based on the relevant provisions of more recent legislation governing judicial review proceedings, ordered the second instance administrative bodies in question to adopt formal decisions in respect of each claimant (U. 7214/12 and U. 13662/11).

11. Other relevant case-law

38. In various contexts between 1955 and 1985 the former Federal Supreme Court (*Savezni vrhovni sud*) and the former Federal Court (*Savezni sud*), based on the relevant legislation at that time, both routinely applied provisions corresponding to Article 24 of the Administrative Disputes Act (see, for example, Uz. 5080/55 and Us. 67/85), as did the Supreme Court of Serbia in numerous decisions rendered between 1971 and 1997 (see, for example, U. 53/70 and Uvp. 28/96).

39. In six judgments rendered between 8 December 1999 and 9 April 2009 the Supreme Military Court and the Supreme Court of Serbia, respectively, ruled on the merits of administrative disputes concerning pension entitlements, the right to stand for elections, property-related municipal decisions, disability benefits and the proposed change in the registration of persons authorised to represent political parties (see Up. br. 2530/03, Už. 133/92, Už. 11/08, U.br. 1739/08, U.br. 48/08 and U.br. 1093/02).

COMPLAINTS

40. The applicant referred to Articles 6 and 14 of the Convention, as well as Article 2 of Protocol No. 1. In substance, she complained about: (a) the administrative rejection of her request for a subspecialisation; (b) the subsequent breach of her right of access to a court in the determination thereof; and (c) similar requests filed by others in her situation having been granted.

THE LAW

41. As noted above, the applicant essentially complained about the rejection of her request for a subspecialisation, being subsequently denied judicial review of this rejection, and being discriminated against in this situation. The Court considers that these complaints fall to be examined under Articles 6 § 1 and 14 of the Convention. The relevant provisions of these Articles read as follows:

Article 6 § 1

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The parties' submissions

42. The Government noted that the applicant had failed to make use of the judicial review avenue as provided for in the Administrative Disputes Act (see paragraphs 26-30 above). The relevant case-law, however, made it clear that this remedy was fully capable of affording the applicant adequate redress. The Government, lastly, referred to the Court's own judgment in *Juhas Đurić* wherein the same remedy "had already been deemed effective" (see *Juhas Đurić v. Serbia* (revision), no. 48155/06, 10 April 2012).

43. The applicant maintained that she had exhausted the available domestic remedies. In particular, on 25 November 2009 the Ministry of Health had adopted no formal decision in her case and the applicant was therefore precluded from seeking judicial review by means of an administrative dispute (see paragraph 26 above). Equally, when rejecting her complaints the Constitutional Court itself neglected to note that Article 170 of the Constitution provides that a constitutional appeal may be lodged

not only against an individual decision but also against a specific "action" of a State body undertaken in breach of a right or freedom guaranteed by the Constitution (see paragraph 19 above).

B. The Court's assessment

44. The Court reiterates that, under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII).

45. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his or her Convention grievances. It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised at least in substance (see *Castells v. Spain*, 23 April 1992, § 32, Series A no. 236; and *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

46. The applicants must comply with the applicable rules and procedures of domestic law, failing which their application is likely to fall foul of the condition laid down in Article 35 § 1 (see, for example, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200; and *Akdivar*, cited above, § 66).

47. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004; and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II). The Court has also frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13; and *Akdivar*, cited above, § 69).

48. In terms of the burden of proof, it is up to the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, § 27, Series A no. 198, and *Dalia v. France*, judgment of 19 February 1998, § 38, Reports 1998-I). Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003; and *Akdivar*, cited above, § 68).

49. In the context of the present case, the Court notes that in *Juhas Đurić* it has already held, albeit regarding the merits of that application, that the applicant had not been denied access to a court since he could have pursued his claim before the Supreme Court of Serbia based on the relevant provisions of the Administrative Disputes Act (see *Juhas Đurić*, cited above, § 48; see also paragraphs 28-30 above). There was also ample case-law indicating that the domestic judiciary had been willing to consider very diverse claims in this respect, as well as to grant redress on the merits where appropriate (see paragraph 39 above). However, the legal situation of the applicant in the present case would appear to have been somewhat different. Specifically, while in *Juhas Đurić* the claimant's request had been ignored by the competent administrative bodies, in the applicant's case the Ministry of Health effectively withheld its consent for a subspecialisation but refused to do so formally (see *Juhas Đurić*, cited above; see also paragraph 11 above). The issue which therefore arises is whether the applicant in these particular circumstances should have challenged the said outcome through a judicial review procedure.

50. The Court recalls in this respect that Article 6 of the Administrative Disputes Act provides that an administrative dispute may only be brought against an "administrative act", which is an act/decision adopted by a State body in the determination of one's rights and obligations concerning an administrative matter. While, in principle, an administrative act should be rendered as a formal decision (*rešenje*) it would seem that every "act" which is of a "decisive character" and is issued by an administrative body may, having become final, be challenged by means of an administrative dispute (see paragraphs 27 and 34 above). There is likewise case-law to the effect that an information note (*obaveštenje*), such as the one sent to the applicant in the present case, may be considered as an administrative act depending on whether or not it amounts to a decision effecting one's rights or obligations (see paragraphs 32 and 33 above). It cannot therefore be said that the applicants' attempt to obtain judicial redress by means of an administrative dispute would have obviously been futile, particularly bearing in mind that even where there is some doubt in respect of the effectiveness of a given remedy this alone is not a valid reason for not actively pursuing it (see *Akdivar*, cited above, § 71). Finally, the Court considers that even had the competent court refused to accept the impugned information note as an "administrative act" capable of being challenged through a judicial review procedure, it could have applied other provisions of the Administrative Disputes Act and thereby ordered the Ministry of Health to issue a formal decision on the matter. Ultimately and if need be the court could also have adjudicated upon the request itself (see paragraphs 28-30, 36 and 37 above; see also *Juhas Đurić*, cited above).

51. In view of the foregoing and even assuming that the applicant had had a right under domestic law to the subspecialisation sought, her

application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court by a majority

Declares the application inadmissible.

Stanley Naismith
Registrar

Guido Raimondi
President