

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

THIRD SECTION

DECISION

Application no. 35044/07
Milan ZARUBICA against Serbia
and 2 other applications
(see list appended)

The European Court of Human Rights (Third Section), sitting on 26 May 2015 as a Chamber composed of:

Josep Casadevall, *President,*
Luis López Guerra,
Ján Šikuta,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*

and Stephen Phillips, *Section Registrar,*

Having regard to the above applications lodged on 7 August 2007, 30 August 2006 and 30 August 2006 respectively,

Having regard to the parties' submissions,

Having deliberated, decides as follows:

## PROCEDURE

1. On 1 February 2014 the Court changed the composition of its Sections (Rule 25 § 1). These cases were thus assigned to the newly composed Third Section (Rule 52 § 1).

2. On 29 March 2011 Mr Dragoljub Popović, the judge elected in respect of Serbia, withdrew from sitting in the Chamber (Rule 28). On 20 October 2014 the President of the Court appointed Mr Johannes Silvis to sit as an *ad hoc* judge (Rule 29 § 2 (a)).

# THE FACTS

3. The applicants are Mr Milan Zarubica ("the first applicant"), VARAN CHEMICALS LTD ("the second applicant") and LENAL PHARM LTD ("the third applicant").

4. The first applicant is a medical doctor and a Serbian national who was born in 1968, and is presently serving a prison sentence in the Sremska Mitrovica Penitentiary. The second and third applicants are limited liability companies based in Serbia. They were both co-owned by the first applicant.

5. The applicants are represented before the Court by Mr M. Zindović, Mr Ž. Lazović, N. Zeković and M. Timotijević, all lawyers practising in Belgrade. The Serbian Government (the Government") were initially represented by their former Agent, Mr S. Carić, and subsequently by their current Agent, Ms Vanja Rodić.

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

## A. The proceedings

7. On 4 February 2003 the first applicant was arrested on charges primarily related to the production and trafficking of narcotics (amphetamines).

8. On 27 June 2003 the first applicant and numerous others were indicted by the Belgrade District Public Prosecutor's Office for various drugs-related felonies alleged to have been committed in an organised crime context. The first applicant was described as being the head of this criminal enterprise.

9. The second and third applicants were never indicted, as the domestic legislation at that time did not provide for the possibility to bring criminal charges against legal entities. They were, however, mentioned as vehicles used by the first applicant and others to carry out their criminal endeavours, as well as companies in which criminal proceeds had been invested.

10. On 25 March 2005, the Belgrade District Court: (a) found the first applicant guilty and sentenced him to a total of twelve years' imprisonment for the narcotics-related charges, as well as the charge of tax evasion; (b) ordered the confiscation of all substances containing amphetamine found in the first applicant's possession; (c) ordered the confiscation of the 320,000 United Sates Dollars ("USD") and 89,000 Euros ("EUR") found in the first applicant's flat; (d) ordered the confiscation of the 2,500,000 Swiss Francs ("CHF") deposited in the first applicant's bank account in Switzerland; (e) ordered the first applicant to pay, for the restitution of the "remainder of his criminally gained assets", the sum of USD 10,000,000; and (f) ordered the confiscation of a building owned by the second applicant, as well as the confiscation of all of the second and third

applicants' production facilities, laboratory equipment and chemical substances found on their premises.

11. On 2 February 2006 the Supreme Court upheld the first applicant's conviction as regards the narcotics-related charges, and sentenced him to eleven years' imprisonment. The Supreme Court further quashed the first applicant's conviction regarding tax evasion, and excluded the second applicant's building from the confiscation ordered at first instance, noting that following the removal of the confiscated production facilities and illegal substances the building itself posed no danger to the public.

12. The applicants did not receive the Supreme Court's decision before 5 March 2006.

13. In April 2006 the applicants filed an appeal on points of law (*zahtev za ispitivanje zakonitosti pravosnažne presude*).

14. On 24 January 2007 the Supreme Court, sitting in a differently composed panel compared to the one which had considered the applicants' case on appeal, rejected the first applicant's appeal on points of law as unfounded. As regards the second and third applicants' pleadings, they were rejected as inadmissible since an appeal on points of law could only be filed by the defendants and their counsel. On 7 March 2007 the judgment was issued in writing.

### B. Other relevant facts

15. On 9 May 2006 the District Court formally filed a request with the competent Swiss authorities, relying on its judgment of 25 March 2005, seeking confiscation of the funds deposited on the first applicant's bank account in Switzerland.

16. On 18 May 2007 the Zurich District Prosecutor's Office rejected this request as unfounded, stating, *inter alia*, that it could not conclude that the assets in question were indeed of a criminal origin. In particular, there was no evidence that the first applicant had made any deposits during the period when he was alleged to have committed the crimes in question. By 18 June 2007, this rejection became final.

17. On 25 July 2007 the first applicant was informed by the Swiss authorities that he could freely access and make use of his funds on the bank account in question.

## COMPLAINTS

18. Relying on Articles 6, 8 and 13 of the Convention, the applicants raised numerous fairness and property-related complaints, allegedly stemming from the above-described criminal proceedings.

# THE LAW

## A. The joinder of the applications

19. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

## B. The alleged abuse of the right of petition

20. Following the communication of the cases to the Government, on 28 October 2011 one of the applicants' lawyers, Mr M. Timotijević, was quoted as having told *Blic*, a Serbian daily newspaper, that the Court had already "established a breach of ... [the applicants'] ... human rights" in the impugned domestic proceedings. He then, according to the article, went on to describe, in some detail, the various domestic procedural violations as he saw them. In the same piece, the Government Agent at the time, Mr S. Carić, was mentioned as having declined to comment on the matter, stating that the cases were still pending before the Court.

21. On 22 January 2013, according to *Telegraf*, a Serbian internet news portal, the same lawyer again stated that the Court had already established a number of human rights violations in the first applicant's case. The lawyer further described the alleged domestic procedural violations in question and noted that this would cost the Serbian taxpayer a total of nine million euros in damages, a sum which could have been "significantly less" had the Government "not refused the Court's friendly settlement offer".

22. On 4 November 2014 the Court, *proprio motu*, invited the parties to submit further written observations on whether it could be said, having regard to the statements allegedly made by their counsel, that the applicants had abused the right of application, within the meaning of Article 35 § 3 (a) of the Convention.

23. In response, the Government maintained that the applicants' counsel had shown an irresponsible and frivolous attitude to the proceedings which were still pending, thus subverting the proper functioning of the Court and the smooth conduct of the proceedings before it. The ultimate goal, according to the Government, was to prejudice the Court's deliberations as regards the substantive outcome of the cases in hand and the amounts of any damages to be awarded against the State. The applicants' counsel had also deliberately breached the confidentiality of the friendly settlement negotiations process and did not disclose all of the relevant facts in his written pleadings before the Court. Finally, the Government maintained that the applicants' counsel had failed to seek rectification of his statements carried in *Blic*, which is why it must be assumed that he had clearly had no issue with their veracity until this became expedient.

24. The applicants' counsel, Mr M. Timotijević, contended, as regards the first article, that he had been misinterpreted by the journalist. Specifically, that he had told him that the Court had "decided to examine [the] admissibility and merits of ... [the] ... applications", not that it had already decided the cases, but that the journalist, who had not been "a legally trained person", had obviously failed to note the "terminological" distinction.

25. As regards the second article, the applicant's counsel submitted that he had never spoken to the reporter and had not even known of the article's existence until the Court informed him thereof.

26. The applicant's counsel likewise noted that the applications had never been motivated by publicity, politics or propaganda, that there had been no discussion of any friendly settlement proceedings with the journalist, since none had been ongoing, and that the applicants themselves had never made any public statements. If anything, it had been the Government that had hindered the proper conduct of proceedings before the Court by providing it with unsolicited submissions and irrelevant information (albeit unrelated to the abuse issue). This "diversion", according to the applicants' counsel, had nevertheless "accomplished its purpose", resulting in the Court's decision to raise the issue of abuse of the right of petition *proprio motu*. Such an approach could not "serve justice in any way". All it could do was "to send a dangerous message to [the] Serbian [Government], or any other Government, that ... [they] ... can trample over [the] human rights of ... [their] ... citizens or legal entities and may get a free pass for it, not because the applicants didn't prove their case but because of a canard". The applicants' counsel argued that this "[was a] ... purpose ... [which] ... the European Court of Human Rights must never serve".

27. Lastly, the first applicant personally, in a letter attached to his counsel's submission, *inter alia*, questioned the Court's "extra-judicial" motivation when it had decided to raise the abuse issue *proprio motu*. The relevant part of the letter read as follows:

> "I must also tell you that this surprising turn of events ... leads to a certain doubt about the existence of extra-judicial motives for such actions, as much as I refuse to believe so. It strikes me as very odd ... that the Court, instead of having already decided on our applications, instigates the procedure for [the] examination of articles ... published several years ago, in obscure Serbian media ... with extremely dubious provenance, ... [in order to establish whether] ... two other applicants and I abused the right ... [of] ... application, even though ... we did nothing wrong, ... [and] ... without any conduct on our part ... that ... [would have been prohibited] ... by any of the rules ... or the Court's precedents? You must admit my right to doubt ... that someone was tempted to explore ways of exiting these cases ... without deciding on the merits of our claims, concerning human rights violations, for which I have grounds to assert ... [that they were] ... drastic ... and unfortunately ... not at all unusual for the Serbian judiciary."

28. The Court recalls that Article 35 § 3 (a) of the Convention allows it to declare inadmissible any application that it considers to be "an abuse of the right of individual application".

29. In the *S.A.S.* judgment (*S.A.S. v. France* [GC], no. 43835/11, ECHR 2014 (extracts)) the Grand Chamber held as follows:

> "66. The Court reiterates in this connection that the implementation of ... [Article 35 § 3 (a)] ... is an "exceptional procedural measure" and that the concept of "abuse" refers to its ordinary meaning, namely, the harmful exercise of a right by its holder in a manner that is inconsistent with the purpose for which such right is granted (see *Miroļubovs and Others v. Latvia*, no. 798/05, § 62, 15 September 2009). In that connection, the Court has noted that for such "abuse" to be established on the part of the applicant it requires not only manifest inconsistency with the purpose of the right of application but also some hindrance to the proper functioning of the Court or to the smooth conduct of the proceedings before it (ibid., § 65).
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> 67. The Court has applied that provision in four types of situation (see *Miroļubovs and Others*, cited above, §§ 62-66). First, in the case of applications which were knowingly based on untrue facts (see *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X), whether there had been falsification of documents in the file (see, for example, *Jian v. Romania* (dec.), no. 46640/99, 30 March 2004) or failure to inform the Court of an essential item of evidence for its examination of the case (see, for example, *Al-Nashif v. Bulgaria*, no. 50963/99, § 89, 20 June 2002, and *Kerechashvili v. Georgia* (dec.), no. 5667/02, 2 May 2006) or of new major developments in the course of the proceedings (see, for example, [*Gross v. Switzerland* [GC], no. 67810/10, §§ 35 and 36, ECHR 2014, and] *Predescu v. Romania*, no. 21447/03, §§ 25-27, 2 December 2008). Secondly, in cases where an applicant had used particularly vexatious, contemptuous, threatening or provocative expressions in his correspondence with the Court (see, for example, *Řehák v. the Czech Republic* (dec.), no. 67208/01, 18 May 2004). Thirdly, in cases where an applicant had deliberately breached the confidentiality of negotiations for a friendly settlement (see, for example, *Hadrabová and Others v. the Czech Republic* (dec.), nos. 42165/02 and 466/03, 25 September 2007, and *Deceuninck v. France* (dec.), no. 47447/08, 13 December 2011). Fourthly, in cases where applicants had repeatedly sent quibbling and manifestly ill-founded applications resembling an application they had previously lodged that had been declared inadmissible (see *Anibal Vieira & Filhos LDA and Maria Rosa Ferreira da Costa LDA v. Portugal* (dec.), nos. 980/12 and 18385/12, 13 November 2012; see also the Commission decisions *M. v. the United Kingdom*, no. 13284/87, 15 October 1987, and *Philis v. Greece*, no. 28970/95, 17 October 1996). The Court has also stipulated that, even though an application motivated by publicity or propaganda is not, by that very fact alone, an abuse of the right of application, the situation is different where the applicant, driven by political interests, gives an interview to the press or television showing an irresponsible and frivolous attitude towards proceedings that are pending before the Court (see *Miroļubovs and Others*, cited above, § 66)."

30. Turning to the present case, the Court firstly notes that the absence of the Government's initial objection as regards the abuse of the right of petition does not preclude it from examining the matter *proprio motu*. It is, indeed, for the Court itself and not the respondent Government to monitor compliance with the procedural obligations imposed by the Convention and its Rules on the applicant party (see *Miroļubovs and Others*, cited above,

§ 70). The Court, therefore, has both a right and an obligation to monitor such compliance taking into account all relevant information, whether it happens to be provided by the parties themselves or is otherwise publicly available.

31. Secondly, the applicants' council has admitted that he gave a statement to the *Blic* newspaper on 28 October 2011, wherein all three applicants were mentioned. While he now maintains that he was misinterpreted by the journalist, the Court cannot but note that the applicant's counsel had had, at least publicly, no issue with respect to the veracity of the statement in question until this matter was raised by the Court itself. Further, he could have sought rectification of the statement carried by *Blic*, but he never did so. Lastly, it remains conspicuous that, unlike what purportedly happened with the statement of the applicant's counsel, the journalist, on the same occasion, clearly had no problem accurately quoting the Government's Agent who had informed him that the proceedings were still pending. As to the substance of the statement, the Court notes that it was blatantly false in that the Court has to date clearly not adopted any decision on the merits of the present case. Such conduct, regardless of the counsel's motivation, must hence be deemed as showing a particularly irresponsible attitude towards the Court's proceedings.

32. Thirdly, in his response to the Court's question, the first applicant personally went on to question the Court's integrity by alleging its possible "extra-judicial" motivation when it had decided to examine the abuse issue *proprio motu*. Having regard to the principles established in its case-law, the Court considers that this statement cannot be deemed as simply a legitimate exercise of the first applicant's right to freedom of expression (see *Hațegan v. Romania* (dec.), no. 24159/03, 17 April 2012, compare also to *Stamoulakatos v. Greece*, no. 32857/96, Commission decision of 3 December 1997). It is rather an insulting and wholly unsupported allegation reaching a level which exceeds the bounds of normal criticism and amounts to contempt of court (see, *mutatis mutandis*, *Hategan*, cited above, *Apinis v. Latvia* (dec.), no. 46549/06, 20 September 2011, and *Duringer and Others v. France* (dec.), nos. 61164/00 and 18589/02, ECHR 2003-II (extracts), all cases where, *inter alia*, the Court's and/or the Registry's integrity had been impugned in the absence of any meaningful substantiation).

33. In view of the forgoing, the Court is of the opinion that the first applicant's conduct, as well as the conduct of the applicants' counsel in respect of the article published in the *Blic* newspaper on 28 October 2011, quite apart from any issues related to the second article posted on the *Telegraf* website on 22 January 2013, constitutes an abuse of the right of individual application within the meaning of Article 35 § 3 (a) of the Convention. It follows that all three applications must be rejected pursuant to Article 35 §§ 3 (a) and 4 thereof. It is further understood, in this

connection, that while only one of the applicants' counsel had made statements to the press this person was also the sole lawyer to whom the Court's correspondence has been addressed following the communication letters sent to the parties. Finally, in the domestic proceedings the courts clearly considered the first applicant as a person with standing to express views on behalf of the remaining two applicants. Indeed, the first applicant was convicted, *inter alia*, for having used the remaining two applicants as vehicles for his criminal endeavours.

For these reasons, the Court, unanimously,

*Decides* to join the applications;

*Declares* the applications inadmissible.

Done in English and notified in writing on 18 June 2015.

Stephen Phillips
Registrar

Josep Casadevall
President

# APPENDIX

| | File no. | Case name | Date of lodging |
|---|---|---|---|
| 1. | 36983/06 | VARAN CHEMICALS DOO v. Serbia | 30/08/2006 |
| 2. | 36984/06 | LENAL PHARM DOO v. Serbia | 30/08/2006 |
| 3. | 35044/07 | ZARUBICA v. Serbia | 07/08/2007 |