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

FOURTH SECTION

DECISION

Application no. 42670/16
Jelka ŽIVKOVIĆ against Slovenia
and 3 other applications
(see list appended)

The European Court of Human Rights (Fourth Section), sitting on 5 September 2017 as a Committee composed of:

Vincent A. De Gaetano, *President,*
Georges Ravarani,
Marko Bošnjak, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above applications lodged on the various dates indicated in the appended table,

Having deliberated, decides as follows:

THE FACTS

1. The first applicant, Ms Živković, was born on 1 October 1951 in Gornje Romanovce, Serbia. The second applicant, Mr Mihajlović, was born on 18 September 1948 in Pejkovac, Serbia. The third applicant, Ms Petrović, was born on 6 February 1960 in Studenac, Serbia. The fourth applicant, Mr Živković, was born on 19 May 1951 in Surdulica, Serbia. All four applicants are currently nationals of the Republic of Serbia and reside in the places indicated in the appended table.

2. The applicants were represented before the Court by Mr I. Stančevski, a lawyer practising in Niš, Serbia.

A. The circumstances of the case

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

1. The general context

4. Before 25 June 1991, the date on which the Republic of Slovenia declared its independence, the applicants were all nationals of both the Socialist Federal Republic of Yugoslavia ("the SFRY") and of the Socialist Republic of Serbia, one of its constituent republics. As nationals of the SFRY, they had acquired the status of permanent residents in Slovenia. They belong to a group of persons known as the "erased" (*izbrisani*), former nationals of the SFRY with permanent residence in Slovenia whose names were deleted from the Register of Permanent Residents on 26 February 1992 or on subsequent dates (see paragraphs 17, 22, 28 and 33 below).

5. The Court examined the "erasure" of such former permanent residents in Slovenia in the pilot case of *Kurić and Others v. Slovenia* ((merits) [GC], no. 26828/06, ECHR 2012). The Grand Chamber held unanimously that there had been a violation of the applicants' rights, as guaranteed by Articles 8, 13 and 14 of the Convention. The violation essentially originated in the prolonged failure of the Slovenian authorities, in spite of leading judgments from the Constitutional Court, to regularise the applicants' residential status following their "erasure" and to provide them with adequate redress in Slovenia (ibid., §§ 339-362, 369-372 and 384-396). Under Article 46 of the Convention, the Grand Chamber ordered the respondent State to set up as a general measure a domestic *ad hoc* compensation scheme within one year of the delivery of its judgment, that is to say no later than 26 June 2013 (ibid., § 415 and point 9 of the operative part).

6. For more details of the general context see *Kurić and Others* ((merits), cited above, §§ 16-83), and *Anastasov and Others v. Slovenia* ((dec.), no. 65020/13, §§ 6-10, 18 October 2016).

2. The current legislative framework in the Republic of Slovenia

7. In the course of the proceedings in the *Kurić and Others* case, amendments and supplements to the Act on the Regularisation of the Legal Status of Citizens of Other Successor States to the Former SFRY in Slovenia (*Zakon o spremembah in dopolnitvah Zakona o urejanju statusa državljanov drugih držav naslednic nekdanje SFRJ v Republiki Sloveniji* – "the amended Legal Status Act") were passed. They entered into force on 24 July 2010. The deadline for filing requests for permanent residence permits expired on 24 July 2013 (see *Anastasov and Others*, decision cited above, § 8).

8. Section 1 of the amended Legal Status Act applied to aliens who had been citizens of other former SFRY republics on 25 June 1991, had been registered as permanent residents in Slovenia on 23 December 1990 and had "actually resided" there since then. It also applied to aliens who had been residing in Slovenia on 25 June 1991 and had "actually resided" there since

without interruption. Both conditions were valid regardless of the provisions of the Aliens Act. The Act provided for the acquisition of both *ex nunc* and *ex tunc* permanent residence permits for those "erased" who fulfilled the statutory conditions.

9. In particular, section 1(č) defined the meaning of the words "actually residing" in Slovenia – which was one of the conditions for obtaining permanent residence status – as a situation where the person had the centre of his or her life interests in Slovenia, this being determined on the basis of personal, family, economic, social and other ties demonstrating the existence of actual and permanent connections between the individual and Slovenia. The condition of "actually residing" in Slovenia was deemed to be fulfilled if a person was absent from Slovenia for a period of no longer than one year, regardless of the grounds for absence.

10. Section 1(č) further provided that the condition of "actually residing" could also be met in cases of justifiable absence for more than a year (absence as a consequence of the "erasure", forced removal from Slovenia, impossibility of returning because of the state of war in other successor States of the SFRY, and so forth). In such circumstances, the condition of "actually residing" could be satisfied for a period of five years, and for a further five years only if the person's actions indicated that he or she had tried to return to Slovenia and continue living there (see *Kurić and Others* (merits), cited above, §§ 76-79 and paragraph 38 below).

11. Finally, in the framework of the execution of the *Kurić and Others* pilot judgment, the Act on Compensation for Damage to Persons Erased from the Register of Permanent Residents (*Zakon o povračilu škode osebam, ki so bile izbrisane iz registra stalnega prebivalstva* – "the 'Erased' Compensation Act") was enacted on 21 November 2013 by the Slovenian Parliament. It entered into force on 18 December 2013 and has been applicable since 18 June 2014.

12. The beneficiaries of the scheme are those "erased" who have acquired a permanent residence permit, on any legal grounds, or have been granted Slovenian citizenship. It also includes those "erased" who had made an unsuccessful application to that effect under the previous legislation (that is to say prior to the enactment of the amended Legal Status Act), subject to certain conditions. Any claims for compensation have to be lodged by 18 June 2017, or after receipt of the decision on permanent residence or Slovenian citizenship, or the final negative decision under the previous legislation (see *Anastasov and Others*, decision cited above, §§ 18-19).

3. The execution of the pilot judgment and the final Resolution of the Committee of Ministers

13. On 25 May 2016 the Committee of Ministers of the Council of Europe adopted Resolution CM/ResDH(2016)112 in the pilot case of *Kurić and Others* ("the 2016 CM Final Resolution") under the terms of

Article 46 § 2 of the Convention. After satisfying itself that both the general and individual measures required by Article 46 § 1 had been adopted by the Respondent State, the Committee of Ministers declared that it had exercised its functions under Article 46 § 2 and decided to close its examination of the case.

14. For a more detailed summary of the 2016 CM Final Resolution see *Anastasov and Others* (decision cited above, §§ 25-32).

4. The closure of the pilot judgment procedure

15. On 18 October 2016 the Court (Fourth Section) held that the matter giving rise to applications against Slovenia from "erased" applicants who had regularised their legal status "ha[d] been resolved" for the purposes of Article 37 § 1(b) of the Convention and that it was no longer justified to continue the examination of those cases. It thus decided to strike one such application out of its list of cases (ibid., §§ 97-103).

5. The particular circumstances of the present cases

16. All the applicants in the present case left Slovenia after their "erasure" and applied for permanent residence permits under section 1 of the amended Legal Status Act, with section 1(č) being applicable owing to their prolonged absence from Slovenia (see paragraphs 9-10 above and 19, 24-25, 30 and 35 below). None of the applicants has succeeded in regularising his or her legal status in Slovenia.

(a) Ms Jelka Živković (applicant in application no. 42670/16)

17. The applicant moved to Slovenia in 1973 and started working in Kranj. She was registered as a permanent resident in that town from 3 May 1984 to 26 February 1992.

18. According to her, she and her family started to experience problems because of their Serbian nationality in 1992. In June 1992 she returned their flat to the Municipality of Kranj and in July she and her family left Slovenia and moved to Serbia. Because of the threats in Slovenia, she enrolled the children in school in Serbia, where they continued their education. The applicant returned to Slovenia only once after that for a private visit; however, her sons went on visits there regularly. She stated that she had attempted to resolve her residence status in Slovenia but her friends had told her that she had not been able to regain her residence status.

19. On 25 July 2013 the applicant lodged a request with the Kranj Administrative Unit for the regularisation of her status as a permanent resident under section 1 of the amended Legal Status Act. On 9 October 2013 she was questioned by the consular service of the Embassy of Slovenia in Belgrade. After questioning witnesses, the Administrative Unit rejected the applicant's request on 30 April 2014. It found that she had

proven that her leaving Slovenia had been the result of "erasure". However, she had failed to prove under any of the grounds under section 1(č) that she had tried to return to Slovenia after being absent for five years (see paragraph 38 below). The Ministry of the Interior (hereinafter "the Ministry") confirmed the decision on 3 September 2014.

20. The applicant challenged the decision by instituting proceedings before the Administrative Court, but it dismissed her action on 6 January 2016.

21. On 22 February 2016 the applicant lodged a constitutional complaint, arguing, *inter alia*, that she had complied with the admissibility criteria as no other remedy, either ordinary or extraordinary, existed. The Constitutional Court rejected the constitutional complaint on 20 April 2016 for failure to properly exhaust legal remedies, relying on its case-law (see paragraph 40 below).

(b) Mr Živojin Mihajlović (applicant in application no. 43334/16)

22. The applicant moved to Slovenia in 1966. He was registered as a permanent resident at various addresses in Slovenia from 21 September 1973 to 22 February 1993.

23. According to him, he left Slovenia after receiving threats and moved back to Serbia on 7 July 1991. In 1997 or 1998, when he returned to Slovenia for the first time and attempted to register at his aunt's address, he found out that he had been "erased". He made no further attempts to obtain a permanent residence permit. He had no proof that he had asked for several visas as he had been given no written reply. His family remained in Slovenia and his wife has Slovenian citizenship.

24. On 17 July 2013 the applicant lodged a request with the Domžale Administrative Unit, asking that his permanent residence status be regularised under section 1 of the amended Legal Status Act. On 17 September 2013 the applicant had an interview at the consular service of the Embassy of Slovenia in Belgrade. At the applicant's suggestion, the applicant's wife and aunt were questioned by the Administrative Unit. On 22 October 2014 the applicant's request was dismissed given that none of the conditions of section 1(č) had been fulfilled (see paragraph 38 below).

25. The Administrative Unit considered that after July 1991 the applicant's centre of living interests had been in Serbia and not in Slovenia. He had also failed to prove that he had attempted to return to Slovenia in the years prior to 1998. In addition, he had never initiated proceedings to obtain permanent residence status. The decision was confirmed by the Ministry on 26 January 2015.

26. The applicant challenged the decision before the Administrative Court, but on 22 October 2015 the latter dismissed his action.

27. On 26 November 2015 the applicant lodged a constitutional complaint, arguing, *inter alia*, that he had complied with the admissibility

criteria as no other remedy, either ordinary or extraordinary, existed. On 12 April 2016 the Constitutional Court, relying on its previous case-law (see paragraph 40 below), rejected the constitutional complaint for non-exhaustion of available remedies as the applicant had not lodged an appeal on points of law (*revizija*).

(c) Ms Ljiljana Petrović (applicant in application no. 43381/16)

28. The applicant moved to Slovenia in 1979 and started working in Kranj. She was registered as a permanent resident there from 21 September 1984 to 26 February 1992.

29. According to the applicant, she and her family started to experience difficulties because of their Serbian nationality in 1991. Sometime that year she and her family left Slovenia on vacation, but were unable to return. They had intended to return in February or March 1992, but were told by friends that they could not because they had been "erased". Afterwards, the family lived in Serbia and did not try to return to Slovenia. The applicant alleged that she sought a visa on several occasions; however, she has no written evidence in this regard. She has a sister and friends living in Slovenia.

30. On 25 July 2013 the applicant lodged a request with the Kranj Administrative Unit, asking that her permanent residence status be regularised under section 1 of the amended Legal Status Act. On 14 October 2013 she was interviewed by the consular service of the Embassy of Slovenia in Belgrade. Several witnesses were questioned by the Administrative Unit. On 5 May 2014 the applicant's request was dismissed. The Administrative Unit considered that the applicant had proven that her leaving Slovenia had been a result of "erasure"; however, she had failed to prove under any of the grounds under section 1(č) that she had tried to return to Slovenia after being absent for five years (see paragraph 38 below). On 24 July 2014 the decision was confirmed by the Ministry.

31. The applicant challenged the decision before the Administrative Court, which dismissed her action on 5 November 2015.

32. On 2 December 2015 the applicant lodged a constitutional complaint, arguing that she had complied with the admissibility criteria as no other remedy, either ordinary or extraordinary, existed. On 20 April 2016 the Constitutional Court rejected the constitutional complaint for non-exhaustion of the available legal remedies (see paragraph 40 below).

(d) Mr Toplica Živković (applicant in application no. 43393/16)

33. The applicant, who is the husband of Ms Jelka Živković (the applicant in application no. 42670/16 – see paragraphs 17-21 above), moved to Slovenia in 1972 and started working in Kranj. He was registered as a permanent resident there from 3 May 1984 to 26 February 1992.

34. According to him, he and his family started to experience problems because of their Serbian nationality in 1992. In July of that year he left Slovenia with his family and moved to Serbia. He stated that he tried to return to Slovenia on several occasions but lacked the financial means to do so. He was employed in Serbia, while his sons visited Slovenia regularly.

35. On 25 July 2013 the applicant lodged a request with the Kranj Administrative Unit, asking that his permanent residence status be regularised under section 1 of the amended Legal Status Act. On 9 October 2013 the applicant was interviewed by the consular service of the Embassy of Slovenia in Belgrade. Some witnesses were questioned by the Administrative Unit, which found that the applicant had proven that he had left Slovenia as a result of the "erasure". However, he had failed to prove under any of the grounds under section 1(č) that he had tried to return to Slovenia after being absent for five years (see paragraph 38 below). The applicant's request was dismissed on 30 April 2014, a decision which was confirmed by the Ministry on 5 September 2014.

36. The applicant challenged the decision before the Administrative Court but on 2 December 2015 it dismissed his action.

37. The applicant lodged a constitutional complaint, arguing, *inter alia*, that since no other remedy existed, either ordinary or extraordinary, he had complied with the admissibility criteria. On 8 April 2016 the Constitutional Court rejected the constitutional complaint for non-exhaustion of the available remedies (see paragraph 40 below).

B. Relevant domestic law and practice

1. The amended Legal Status Act

38. On 24 July 2011 the amended Legal Status Act (Official Gazette no. 50/2010) came into force. Section 1(č) of the Act provided:

> "Actually residing in the Republic of Slovenia for the purposes of this Act shall mean that an individual has the centre of his or her life interests in the Republic of Slovenia, this being determined on the basis of his or her personal, family, economic, social and other ties demonstrating the existence of actual and permanent connections between an individual and the Republic of Slovenia. Justifiable absence from the Republic of Slovenia because of reasons referred to in the third subsection of this section shall not mean an interruption of actual residence in the Republic of Slovenia.
>
> The condition of actual residence in the Republic of Slovenia shall be met if the person left the Republic of Slovenia and his or her continuous absence was not longer than one year, irrespective of the reason for the absence.
>
> The condition of actual residence in the Republic of Slovenia shall also be met in the event that the absence was longer than one year but was justifiable for the following reasons:
>
> - if the person left the Republic of Slovenia as a consequence of removal from the Register of Permanent Residents;

- if the person left the Republic of Slovenia because he or she was assigned to work, study or undergo medical treatment by a legal entity from the Republic of Slovenia or, in the case of a minor, by his or her parents or guardians, or if the person was an employee on a ship with a home port in the Republic of Slovenia, during the period of posting, study or treatment or the period of employment on the ship;

- if the person left the Republic of Slovenia because he or she could not acquire a residence permit in the Republic of Slovenia owing to non-fulfilment of the relevant conditions and the application for a permit was rejected or dismissed or the procedure was terminated;

- if the person could not return to the Republic of Slovenia because of the state of war in other successor States to the former Socialist Federal Republic of Yugoslavia, or for medical reasons;

- if the person was expelled from the Republic of Slovenia pursuant to section 28 ... or section 50 of the Aliens Act ..., unless the person was an alien expelled from the country as a sanction for having committed a criminal offence;

- if the person was refused entry to the Republic of Slovenia, except where entry was refused because of the imposition of a secondary sanction of expulsion for having committed a criminal offence ...

If the absence for reasons referred to in the preceding subsection, except for those referred to in the second indent, lasted more than five years, it shall be deemed that the condition of actual living is satisfied for the period of five years and for a further period of five years only if the conduct of the person demonstrates that, during the period of absence, the person tried to return to the Republic of Slovenia and to continue his or her actual residence there.

For the purposes of this Act, a permanent residence permit or a specific decision on a retroactive permanent residence permit and registered permanent residence or a supplementary decision issued pursuant to point 8 of the Constitutional Court decision ..., no U-1-246/02-28 of 3 April 2003 ... shall not mean that the condition of actual residence in the Republic of Slovenia in proceedings initiated under the Citizenship of the Republic of Slovenia Act is met."

2. The Administrative Disputes Act

39. The Administrative Disputes Act (*Zakon o upravnem sporu,* Official Gazette no. 105/2006), which entered into force on 1 January 2007, provides in section 83 the grounds on which an appeal on points of law (*revizija*) can be lodged with the Supreme Court in order to challenge a first-instance judgment. The grounds are provided as alternatives. The relevant text reads as follows:

"(2) An appeal on points of law is admissible if:

...

2. it concerns an important legal question ...;

3. the impugned decision has serious consequences for the party;

..."

3. Case-law of the Constitutional Court

40. The Constitutional Court noted on 18 December 2007 (Up-2394/07), in a case brought by a plaintiff in an administrative dispute, that the Administrative Disputes Act of 2007 had reintroduced the appeal on points of law (*revizija*) into administrative proceedings as an extraordinary legal remedy in disputes against decisions which were not subject to appeal before the Higher Administrative Court. The Constitutional Court rejected the constitutional complaint in that case for non-exhaustion, given that the plaintiff had failed to lodge an appeal on points of law with the Supreme Court.

COMPLAINTS

41. The applicants complained under Article 6 of the Convention that the domestic proceedings had been unfair. Evidence had been rejected by the domestic authorities and they had borne a disproportionate burden of proof. Furthermore, they had had no answer to their submissions that their constitutional rights had been violated despite the *Kurić and Others* pilot judgment being part of the domestic legal system. In substance, the applicants also complained about the length of the proceedings.

42. Under Article 8 of the Convention the applicants complained that their right to a private and family life had been violated because they had been prevented from living in Slovenia, which had led to their families being broken up.

43. They complained under Article 13 of the Convention that the amended Legal Status Act had set impossible conditions for the regularising of residence status for those "erased" who had been forced to leave Slovenia. Inadequate domestic remedies had prevented them from remedying their situation and having their permanent residence status returned, which was a precondition for claiming compensation under the *ad hoc* compensation scheme. In particular, the applicants contended that the use of the extraordinary legal remedy (which is, an appeal on points of law with the Supreme Court), as indicated by the Constitutional Court, was not effective, not necessary and would not have changed anything. The problem of the "erased" was still a systemic problem.

44. Under Article 14 of the Convention the applicants complained that they had been discriminated against compared with those "erased" who had resided illegally in Slovenia even after their "erasure" and had succeeded in regularising their legal status.

45. Finally, invoking Article 17 of the Convention, the applicants argued that the condition under section 1(č) of the amended Legal Status Act of setting a maximum 10 years absence from Slovenia for the "erased" who

had left after 26 February 1992 represented "an abuse of rights" by the domestic authorities.

THE LAW

46. Relying on Articles 6, 8, 13, 14 and 17 of the Convention, the applicants complained about the statutory conditions for the acquisition of permanent residence status under the amended Legal Status Act for those "erased" who had left Slovenia at the beginning of the 1990s and of unfair administrative proceedings. In particular, they claimed that an appeal on points of law with the Supreme Court was not an effective legal remedy in such administrative proceedings.

A. Joinder of the cases

47. The Court considers that the applications should be joined, given their related factual and legal background (Rule 42 § 1 of the Rules of Court).

B. Complaint under Article 6 of the Convention

48. In so far as relevant, Article 6 § 1 reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ..."

49. The Court reiterates that Article 6 § 1 of the Convention does not apply to proceedings regulating a person's entry, stay and deportation of aliens, as such proceedings do not involve either the "determination of his civil rights and obligations or of any criminal charge against him" within the meaning of 6 § 1 of the Convention (see, among other authorities, *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 94, ECHR 2002-II (extracts), and *Maaouia v. France* [GC], no. 39652/98, §§ 36-40, ECHR 2000-X).

50. Since the proceedings before the administrative authorities and the Constitutional Court concerned the regulation of the residence status of "erased" applicants who had left Slovenia after their "erasure" at the beginning of the 1990s, the Court observes that those proceedings did not concern the determination of their civil rights, still less any criminal charges against them. Hence, Article 6 § 1 does not apply to these proceedings (see *Makuc and Others v. Slovenia* (dec.), no. 26828/06, §§ 186-189, 31 May 2007).

51. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

C. Complaints under Articles 8, 14 and 17 of the Convention

52. The applicants considered that their "erasure" and the difficulties they had faced in regaining a valid residence permit, coupled with the impossibility of obtaining compensation, violated their rights under Articles 8, 14 and 17 of the Convention.

These provisions read as follows:

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

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."

Article 17

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

53. The Court should first determine whether the applicants have exhausted the domestic remedies available to them, as requested by Article 35 § 1 of the Convention.

1. General principles on exhaustion of domestic remedies deriving from the Court's case-law

54. According to the Court's settled case-law, it is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is based on the

assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged breach. The rule is therefore an indispensable part of the functioning of this system of protection (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014).

55. States do not have to answer before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see *Vučković and Others*, cited above, § 70, and *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 115, ECHR 2016). The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions (see *Demopoulos and Others v. Turkey* [GC] (dec.), nos. 46113/99 and 7 others, § 69, ECHR 2010).

56. Nevertheless, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV; and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I). In addition, in accordance with the "generally recognised principles of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his or her disposal (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999-V). The Court must thus take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicants (see, among other authorities, *Akdivar and Others*, cited above, §§ 68-69; *Orchowski v. Poland*, no. 17885/04, § 106, 22 October 2009; *Demopoulos and Others*, decision cited above, § 70; *Kurić and Others v. Slovenia* (merits) [GC], no. 26828/06, § 286, ECHR 2012; and *Berger-Krall and Others v. Slovenia* (dec.), no. 14717/04, § 126, 28 May 2013).

57. However, the Court points out that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Akdivar and Others*, cited above, § 71; *Brusco v. Italy* (dec.), no. 69789/01,

ECHR 2001-IX; *Bizjak v. Slovenia* (dec.), no. 25516/12, § 42, 8 July 2014; and *Hodžić v. Slovenia* (dec.), no. 3461/08, § 18, 4 April 2017).

2. Application of these principles to the present case

58. The Court notes that in the course of the administrative proceedings for the issuance of permanent residence permits, the applicants challenged the decisions rejecting their requests by the administrative authorities before the first-instance Administrative Court under the amended Legal Status Act and the Administrative Disputes Act (see paragraphs 20, 26, 31 and 36 above). They then directly lodged constitutional complaints. The Constitutional Court rejected their constitutional complaints for failure to properly exhaust available legal remedies (see paragraphs 21, 27, 32 and 37 above). In particular, relying on its settled case-law from 2007 (see paragraph 40 above), the Constitutional Court stated that in the circumstances of their cases the applicants should have lodged an appeal on points of law (*revizija*) with the Supreme Court before lodging a constitutional complaint. The applicants alleged that that extraordinary legal remedy was ineffective and that there was still a systemic problem in respect of the "erased" (see paragraph 43 above).

59. The Court reiterates that as far as applications lodged against Slovenia are concerned applicants are, according to its case-law, in principle required to exhaust remedies before the domestic courts, and ultimately to lodge a constitutional complaint (see *Kurić and Others* (merits), cited above, §§ 296-297, and *Bradeško and Rutar Marketing d.o.o. v. Slovenia* (dec.), no. 6781/09, § 32, 7 May 2013).

60. The Court observes that the Grand Chamber made an extensive examination of the requirement of exhaustion of domestic remedies in the particular situation of the "erased" in the pilot case of *Kurič and Others.* It is worth noting that six successful applicants in that case had filed applications for residence permits and that they received them in the course of proceedings before the Court, after the amended Legal Status Act had come into force. However, none of them had lodged an individual constitutional complaint prior to the change of law and only one had lodged an appeal with the Supreme Court, a case that had been remitted (see *Kurić and Others* (merits), cited above, § 172).

61. When assessing at the time whether the applicants had been obliged to exhaust all available domestic remedies, including individual constitutional complaints, the Court had due regard to the systemic nature of the Convention violations found. It took note of the fact that the Constitutional Court had adopted two *erga omnes* decisions concerning the "erased", handed down on 4 February 1999 and 3 April 2003, finding the "erasure" and, subsequently, certain provisions of the Legal Status Act as it stood in 1999 unconstitutional. The Constitutional Court had by that time thus twice examined in essence similar complaints to that of the applicants,

ordering the legislature to rectify the unconstitutional provisions in question within six months (see *Kurić and Others* (merits), cited above, §§ 47 and 59). However, those decisions remained only partially implemented for a long time. In the Court's opinion, that fact undermined trust in the effectiveness and the prospects of success of further individual constitutional complaints. Having due regard also to the overall duration of the administrative proceedings brought by the applicants and their situation of vulnerability and legal insecurity, the Court found, in the particular circumstances of the *Kurić* case, that they were dispensed from having to lodge individual constitutional complaints (see *Kurić and Others* (merits), cited above, §§ 298-303). The Court specified, however, that its decision was limited to the particular circumstances of the *Kurić* case and should not be interpreted as a general statement that an appeal to the Constitutional Court would never be a remedy in Slovenia in cases of non-compliance with decisions in which that court had laid down general measures (ibid., § 304).

62. Be that as it may, the Court considers that the current applicants are in a different situation when it comes to the requirement to exhaust all available domestic legal remedies. In particular, they lodged their applications on 18 July 2016, more than five years and seven months after the above-mentioned Constitutional Court decisions had been implemented by the domestic authorities by the passing of the amended Legal Status Act on 8 March 2010 (see paragraph 7 above and *Kurić and Others* (merits), cited above, § 71). That piece of legislation was found by the Constitutional Court on 10 June 2010 to be consistent with the Constitution, providing a permanent solution to the problem of the status of those "erased" persons who had been unable to regularise their situation. The Constitutional Court also refused to allow a referendum to be held, considering that potential rejection of the amended Legal Status Act would lead to unconstitutional consequences (see *Kurić and Others* (merits), cited above, § 73).

63. The Court also notes that since the Grand Chamber's judgment in *Kurić and Others*, significant developments affecting the situation of the current applicants in respect of the requirement to exhaust all available domestic legal avenues have occurred in Slovenia at the legislative, political and jurisprudential level. That resulted in the Committee of Ministers adopting its 2016 Final Resolution, acknowledging that both the general and individual measures required by Article 46 § 1 in the framework of the execution of the pilot judgment in *Kurić* had been enacted by the Respondent State (see paragraphs 13-14 above). The Court also held on 18 October 2016 that the matter giving rise to applications against Slovenia from "erased" applicants who had regularised their legal status "ha[d] been resolved" for the purposes of Article 37 § 1(b) of the Convention and that it was no longer justified to continue the examination of those cases (see paragraph 15 above). It is true that the resolution and decision were adopted a few months after the expiry of the time-limit for the applicants in this case

to lodge an appeal on points of law with the Supreme Court in order to challenge the Administrative Court's decisions dismissing their claims (see paragraphs 20, 26, 31 and 36 above). However, the Court considers that the resolution and decision at issue clearly referred to situations which were already in existence before the date of their adoption.

64. Furthermore, in contrast to *Kurić and Others* (see paragraph 61 above), the domestic authorities in the present case dealt with the applicants' complaints fairly swiftly. They initiated their respective administrative proceedings in July 2013 and the Constitutional Court delivered decisions on various dates in April 2016, an average of two years and nine months at three levels of jurisdiction.

65. Having regard to the above developments and to the factual differences from *Kurić and Others*, the Court considers that in the specific circumstances of this case the domestic authorities should have had an opportunity to put matters right in respect of applications lodged by "erased" people whose requests for a permanent residence permit had been rejected by the domestic authorities for failure to comply with the statutory conditions of the amended Legal Status Act. The applicants should therefore have complied with the procedural rules which provide that extraordinary legal remedies should be sought via the Supreme Court before a constitutional complaint is lodged with the Constitutional Court (see paragraph 40 above). Moreover, there is no settled domestic case-law suggesting that such a procedure had no reasonable prospect of success (see, *a contrario, Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 27, Series A no. 332, and *Kurić and Others* (merits), cited above, § 83).

66. The applicants have also failed to put forward any arguments, give any specific reasons or submit any evidence showing that an appeal on points of law in proceedings under the amended Legal Status Act would have been ineffective in their personal situations. They merely submitted that there was no effective remedy, whether ordinary or extraordinary, to challenge Administrative Court judgments (see paragraphs 21, 27, 32, 37 and 43 above). However, the Court notes that it has already found that, given its nature, an appeal on points of law must in principle, and whenever available in accordance with the relevant procedural rules, be considered an effective domestic remedy within the meaning of Article 35 § 1 of the Convention (see, *mutatis mutandis, Rakić and Others v. Serbia*, nos. 47460/07 and 29 others, § 37, 5 October 2010, and *Debelić v. Croatia*, no. 2448/03, §§ 20 and 21, 26 May 2005).

67. The Court reiterates that in a legal system providing constitutional protection for fundamental rights it is incumbent on the aggrieved individual to test the extent of that protection (see *A, B and C v. Ireland* [GC], no. 25579/05, § 142, ECHR 2010). The applicants had the possibility to lodge an appeal on points of law with the Supreme Court and,

in case of rejection of their claim, to raise the issue of the potential ineffectiveness of that appeal before the Constitutional Court. However, they failed to do so. By omitting to lodge an appeal on points of law they also disregarded the settled case-law of the Constitutional Court (see paragraph 40 above), thus leading to the rejection of their constitutional complaints for non-exhaustion of available remedies.

68. In the light of the above, the Court holds that the special circumstances in respect of the "erased" found in *Kurić and Others* no longer obtain and that remedies available to applicants in administrative proceedings, including an appeal on points of law followed by a constitutional complaint, can be considered effective for the purposes of Article 35 § 1 (compare *Bradeško and Rutar Marketing d.o.o.*, decision cited above, §§ 33-38). As the applicants failed to lodge an appeal on points of law with the Supreme Court and the Constitutional Court rejected their constitutional complaints on those grounds, this part of the applicants' applications should be rejected for non-exhaustion under Article 35 §§ 1 and 4 of the Convention.

D. Complaint under Article 13 of the Convention

69. The applicants complained that they had been denied an effective remedy for their grievances. They relied on Article 13 of the Convention, which provides:

> "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."

70. The Court has already found that an appeal on points of law followed by a constitutional complaint provided the applicants with an effective remedy for their complaints under Articles 8, 14 and 17 of the Convention. That finding is also valid in the context of the complaint under Article 13.

71. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 28 September 2017.

Andrea Tamietti
Deputy Registrar

Vincent A. De Gaetano
President

APPENDIX

No.	Application no.	Lodged on	Applicant Date of birth Place of residence Nationality	Represented by
1.	42670/16	18/07/2016	**Jelka ŽIVKOVIĆ** 01/10/1951 Niš Serbian	Ivan STANČEVSKI
2.	43334/16	18/07/2016	**Živojin MIHAJLOVIĆ** 19/09/1948 Pejkovac Serbian	Ivan STANČEVSKI
3.	43381/16	18/07/2016	**Ljiljana PETROVIĆ** 06/02/1960 Pejkovac Serbian	Ivan STANČEVSKI
4.	43393/16	18/07/2016	**Toplica ŽIVKOVIĆ** 19/05/1951 Niš Serbian	Ivan STANČEVSKI