SECOND SECTION

CASE OF BACKOVIĆ v. SERBIA

(Application no. 47997/06)

JUDGMENT

STRASBOURG

7 February 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Backović v. Serbia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President,*
Danutė Jočienė,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *judges,*
Milenko Kreća, ad hoc *judge,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 17 January 2012, delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 47997/06) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Čedomir Backović ("the applicant"), on 3 November 2006.

2. The applicant was represented by Mr V. Zdravković, a lawyer practising in Belgrade. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. Mr Dragoljub Popović, the judge elected in respect of Serbia, was unable to sit in the case (Rule 28). The Government accordingly appointed Mr Milenko Kreća to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1 as in force at the time).

4. The applicant alleged that he had been denied access to a court in the determination of his civil rights and obligations.

5. On 12 April 2010 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (former Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1956 and lives in Sombor, Serbia.

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

8. On 24 February 2005 the applicant bought a store together with a plot of land from the P Company (plot A).

9. As the owner of the above real estate, as well as of plots B and C, the P Company was burdened with a landed servitude (*lični realni teret*) in favour of third persons, requiring their life-long maintenance (*doživotno izdržavanje*).

10. On the basis of the above contract, however, the servitude in question, being tied, *inter alia*, to plot A, was partly transferred to the applicant as its new owner.

11. On 30 March 2005 the applicant and the P Company concluded a court-certified amendment to the contract of 24 February 2005. The P Company thereby accepted to reimburse the applicant for any payments made in connection with the said servitude. This entitlement was itself constituted as a separate landed servitude (easement, *stvarni realni teret*) tied to plots B and C and established in favour of the applicant as the current owner of plot A, as well as any future owners thereof.

12. On 30 March 2005 the applicant filed a request with the Municipal Cadastre Office (*Služba za katastar nepokretnosti*) in Sombor, seeking registration of his easement.

13. On 11 April 2005 the Municipal Cadastre Office rejected the applicant's request, stating that the registration sought could not be granted in view of the relevant domestic law.

14. On 18 July 2005 the applicant appealed against this decision.

15. On 30 January 2006 the applicant supplemented his appeal with an expert opinion provided by a well-known domestic legal expert, according to whom the applicant's entitlement of 30 March 2005 was an easement and, as such, had had to be registered by the Municipal Cadastre Office. The expert, retained by the applicant, further noted that the rights of the third persons in question remained unaffected, thus implying that their consent was not needed.

16. On 29 May 2006 the legal branch of the Department of Geodesy (*Republički geodetski zavod - sector za pravne poslove*) confirmed the impugned decision of the Municipal Cadastre Office. It stated that the applicant had not offered any proof that the third persons in question had agreed to the arrangement reached on 24 February 2005 and 30 March 2005. It also noted that no judicial review by means of an administrative dispute was possible.

17. Both the Municipal Cadastre Office and the Department of Geodesy are administrative authorities and, as such, part of the respondent State's executive branch of government.

II. RELEVANT DOMESTIC LAW

A. The Cadastre Act 1992 (Zakon o državnom premeru i katastru i upisima prava na nepokretnostima; published in the Official Gazette of the Republic of Serbia - OG RS - nos. 83/92, 53/93, 67/93, 48/94, 12/96, 15/96, 34/01, 25/02 and 101/05)

18. Articles 1, 5 § 1, 58a and 58e provide that this Act shall regulate, *inter alia*, the registration of specified real estate-related legal entitlements, including landed servitudes (*realni tereti i službenosti*). Such entitlements shall be deemed constituted upon their registration.

19. Article 58v provides that registration of such entitlements may, *inter alia*, be granted on the basis of a legally valid contract.

20. Article 105 § 3 provides that no judicial review, by means of an administrative dispute, of a registration-related decision issued by the Department of Geodesy shall be possible.

B. The Property Act (Zakon o osnovama svojinskopravnih odnosa; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 6/80 and 36/90; the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - no. 29/96, and OG RS no. 115/05)

21. Article 52 provides, *inter alia*, that a landed servitude shall be deemed constituted upon its registration, i.e. entry in the relevant land register (*modus acquirendi*).

C. The Cadastre Act 2009 (Zakon o državnom premeru i katastru; published in OG RS nos. 72/09 and 18/10)

22. Article 180 § 1 provides that all second instance decisions issued in accordance with "this Act" shall be subject to judicial review by means of an administrative dispute.

23. This Act entered into force on 11 September 2009, thereby repealing the Cadastre Act 1992.

D. The General Administrative Proceedings Act (Zakon o opštem upravnom postupku; published in OG FRY nos. 33/97 and 31/01, as well as in OG RS no. 30/10)

24. Article 13 provides that final administrative decisions granting certain rights or imposing certain obligations may be annulled, cancelled or amended only in situations envisaged by this Act. The Supreme Court clarified that this provision implies that only administrative decisions granting certain rights or imposing certain obligations may be considered final (Uvp II 50/2004 of 26 January 2006).

25. Articles 32-38 set out the details as regards the possible recusal of civil servants who are authorised to decide in individual administrative matters.

E. The Civil Servants Act (Zakon o državnim službenicima; published in OG RS nos. 79/05, 81/05, and 83/05)

26. Articles 5 provides that a civil servant (*državni službenik*) shall be obliged to act in accordance with the Constitution, the applicable legislation and the rules of his profession, as well as to adhere to the principles of impartiality and political neutrality. A civil servant shall further, in the course of his work, desist from expressing or asserting any political beliefs.

27. Article 6 provides that civil servants shall be accountable for the legality, quality and efficiency of their work, respectively. No one shall be allowed to influence them in the performance of their duties.

28. Article 18 provides, *inter alia*, that a civil servant shall be obliged to execute a verbal order issued by his superior except if he considers that the order in question is contrary to the law or the relevant professional rules or that its execution may "cause harm". A civil servant shall be obliged to execute a repeated written order of his superior issued to the same effect. He shall, however, be obliged to refuse the execution of a verbal or a written order whose execution would amount to a punishable offence. In a situation of this kind the civil servant in question shall be obliged to report the entire matter, by means of a written submission, to his authorised supervisor.

29. Articles 49-81, 86 and 126-132 provide details as regards the recruitment of civil servants as well as the termination of their employment. Article 62 § 1 provides that civil servants shall, in principle, be employed on a permanent basis.

30. This Act entered into force on 1 July 2006, thus repealing earlier legislation regulating the status of civil servants.

III. RELEVANT INTERNATIONAL FINDINGS

A. European Commission, Serbia and Montenegro, 2005 Progress Report, COM (2005) 561, p. 13

31. Relevant sections of this report read as follows:

"Pending the adoption and full implementation of new laws, the Serbian administration remains overstaffed but at the same time suffers from a shortage of qualified personnel and undue political interference, which affects both institutional and policy continuity.

In the context of the reform strategy, the Serbian Parliament adopted the ... Law on Public Administration and the Law on Civil Servants ..."

B. Analytical report accompanying the Commission's Opinion on Serbia's application for membership of the European Union, COM (2011) 668, p. 14

32. Relevant sections of this report read as follows:

"1.1.3. Public administration

The legal framework providing for public administration reform (PAR) is largely in place in Serbia and administrative capacities are generally well developed, in particular at central level. A Strategy for PAR was adopted by the Government in 2004 and supplemented by an Action Plan covering the period 2009-2012 ...

The implementation of the Strategy is making slow progress ...

The Law on Civil Servants ..[,] adopted in 2005, regulates the position of employees in the public administration. The Law was subsequently amended to establish educational requirements for civil servant posts, aimed at increasing professionalism and reducing the risk of political influence and nepotism ... A significant number of appointments for senior civil servant positions are still pending. Selection procedures are not applied uniformly and, in the absence of criteria for final recruitment decisions, managers still have excessive discretionary powers when choosing candidates from lists prepared by the competitions' selection panels. Competence and professionalism in appointments at management and lower levels in the administration need to become the rule ...

A Human Resources Management Service was established in 2006, in charge of ... internal advertising and public competitions for non-management jobs ... and overseeing the general professional training programme for civil servants. A Strategy for the professional training of civil servants for the period 2011- 2013 was adopted in July 2011 ... However, only a small percentage of civil servants, and in particular a very small percentage of managers, takes part in this training. Induction training is not provided."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

33. The applicant complained under Article 6 § 1 of the Convention that he had been denied access to a court of law in the determination of his civil rights and obligations.

34. This provision, in its relevant part, reads as follows:

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

A. Admissibility

35. The Government maintained that the applicant had failed to make use of the available domestic remedies at the time, as well as subsequently, whereby his request would have been determined by a "tribunal" within the meaning of Article 6 § 1 of the Convention.

36. The Court considers that this objection goes to the very heart of the question whether the applicant had been denied the right of access to a court in the determination of his civil rights and obligations in breach of Article 6 § 1. It would thus be more appropriately examined at the merits stage.

37. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

38. The Government opined that there had been no violation of Article 6 § 1 of the Convention.

39. In particular, following the adoption of the new Cadastre Act in 2009 judicial review of decisions rendered by the Department of Geodesy became possible. The applicant should therefore have re-filed his registration request with the Municipal Cadastre Office and, if unsuccessful, appealed this decision to the Department of Geodesy (see paragraph 24 above). A possible rejection of his appeal could itself have subsequently been challenged in a judicial review procedure, i.e. by means of an administrative dispute (see paragraph 22 above).

40. In addition or in the alternative, the Government submitted that the applicant could have brought a separate claim with a civil court, seeking recognition of his entitlement. A judgment in the applicant's favour would have meant that the Municipal Cadastre Office would have had no option but to accept his subsequent request for the registration of the easement in question.

41. Whilst noting in their description of the facts that both "the Municipal Cadastre Office and the Department of Geodesy are ... [a] ... part of the Respondent State's executive", the Government also argued, in respect of the present case, that the civil servants employed with these bodies had been sufficiently "independent" within the meaning of Article 6 § 1. They had been recruited for an indefinite period of time, the termination of their employment had been strictly regulated by law and subject to judicial review, and they could not have lost their jobs merely for refusing to follow the instructions of their superiors. Moreover, the civil servants in question could have been removed from dealing with the matter, had there been any legitimate doubts as regards their impartiality (see paragraphs 26-30 above).

42. Finally, the Government contended that the decisions to refuse the applicant's registration request had been lawful, and noted that neither the Municipal Cadastre Office nor the Department of Geodesy had had an institutional interest to rule one way or another.

43. The applicant reaffirmed his complaint, adding that the breach of his right to a court had been particularly striking in the present case. The registration of his easement had been rejected based on decisions adopted by two administrative bodies and the relevant domestic law, at the time, made it patently clear that no judicial review by means of an administrative dispute was possible.

44. The applicant further argued that the remedies referred to by the Government could not have been effective. In particular, the violation of his rights had occurred in 2006, whilst the new Cadastre Act had only entered into force in 2009. There was likewise no point in bringing a separate civil suit against the P Company since the latter had never contested the easement constituted in favour of the applicant, and the claim could not have been brought against the Department of Geodesy. Ultimately, following any civil judgment rendered in favour of the applicant, the registration of the easement at issue would still have been up to the same administrative authorities.

45. The applicant lastly noted that the Government's submissions as regards the merits of his registration request were irrelevant in the Convention context.

2. The Court's assessment

46. In its *Golder v. the United Kingdom* judgment of 21 February 1975, the Court held that Article 6 § 1 "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal" (§ 36, Series A no. 18). This "right to a court", of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his or her civil rights is unlawful and complains that no possibility was afforded to submit that claim to a court or tribunal meeting the requirements of Article 6 § 1 (see, *inter alia*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X). Only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, amounts to a "tribunal" within the meaning of the said provision (see, among other authorities, the *Beaumartin v. France* judgment of 24 November 1994, § 38, Series A no. 296-B). In determining whether a body can be considered to be "independent" account must be taken of the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures, and the question whether the body presents an appearance of independence (see *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 78, Series A no. 80). The Court further recalls that decisions of administrative authorities which do not themselves satisfy the requirements of Article 6 § 1 should be subject to subsequent control by a "judicial body that has full jurisdiction" (see, *Ortenberg v. Austria*, 25 November 1994, § 31, Series A no. 295-B).

47. Turning to the present case, it is firstly noted that the underlying subject-matter of the applicant's request was real estate-related and pecuniary in nature and that, as such, it clearly falls within the scope of Article 6 § 1 (see, *mutatis mutandis*, *Editions Périscope v. France*, 26 March 1992, § 40, Series A no. 234-B).

48. Secondly, neither the Cadastre Office nor the Department of Geodesy could be deemed, at the relevant time, as fulfilling the requirements of a "tribunal" within the meaning of Article 6 § 1. Admittedly, new legislation was introduced in order to tackle deficiencies in the civil service which had been documented in international reports. However, irrespective of whether or not these changes resulted in the bodies concerned thereafter fulfilling the requirements of a "tribunal", the legislation in question only entered into force on 1 July 2006, which was more than a month after the Department of Geodesy had already rendered its decision in respect of the applicant's request (see paragraphs 16 and 30 above).

49. Thirdly, at the material time, the applicant had been legally barred from seeking judicial review by means of an administrative dispute. This only changed with the adoption of the new Cadastre Act which entered into force on 11 September 2009 (see paragraphs 20, 22 and 23 above). In this regard the Court recalls that the issue of whether domestic remedies have been

exhausted is normally determined by reference to the date when the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)), this rule being, of course, subject to exceptions which may be justified by the specific circumstances of each case (see *Demopoulos v. Turkey and 7 other cases* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 14163/04, 10200/04, 19993/04 and 21819/04), § 87, 1 March 2010, *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII). In the present matter, however, the applicant lodged his application with this Court on 3 November 2006. It was not until 11 September 2009, almost three years later, that he could arguably have re-filed his registration request with the Municipal Cadastre Office and the Department of Geodesy and only then, if unsuccessful, have sought judicial review by means of an administrative dispute. Accordingly, it would be disproportionate to require the applicant to make use of this potential avenue of redress (see, *mutatis mutandis*, *Pikić v. Croatia*, no. 16552/02, § 31, 18 January 2005; and *Parizov v. "the former Yugoslav Republic of Macedonia"*, no. 14258/03, § 46, 7 February 2008).

50. Finally, as regards the Government's argument to the effect that the applicant should have filed a separate civil claim (see paragraph 40 above), the Court accepts the latter's credible response thereto. In particular, following the adoption of any civil judgment in favour of the applicant the registration of the easement at issue would still have been at the discretion of the same administrative authorities. Further, having offered no relevant domestic case-law in support of their contention, the Government have failed to show that in the specific circumstances of the present case a civil claim such as the one referred to would have been anything but theoretical (see, *mutatis mutandis*, *Stojanović v. Serbia*, no. 34425/04, §§ 59 and 60, 19 May 2009). The applicant cannot thus be blamed for not having pursued this remedy.

51. In view of the foregoing and it being understood that it is not its task to determine what the actual outcome of the applicant's registration request should have been, the Court dismisses the Government's preliminary objection and considers that the applicant has been denied access to a court in the determination of his civil rights and obligations.

52. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

54. In his application introduced on 3 November 2006 the applicant sought 10,000 Euros (EUR) for the non-pecuniary damage suffered.

55. In his subsequent observations the applicant made no reference to this claim.

56. Rule 60 §§ 2 and 3 of the Rules of Court provides as follows:

> "2. The applicant must submit itemised particulars of all [just satisfaction] claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise [emphasis added].
>
> 3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part."

57. In view of the above, the applicant's claim must be dismissed in its entirety.

B. Costs and expenses

58. The applicant, however, claimed EUR 2,460 for the costs and expenses incurred before the Court.

59. The Government contested this claim.

60. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were also reasonable as to their quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,000 for the proceedings before it.

C. Default interest

61. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the Government's objection as to the non-exhaustion of domestic remedies and dismisses it;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of the costs and expenses incurred before the Court, to be converted into Serbian Dinars at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Françoise Tulkens President