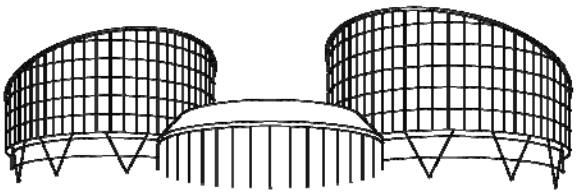


EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ĐOKIĆ v. SERBIA

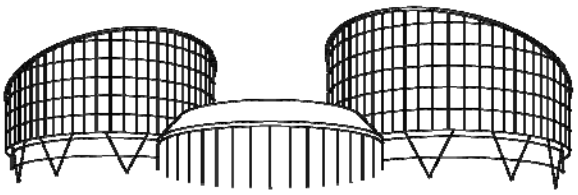
(Application no. 1005/08)

JUDGMENT

STRASBOURG

20 December 2011

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



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

In the case of Đokić v. Serbia,

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

Françoise Tulkens, *President,*
Dragoljub Popović,
Isabelle Berro-Lefèvre,
András Sajó,
Guido Raimondi,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 29 November 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1005/08) 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 Nenad Đokić ("the applicant"), on 19 December 2007.

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

3. The applicant complained about the fairness and outcome of the criminal proceedings against him, being denied access to the Supreme Court, and, lastly, the lack of impartiality on the part of the Serbian judiciary.

4. On 9 November 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a former police officer who was born in 1970 and is currently serving a prison sentence in the Niš Penitentiary (*Kazneno-popravni zavod u Nišu*).

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

7. On 26 May 2005 the District Court in Leskovac found the applicant guilty of murdering his former wife, and sentenced him to eleven years' imprisonment.

8. On 18 October 2005 the Supreme Court quashed this judgment and ordered a retrial.

9. On 16 December 2005 the District Court in Leskovac again convicted the applicant and sentenced him to eleven years' imprisonment. In so doing, it provided extensive reasoning.

10. On 20 March 2006 the Supreme Court upheld this judgment. The appeal bench included judge M.C. and the applicant received the judgment on 26 May 2006.

11. On 26 June 2006, through the prison authorities and as evidenced by their certificate, the applicant filed an appeal on points of law (*zahtev za ispitivanje zakonitosti pravosnažne presude*). The Supreme Court received this appeal on 5 July 2006, as certified by its stamp of even date.

12. On 31 May 2007 the Supreme Court noted that the appeal had been lodged on 5 July 2006 and consequently had to be rejected as out of time (*neblagovremen*; see paragraph 20 below). The Supreme Court's bench again included judge M.C. and the applicant received this decision on 21 September 2007.

II. RELEVANT DOMESTIC LAW AND JURISPRUDENCE

13. The relevant domestic provisions are contained in the Code of Criminal Procedure (*Zakonik o krivičnom postupku*, published in the Official Gazette of the Federal Republic of Yugoslavia nos. 70/01 and 68/02, as well as in the Official Gazette of the Republic of Serbia – OG RS – nos. 58/04, 85/05, 115/05 and 49/07).

14. Article 40 (5) provides that a judge may not sit in a case when he or she has already taken part in the adoption of a decision before a lower court or before "the same court" should its decision subsequently "be appealed".

15. Article 41 § 1 provides, *inter alia*, that as soon as a judge discovers this ground for recusal, he or she shall cease dealing with the case and

request the president of the court to appoint another judge in his or her stead.

16. Article 182 § 4 provides, *inter alia*, that a defendant who has been sentenced to a prison term shall have the right to file his submissions through the prison authorities, thereby interrupting any time-limits.

17. Article 183 § 3 provides, *inter alia*, that a time-limit set in months shall expire by the end of the day, of the last month, which corresponds by number to the date when the running of the time-limit commenced.

18. Article 419 provides, *inter alia*, that the competent public prosecutor "may" (*može*) file a Request for the Protection of Legality (*zahtev za zaštitu zakonitosti*) against a "final judicial decision", on behalf of or against the defendant, if the relevant substantive and/or procedural "law has been breached" (*ako je povređen zakon*).

19. On the basis of the above request, under Articles 420, 425 and 426, the Supreme Court may uphold the conviction at issue or reverse it. It may also quash the impugned judgment, in its entirety or partly, and order a re-trial before the lower courts. If the Supreme Court, however, finds that there has been a violation of the law in favour of the defendant, it shall only be authorised to declare so but shall leave the final judgment standing.

20. Article 428 provides, *inter alia*, that a defendant who has been found guilty and sentenced to an effective prison term at first and second instance shall have the right to file an appeal on points of law (*zahtev za ispitivanje zakonitosti pravosnažne presude*) with the Supreme Court within one month as of the date of receipt of the judgment rendered on appeal.

21. In accordance with Articles 432 and 425 and 426, *inter alia*, the Supreme Court shall, should it accept an appeal on points of law, have the power to overturn the impugned judgment or quash it and order a retrial before the lower courts. It shall also be able to do so if there are serious doubts as to the veracity of the decisive facts established in the impugned decision and this impinges upon the proper application of the relevant law.

22. In 2009 amendments to the above Code of Criminal Procedure (*Zakon o izmenama i dopunama Zakonika o krivičnom postupku*, published in OG RS no. 72/09) removed the appeal on points of law as an existing domestic remedy. Article 146 § 1 of this Act, however, provides that in respect of all defendants who had already lodged their appeals on points of law before the entry into force of these amendments it is the "repealed provisions" that shall be applicable.

23. Lastly, in its decision of 17 September 2009 the Constitutional Court held that a Request for the Protection of Legality is not a remedy which needs to be exhausted before one may file an appeal with the Constitutional Court, the reason being, *inter alia*, that it was only the public prosecutor who could have filed such a request on behalf of the defendant and, further, that the former had full discretion in respect of whether to do so (Už-1233/2009).

THE LAW

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

24. The applicant relied on numerous provisions of the Convention, as well as the Protocols thereto. In substance, however, he complained: (i) about the overall fairness of the criminal proceedings brought against him; (ii) that on 31 May 2007 he had unlawfully been denied access to the Supreme Court; and (iii) that the judge who had already ruled in his case on 20 March 2006 was again in a position to do so on 31 May 2007.

25. The Court considers that all of the above complaints fall to be examined under Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal established by law ..."

A. As regards the applicant's access to the Supreme Court

1. Admissibility

26. The Government submitted that the applicant had not exhausted all available and effective domestic remedies. In particular, he had failed to urge the competent public prosecutor to file a Request for the Protection of Legality ("RPL") on his behalf (see paragraphs 18 and 19 above).

27. The Government maintained that public prosecutors had been willing to file RPLs on behalf of many defendants, including in matters relating to timely appeals being ignored at second instance, and documented that in several such cases the Supreme Court had ultimately ruled in their favour.

28. The Government noted that the competent public prosecutor would not have had "total discretion" on whether to file an RPL on behalf of the applicant. On the contrary, he would have been obliged to do so if he thought that there had been a breach of the relevant domestic legislation (*discretio legalis*).

29. Lastly, the Government relied on judge Kreća's partly dissenting opinion in the *Lepojić* judgment (*Lepojić v. Serbia*, no. 13909/05, 6 November 2007), and observed that their preliminary objection in the present case is to be distinguished from their similar objection in that case in so far as it is now being asserted in respect of a specifically alleged breach of the relevant domestic law.

30. The applicant maintained that he had complied with the exhaustion requirement.

31. In the *Lepojić* judgment the Court has already held that it was only the competent public prosecutor who could have filed an RPL on behalf of the applicant and, moreover, that the former had full discretion in respect of whether to do so. While the applicant could have requested such action, he certainly had no *right* under law to make use of this remedy personally. An RPL was thus ineffective as understood by Article 35 § 1 of the Convention (see *Lepojić v. Serbia*, cited above, §§ 54 and 57). In view of the foregoing and noting the Constitutional Court's decision of 17 September 2009 (see paragraph 23 above), the Court sees no reason to hold otherwise in the present case, notwithstanding the domestic case-law provided by the Government and irrespective of the ground on which the competent public prosecutor might or might not have filed an RPL.

32. The Court therefore finds that the applicant's complaint cannot be declared inadmissible for non-exhaustion of domestic remedies under Article 35 § 1 of the Convention. Accordingly, the Government's objection in this respect must be dismissed.

33. The Court considers that the applicant's complaint is also not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and finds no other ground to declare it inadmissible. The complaint must therefore be declared admissible.

2. Merits

34. The applicant reaffirmed his complaint, whilst the Government, without making any specific comments on the merits, left it to the Court to "assess" whether there has been a violation of Article 6 § 1 of the Convention.

35. 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). Subsequently, in *Deweer v. Belgium* it clarified that the "right to a court" applied to criminal as well as to civil cases (judgment of 27 February 1980, Series A no. 35). This right, however, is not absolute; it is subject to limitations permitted by implication, and particularly so where the "conditions of admissibility of an appeal are concerned" (see, *mutatis mutandis*, *García Manibardo v. Spain*, no. 38695/97, § 36, ECHR 2000-II). Nonetheless, these limitations must not restrict or reduce an individual's access in such a way or to such an extent as to impair the very essence of the right. They will only be compatible with Article 6 § 1 if they are in accordance with the relevant domestic legislation, pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued (see, *mutatis mutandis*, *Guérin v. France*, 29 July 1998, § 37, Reports of Judgments and Decisions 1998-V).

36. Finally, it is recalled that Article 6 of the Convention does not compel the Contracting States to set up courts of cassation. Nevertheless, where such courts exist the guarantees contained in Article 6 must be complied with, *inter alia* by ensuring effective access to these courts (see, among other authorities, *García Manibardo v. Spain*, cited above, § 39).

37. Turning to the present case, the Court notes that the applicant's complaint concerns the determination of a criminal charge against him and, as such, falls within the scope of Article 6 § 1. In addition, the applicant had clearly been entitled to lodge an appeal on points of law within a month as of the date of receipt of the judgment rendered on appeal, i.e. by 26 June 2006, which he had done through the prison authorities (see paragraphs 10 and 11 above). In its decision of 31 May 2007, however, the Supreme Court mistakenly rejected the applicant's appeal on points of law as belated, stating that it had been lodged on 5 July 2006 whereas, in fact, this was only the date when the Supreme Court itself had received the said appeal (see paragraphs 11 and 12 above). The Supreme Court thus breached Article 428 of the Code of Criminal Procedure (see paragraphs 20, 17 and 16 above, in that order), as well as the applicants' right of access to a court under the Convention, it being understood that it is not this Court's task to determine what the actual outcome of the applicant's appeal on points of law should have been had the Supreme Court accepted to consider it on its merits.

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

B. As regards the impartiality of the Supreme Court's bench of 31 May 2007 and the overall fairness of the criminal proceedings brought against the applicant

39. Having regard to its findings at paragraphs 37 and 38 above, given its pronouncement under Article 46 below, and bearing in mind that an appeal on points of law must, in principle and whenever available in accordance with the relevant domestic rules of procedure, be considered an effective avenue of redress (see, *mutatis mutandis*, *Rakić and Others v. Serbia*, no. 47460/07 et seq., § 37, 5 October 2010), the Court declares these complaints admissible but considers that they do not require a separate examination on the merits.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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."

41. The applicant claimed 15,000 euros (EUR) in respect of the pecuniary and non-pecuniary damage suffered.

42. The Government described this claim as belated, unsubstantiated and/or excessive.

43. The Court notes that the original deadline for the submission of the applicant's just satisfaction claim was 14 June 2011. On 21 July 2011 the applicant informed the Court that he had sent his claim in time, but that the Court had apparently not received it. The applicant, however, never offered any evidence to this effect, such as a postal receipt certificate of his original submission or indeed even a copy of the letter. Instead, he merely provided the Court with a new just satisfaction claim posted on 27 July 2011.

44. In such circumstances, the Court cannot but conclude that the applicant has failed to comply with Rule 60 §§ 2 and 3 of the Rules of Court, which is why his claim must be dismissed.

III. APPLICATION OF ARTICLE 46 OF THE CONVENTION

45. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

46. Given these provisions, it follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned any sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress, in so far as possible, the effects thereof (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

47. The High Contracting Party concerned should therefore, with diligence, through appropriate procedures and if the applicant so requests, ensure that his appeal on points of law receives an examination on its merits (see, in this connection, the Government's own views summarised at paragraphs 26 and 27 above; see also paragraphs 18-22 above). It is

understood that it is not this Court's task to determine what the actual outcome of this examination should be.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the applicant's access to the Supreme Court on 31 May 2007;

3. *Holds* that there is no need to examine separately the complaints under Article 6 § 1 of the Convention as regards the Supreme Court's impartiality on 31 May 2007 and the overall fairness of the criminal proceedings brought against the applicant;

4. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Françoise Tulkens
Registrar	President