SECOND SECTION

CASE OF MATIJAŠEVIĆ v. SERBIA

(Application no. 23037/04)

JUDGMENT

STRASBOURG

19 September 2006

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 Matijašević v. Serbia,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mrs A. MULARONI,
Mrs E. FURA-SANDSTRÖM,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 29 August 2006,

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

PROCEDURE

1. The case originated in an application (no. 23037/04) against the State Union of Serbia and Montenegro, subsequently succeeded by Serbia (see paragraphs 22-25 below), lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by, at that time, a citizen of the State Union of Serbia and Montenegro, Mr Milija Matijašević ("the applicant"), on 20 May 2004.

2. The applicant was represented by Mr V. Beljanski, Mr S. Beljanski and Ms G. Francuski, all lawyers practising in Novi Sad. The Government of the State Union of Serbia and Montenegro, initially, and the Government of Serbia, subsequently, ("the Government") were represented by their Agent, Mr S. Carić.

3. On 8 June 2005 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided that the merits of the application would be examined together with its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1976 and is currently serving a prison sentence.

5. On 7 May 2003 the applicant was arrested and remanded in custody by the investigating judge of the District Court in Novi Sad on suspicion of fraud and murder offences.

6. On 4 November 2003 the District Public Prosecutor's Office in Novi Sad issued an indictment against the applicant, charging him with fraud and incitement to commit murder.

7. On 2 April 2004 the three-judge panel of the District Court in Novi Sad extended the applicant's detention on remand for another two months. In its reasoning, justifying this decision, the panel relied on the applicant's prior convictions as well as his persistent anti-social behaviour. In addition, the panel expressly stated that the applicant had "committed the criminal offences which are the subject of this prosecution" (*"počinio kriv. dela koja su predmet ove optužbe"*) and concluded that the applicant, if released, would be likely to continue committing crimes.

8. On 16 April 2004 the applicant appealed to the Supreme Court of Serbia, requesting that his detention be terminated or, alternatively, that the remand decision be quashed and the case remitted to the District Court in Novi Sad for reconsideration. He argued, *inter alia*, that, since the impugned decision had prejudged the outcome of the pending criminal case, it had blatantly breached his fundamental right to be presumed innocent as "guaranteed in the Criminal Procedure Code, the Constitution of the Republic of Serbia and indeed Article 6 § 2 of the European Convention of Human Rights and Fundamental Freedoms".

9. On 22 April 2004 the Supreme Court of Serbia rejected the appeal, focusing exclusively on the applicant's prior criminal convictions and the alleged danger that he would commit other crimes if released. It did not refer to the applicant's submission concerning the presumption of innocence.

10. On 27 May 2004 the District Court in Novi Sad found the applicant guilty of incitement to murder and sentenced him to eight years in prison.

11. On 23 September 2004 the Supreme Court of Serbia upheld the judgment of the District Court in Novi Sad. As stated by the applicant in a separate case currently pending before this Court (application no. 31617/05), his lawyer received this decision on 7 March 2005.

II. RELEVANT DOMESTIC LAW

A. Charter on Human and Minority Rights and Civic Freedoms of the State Union of Serbia and Montenegro (Povelja o ljudskim i manjinskim pravima i građanskim slobodama državne zajednice Srbija i Crna Gora; published in the Official Gazette of Serbia and Montenegro - OG SCG - no. 6/03)

12. Articles 19 and 9 § 2 of the Charter provided as follows:

Article 19

"Everyone is deemed innocent until his guilt of a criminal offence is proven by a final decision of a court of law."

Article 9 § 2

"Everyone who believes that any of his human or minority rights guaranteed by this Charter has been violated or denied by an individual act or action of a State Union institution, or a member state body or organization exercising public powers, shall have the right to submit a complaint to the Court of Serbia and Montenegro, if no other legal redress is provided in a member state, in accordance with the Constitutional Charter."

B. Constitutional Charter of the State Union of Serbia and Montenegro (Ustavna povelja državne zajednice Srbija i Crna Gora; published in OG SCG no. 1/03)

13. The relevant part of Article 46 of the Constitutional Charter provided as follows:

"The Court of Serbia and Montenegro: ...

- decides with respect to complaints filed by citizens in cases where an institution of Serbia and Montenegro has infringed their rights and freedoms guaranteed by the Constitutional Charter, if no other legal redress has been provided; ..."

C. Constitution of the Republic of Serbia (Ustav Republike Srbije; published in the Official Gazette of the Republic of Serbia - OG RS - no. 1/90)

14. Article 23 § 3 of this Constitution provides as follows:

"No one shall be considered guilty of a criminal offence until so proven by a final decision of a court of law."

D. Obligations Act (Zakon o obligacionim odnosima; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia - OG SFRY - nos. 29/78, 39/85, 45/89, 57/89 and the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - no. 31/93)

15. Under Articles 199 and 200 of the Obligations Act, *inter alia*, anyone who has suffered fear, physical pain or, indeed, mental anguish as a consequence of a breach of "personal rights" ("*prava ličnosti*") may, depending on their duration and intensity, sue for financial compensation before the civil courts and, in addition, request other forms of redress "which may be capable" of affording adequate non-pecuniary satisfaction.

E. Court of Serbia and Montenegro Act (Zakon o Sudu Srbije i Crne Gore, published in OG SCG no. 26/03)

16. The relevant provisions of this legislation were as follows:

Article 62 § 1

"A citizen's complaint may be filed by anyone who considers that an individual act or action of an institution of Serbia and Montenegro, or a member State body or organization exercising public powers, has violated his human or minority right, if no other avenue of legal redress is provided or if redress has not been secured within a member State."

Article 64

"A citizen's complaint may be filed within three months of the date of receipt of the individual decision or the commission or cessation of an action in violation of a human or minority right guaranteed by the Constitutional Charter."

Article 65 §§ 1 and 2

"If the Court finds that an individual decision or action is in violation of a human or minority right guaranteed by the Constitutional Charter, it may annul the individual decision in question, ban the continuation of such actions or order the implementation of other specific measures and, in view of the circumstances of each case, order the removal of all consequences stemming from such decisions and/or actions.

The decision of the Court accepting a citizen's complaint shall constitute a legal basis for requesting compensation or the removal of other adverse consequences before a competent body, in accordance with law."

III. REPORTS OF THE COUNCIL OF EUROPE

17. In a Council of Europe report on the State Union of Serbia and Montenegro of 30 April 2004, it was stated that the Court of Serbia and Montenegro had still not been established and that the setting-up of such a court had not been considered a priority by the State Union authorities since the accession to the Convention (Serbia and Montenegro: Compliance with obligations and commitments and implementation of the post-accession co-operation programme, document presented by the Secretary General of the Council of Europe, fourth report, February - April 2004, § 27).

18. In a subsequent report of 13 July 2005, the Council of Europe found that the Court of Serbia and Montenegro had at last started operating in January 2005. The court's financing, however, had not been fully secured. Finally, 200 individual human rights complaints had been registered as cases, but no decisions had yet been rendered (Serbia and Montenegro: Compliance with obligations and commitments and implementation of the post-accession co-operation programme, document presented by the Secretary General, eight report, March 2005 - June 2005, §§ 14 and 44).

IV. RESERVATION UNDER ARTICLE 13 OF THE CONVENTION

19. In its reservation contained in the instrument of ratification of the Convention and its Protocols, deposited with the Council of Europe on 3 March 2004, the Government of the State Union of Serbia and Montenegro stated that "the provisions of Article 13 shall not apply in relation to the legal remedies within the jurisdiction of the Court of Serbia and Montenegro, until the said Court becomes operational in accordance with Articles 46 to 50 of the Constitutional Charter of the State Union of Serbia and Montenegro (*Službeni list Srbije i Crne Gore*, no. 1/03)".

20. This reservation was withdrawn by a letter from the Permanent Representation of the State Union of Serbia and Montenegro, dated 11 July 2005, registered at the Secretariat General on 15 July 2005.

V. LETTER OF THE COURT OF SERBIA AND MONTENEGRO DATED 16 JANUARY 2006

21. In this letter, the Court of Serbia and Montenegro clarified that it was yet to rule in respect of a single "citizen's appeal". In so doing, it pointed out that the reason for this was the proposed modification of the relevant legislation regulating the court's work which, at the time, was still pending (Statement No. 20/60, provided in the context of a separate application pending before this Court; application no. 2361/05).

VI. THE SUCCESSION OF SERBIA

22. The State Union of Serbia and Montenegro ratified the Convention on 3 March 2004.

23. Following a referendum, on 3 June 2006 Montenegro declared its independence from the State Union of Serbia and Montenegro whereby the latter ceased to exist together with all of its bodies including the Court of Serbia and Montenegro.

24. On 5 June 2006 the President of Serbia informed the Secretary General of the Council of Europe that Serbia was the sole successor of the former State Union of Serbia and Montenegro

25. In its decision of 14 June 2006 the Committee of Ministers of the Council of Europe, *inter alia*, noted: i) that "Serbia ... [had continued] ... the membership of [the State Union of] Serbia and Montenegro in the Council of Europe with effect from 3 June 2006", and ii) that it had remained a party to a number of Council of Europe conventions signed and ratified by the former State Union of Serbia and Montenegro, including the Convention for the Protection of Human Rights and Fundamental Freedoms.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

26. Under Article 6 § 2 of the Convention, in his application introduced on 20 May 2004, the applicant complained that in the course of reviewing his detention on remand, on 2 April 2004, the District Court in Novi Sad declared him guilty before his guilt had been proven according to law and, further, that on 22 April 2004 the Supreme Court of Serbia failed to rectify this "error" on appeal. Article 6 § 2 reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. Admissibility (exhaustion of domestic remedies)

1. Arguments of the parties

27. The Government submitted that the applicant did not exhaust all available and effective domestic remedies. In particular, that he had failed to file a civil claim under

Articles 199 and 200 of the Obligations Act, as well as a "citizen's complaint" (appeal) with the Court of Serbia and Montenegro (see paragraphs 15 and 16 above). Further, Article 19 of the Charter on Human and Minority Rights and Civic Freedoms (see paragraph 12 above) enshrined the presumption of innocence, which is why the present case was clearly within the said court's competence *ratione materiae*. Finally, the Government submitted that the Court of Serbia and Montenegro Act was being reviewed and its jurisdiction could, in due course, be amended so that the citizen's complaints could be considered by the court's plenary session instead of the chambers and, further, that its rulings adopted within such a procedure would formally be "decisions" rather than "judgments".

28. The applicant stated that a citizen's complaint, alleging an individual human rights violation, referred to by the Government, was a remedy which was neither available in his case nor effective in general. The applicant recalled that he had lodged his application with the Court on 20 May 2004 but that the respondent Government had since conceded that the Court of Serbia and Montenegro was not in operation before 7 July 2004. Further, even though this court had yet to issue a single judgment in respect of a citizen's complaint, the Government had already started discussing amendments to the relevant legislation, thereby implicitly acknowledging its ineffectiveness to date. Finally, the applicant maintained that, given the relevant domestic law, it was unclear whether a citizen's complaint could be filed once all other legal remedies have been exhausted or only where no such remedies existed in the first place. In any event, there was no jurisprudence which could have provided any guidance in this respect.

2. Relevant principles

29. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against the State before an international judicial body to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see *Assenov and Others v. Bulgaria,* no. 24760/94, § 85, ECHR 1999-VIII).

30. Further, 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, *mutatis mutandis*, the *Van Droogenbroeck v. Belgium* judgment of 24 June 1982, Series A no. 50, p. 30, § 54).

31. Finally, where there are several effective remedies available, it is for the applicant to select which remedy to pursue in order to comply with the requirements of Article 35 § 1 of the Convention (see *Airey v. Ireland* judgment of 7 October 1979, Series A no. 32, p. 12, § 23).

3. Application of these principles to the present case

32. The Court notes that the Government were unable to cite any domestic jurisprudence where a claim based on Articles 199 and 200 of the Obligations Act had been successfully brought in a case such as the applicant's. However, even assuming that this remedy could have provided the applicant with redress, the Court considers that,

having exhausted the effective remedies in the context of his detention, the applicant could not in addition have been reasonably expected to embark upon yet another avenue of "potential redress".

33. The said civil claim, in the specific circumstances of the present case, was thus not necessary to exhaust, pursuant to Article 35 § 1 of the Convention.

34. As regards a "citizen's complaint" with the Court of Serbia and Montenegro, it is noted that on 15 July 2005 the respondent State withdrew its reservation contained in the instrument of ratification of the Convention. Thereby, in the Court's view, the Government implicitly accepted that, prior to that date, the said court could not have been considered effective or even available (see paragraphs 19-20 above).

35. Further, on 16 January 2006, the Court of Serbia and Montenegro itself acknowledged that it had yet to rule on a single "citizen's complaint" alleging an individual human rights violation. Moreover, it was apparently awaiting the adoption of amendments to the Court of Serbia and Montenegro Act, at some point in the unforeseeable future (see paragraph 21 above).

36. Finally, on 3 June 2006 Montenegro declared its independence from the State Union of Serbia and Montenegro whereby the latter ceased to exist, as did all of its bodies including the Court of Serbia and Montenegro (see paragraphs 22-25 above).

37. The Court therefore considers that the applicant was not obliged to exhaust a remedy which was both unavailable at the material time and had remained ineffective until the very break up of State Union of Serbia and Montenegro.

4. Conclusion

38. The Court concludes that the complaint cannot be declared inadmissible for non-exhaustion of domestic remedies in accordance with Article 35 § 1 of the Convention. Accordingly the Government's objection must be dismissed.

39. The Court also considers that the complaint raises questions of law which are sufficiently serious for its determination to depend on an examination of the merits, no other ground for declaring it inadmissible having been established. The Court therefore declares the complaint admissible.

B. Merits

1. Arguments of the parties

40. The applicant submitted in particular that, in the course of reviewing his detention on remand, on 2 April 2004 the District Court in Novi Sad declared him guilty before his guilt was proven according to law; that it did so by stating that he had "committed the criminal offences which are the subject of this prosecution", and that on 22 April 2004 the Supreme Court of Serbia failed to rectify this "error" on appeal.

41. The Government submitted that the impugned wording of the District Court in Novi Sad was an obvious mistake, i.e. "an imprecise formulation", and that it should instead have said that there was "a reasonable suspicion" that the applicant had committed the crimes of which he was charged.

42. The applicant maintained that the District Court's reasoning could not be dismissed as a mere mistake. He submitted that there is a fundamental difference between a statement that someone has committed a crime and an assertion that he is simply

suspected of having done so. In any event, even though the decision at issue was appealed to the Supreme Court, via the District Court, neither court did anything to rectify the "error". On the contrary, the Supreme Court rejected the appeal, although it had contained explicit complaints concerning the breach of the presumption of innocence.

43. The Government recalled that on 27 May 2004 the District Court in Novi Sad found the applicant guilty of incitement to murder and sentenced him to eight years in prison, that conviction being subsequently upheld by the Supreme Court on appeal. They concluded that, in such circumstances, there could be no violation of Article 6 § 2 of the Convention and, in so doing, cited the judgments in *Phillips v. the United Kingdom* (no. 41087/98, ECHR 2001-VII) and *Engel and Others v. the Netherlands* (judgment of 8 June 1976, Series A no. 22).

44. The applicant emphasised that a subsequent conviction could not vacate one's initial right to the presumption of innocence.

2. Relevant principles

45. The Court recalls that the presumption of innocence under Article 6 § 2 will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proved according to law. It suffices, in the absence of a formal finding, that there is some reasoning suggesting that the court or the official in question regards the accused as guilty, while a premature expression by the tribunal itself of such an opinion will inevitably run foul of the said presumption (see, among other authorities, *Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, p. 30, § 56, *Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62, §§ 27, 30 and 37, *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36 and *Karakaş and Yeşilırmak v. Turkey*, no. 43925/985, § 49, 28 June 2005).

46. Article 6 § 2 governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution" (see *Minelli v. Switzerland*, cited above, § 30). However, once an accused is found guilty, in principle, it ceases to apply in respect of any allegations made within the subsequent sentencing procedure (see *Phillips v. the United Kingdom* and *Engel and Others v. the Netherlands*, both cited above).

3. Application of these principles to the present case

47. In view of the facts of the case, as well as the above-cited jurisprudence, the Court finds that the District Court in Novi Sad, in its decision dated 2 April 2004, did pronounce the applicant's guilt before it was proven according to law and, moreover, on 22 April 2004, the Supreme Court of Serbia failed to rectify this "error" on appeal.

48. As regards the Government's suggestion that the impugned wording of the District Court was an obvious mistake, namely "an imprecise formulation", the Court agrees with the applicant that there is a fundamental distinction to be made between a statement that someone is merely *suspected* of having committed a crime and a clear judicial declaration, in the absence of a final conviction, that the individual *has committed* the crime in question.

49. The fact that the applicant was ultimately found guilty and sentenced to 8 years in prison cannot vacate the applicant's initial right to be presumed innocent until proven guilty according to law. As noted repeatedly in this Court jurisprudence, Article 6 § 2

governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution" (see paragraph 46 above).

50. Finally, the Court considers the present case, where the impugned statement was made in the context of detention, clearly distinguishable from those of *Phillips* and *Engel* to which the Government referred (see paragraph 46 above).

51. There has accordingly been a violation of Article 6 § 2 of the Convention.

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

52. Following the introduction of the application on 20 May 2004, in his submissions of 28 October 2005, for the first time, the applicant complained that one of the judges who had proclaimed him guilty in the District Court on 2 April 2004 was also a member of the same court's trial chamber which convicted him on 27 May 2004. The applicant maintained that the breach of his right to be presumed innocent was thus aggravated and the overall fairness of the criminal proceedings against him undermined.

53. The Court has assumed in favour of the applicant that these complaints could give rise to a separate issue under Article 6 § 1. However, since the applicant's lawyer received the decision of the Supreme Court of Serbia on 7 March 2005 (see paragraph 11 above), the complaints at issue are out of time, within the meaning of Article 35 § 1 of the Convention, and must, therefore, be rejected in accordance with Article 35 §§ 1 and 4 thereof.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant claimed 50,000 euros (EUR) for the non-pecuniary damage suffered as a result of the violation of his right to a fair trial as well as his right to be presumed innocent until proven guilty, guaranteed by Article 6 §§ 1 and 2, respectively.

56. The Government deemed the above amount to be "manifestly unfounded" and declined to provide any additional comments.

57. In the circumstances of the case, the Court considers that the finding of a violation of Article 6 § 2 of the Convention alone constitutes adequate just satisfaction in respect of the compensation claimed under this head (see, *mutatis mutandis*, *Lavents v. Latvia*, no. 58442/00, 28 November 2002).

B. Costs

58. The applicant also claimed a total of EUR 662 for the costs of his legal representation before this Court.

59. The Government deemed the above amount to be also "manifestly unfounded" and declined to provide any additional comments.

60. The applicant provided the Court with an itemised and precise calculation of these costs, fully in accordance with the "Lawyer's Remuneration Tariff", as amended in 2004 and published in *OG SCG* no. 58/04 ("*Tarifa o nagradama i naknadama troškova za rad advokata*").

61. The Court therefore considers that these costs have been actually and necessarily incurred, and are reasonable as to quantum. Consequently, it awards the full claim of EUR 662.

C. Default interest

62. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 § 2 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 2 of the Convention;

3. *Holds* that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered;

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 662 (six hundred and sixty-two euros) for costs, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 19 September 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President