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

SECOND SECTION

CASE OF MIKULJANAC, MALIŠIĆ AND ŠAFAR v. SERBIA

(Application no. 41513/05)

JUDGMENT

STRASBOURG

9 October 2007

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 Mikuljanac, Mališić and Šafar v. Serbia,

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

Mrs F. TULKENS, *President*,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mr M. UGREKHELIDZE,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Mr D. POPOVIĆ, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 18 September 2007,

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

PROCEDURE

1. The case originated in an application (no. 41513/05) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Serbian nationals, Mr Miroslav Mikuljanac, Mrs Vesna Mališić and Mr Željko Šafar ("the applicants"), on 4 November 2005.

2. The applicants were represented by The Committee of Lawyers for Human Rights - Yucom, a non-governmental organisation with its seat in Beograd. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. On 28 August 2006 the Court decided to give notice of the application to the Government. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1963, 1958 and 1966, respectively, and live in Beograd.

5. On 23 May 2001 the applicants were dismissed from their work.

6. On 6 June 2001 they instituted civil proceedings in the Beograd Third Municipal Court against their former employer, seeking reinstatement and salary arrears.

7. Sometime after the respondent State's ratification of the Convention on 3 March 2004, the applicants' case was assigned to another judge.

8. The next hearing in the case was held on 26 October 2004, when the court decided to hear several witnesses.

9. The hearing scheduled for 23 December 2004 was adjourned by the judge. Subsequently, the case was yet again assigned to another judge and the next hearing was scheduled for 9 September 2005, but did not take place because the witnesses had not been duly summoned.

10. The next hearing, scheduled for 23 November 2005, was adjourned because the summoned witnesses failed to appear.

11. On 24 February 2006 the court held a hearing and heard the applicants and a witness. The applicants requested the court to obtain an additional expert opinion concerning the amount of their salary arrears. The court held two more hearings – on 31 March and 15 May 2006.

12. On 18 May 2006 the court ordered the applicants to advance the costs of the proposed expert opinion and to suggest an expert. The applicants did so on 1 June. At the next hearing held on 16 June 2006, the court ordered that the expert opinion be obtained. The appointed expert submitted the opinion on 5 October 2006.

13. The court held further hearings on 13 October and 15 November 2006. The respondent then filed a request for a transfer of jurisdiction, which was dismissed by the Supreme Court on 6 December 2006.

14. The court held further hearings on 2 and 16 February and on 16 March 2007. On the last mentioned date the court gave judgment, accepting the applicants' claim. The applicants appealed against the decision on costs and the proceedings are currently pending before the second-instance court.

II. RELEVANT DOMESTIC LAW

A. Relevant provisions of the Judges Act as well as the Obligations Act

15. The relevant provisions of this legislation are set out in the *V.A.M. v. Serbia* judgment (no. 39177/05, §§ 70-72, 13 March 2007).

B. Relevant provisions of the labour laws

1. *Labour Act 2001 (Zakon o radu; published in the Official Gazette of the Republic of Serbia - OG RS - nos. 70/01 and 73/01)*

16. Article 122 § 3 provided that all employment-related disputes were to be resolved by the courts within a period of 6 months from the date of institution of the proceedings.

2. *Labour Act 2005 (Zakon o radu; published in OG RS no. 24/05 and 61/05)*

17. This Act entered into force on 23 March 2005 and thereby repealed the Labour Act of 2001.

18. The text of Article 195 § 3 of the Labour Act of 2005 corresponds to the aforementioned Article 122 § 3 of the Labour Act of 2001.

C. The Court of Serbia and Montenegro and the succession of the State Union of Serbia and Montenegro

19. The relevant provisions concerning the Court of Serbia and Montenegro and the succession of the State Union of Serbia and Montenegro are set out in the *Matijašević v. Serbia* judgment (no. 23037/04, §§ 12, 13 and 16-25, 19 September 2006).

D. Criminal Code 1977 (Krivični zakon Republike Srbije; published OG SRS nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, 21/90 and OG RS nos. 16/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03 and 67/03)

20. Article 243 of this Code defines "judicial malfeasance" (*kršenje zakona od strane sudije*) as a separate criminal offence.

E. Relevant constitutional provisions

21. Article 25 of the Serbian Constitution (*Ustav Republike Srbije*), published in the Official Gazette of the Socialist Republic of Serbia (OG SRS - no. 1/90), provided as follows:

> "Everyone shall be entitled to compensation for any pecuniary and non-pecuniary damages suffered due to the unlawful or improper conduct of a State official, a State body or a public authority, in accordance with the law.
>
> Such damages shall be covered by the Republic of Serbia or the public authority [in question]."

22. This Constitution was repealed on 8 November 2006, which is when the "new" Constitution (published in OG RS no. 98/06) entered into force.

23. The substance of Article 35 § 2 of the new Constitution corresponds, in its relevant part, to the above-cited text of the aforementioned Article 25 of the previous Constitution.

24. Article 170 of the new Constitution provides that a constitutional complaint may be lodged against the acts of public entities violating human and minority rights and liberties guaranteed by the Constitution.

25. Section 9 of the Constitutional Act on the Implementation of the Constitution (OG RS 98/06) provides that the election of Constitutional Court judges shall be finalised before the end of the first National Assembly session.

THE LAW

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

26. The applicants complained that the length of the proceedings had been incompatible with the "reasonable time" requirement of Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

A. Admissibility

27. The Government submitted that the applicants had not exhausted all effective domestic remedies. In particular, they had failed to complain about the delay in question to the President of the competent court, the President of the directly higher court or to the Supreme Court's Supervisory Board (see paragraph 15 above). Further, the applicants had neither brought a separate civil lawsuit under Articles 199 and 200 of the Obligations Act and Article 25 of the Constitution (see paragraphs 15 and 21 above); nor had they filed a criminal complaint under Article 243 of the Criminal Code 1977 (see paragraph 20 above). Finally, they had not made use of the complaint procedure before the Court of Serbia and Montenegro (see paragraph 19 above); nor had they lodged a constitutional complaint under Article 170 of the new Serbian Constitution (see paragraph 24 above).

28. The applicants contested the effectiveness of these remedies.

29. As regards the possibility of lodging a constitutional complaint, it is observed that the new Serbian Constitution indeed envisaged the possibility of lodging an individual constitutional complaint against acts of public

entities violating the individual's human rights (see above paragraph 24). However, the Court notes that the said provision is of a general nature and requires further implementation – the election of judges and the establishment of the Constitutional Court, as well as the adoption of legislation regulating its structure and rules of procedure. Nevertheless, none of these conditions have to date been fulfilled; the respondent State has not elected judges, nor has it adopted the necessary legislation. In these circumstances, a constitutional complaint cannot be considered as having been available to the applicants or as being a remedy that needed to be exhausted in the circumstances of the present case.

30. In respect of the remainder of the remedies put forward by the Government, the Court has already held that they could not be deemed effective within the meaning of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *V.A.M. v. Serbia*, cited above, §§ 85-88 and 119, 13 March 2007, and *EVT Company v. Serbia*, no. 3102/05, §§ 39 and 41, 21 June 2007). It sees no reason to depart from those findings in the present case and concludes, therefore, that the Government's objections must be rejected.

31. The Court notes that this 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 grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

32. The Government acknowledged that the present case, being of a labour law nature, was of great importance for the applicants. However, they argued that the case was factually complex and that the applicants had contributed to its length because they had filed three claims within one civil action. Had each of the applicants filed their own claim separately, this would have shortened the length of the proceedings to a certain extent.

33. As regards the conduct of the competent authorities, the Government pointed to the significant backlog of cases which burdens the Serbian courts. They submitted that the courts were undergoing a special program to absorb that backlog, starting in 2006, but that it was not possible to resolve the issue in the short time since Serbia has been a party to the Convention.

34. The applicants disagreed. They submitted that, by filing their claims in one set of proceedings, given that they were based on the same legal grounds, they have contributed to efficiency and the lowering of the overall costs.

2. Period to be taken into account

35. The Court notes that the proceedings started on 6 June 2001 when the applicants filed their civil action. According to the information available in the case file, they were still pending on the date of adoption of the present judgment. Consequently, they have lasted more than six years and three months before two instances.

36. However, the period falling within the Court's jurisdiction began on 3 March 2004, when the Convention entered into force in respect of Serbia, and has not yet ended on the date of the adoption of the present judgment. It has thus lasted over three years and six months for two levels of jurisdiction.

37. Nevertheless, in order to determine the reasonableness of the length of time in question, regard may also be had to the state of the case on 3 March 2004 (see, among other authorities, *Styranowski v. Poland*, judgment of 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3376, § 46). By that date, the case had already been pending two years and nine months at first instance.

3. The Court's assessment

38. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

39. According to the Court's established case-law, a chronic backlog of cases is not a valid explanation for excessive delay (see *Probstmeier v. Germany*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1138, § 64). Moreover, Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time (see *Portington v. Greece,* judgment of 23 September 1998, *Reports* 1998-VI, p. 2633, § 33). This obligation is valid for all Contracting States, regardless of the date of their ratification of the Convention.

40. Further, the Court cannot accept the Government's argument that filing three identical claims in one action contributed to the complexity of the case. Had the applicants filed three separate actions concerning the same legal and factual background, the domestic courts, for reasons of the efficient administration of justice, would probably have joined them. Otherwise they would have been obliged to hear the same witnesses and obtain expert opinions three times. The Court therefore concludes that the applicants did not contribute to the length of the proceedings.

41. In contrast, it appears that the conduct of the domestic authorities caused a certain delay in the case. This transpires from the fact that, after the ratification of the Convention, the case was on two occasions re-assigned to different judges and that, consequently, for a period of almost a year the competent court held no hearings (from 23 October 2004 until 9 September 2005). In addition the subject matter of the litigation was of primary importance to the applicants and required that the proceedings be dealt with "expeditiously" (see *Guzicka v. Poland*, no. 55383/00, § 30, 13 July 2004). Indeed, this requirement is reinforced additionally in respect of States where domestic law provides that reinstatement cases must be resolved with particular urgency (see, *mutatis mutandis*, *Borgese v. Italy*, judgment of 26 February 1992, Series A no. 228-B, § 18; see also paragraphs 16-18 above).

42. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (see *Frydlender*, cited above).

43. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the case at hand. Having regard to its case-law on the subject and in particular the protracted duration of this employment claim before the first-instance court, the Court considers that in the present case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

There has accordingly been a breach of Article 6 § 1.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

44. The applicants further complained of the fact that in Serbia there was no court to which an application could be made to complain of the excessive length of proceedings. They relied on Article 13 of the Convention.

45. The Government contested that argument.

A. Admissibility

46. The Court notes that this complaint is linked to the one examined above and must, therefore, likewise be declared admissible.

B. Merits

47. The Court reiterates that Article 13 guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time (see *Kudła v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI). It notes that the objections and arguments put forward by the Government have been rejected in earlier

cases (see *V.A.M. v. Serbia*, no. 39177/05, § 155, 13 March 2007) and sees no reason to reach a different conclusion in the present case.

48. Accordingly, the Court considers that in the present case there has been a violation of Article 13 of the Convention on account of the lack of a remedy under domestic law whereby the applicants could have obtained a ruling upholding their right to have their case heard within a reasonable time, as set forth in Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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

50. The applicants each claimed 2,000 euros (EUR) in respect of non-pecuniary damage.

51. The Government contested this claim.

52. The Court considers that the applicants must have sustained some non-pecuniary damage. Ruling on an equitable basis, it awards them EUR 1,000 each under that head.

B. Costs and expenses

53. The applicants did not specify their claim in this respect. Accordingly, the Court makes no award under this head.

C. Default interest

54. The Court considers it appropriate that the default interest 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. *Declares* the application admissible;

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

3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *Holds*
(a) that the respondent State is to pay each 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) in respect of non-pecuniary damage, which sums are to be converted into the currency of the respondent State at the rate applicable at the date of settlement, and free of any taxes or charges 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;

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

Done in English, and notified in writing on 9 October 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

F. ELENS-PASSOS
Deputy Registrar

F. TULKENS
President