CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF SAMARDŽIĆ AND AD PLASTIKA v. SERBIA

(Application no. 28443/05)

JUDGMENT

STRASBOURG

17 July 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 Samardžić and AD Plastika 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 S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 26 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 28443/05) 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 a Serbian national, Mr Ljubomir Samardžić, and a company incorporated under Serbian law, AD Plastika ("the applicants"), on 27 July 2005.

2. The applicants were represented by Mr P. Savić, a lawyer practising 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 first applicant was born in 1975 and lives in Beograd. The second applicant is a joint stock company with its seat in Beograd.

5. On 11 October 1991 the second applicant directly instituted enforcement proceedings in the Novi Sad Commercial Court (*Trgovinski sud u Novom Sadu*) against a certain company V.

6. On 30 October 1991 the court issued an enforcement order. Since V. filed an objection, the case was transformed into civil proceedings.

7. The second applicant amended its claim on four occasions: on 4 May and 19 November 1993, 9 February and 12 October 1994.

8. On 15 February 1995 the court gave a judgment in the second applicant's favour, accepting its claim in part. On 6 October 1995 the court gave a supplementary judgment (*dopunska presuda*) in the case.

9. On 30 May 1996 the Beograd High Commercial Court (*Viši Trgovinski sud u Beogradu*) quashed the first-instance judgment and remitted the case because of factual shortcomings.

10. By this time, four different judges had been assigned to hear the second applicant's case, the last change of judges having occurred on 23 January 2003.

11. On 11 November 2004 the court appointed an expert, ordering him to prepare his opinion within 30 days. This expert submitted his opinion on 14 October 2005.

12. The court subsequently held hearings on 30 November 2005, 25 January and 13 February 2006. The hearing scheduled for 20 December 2005 was adjourned because the second applicant failed to appear.

13. On 13 February 2006 the court closed the main hearing and gave a judgment dismissing the second applicant's claim.

14. On appeal, on 3 November 2006 the Beograd High Commercial Court again quashed the first-instance judgment and remitted the case.

15. In the resumed proceedings, on 8 December 2006 the Novi Sad Commercial Court stayed the proceedings because, meanwhile, on 22 March 2006 the Zrenjanin Commercial Court (*Trgovinski sud u Zrenjaninu*) had opened bankruptcy proceedings against the second applicant.

16. The proceedings resumed on 16 February 2007, when the Novi Sad Commercial Court declared that it no longer had territorial jurisdiction in the matter and sent the case file to the Zrenjanin Commercial Court.

II. RELEVANT DOMESTIC LAW

A. Civil Procedure Act (Zakon o parničnom postupku; published in the Official Gazette of the Republic of Serbia - OG RS - no. 125/04)

17. Article 10 provides that "[t]he parties have the right to have the ruling of the court in respect of their claims and proposals within a reasonable time" and, further, that "[i]t is incumbent upon the court to conduct the proceedings without undue delay ..."

B. Criminal Code 1977 (Krivični zakon Republike Srbije; published in OG RS nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, 21/90, 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)

18. Articles 242, 243 and 245 of this Code incriminate "abuse of office" (*zloupotreba službenog položaja*), "judicial malfeasance" (*kršenje zakona od strane sudije*) and "official malfeasance" (*nesavestan rad u službi*), respectively.

C. Criminal Code 2005 (Krivični zakonik; published in OG RS nos. 85/05, 88/05 and 107/05)

19. The substance of Articles 359, 360 and 361 corresponds to that of the provisions of the Criminal Code 1977 mentioned above.

20. This Code entered into force on 1 January 2006, thereby repealing the Criminal Code 1977.

D. Obligations Act (Zakon o obligacionim odnosima; published in OG SFRY nos. 29/78, 39/85, 45/89, 57/89 and OG FRY no. 31/93)

21. Article 172 § 1 provides that a legal entity ("*pravno lice*"), which includes the State, is liable for any damage caused by one of "its bodies" ("*njegov organ*") to a "third person".

22. Under Articles 199 and 200 of the Obligations Act, *inter alia*, anyone who has suffered fear, physical pain or 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.

THE LAW

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

23. 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 insofar as relevant as follows:

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

24. The Government contested that argument.

25. The Court notes that the proceedings started on 11 October 1991, when the second applicant lodged its enforcement request. 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 fifteen years and nine months.

26. 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 apparently has not yet ended. It has thus lasted over three years and four months for two levels of jurisdiction.

27. 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 twelve and a half years and was still pending at first instance after a remittal.

A. Admissibility

1. Compatibility ratione personae

28. The Government first invited the Court to declare the case inadmissible *ratione personae* in respect of the first applicant. They submitted that, since it was the second applicant conducting the domestic proceedings, the first applicant could not be considered a victim of the alleged violation.

29. The applicants made no comments in this respect.

30. The Court recalls that disregarding a company's legal personality is justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for a company to apply to the Court through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators (see *Agrotexim and Others v. Greece*, judgment of 24 October 1995, Series A no. 330–A, pp. 25-26, §§ 66 and 71).

31. In the present case, the company itself applied to the Court through its manager, the first applicant.

32. Consequently, the first applicant cannot be regarded as being personally entitled to apply to the Court. It follows that this aspect of the case is indeed incompatible *ratione personae* with the provisions of the

Convention, within the meaning of Article 35 § 3, and must be rejected in accordance with Article 35 § 4.

2. Exhaustion of domestic remedies

33. The Government next submitted that the applicants had not exhausted all available, effective domestic remedies. In particular, they had failed to lodge a criminal complaint under Articles 242, 243 and 245 of the Criminal Code 1977 or, under the newly enacted legislation, a complaint under Articles 359, 360 and 361 of the Criminal Code 2004. Further, the Government maintained that the applicants had failed to bring a separate civil lawsuit under Articles 154, 199 and 200 of the Obligations Act.

34. The applicants disagreed, contesting the effectiveness of such remedies.

35. The Court recalls that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court. However, the only remedies to be exhausted are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11–12, § 27, and *Dalia v. France*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, pp. 87-88, § 38). Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Dankevich v. Ukraine,* no. 40679/98, § 107, 29 April 2003).

36. The Court reiterates that the decisive question in assessing the effectiveness of a remedy concerning a complaint about procedural delay is whether or not there is a possibility for the applicant to be provided with direct and speedy redress, rather than an indirect protection of the rights guaranteed under Article 6 (see, *mutatis mutandis*, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 195, ECHR 2006, and *Sürmeli v. Germany* [GC], no. 75529/01, § 101, 8 June 2006). In particular, a remedy of this sort shall be "effective" if it can be used either to expedite the proceedings at issue or to provide the litigant with adequate redress for delays which have already occurred (see, *mutatis mutandis*, *Kudła v. Poland* [GC], no. 30210/96, §§ 157-159, ECHR 2000-XI, *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII, and *Sürmeli v. Germany* [GC], cited above, § 99).

37. The Court considers that a separate criminal complaint or a separate claim for damages caused by procedural delay would not have been effective remedies in the present case. Even assuming that the applicant

company could have obtained compensation for the past delay, the Government have failed to show that such proceedings would have been speedier than any other "ordinary" civil or criminal case which could have lasted for years and gone through several levels of jurisdiction (see, *mutatis mutandis*, *Merit v. Ukraine*, no. 66561/01, § 59, 30 March 2004, and *Scordino v. Italy (no. 1)*, cited above, § 195). Moreover, for the same reason, the said claim was clearly not capable of expediting the proceedings at issue.

38. The Government's arguments in this respect must therefore be rejected.

3. Conclusion

39. The Court notes that the second applicant's length 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

40. 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).

41. 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).

42. The Government submitted that the case raised a number of complex factual issues requiring expert opinions. They further submitted that the second applicant contributed to the length of the proceedings by amending its claim on several occasions and by failing to appear at certain hearings, notably the one scheduled for 20 December 2005 (see paragraphs 7 and 12). Further delays occurred due to several changes in the judges appointed to hear the case (see paragraph 10). Finally, the Government pointed out that the second applicant had gone bankrupt, which further prolonged the proceedings.

43. The applicant company disagreed with the Government.

44. As regards the Government's arguments that certain delays in the proceedings occurred due to the second applicant's frequent amendments to its claim and the repeated change of judge, the Court observes that these facts took place prior to Serbia's ratification of the Convention (see paragraphs 7 and 10 above). Moreover, the subsequent bankruptcy proceedings opened against the second applicant appear not to have prolonged the proceedings for more than two months (from 8 December 2006, when the court stayed the proceedings, until 16 February 2007, when the proceedings resumed). The only procedural fault attributable to the second applicant would be its failure to attend the hearing scheduled for 20 December 2005. However, the Court attaches no particular importance to that fact, as the next hearing took place shortly afterwards.

45. The Court observes that, following the ratification of the Convention, the competent domestic courts gave two decisions in the present case – a first-instance judgment on the merits and a second-instance decision remitting the case. Consequently, the proceedings are now again pending before the first-instance court. In this connection, the Court recalls that the remittal of a case for re-examination is usually ordered as a result of errors committed by lower instances and may disclose a deficiency in the procedural system (see, *mutatis mutandis*, *Wierciszewska v. Poland*, no. 41431/98, § 46, 25 November 2003).

46. Furthermore, the Government have provided no explanation for the prolonged period of inactivity of the first-instance court, amounting to more than one and a half years, between the entry into force of the Convention on 3 March 2004 and the submission of the expert opinion on 14 October 2005.

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

48. 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 present case. Having regard to its case-law on the subject, the period during which the case was pending prior to and in particular after the ratification of the Convention, the Court considers that the length of the proceedings has been excessive and has failed to meet the "reasonable time" requirement.

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

II. 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 second applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

51. The Government contested this claim.

52. The Court considers that the second applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards award the company EUR 1,000 under this head.

B. Costs and expenses

53. The applicant company also claimed EUR 1,200 for the costs and expenses incurred before the Court.

54. The Government contested this claim.

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

C. Default interest

56. 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 second applicant's length complaint admissible and the remainder of the application inadmissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant company, 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 and EUR 1,000 (one thousand euros) for costs and expenses, which sums are to be converted into the national currency of the respondent State at the rate applicable on 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;

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

Done in English, and notified in writing on 17 July 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

F. TULKENS
President