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

SECOND SECTION

CASE OF TOMIĆ v. SERBIA

(Application no. 25959/06)

JUDGMENT

STRASBOURG

26 June 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 Tomić v. Serbia,

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

Mrs F. TULKENS, *President,*
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Ms D. JOČIENĖ,
Mr D. POPOVIĆ, *judges,*

and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 5 June 2007,

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

PROCEDURE

1. The case originated in an application (no. 25959/06) against the State Union of Serbia and Montenegro, succeeded by Serbia on 3 June 2006 (see paragraph 72 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, Ms Slađana Tomić ("the applicant"), on 24 May 2006.

2. 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. The President of the Chamber gave priority to the application in accordance with Rule 41 of the Rules of Court.

4. On 31 August 2006 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was also decided that the merits of the application would be examined together with its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1973 and lives in Smederevo.

A. First set of custody proceedings

6. In 1998 the applicant married P.V. and later that year their daughter A.V. was born.

7. Initially, the applicant lived with P.V.'s parents in Krupanj while P.V. remained in Belgrade in order to finish his studies.

8. In 2001 the applicant and P.V. started having marital problems, apparently as a result of this separation.

9. On 24 February 2001 the applicant and A.V. moved to her parents' house in Smederevo, where they stayed for a period of four months and wherefrom the applicant filed a claim with the Municipal Court in Krupanj (*Opštinski sud u Krupnju*), seeking the dissolution of her marriage, custody of A.V. and child maintenance.

10. On 19 July 2001 the Municipal Court in Krupanj ("the Municipal Court") issued a partial judgment, dissolving the marriage. The proceedings, thereafter, continued in respect of the child custody/maintenance sought by the applicant.

11. On 10 April 2002 the Mental Health Institute (*Institut za mentalno zdravlje*) recommended that custody be granted to the applicant and held that P.V. was "incapable of adequately taking into account" the needs of A.V., including and especially her need for communication with the applicant.

12. On 25 February 2004 the Municipal Court ruled in favour of the applicant. In so doing, *inter alia*, it granted her custody of A.V. and ordered P.V. to pay 10% of his monthly salary as child maintenance.

13. On 17 December 2004 the District Court in Šabac (*Okružni sud u Šapcu*) upheld the ruling of the Municipal Court. P.V. was apparently served with this judgment some two months later, which is when the Municipal Court's judgment became enforceable.

14. On 9 March 2006 the Supreme Court of Serbia (*Vrhovni sud Srbije*) confirmed the decision of the District Court in Šabac ("the District Court"), at third instance.

B. The ensuing enforcement proceedings

15. Given that, as of 29 June 2001, A.V. was staying with P.V. and his parents in Krupanj (see paragraph 39 below), on 11 March 2005 the applicant requested enforcement of the final judgment rendered in her favour.

16. On 18 March 2005 the Municipal Court accepted this request. It ordered P.V. to surrender A.V. to the applicant within three days, warned him that he would otherwise be fined, and stated that, should the fine fail to bring about compliance, A.V. would be taken forcibly, in co-operation with the local Social Care Centre (*Centar za socijalni rad*).

17. On 11 April 2005 the District Court upheld this decision.

18. On 28 April 2005 the Municipal Court scheduled a hearing for 25 May 2005, on which occasion P.V. was supposed to surrender A.V. to the applicant. This hearing, however, was never held because P.V. informed the Municipal Court that he was unable to attend and the applicant thereafter apparently decided not to appear.

19. The next hearing was held on 8 June 2005. Both the applicant and P.V. attended, as did a psychologist from the Social Care Centre. P.V. again failed to surrender A.V. to the applicant. The psychologist stated that A.V. should not be removed forcibly but should instead be gradually prepared for the custody transfer. On the same occasion, P.V. apparently agreed to facilitate the applicant's contact with A.V. immediately following the hearing. This meeting between the applicant and A.V., however, never materialised, which is why the Municipal Court fined P.V. in the amount of 20,000 Dinars ("RSD"), at the time equivalent to approximately 242 euros ("EUR"). On 20 June 2005 this fine was upheld by the District Court on appeal.

20. On 12 August 2005 the Municipal Court adjourned the hearing in view of the fact that P.V. had failed to appear in person. The applicant, however, had sent a written explanation in advance, stating that she had informally learned that both P.V. and A.V. were out of town and would not attend the hearing. The applicant stated that she could not afford to travel from Smederevo merely in order to be present at a hearing which was bound to be adjourned. On the same date the Municipal Court fined P.V. in the amount of RSD 50,000, at the time equivalent to approximately EUR 594. On 19 September 2005 this fine was upheld by the District Court on appeal.

21. On 7 December 2005 the Municipal Court ordered P.V.'s employer, a local primary school, to deduct the said RSD 50,000 from his salary and have it transferred to the Municipal Court's account.

22. Both the applicant and P.V. attended the next hearing before the Municipal Court held on 11 January 2006. P.V. stated, however, that he did not bring A.V. because she had refused to come of her own free will and he did not want to force her. The enforcement judge thereafter, accompanied by the parties and several police officers, went to P.V.'s home but found the house vacant. On the same date the Municipal Court therefore again fined P.V. in the amount of RSD 60,000, at the time equivalent to approximately EUR 689.

23. The next hearing before the Municipal Court scheduled for 2 February 2006 was adjourned. P.V. attended but did not bring A.V. and the Director of the Social Care Centre informed the court that no psychologist was available.

24. On 9 March 2006 the Municipal Court held another hearing. It was attended by both the applicant and P.V., as well as by two psychologists, but A.V. was again not present. The psychologists agreed that A.V. should, if at

all possible, be gradually prepared for the custody transfer, but had also stated that continued uncertainty was not in her best interests and that a forcible transfer of custody could thus ultimately be unavoidable. Finally, the Municipal Court decided that P.V. should facilitate the applicant's access to A.V. and that, should he fail to do so, on 17 March 2006 A.V. would be taken forcibly.

25. On 17 March 2006 P.V. did not appear at the hearing scheduled before the Municipal Court, but the applicant, the police and a child psychologist were present. On the same date a forcible transfer of custody was attempted but, again, P.V.'s house was found to be vacant. The next hearing was scheduled for 14 April 2006.

26. On 12 April 2006, however, P.V. filed a submission with the Municipal Court, seeking the postponement of the scheduled enforcement. He pointed out that A.V. was a first grade student and that it would therefore be better to wait until the academic year was over.

27. On 13 April 2006 the applicant filed a submission with the Municipal Court, stating that she was informed by the judge that the enforcement scheduled for 14 April 2006 could not take place in view of the fact that the presence of a psychologist could not be secured. The hearing scheduled for 14 April 2006 was thus adjourned.

28. On 26 May 2006 the Municipal Court attempted to carry out the transfer of custody, in the presence of the applicant, the police, as well as a child psychologist, but was unable to do so given that A.V. could not be located at her primary school and was later found to be "at the doctor's".

29. On 14 June 2006 the Municipal Court again attempted to carry out the forcible transfer of custody. The applicant, several police officers and a child psychologist were present. Ultimately, the enforcement judge ordered that P.V.'s house be broken into. Once this was done, P.V. was found to be inside the house but A.V. was not there. On the same occasion P.V. stated that he did not want to cooperate with the Municipal Court or, indeed, give any information as to A.V.'s whereabouts.

30. On 20 June 2006 P.V. requested that the enforcement proceedings be postponed in view of an interim measure issued in his favour within a separate set of proceedings (see paragraph 44 below).

31. On 1 September 2006 the Municipal Court's enforcement judge in charge of the applicant's case withdrew from the proceedings, stating that he did not meet the recently introduced legal requirements in respect of judges dealing with family matters (see paragraph 61 below). Since the Municipal Court in Krupanj had no other suitable judge, on 13 October 2006 the applicant's case was forwarded to the Municipal Court in Loznica (*Opštinski sud u Loznici*).

32. On 31 October 2006 the said court rejected P.V.'s request of 20 June 2006.

33. The next hearing was scheduled for 24 January 2007.

34. On 18 January 2007 the applicant apparently suggested that this hearing be held in her absence given that she was six months pregnant and specifically advised not to travel. She urged the Municipal Court, however, to arrange that A.V. be transferred to her custody at the premises of the Social Care Centre based in Smederevo, her hometown. At the same time, P.V. apparently pleaded that the enforcement be postponed in view of the fact that the Municipal Court in Loznica had, within a separate set of civil proceedings, reversed the custody judgment rendered in the applicant's favour (see paragraph 48 below).

35. It would appear that the hearing scheduled for 24 January 2007 was thus adjourned.

36. On 2 February 2007 the Municipal Court in Loznica accepted P.V.'s request and formally postponed the enforcement proceedings until there was a final decision in the separate civil suit concerning A.V.'s custody. The court relied on Article 64 § 1 of the Enforcement Procedure Act (see paragraph 56 below).

C. Additional facts as regards the enforcement proceedings

37. The applicant complained about the delay in the enforcement proceedings to: i) the President of the Municipal Court on 29 November 2005, 20 February 2006 and 3 May 2006; ii) the President of the District Court on 10 June 2005, 20 February 2006 and 3 May 2006; and iii) the Ministry of Justice on 20 February 2006.

38. On 8 December 2005 the President of the Municipal Court informed the applicant that she was fully aware of the urgency of the matter in question, but explained that the court only had three active judges which is why the delay was objectively justified.

D. The applicant's contact with A.V.

39. On 29 June 2001, following a meeting at the Social Care Centre in Smederevo, P.V. took A.V. to his parents' house in Krupanj, which is where she has been living ever since.

40. On 25 October 2001 the same Social Care Centre stated that P.V. had done so forcibly, disregarding the best interests of A.V.

41. As of 29 June 2001, the applicant was only able to see A.V. at the premises of the Social Care Centre in Krupanj, and even there for very short periods of time.

42. Since March 2005, however, following the institution of the enforcement proceedings, the applicant has been deprived of all access to A.V.

E. The second set of custody proceedings

43. On 12 April 2006 P.V. filed a separate civil suit, seeking the reversal of the final judgment of 25 February 2004 (see paragraphs 12-13 above).

44. On 14 June 2006 the Municipal Court in Loznica issued an interim measure, ruling that A.V. could stay with P.V. until the end of the academic year.

45. On 4 July 2006 this decision was quashed by the District Court on appeal.

46. On 14 June 2006 the Social Care Centre in Krupanj, P.V.'s hometown, proposed that custody of A.V. be given to P.V.

47. On 18 October 2006 the Social Care Centre based in Smederevo, the applicant's hometown, proposed that the applicant retain her custody of A.V.

48. On 13 December 2006 the Municipal Court in Loznica ruled in favour of P.V. It granted him full custody of A.V. and ordered the applicant to pay 25 % of her monthly salary as child maintenance, *pro futuro*, plus the accrued maintenance from 12 April 2006 to 12 December 2006. Finally, the applicant was ordered to pay the costs and granted limited access rights: i) from 13 December 2006 to 13 March 2007, two hours every Friday, at the premises of the Social Care Centre based in Krupanj; ii) from 14 March 2007 onwards, one weekend monthly as well as every other birthday plus fifteen days of summer and seven days of winter vacation annually.

49. In its reasoning the Municipal Court explained that it accepted the recommendation of the Social Care Centre based in Krupanj which had stated, *inter alia*, that A.V. was properly cared for by P.V., that she was fully adapted to her current family situation and that any transfer of custody to the applicant would thus be traumatic. The recommendation of the Social Care Centre based in Smederevo, however, was dismissed, *inter alia*, because it was found to be contradictory and the centre had failed to establish direct contact with A.V. The court further noted that A.V., when heard in person, had stated that she wanted to stay with P.V. to whom she was deeply attached and, also, that the applicant had, with the passage of time, become estranged from her. Finally, the Municipal Court noted that the applicant had remarried and lost interest in A.V. and that she had failed effectively to take part in the proceedings.

50. On 14 March 2007 the District Court upheld the judgment of the Municipal Court in Loznica concerning the custody of A.V. In that respect, it thereby became final. At the same time, however, the District Court quashed the impugned judgment as regards the monthly child maintenance, the applicant's access rights, as well as the costs awarded, and ordered that those issues be re-examined at first instance.

F. Criminal complaints filed against P.V.

51. In 2001 the applicant filed a criminal complaint against P.V., alleging that he had illegally taken exclusive custody of A.V. This complaint, however, appears to have been rejected by the Municipal Public Prosecutor's Office (*Opštinsko javno tužilastvo*) in Krupanj at some point thereafter, since no final custody judgment was rendered by the courts.

52. On 24 February 2005 the applicant filed another criminal complaint, this time with the police department in Smederevo, stating that she had been threatened by P.V. in connection with her attempts to have her lawful custody rights enforced.

53. Finally, following the adoption of the custody judgment in her favour, in 2006 the applicant filed yet another criminal complaint against P.V., this time under Article 191 § 1 of the Criminal Code 2005 (see paragraph 69 below). It would appear, however, that this complaint was also subsequently rejected by the Municipal Public Prosecutor's Office in Krupanj.

G. Other criminal complaints

54. On 17 March 2006 the applicant filed a criminal complaint against the chief accountant of the primary school in which P.V. was employed, alleging that he had refused to implement the Municipal Court's order of 7 December 2005 (see paragraph 21 above).

II. RELEVANT DOMESTIC LAW

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

55. Article 5 § 1 provides that all enforcement proceedings are to be conducted urgently.

56. Article 64 § 1 states, *inter alia*, that the court shall, at the request of a respondent, postpone an ongoing enforcement case if the enforcement title at issue, for example a final court judgment, has, within a separate set of proceedings, been set aside by a decision rendered at first instance and the respondent proves that the continuation of the enforcement, under such circumstances, would probably result in irreparable or particularly serious harm.

57. Article 68 § 1 provides, *inter alia*, that an ongoing enforcement case shall be terminated by the court *ex officio* if the enforcement title in question

has in the meantime been set aside by a final decision rendered within a separate set of proceedings.

58. Article 224, placing special emphasis on the best interests of the child, provides that there shall be an initial period of three days for voluntary compliance with a child custody order. Beyond that, however, fines shall be imposed and, ultimately, if necessary, the child taken forcibly by the judge, in co-operation with a psychologist employed by a school or attached to a specialised child care agency.

B. Marriage and Family Relations Act (Zakon o braku i porodičnim odnosima; published in the Official Gazette of the Socialist Republic of Serbia - OG SRS - nos. 22/80, 11/88 and OG RS nos. 22/93, 25/93, 35/94, 46/95 and 29/01)

59. Article 391 provided, *inter alia*, that all child custody enforcement proceedings had to be conducted urgently.

C. Family Act (Porodični zakon; published in OG RS no. 18/05)

60. Article 65 §§ 3 and 4 states that the opinion of a child shall be given due consideration in respect of all matters and within proceedings which concern his or her rights, whilst taking into account the child's age and maturity. Further, a child who is ten years old may freely and directly express an opinion whenever his or her rights are at stake.

61. Under Article 203 § 2, judges dealing with family matters must be persons with a specialised knowledge of children's rights and issues.

62. This Act entered into force on 1 July 2005 and thereby repealed the Marriage and Family Relations Act referred to above.

D. Relevant constitutional provisions

63. Article 25 of the Serbian Constitution (*Ustav Republike Srbije*) published in 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]."

64. This Constitution was repealed on 10 November 2006, which is when the new Constitution, published in OG RS no. 98/06, entered into force.

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

E. 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)

66. 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".

67. 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.

F. 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)

68. Articles 242 and 245 of this Code incriminate "abuse of office" (*zloupotreba službenog položaja*) and "official malfeasance" (*nesavestan rad u službi*), respectively.

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

69. Under Article 191 anyone who, *inter alia*, obstructs the enforcement of a child custody decision shall be fined or sentenced to a prison term not exceeding two years. Should the perpetrator, however, subsequently hand over the child in question or otherwise comply with the custody decision at issue, the court may decide not to fine him/her or impose a prison sentence. The court may also render a suspended prison sentence, in which case the perpetrator may be ordered to serve the time suspended should he/she fail to surrender the minor at issue within the time specified.

70. Article 340 incriminates "non-enforcement of a court decision".

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

H. Relevant provisions concerning the Court of Serbia and Montenegro and the succession of the State Union of Serbia and Montenegro

72. 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).

III. RESERVATION UNDER ARTICLE 13 OF THE CONVENTION

73. In a reservation contained in its instrument of ratification of the Convention and its Protocols, deposited with the Council of Europe on 3 March 2004, the Government 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)".

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

75. Under Article 6 of the Convention, the applicant complained about the non-enforcement of the final custody judgment of 25 February 2004.

Article 6 § 1 of the Convention, in its relevant part, provides:

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

A. Admissibility

1. Arguments of the parties

76. The Government submitted that the applicant had not exhausted all available and effective domestic remedies. In particular, she had failed to bring a separate lawsuit under Articles 172 and 200 of the Obligations Act

or Article 25 of the Constitution (see paragraphs 63-67 above). Indeed, the Government provided some domestic jurisprudence in this respect, arguing that the recovery of both pecuniary and non-pecuniary damages sustained as a result of various "procedural irregularities" including delay was now possible before the courts in Serbia. The Government added that the applicant had not lodged a criminal complaint under Articles 242 and 245 of the Criminal Code 1977 or a complaint under Article 340 of the Criminal Code 2004 (see paragraphs 68 and 70 above). Finally, they noted that the criminal complaint filed by the applicant under Article 191 of the Criminal Code 2004 was not lodged promptly (see paragraphs 69 and 53 above, respectively).

77. The applicant maintained that she had fully complied with the exhaustion requirement contained in Article 35 § 1 of the Convention, having done everything in her power to bring about the enforcement of the final custody judgment rendered in her favour. The applicant added that she had filed several separate criminal complaints, but to no avail, and had repeatedly addressed her concerns to various State bodies (see paragraphs 51-54 and 37-38 above, respectively).

2. Relevant principles

78. The Court recalls that, according to its established case-law, the purpose of the domestic remedies rule contained 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).

79. The Court notes that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports* 1996-IV, p. 1211, § 69).

80. Finally, the Court reiterates that the decisive question in assessing the effectiveness of a remedy concerning procedural delay is whether or not there is a possibility for the applicant to be provided with direct and speedy

redress, rather than the 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 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).

3. The Court's assessment

81. The Court notes that a separate claim for damages (see paragraphs 63-67 above) would have been ineffective within the meaning of Article 35 § 1 of the Convention. In particular, even assuming that the applicant 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 suit which could have lasted for years and gone through several instances (see, *mutatis mutandis*, *Merit v. Ukraine*, no. 66561/01, § 59, 30 March 2004, and *Scordino v. Italy (no. 1)*, cited above, § 195). A claim of this sort was thus also clearly incapable of expediting the enforcement at issue.

82. The Court further considers that the criminal complaint (see paragraphs 51-54 above) was just as ineffective since it was dealt with no faster than any other criminal case. The Government certainly offered no evidence to the contrary.

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

B. Merits

1. Arguments of the parties

84. The Government noted that the respondent State had ratified the Convention on 3 March 2004, that the enforcement proceedings complained of had been pending from 18 March 2005 until 14 March 2007, and that the domestic courts, during that time, had done everything in order to enforce the final judgment rendered in the applicant's favour. They were, in particular, in constant contact with the applicant and fully responsive to her

numerous requests. The case at issue, however, was very complex and sensitive, involving the vital interests of a minor child. Further, the applicant had failed to appear at several hearings and had also filed the enforcement request some three months after the Municipal Court's judgment had already become enforceable. Finally, the Government argued that the applicant did not invest sufficient effort in order to establish contact with A.V. throughout the relevant period.

85. The applicant stated that the judgment of the Municipal Court had become enforceable in February 2005 and that she had lodged her enforcement request immediately thereafter. She admitted that the enforcement court was not totally inactive but noted that it ultimately failed to enforce the judgment in question. The only hearings not attended by the applicant were those in respect of which the applicant already knew that they would be adjourned for one reason or another. The best interests of A.V. also required that she be reunited with the applicant as soon as possible, which is why the applicant was even ready to accept various kinds of gradual transfer of custody. In any event, the enforcement court did not schedule hearings with adequate frequency and was, on several occasions, unable to find a psychologist, which only added to the delay at issue. Finally, the applicant argued that she did everything in her power to expedite the enforcement and had consistently tried to establish contact with her daughter.

2. Relevant principles

86. The Court recalls its settled case-law to the effect that Article 6, *inter alia*, protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. Accordingly, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed (see, among other authorities, *Hornsby v. Greece*, judgment of 19 March 1997, *Reports* 1997-II, pp. 510-11, § 40, *Burdov v. Russia*, no. 59498/00, § 34, ECHR 2002-III, and *Jasiūnienė v. Lithuania*, no. 41510/98, § 27, 6 March 2003).

87. Further, the Court notes that, irrespective of whether an enforcement is to be carried out against a private or a State actor, it is up to the State to take all necessary steps to execute a final court judgment as well as to, in so doing, ensure effective participation of its entire apparatus, failing which it will fall short of the requirements contained in Article 6 § 1 (see, *mutatis mutandis*, in the child custody context, *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 174-189, ECHR 2004-V).

3. The Court's assessment

88. The Court observes that the final custody judgment of 25 February 2004 remained unenforced from 18 March 2005 until

14 March 2007, when it ceased having a valid enforcement title (see paragraphs 15-16, 48-50 and 57 above). During those two years, the Municipal Court imposed fines and attempted to make use of coercive measures on several separate occasions. Ultimately, however, the transfer of custody never took place.

89. The Court further observes that the applicant pursued with much diligence the enforcement proceedings while P.V. had made it abundantly clear that he had no intention of co-operating with the authorities or surrendering A.V. to the applicant (see paragraphs 15-37 and 29 above, respectively). Moreover, the applicant could not have been expected to travel from her hometown, Smederevo, to Krupanj, some 230 kilometres away, just to attend several hearings which, in any event, could not have been held for reasons unrelated to her own conduct or, indeed, to travel contrary to medical advice (see paragraphs 18, 20, 27 and 34 above).

90. Finally, the Court notes that no enforcement was attempted from 21 June 2005 to 11 August 2005, 20 September 2005 to 6 December 2005 and 15 June 2006 to 1 February 2007, and that on 2 February 2007 the enforcement proceedings were formally postponed until 14 March 2007 when the applicant lost her custody of A.V. (see paragraphs 19-21, 29-36, 48-50 and 57 above).

91. In view of the above and notwithstanding the sensitivity of the impugned proceedings, the Court considers that the Serbian authorities did not take sufficient steps in order to execute the final judgment of 25 February 2004. There has consequently been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

92. The applicant further complained that, as a result of the non-enforcement of the final custody judgment adopted in her favour, she had been denied all access to and contact with her child for the past two years.

The Court considers that this complaint falls to be examined under Article 8 of the Convention, which, insofar as relevant, reads:

> "1. Everyone has the right to respect for his [or her] private and family life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

93. The Government and the applicant both relied on the arguments already summarised at paragraphs 76 and 77 above.

94. Having considered them, the Court comes to the same conclusion as described at paragraphs 81-83 above.

95. The Court further notes that the applicant's complaint under Article 8 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

96. The Government and the applicant both relied on the arguments already outlined at paragraphs 84 and 85 above.

97. The Government further acknowledged that the applicant's family life was indeed affected by the duration of the enforcement proceedings at issue but referred to this Court's jurisprudence (see paragraphs 99-102 below) and concluded that the domestic authorities had done everything they could to enforce the custody judgment rendered in the applicant's favour.

98. The applicant stated that there was no point in having a final court judgment if the respondent State was unable or unwilling to have this judgment enforced. It was not therefore the State's alleged effort aimed at securing enforcement that should be decisive but rather its ultimate failure to do so.

2. Relevant principles

99. The Court notes, in the first place, that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 (see, among other authorities, *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

100. Secondly, a State's positive obligation under Article 8 includes a right for parents to measures that will enable them to be reunited with their children. However, the national authorities' obligation to take such measures is not absolute, since the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and may require preparatory measures. The nature and extent of such measures shall depend on the circumstances of each case, but the understanding and co-operation of all those concerned are important ingredients. Where contact with the parent might appear to threaten the child's best interests, it is for the national authorities to strike a fair balance (see *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299, p. 22, § 58; and *Sylvester*, cited above § 58).

101. Thirdly, the Court recalls that effective respect for family life requires that future relations between parent and child not be determined by the mere passage of time (see, *mutatis mutandis, Sylvester v. Austria,* nos. 36812/97 and 40104/98, § 69, 24 April 2003, and *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, p. 29, § 65).

102. Finally, in cases concerning the enforcement of decisions in the realm of family law, the Court has repeatedly found that what is decisive is whether the national authorities have taken all necessary steps to facilitate execution as can reasonably be demanded in the special circumstances of each case (see *Hokkanen*, cited above, p. 22, § 58, and *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 96, ECHR 2000-I).

3. The Court's assessment

103. In view of the above-cited jurisprudence, the specific facts of the present case and the parties' own submissions already considered under Article 6 (see paragraphs 84 and 85 above), the Court finds that the Serbian authorities have failed to do everything in their power that could reasonably have been expected of them in order to facilitate the reunion between the applicant and her daughter (see paragraphs 88-91 above).

104. In particular, the forcible transfer of custody, though unavoidable (see *Ignaccolo-Zenide*, cited above, § 106) and attempted on several occasions, was never brought to a successful conclusion. Further, the legitimate interest of the applicant to develop a bond with her child as well as the latter's long-term interest to the same effect were not duly considered by the national authorities (see *Görgülü v. Germany*, no. 74969/01, § 46, 26 February 2004). Finally, P.V. was *de facto* allowed to use the judicial system to his advantage until the factual situation was sufficiently altered by the passage of time so as to allow for the reversal of the applicant's custody rights through a separate set of judicial proceedings (see paragraphs 48-50 above; see also *mutatis mutandis*, *Pini and Others v. Romania*, cited above, § 188, concerning the adverse consequences of non-enforcement in the realm of family relations).

105. The Court concludes therefore that, notwithstanding the respondent State's margin of appreciation, the non-enforcement of the applicant's custody rights, as recognised in the Municipal Court's judgment of 25 February 2004, did amount to a separate breach of her right to respect for her family life as guaranteed by Article 8 (see, *mutatis mutandis*, *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, § 91, and *Pini and Others v. Romania*, cited above).

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

106. Finally, the applicant submitted that she had no effective domestic remedy at her disposal in order to expedite the enforcement proceedings at issue.

The Court considers that this complaint falls to be examined under Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

107. The Court notes that this complaint raises issues of fact and law under the Convention, the determination of which requires an examination of the merits. It also considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it cannot be declared inadmissible on any other grounds. The complaint must therefore be declared admissible.

B. Merits

1. Arguments of the parties

108. Both the Government and the applicant relied on their arguments described at paragraphs 76 and 77 above.

109. The Government added that, given the content of their reservation under Article 13, the respondent State "could not be responsible for the possible non-compliance of its legislation with the provisions of Article 13" prior to 15 July 2005 (see paragraphs 73 and 74 above).

110. Finally, the Government maintained that the Court should also give due weight to the fact that on 3 June 2006 Montenegro declared its independence, which meant that the respondent State needed time to bring its legal system in line "with the[se] new ... circumstances" (see paragraph 72 above).

2. Relevant principles

111. The Court notes that Article 13 guarantees an effective remedy before a national authority for an alleged breach of all rights and freedoms guaranteed by the Convention, including the right to a hearing within a reasonable time under Articles 6 § 1 (see, *inter alia*, *Kudła v. Poland*, cited above, § 156).

112. It recalls, further, that a remedy concerning length is "effective" if it can be used either to expedite the proceedings before the courts dealing with the case, or to provide the litigant with adequate redress for delays which have already occurred (see *Sürmeli v. Germany* [GC], cited above, § 99).

113. Finally, the Court emphasises that the best solution in absolute terms is indisputably, as in many spheres, prevention. Where the judicial system is deficient with regard to the reasonable-time requirement of Article 6 § 1 of the Convention, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation, since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*. Some States have fully understood the situation by choosing to combine these two types of remedy (see *Scordino*, cited above, §§ 183 and 186, *Cocchiarella v. Italy* [GC], no. 64886/01, §§ 74 and 77 ECHR 2006, and *Sürmeli v. Germany* [GC], cited above, §100).

3. The Court's assessment

114. The Court notes that the Government have already suggested in their preliminary objection that there were remedies available for the applicant's complaints about non-enforcement made under Article 6 § 1 and that, in so far as they rely on the same reasoning by way of their response to the Article 13 complaint, their arguments must, just like their objection, be rejected on the grounds described at paragraphs 81-83 above.

115. As regards the Government's argument concerning their reservation made and then withdrawn under Article 13 of the Convention, the Court notes that the reservation referred to clearly concerned the Court of Serbia and Montenegro only, rather than the overall state of Serbian legislation in terms of its compliance with the requirements of Article 13 (see paragraph 73 above). The Court further recalls that it has already held that this particular remedy was unavailable until 15 July 2005 and, also, that it remained ineffective until the break up of the State Union of Serbia and Montenegro (see *Matijašević v. Serbia*, cited above, §§ 34-37). It sees no reason to depart from this finding in the present case.

116. In view of the above, the Court considers that there has been a violation of Article 13, taken together with Article 6 § 1 of the Convention, on account of the lack of an effective remedy under domestic law for the applicant's complaint about the length of the enforcement proceedings.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

117. 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

118. The applicant claimed EUR 20,000 for the non-pecuniary damage suffered.

119. The Government contested that claim. They added, however, that should the Court find a violation of the Convention any financial compensation awarded should be consistent with the Court's case-law in similar matters and take into account the respondent State's economic situation.

120. The Court sees no reason to doubt that the applicant suffered distress as a result of the non-enforcement of her custody rights, which is why a finding of a violation alone would not constitute sufficient just satisfaction within the meaning of Article 41.

121. Having regard to the above, the amounts awarded in comparable cases (see, *mutatis mutandis*, *Karadžić v. Croatia*, no. 35030/04, § 71, 15 December 2005) and on the basis of equity, as required by Article 41 of the Convention, the Court awards the applicant EUR 10,000 under this head.

B. Costs and expenses

122. The applicant also claimed RSD 143,250, approximately EUR 1,770, plus statutory interest, for the costs and expenses incurred before the domestic courts, for which she provided an itemised calculation, and an unspecified amount for the costs and expenses incurred in the proceedings before this Court.

123. The Government contested those claims.

124. 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 (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

125. In the present case, concerning the costs and expenses incurred domestically, the Court considers that the amounts claimed by the applicant are excessive. Regard being had to the information in its possession and the above criteria, however, the Court considers it reasonable to award the

applicant the sum of EUR 950 for the costs and expenses incurred while attempting to expedite the proceedings complained of (see, *mutatis mutandis*, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 18 October 1982 (Article 50), Series A no. 54, § 17; see also, *argumentum a contrario*, *O'Reilly and Others v. Ireland*, no. 54725/00, § 44, 29 July 2004).

126. As regards the costs sought in respect of the proceedings before this Court, the Court finds them unsubstantiated and therefore makes no award in this regard.

C. Default interest

127. 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 Articles 6 § 1, 8 and 13 of the Convention.
3. *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 10,000 (ten thousand euros) in respect of the non-pecuniary damage suffered and EUR 950 (nine hundred and fifty euros) for the costs incurred domestically, 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

F. ELENS-PASSOS
Deputy Registrar

F. TULKENS
President