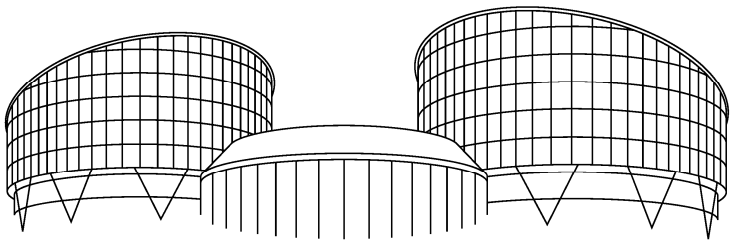


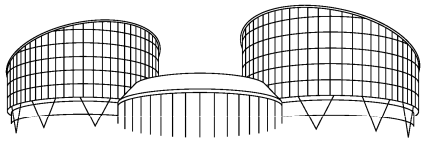
EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Case of Vučković and Others v. Serbia

(Applications nos. 17153/11, 17157/11, 17160/11, 17163/11, 17168/11, 17173/11, 17178/11, 17181/11, 17182/11, 17186/11, 17343/11, 17344/11, 17362/11, 17364/11, 17367/11, 17370/11, 17372/11, 17377/11, 17380/11, 17382/11, 17386/11, 17421/11, 17424/11, 17428/11, 17431/11, 17435/11, 17438/11, 17439/11, 17440/11 and 17443/11)

Judgment

Strasbourg, 25 March 2014



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

GRAND CHAMBER

CASE OF VUČKOVIĆ AND OTHERS v. SERBIA

(Applications nos. 17153/11, 17157/11, 17160/11, 17163/11, 17168/11, 17173/11, 17178/11, 17181/11, 17182/11, 17186/11, 17343/11, 17344/11, 17362/11, 17364/11, 17367/11, 17370/11, 17372/11, 17377/11, 17380/11, 17382/11, 17386/11, 17421/11, 17424/11, 17428/11, 17431/11, 17435/11, 17438/11, 17439/11, 17440/11 and 17443/11)

JUDGMENT

STRASBOURG

25 March 2014

This judgment is final but may be subject to editorial revision.

In the case of Vučković and Others v. Serbia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President,*
Josep Casadevall,
Ineta Ziemele,
Mark Villiger,
Alvina Gyulumyan,
Khanlar Hajiyev,
David Thór Björgvinsson,
Ján Šikuta,
Dragoljub Popović,
Päivi Hirvelä,
Nona Tsotsoria,
Kristina Pardalos,
Ganna Yudkivska,
Vincent A. De Gaetano,
Helen Keller,
Aleš Pejchal,
Ksenija Turković, *judges,*

and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 15 May 2013 and 29 January 2014,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in thirty separate applications against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 14 February 2011. The applicants are all Serbian nationals, and their further personal details are set out in the Annex to this judgment.

2. The applicants were represented by Mr S. Aleksić and Ms B. Isailović, lawyers practising in Niš and Paris, respectively.

3. The Serbian Government ("the Government") were represented by their Agent and Assistant Minister for Justice and Public Administration, Mr S. Carić.

4. The applicants, relying on Articles 6 and 14 of the Convention, complained about discrimination and inconsistent domestic case-law as regards the payment of *per diems* granted to all reservists who had served in the Yugoslav Army between March and June 1999.

5. The applications were allocated to the Court's Second Section (Rule 52 § 1 of the Rules of Court).

6. On 24 August 2011 the President of the Second Section decided to give notice to the Government of the applicants' complaints under Articles 6 and 14 of the Convention – the latter taken in conjunction with Article 1 of Protocol No. 1 – and under Article 1 of Protocol No. 12. It was also decided that the Court would rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

7. On 28 August 2012 a Chamber of the Second Section composed of the following judges: Françoise Tulkens, Danutė Jočienė, Dragoljub Popović, Isabelle Berro-Lefèvre, András Sajó, Işıl Karakaş and Guido Raimondi, and also of Françoise Elens-Passos, Deputy Section Registrar, unanimously decided to join the applications. It declared, by a majority, the discrimination complaints under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1, as well as those under Article 1 of Protocol No. 12, admissible. The remaining complaints, under Article 6 of the Convention, concerning the divergent national case-law, were unanimously declared inadmissible. The Chamber further found, by six votes to one, a violation of Article 14 read in conjunction with Article 1 of Protocol No. 1, unanimously held that Article 1 of Protocol No. 12 need not be examined separately, and unanimously dismissed the applicants' just satisfaction claims as belated. Under Article 46, however, it decided, by six votes to one, to order that, within six months of the date on which the judgment became final, the Government must take all appropriate measures to secure non-discriminatory payment of the *per diems* in question to all those entitled. Lastly, the Chamber decided by a majority to adjourn, for six months starting from the said date, all similar applications already pending before the Court. The partly concurring and partly dissenting opinion of Judge Sajó was annexed to the judgment.

8. On 26 November 2012 the Government asked for the case to be referred to the Grand Chamber by virtue of Article 43 of the Convention and Rule 73. On 11 February 2013 a panel of the Grand Chamber granted that request.

9. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

10. The applicants and the Government each filed written observations.

11. A hearing took place in public in the Human Rights Building, Strasbourg, on 15 May 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government,*
Mr S. CARIĆ, Assistant Minister for Justice and Public Administration, *Agent,*
Ms V. RODIĆ, Agent's Office,
Mr N. PETKOVIĆ, Agent's Office,
Mr R. ARSENIJEVIĆ, Ministry of Defence,
Mr S. VUKSANOVIĆ, Ministry of Defence,
Ms S. ĐURĐEVIĆ, *Advisers;*

(b) *for the applicants*
Mr S. ALEKSIĆ,
Ms B. ISAILOVIĆ, *Counsel,*
Ms M. LAZAREVIĆ, *Adviser.*

The Grand Chamber heard addresses by Mr Aleksić, Ms Isailović and Mr Carić, as well as the answers given by Ms Isailović and Mr Carić to questions put by the judges.

Additional documents were submitted by the applicants on the day of the hearing, and the President authorised the parties to submit their written comments in respect thereof. Written comments were submitted by the Government and the applicants on 17 June 2013 and 25 June 2013, respectively.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. The context and the proceedings brought by the applicants

13. The applicants were all reservists who had been drafted by the Yugoslav Army in connection with the North Atlantic Treaty Organisation's intervention in Serbia. They remained in military service between March and June 1999, and were thus entitled to a certain *per diem* under the Rules on Travel and Other Expenses in the Yugoslav Army (see paragraph 44 below) and by virtue of two separate decisions (nos. 03/825-2 and 06/691-1) adopted by its Chief of Staff on 1 and 3 April 1999 respectively.

14. However, following the demobilisation the Government allegedly refused to honour their obligation to the reservists, including the applicants.

15. The reservists subsequently organised a series of public protests, some of which ended in open confrontation with the police. Ultimately, following protracted negotiations, on 11 January 2008 the Government reached an agreement with some of the reservists ("the Agreement"), in particular those residing in the municipalities of Kuršumlija, Lebane, Bojnik, Žitorađa, Doljevac, Prokuplje and Blace, whereby these reservists were guaranteed payment in six monthly instalments. This payment was to be effected through their respective municipalities, aggregate sums having been specified per municipality. The said municipalities were apparently chosen because of their "underdeveloped" status, implying the reservists' indigence. For their part, the reservists in question agreed to renounce all their outstanding claims based on their military service in 1999 which were still pending before the civil courts, as well as any other claim in this connection. It was, lastly, stipulated that the criteria for the distribution of the "financial aid" in question should be set out by a Commission consisting of local government representatives and the representatives of the reservists themselves.

16. The applicants, like all other reservists without a registered residence in one of the seven municipalities in question, could not benefit from the Agreement.

1. Civil Proceedings

17. On 26 March 2009 the applicants therefore filed a civil claim against the respondent State based on the regulations referred to in paragraph 13 above. In their submissions, they pointed *inter alia* to the discrimination resulting from the Agreement. By way of redress (*tužbeni zahtev*), the applicants requested the payment of specific sums on account of the *per diems* in question, as well as certain other benefits, without relying on any anti-discrimination provision – domestic or international – or otherwise referring to the issue of discrimination.

18. On 8 July 2010 the Niš Court of First Instance (*Osnovni sud*) ruled against the applicants. In so doing, it acknowledged that their claim had a valid legal basis but noted, as pointed out by the respondent, that the applicable prescription period had been three years as of their demobilisation, in accordance with section 376 § 1 of the Obligations Act (see paragraph 49 below). The applicants' claim had thus been filed out of time.

19. On 2 August 2010 the applicants lodged an appeal against that judgment, complaining about various procedural violations allegedly committed at first instance, the failure of the court in question to properly establish all of the relevant facts, and the erroneous application of the applicable prescription periods. The applicants also referred to the Agreement, in so far as other reservists had thus resolved their problem

without litigation, but they did not rely on any anti-discrimination provision, domestic or international.

20. On 16 November 2010 the Niš Court of Appeal (*Apelacioni sud*) upheld the impugned judgment on appeal, and it thereby became final. In its reasoning the court stated, *inter alia*, that the *per diems* had indeed "only been partly paid" by the Ministry of Defence (*Ministarstvo odbrane*) but that both the three-year and the five-year prescription periods provided for in section 376 §§ 1 and 2 of the Obligations Act had already elapsed before the applicants had filed their civil claim (see paragraph 49 below). The Court of Appeal considered the Agreement as having no bearing on the matter since the applicants had sought payment of the sums owed to them on a different legal basis.

2. Constitutional appeal

21. Having been served with the Court of Appeal's decision, on 21 January 2011 the applicants lodged a further appeal (*ustavna žalba*) with the Constitutional Court (*Ustavni sud*). Relying on Articles 32 and 36 of the Constitution (see paragraph 32 below) and Article 6 of the Convention, they complained about the fairness of the civil proceedings and the erroneous application of the relevant domestic law, including the provisions concerning prescription. The applicants also maintained that the impugned judgment of the Niš Court of Appeal was inconsistent with numerous judgments adopted by other appellate courts in Serbia – that is the district courts (*okružni sudovi*) while they existed, as well as the high courts and the courts of appeal (*viši i apelacioni sudovi*) thereafter – which on the same facts had applied a longer, ten-year, prescription period and ruled in favour of the plaintiffs (see section 371 of the Obligations Act, in paragraph 48 below). Lastly, the applicants mentioned the Agreement and the Government's subsequent decision endorsing it, but did not elaborate on their substance and/or impact.

22. On 5 December 2012, following the adoption of the judgment by the Chamber in the present case, the Constitutional Court ruled in favour of the applicants as regards their complaints of inconsistent domestic case-law in respect of the civil courts' application of the statutory time-limitation (the same complaints the Chamber had rejected as manifestly ill-founded – see paragraphs 54-60 of its judgment of 28 August 2012), but made no mention of the Agreement. The Constitutional Court accordingly found a violation of Article 36 § 1 of the Constitution. It ordered that its decision be published in the Official Gazette of the Republic of Serbia, deeming this sufficient redress in a situation where the civil courts had, despite the said inconsistency, applied the relevant substantive law based on a "constitutionally acceptable interpretation" thereof. For more detailed reasoning, the Constitutional Court referred to its decision of 7 November

2012 concerning the same issue in another case involving different appellants (Už. 2156/11).

23. The Constitutional Court's decision of 7 November 2012 referred, *inter alia*, to the inconsistent case-law in question, citing specific judgments irrespective of the time-frame, and found a violation of the appellants' right to equal protection before the courts as guaranteed under Article 36 § 1 of the Constitution. The Constitutional Court was of the opinion that the courts of last instance, by ruling differently on the validity of claims based on identical facts and law, had placed appellants whose claims had been rejected in a materially different position from that of claimants whose claims had been allowed. There had accordingly been a violation of Article 36 § 1. However, the Constitutional Court considered that the allegations before it presented no constitutional basis upon which it could establish a violation of the appellants' right to a fair trial in so far as they complained about procedural fairness and the civil courts' allegedly inadequate characterisation of the legal nature of their claims. The appellants' additional complaint, raised under Article 21 of the Constitution, was also rejected. In particular, there was no evidence to corroborate the claim that the first- and second-instance court decisions in the appellants' civil case had been rendered on the basis of any "personal qualities", this being a precondition for determining the existence of a violation of the principle of non-discrimination. The Constitutional Court took note of the Chamber's finding of 28 August 2012 of a violation of the prohibition of discrimination under Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 (see paragraph 7 above; for additional constitutional case-law to this effect, see decision Už. 2886/10 of 4 October 2012, as well as decisions Už. 649/11 and Už. 2021/11, both of 12 December 2012, in their relevant parts), but for reasons that were different from those stated in this particular constitutional appeal. The fact that the latter complaint had been dismissed did not affect the State's obligation to act in accordance with the European Court's decision in respect of all persons, including the appellants, whose war *per diems* had not been paid out.

B. Other civil suits

24. Between 2002 and early March 2009 first-instance and appellate courts across Serbia ruled both in favour of reservists in a situation comparable to that of the applicants and against them, relying on the three-year/five-year or ten-year prescription periods respectively (for examples of cases where the reservists were successful see, among numerous others, Belgrade District Court judgments Gž. 1703/05 and 2386/08 of 13 April 2005 and 16 July 2008 respectively).

25. In the meantime, in 2003 and 2004 the Supreme Court had adopted two legal opinions (*pravna shvatanja*), both of which implied that the

applicable prescription period should be three or five years pursuant to section 376 §§ 1 and 2 of the Obligations Act (see paragraph 49 below).

26. Between 25 February 2010 and 15 September 2011 various appellate courts substantively ruled in compliance with the Supreme Court's opinions of 2003 and 2004 (see, for example, Kraljevo High Court decision Gž. 1476/11 of 15 September 2011; Valjevo High Court decisions Gž. 252/10 of 25 February 2010, 806/10 of 27 May 2010, 1301/10 of 30 September 2010, 1364/10 of 4 November 2010 and 355/11 of 24 March 2011; Kruševac High Court decisions Gž. 38/11 of 27 January 2011, 282/11 of 7 April 2011 and 280/11 of 26 April 2011; and Niš Court of Appeal decisions Gž. 2396/10 of 23 June 2010, 3379/2010 of 2 July 2010, 2373/2010 of 21 July 2010 and 4117/2010 of 30 November 2010).

27. Between 17 June 2009 and 23 November 2011 there were also a number of decisions where appellate courts ruled against the reservists, albeit on a different ground. Their claims, unlike those of the applicants in the present case, were rejected as being administrative in nature and as such falling outside the competence of the civil courts (see Belgrade District Court decision Gž. 7773/09 of 17 June 2009, and Belgrade High Court decisions Gž. 11139/10, 11636/10 and 10897/10, of 17 November 2010, 23 November 2011 and 23 November 2011 respectively).

C. Additional facts as regards the Agreement

28. On 17 January 2008 the Government endorsed the Agreement, and decided to pay the municipalities in question the amounts specified therein.

29. On 28 August 2008 the Government set up a working group tasked with addressing the requests of all other reservists, that is to say those not resident in the seven municipalities mentioned above. However, having discussed the issue with various groups of reservists, this working group ultimately concluded that their demands were not acceptable, *inter alia* because: (a) they had not harmonised or specified their requests; (b) some of their representatives had had dubious standing to represent them; (c) there was a lack of State funds which could be used for this purpose; and (d) in most cases, war *per diems* had already been paid to the reservists.

30. On 26 July 2011 the Commissioner for the Protection of Equality (*Poverenica za zaštitu ravnopravnosti*), an Ombudsman-type office established on the basis of the Prohibition of Discrimination Act (see paragraphs 40 and 41 below), considered the complaints brought by an organisation representing the interests of reservists in a situation comparable to that of the applicants. She concluded that they had been discriminated against on the basis of their registered residence, that is as non-residents of the seven privileged municipalities, and recommended that the Government take all necessary measures in order to ensure that all reservists were afforded the payments recognised by their decision of 17 January 2008. The

Government were also invited to provide the Commissioner with an appropriate "action plan" within a period of thirty days. In its reasoning, the Commissioner's decision noted, *inter alia*, that the payments in question were *per diems*, notwithstanding that the Government had chosen to consider them as social benefits awarded to persons in need (*socijalna pomoć*), and that this was best exemplified by the fact that the reservists in question had had to renounce their legal claims concerning the *per diems*, as well as the fact that the individual reservists resident in the seven municipalities in issue were never under an obligation to prove their indigence (*imovinsko stanje i socijalnu ugroženost*). This being so, there was clearly no objective and reasonable justification for the differential treatment of reservists merely on the basis of their place of residence.

31. On 7 December 2011 the Ministry for Labour and Social Affairs (*Ministarstvo rada i socijalne politike*) noted that discussions should continue with the various groups of reservists and that, if possible, financial support should be offered to the most indigent among them.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution of the Republic of Serbia (*Ustav Republike Srbije*, published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/06)

32. The relevant provisions of the Constitution read as follows:

Article 18

"Human and minority rights guaranteed by the Constitution shall be implemented directly.

The Constitution shall guarantee ... the direct implementation of human and minority rights secured by the generally accepted rules of international law ... [and] ... ratified international treaties ... Legislation may prescribe the manner of exercising these rights only if explicitly so stated in the Constitution or if necessary for the enjoyment of a specific right owing to its nature, it being understood that such legislation may not under any circumstances influence the substance of the guaranteed right in question.

Provisions on human and minority rights shall be interpreted ... pursuant to valid international standards on human and minority rights, as well as the practice of international institutions which supervise their implementation."

Article 21

"Everyone shall be equal before the Constitution and the law.

Everyone shall have the right to equal legal protection, without discrimination.

All direct or indirect discrimination based on any ground, particularly on the grounds of race, sex, national or social origin, birth, religion, political or other

opinion, property status, culture, language, age, mental or physical disability shall be prohibited."

Article 32 § 1

"Everyone shall have the right to ... [a fair hearing before a] ... tribunal ... [in the determination] ... of his [or her] rights and obligations ..."

Article 36 § 1

"Equal protection of rights before the courts of law ... shall be guaranteed."

Article 170

"A constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed."

B. The Constitutional Court Act (*Zakon o Ustavnom sudu*, published in OG RS nos. 109/07 and 99/11)

33. Section 36 § 1 (7) provides for the Constitutional Court to reject a submission, including a constitutional appeal, when the requirements for the institution of the relevant proceedings, set forth by law, have not been fulfilled.

34. Section 87 provides that should the Constitutional Court rule in favour of a group of people on a given issue, that decision will also be applicable to other people in the same legal situation, even if they have personally never filed a constitutional appeal on the issue concerned.

C. The Constitutional Court's case-law

35. According to the Constitutional Court's general opinions (*stavovi*) of 30 October 2008 and 2 April 2009, it is "bound" (*vezan*) by the request formulated in the constitutional appeal when examining whether there has been a breach of a right or freedom guaranteed by the Constitution. The Constitutional Court may only consider the appeal within the limits of the request as formulated.

36. On 9 June 2010 and 17 February 2011 the Constitutional Court rejected two separate constitutional appeals lodged by reservists who were in a situation comparable to the applicants'. It noted, *inter alia*, that the civil courts' decisions against them had been "based on the applicable domestic legislation". The appellants, however, had never specifically complained about the inconsistency of the relevant case-law or that they had been discriminated against (Už. 460/08 and Už. 2293/10).

37. On 17 February 2011, in another case like that of the applicants, relying on Article 21 of the Constitution the appellants complained about the differential treatment of the two groups of reservists stemming from the Agreement. The Constitutional Court, referring to the "accessory character" of Article 21 and noting that the appellants had invoked no other constitutional provision in conjunction with that Article, did not determine the complaint. It then went on to examine the complaints under Article 36 § 1 of the Constitution, specifically the constitutional guarantee of equality before the courts, and dismissed them as the appellants had not offered adequate proof as regards the existence of inconsistent case-law on the matter (Už. 2901/10).

38. On 8 March 2012, in a case where the civil courts had rejected the reservists' claims as being outside their competence *ratione materiae* (see, for example, paragraph 27 above), the Constitutional Court ruled in favour of the appellants, who had alleged inconsistent case-law (between the judgments adopted in their cases and several other judgments adopted by the courts in 2002), and ordered the reopening of the civil proceedings. As regards the appellants' related discrimination complaint under Article 21 of the Constitution, the Constitutional Court found no evidence that the appellants had been discriminated against by the courts on the basis of any "personal characteristic". Lastly, the appellants' additional complaint of discrimination – with reference to the Agreement –that some reservists were paid their *per diems* whilst others, including the appellants, were not, based merely on their place of residence, was not examined (Už. 2289/09).

39. On 4 January 2011, in a case similar to the applicants', a large number of reservists lodged an appeal with the Constitutional Court. They relied on Articles 21 and 32 of the Constitution and complained about the inconsistent case-law in question as well as the discrimination stemming from the Agreement. In their subsequent memorials the appellants rectified certain errors contained in their appeal and further relied on Article 36 of the Constitution. On 20 February 2013 the Constitutional Court ruled in favour of the appellants as regards the inconsistent case-law and found a violation of Articles 32 and 36. It made no reference, however, to the Agreement or the appellants' discrimination complaint raised in that connection (Už. 43/11). For more detailed reasoning, the Constitutional Court referred to its decision of 4 October 2012 concerning the same issue but involving different appellants (Už. 2886/10; see paragraph 23 above).

D. The Prohibition of Discrimination Act (*Zakon o zabrani diskriminacije*, published in OG RS no. 22/09)

40. Section 43 sets out the various forms of redress available to victims of discrimination. They include injunctive and declaratory relief, such as the recognition of the discrimination suffered and its prohibition in the future,

as well as compensation for any pecuniary and/or non-pecuniary damage. The publication in the media of a civil court's judgment rendered in this context may also be ordered.

41. The Prohibition of Discrimination Act entered into force on 7 April 2009.

E. The Civil Procedure Act (*Zakon o parničnom postupku*, published in OG RS no. 72/11)

42. Section 426.12 provides that a case may be reopened if the Constitutional Court has in the meantime found a breach of the appellant's procedural rights which may have precluded a more favourable outcome of the civil proceedings in question.

43. Section 428 § 1 (4) provides, *inter alia*, that in such a situation a request for reopening may be filed within sixty days from when the party concerned could have "used" (*mogla da upotrebi*) the Constitutional Court's decision.

F. The Rules on Travel and Other Expenses in the Yugoslav Army (*Pravilnik o naknadi putnih i drugih troškova u Vojsci Jugoslavije*, published in the Official Military Gazette nos. 38/93, 23/93, 3/97, 11/97, 12/98, 6/99 and 7/99)

44. These Rules set out the relevant details concerning the reimbursement of expenses incurred in connection with military service.

G. The Obligations Act (*Zakon o obligacionim odnosima*, published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 29/78, 39/85, 45/89, 57/89 and the Official Gazette of the Federal Republic of Yugoslavia no. 31/93)

45. Sections 199 and 200 of the Obligations Act provide, *inter alia*, that anyone who has suffered fear, physical pain or, indeed, mental anguish as a consequence of a breach of personal rights (*prava ličnosti*) is entitled, depending on the duration and intensity of the suffering, to sue for financial compensation in the civil courts and, in addition, to request other forms of redress "which might be capable" of affording adequate non-pecuniary satisfaction. See, for example, judgment Pbr. 2939/01 of the Šabac Municipal Court (*Opštinski sud*), of 20 February 2002, concerning the discrimination of Roma in access to a swimming pool, where the said court acknowledged the discrimination alleged by the plaintiffs, prohibited any such discrimination in the future, and ordered the respondent to publish its apology in a major Serbian daily newspaper. On 3 July 2003 the Šabac District Court (*Okružni sud*) upheld that judgment on appeal (Gž. 1591/02).

46. Section 360 § 3 provides that courts may not, in the course of proceedings before them, take into account negative prescription periods unless an objection to this effect has been made by the debtor.

47. Section 367 provides that, where a debtor pays a debt which he was not obliged to pay based on the applicable prescription period, he is not entitled to recover the sum paid.

48. Section 371 states that the general negative prescription period for civil claims is ten years, unless provided otherwise.

49. Section 376 §§ 1 and 2 provides, *inter alia*, that the negative prescription period for seeking civil compensation is three years as of when the claimant first learnt of the damage in question, but that, in any event, the absolute deadline is five years from the time the damage occurred.

50. Sections 387 and 388 provide, *inter alia*, that the running of a negative prescription period is interrupted by the debtor's acceptance – be it direct or implicit – of the claim in issue, or by the claimant's lodging of a civil action.

51. Section 392 §§ 1-3 provides, *inter alia*, that in the event of such an interruption the applicable period will start running afresh as of the debtor's acceptance of the claim in question or the conclusion of the civil suit, pending final settlement.

52. Section 393 provides, *inter alia*, that when a debtor accepts an outstanding obligation on the basis of a new arrangement, a new prescription period starts running in respect of the new arrangement.

H. The legal opinions adopted by the Supreme Court's Civil Division (*pravna shvatanja Građanskog odeljenja Vrhovnog suda Srbije)*

53. On 26 May 2003 the Supreme Court held, *inter alia*, that civil courts had jurisdiction to rule on the merits in all cases concerning reservists' *per diems* provided that the redress sought by the plaintiff was compensation for any damage suffered in that connection (see paragraph 49 above) based on the State's alleged malfeasance (published in the Supreme Court's Bulletin no. 1/04).

54. On 6 April 2004 the Supreme Court essentially reaffirmed the opinion of 26 May 2003, extending its application to certain other "military entitlements". It also noted that there had been some inconsistencies before the courts in the meantime (published in the Supreme Court's Bulletin no. 1/04).

THE LAW

55. The applicants complained of discrimination stemming from the Agreement (see paragraphs 15 and 28 above), relying on Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1, and Article 1 of Protocol No. 12. These provisions read as follows:

Article 14 of the Convention

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 1 of Protocol No. 12

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

I. THE SCOPE OF THE GRAND CHAMBER'S JURISDICTION

56. The Court reiterates its well-established case-law that "the case" referred to the Grand Chamber necessarily embraces all aspects of the application or applications previously examined by the Chamber in its judgment, the scope of its jurisdiction in "the case" being limited only by the Chamber's decision on admissibility. Within these limits, the Grand Chamber may also examine, where appropriate, issues relating to the admissibility of the application in the same manner as this is possible in normal Chamber proceedings. It may do so for example by virtue of Article 35 § 4 *in fine* of the Convention (which empowers the Court to "reject any application which it considers inadmissible ... at any stage of the proceedings"), or where such issues have been joined to the merits or where they are otherwise relevant at the merits stage (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001-VII, and *Perna v. Italy* [GC],

no. 48898/99, §§ 23-24, ECHR 2003-V). Thus, even at the merits stage and subject to Rule 55 of the Rules of Court, the Court may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see, *mutatis mutandis*, *Odièvre v. France* [GC], no. 42326/98, § 22, ECHR 2003-III, and *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III).

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-exhaustion of domestic remedies

1. The Government's submissions to the Grand Chamber

57. The Government pointed out that the applicants had failed to exhaust the relevant domestic remedies as regards their complaints of discrimination.

58. The civil claim brought by them, despite mentioning the Agreement, concerned the Government's alleged debt in respect of the *per diems* and was rejected on the basis of the applicable prescription periods. The applicants should, instead, have filed a civil case based on section 43 of the Prohibition of Discrimination Act, or relied on that provision in the civil case which they had already brought, as it offered various forms of redress including injunctive and declaratory relief as well as compensation where appropriate (see, also, the relevant provisions of the Obligations Act, as well as the relevant case-law, summarised at paragraph 45 above).

59. Nor had the applicants properly exhausted the constitutional avenue either. Admittedly, they had referred to the Agreement in their constitutional appeal, but they had not sought "protection from discrimination". Moreover, the applicants had specifically relied on Articles 32 and 36 of the Constitution, guaranteeing respectively the right to a fair hearing and the right to equal protection before the courts, but had made no reference to Article 21 of the Constitution, which contained a general prohibition of discrimination. In such circumstances, being bound by the applicants' complaints, the Constitutional Court could not have examined the alleged discrimination.

60. The Constitutional Court's decision of 17 February 2011 (Už. 2901/10) dismissed (*odbacila*) the constitutional appeal "on procedural grounds", which was why the discrimination complaint was never discussed on its merits (see paragraph 37 above).

61. In any event, in *Vinčić* the Court held that a constitutional appeal should, in principle, be considered as an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all

applications introduced as of 7 August 2008 (see *Vinčić and Others v. Serbia*, nos. 44698/06 and others, § 51, 1 December 2009).

62. Lastly, the Government argued that ever since the Constitutional Court's decision of 7 November 2012 (Už. no. 2157/11), and especially following the decision in the applicants' favour given by that court on 5 December 2012, the applicants could have lodged a request seeking the reopening of their civil suit, based on the relevant provisions of the Constitutional Court Act or the Civil Procedure Act (see paragraphs 22, 23, 34 and 42 above).

2. The applicants' submissions to the Grand Chamber

63. The applicants maintained that they had complied with the exhaustion requirement. The Court itself had long held that the principle of subsidiarity was not absolute, meaning that remedies which are not adequate or effective in the particular circumstances of a case need not be exhausted.

64. As regards civil redress, when the applicants realised that the Agreement would not apply to them they had filed a civil claim. In so doing they had raised in substance the issue of discrimination before the Court of First Instance, as well as the Court of Appeal, and sought to be placed on an equal footing with those reservists who did benefit from the Agreement. But that "would have cost the State a lot of money" and "it was an opportunity for the judges who survived the 2009 judicial reforms" to "serve the interest" of the Government who had "spared them from dismissal". The relevant domestic courts thus completely disregarded the purpose of the applicants' claim and dismissed it as out of time without ever ruling on the alleged discrimination. The applicants noted that the discrimination in question had occurred in 2008, when the Agreement was reached.

65. Concerning the constitutional appeal, the applicants endorsed the Chamber's finding in paragraphs 71-75 of its judgment. They admitted that they had not awaited the outcome of those proceedings before lodging their applications with the Court. However, this should not be held against them given the kind of decisions handed down by the Constitutional Court prior to and after that date. These included, *inter alia*, the decision of 5 December 2012 in the present case, where the applicants were given no redress capable of placing them in the same situation as reservists who had benefitted from the Agreement. While it was true that the applicants had not relied on Article 21 of the Constitution in their appeal, the Constitutional Court could have examined the discrimination issue since there was information relevant to it in the case file (in support of this argument the applicants referred to the Constitutional Court's decision Už. no. 2156/11; see paragraph 23 above). In other cases, however, where reservists had specifically raised the issue of discrimination stemming from the Agreement and relied on Article 21 of the Constitution in so doing, the Constitutional Court had done the opposite and felt no obligation to even consider it (see,

for example, Už. 43/11 described at paragraph 39 above). The reasoning in all decisions concerning cases like the applicants' had been practically identical and had consisted of ready-made formulas. In some cases though, the Constitutional Court had found that there had been differential treatment in breach of the Constitution based on the judicial inconsistency aspect of the case, but had merely ordered the publication of its decisions in the Official Gazette of the Republic of Serbia as a form of compensation.

66. In view of the above, there could be no doubt that the constitutional appeal was a purely theoretical remedy, given the overall legal and political context and the situation of the reservists in particular (see paragraphs 30 and 32 of the Chamber's judgment, and also the Constitutional Court's decisions Už. nos. 2156/11, 43/11, 2886/10, 649/11 and 2021/11, referred to in paragraphs 23, 38 and 39 above).

3. The Chamber's ruling

67. The Chamber noted, *inter alia*, that discrimination complaints similar to the applicants' had been made by the appellants in case Už. 2901/10, but that on 17 February 2011 the Constitutional Court had effectively ignored them, offering no substantive assessment of the issue whatsoever (see paragraph 37 above). Indeed, in their observations before the Chamber the Government admitted as much, but maintained that there was no evidence that the appellants in that case had ever sought to conclude an agreement like that of 11 January 2008. However, the Chamber found that this assertion, even assuming it was relevant to the present applicants, was not borne out by the facts since there had been extensive negotiations between the Government and the reservists in general, albeit to no avail, on extending the principles accepted on 11 January 2008 to everyone else, and the applicants personally had clearly shown their adherence to this position by bringing their own civil case on 26 March 2009.

68. In such circumstances, the Chamber deemed it clear that notwithstanding the fact that "a constitutional appeal should, in principle, be considered as an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced [against Serbia] as of 7 August 2008" (see *Vinčić*, cited above, § 51), this particular avenue of redress could not be considered effective as regards cases involving complaints such as the ones put forth by the applicants.

4. The Court's assessment

(a) General principles of the Court's case-law

69. It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the

Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection.

70. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, among many authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports* 1996-IV). It should be emphasised that the Court is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 69, ECHR 2010, where the Court in addition quoted the comprehensive statement of principles set out in §§ 66 to 69 of the *Akdivar and Others* judgment, which in so far as relevant are reiterated here below).

71. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others*, cited above, § 66).

72. Article 35 § 1 also requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance (see, for instance, *Castells v. Spain*, 23 April 1992, § 32, Series A no. 236; *Gäfgen v. Germany* [GC], no. 22978/05, §§ 144 and 146, ECHR 2010; and *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I) and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (*Akdivar and Others*, cited above, § 66). Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (see, for example, *Cardot v. France*, 19 March

1991, § 34, Series A no. 200, and *Thiermann and Others v. Norway* (dec.), no. 18712/03, 8 March 2007).

73. However, there is, as indicated above, no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the "generally recognised rules of international law" there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his or her disposal. The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (see *Akdivar and Others*, cited above, § 67).

74. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Akdivar and Others*, cited above, § 71, and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 70, 17 September 2009).

75. In so far as there exists at the national level a remedy enabling the domestic courts to address, at least in substance, the argument of a violation of a given Convention right, it is that remedy which should be exhausted (see *Azinas*, cited above, § 38). It is not sufficient that the applicant may have unsuccessfully exercised another remedy which could have overturned the impugned measure on other grounds not connected with the complaint of a violation of a Convention right. It is the Convention complaint which must have been aired at national level for there to have been exhaustion of "effective remedies". It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument (see *Van Oosterwijck*, judgment of 6 November 1980, Series A no. 40, pp. 16-17, §§ 33-34, and *Azinas*, cited above, § 38).

76. The Court has, however, also frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13, and *Akdivar and Others*, cited above, § 69). It would, for example, be unduly formalistic to require the applicants to exercise a remedy which even the highest court of their country would not oblige them to exhaust (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 117 and 118, ECHR 2007-IV).

77. As regards the burden of proof, 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. Once this burden 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 *Akdivar and Others*, cited above, § 68; *Demopoulos and Others*, cited above, § 69; and *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010).

(b) Application of these principles to the present case

78. The Court observes that under sections 199 and 200 of the Obligations Act a reservist who had served in the army between March and June 1999 could institute proceedings before the civil courts against the authorities of the respondent State and on certain conditions claim compensation on account of any non-payment of *per diems* due by those authorities under the Rules on Travel and Other Expenses in the Yugoslav Army (see paragraphs 44 and 45 above) and the two separate decisions (nos. 03/825-2 and 06/691-1) adopted by its Chief of Staff on 1 and 3 April 1999 respectively. It was also possible to challenge any discriminatory practices in respect of such payments as would run counter to the prohibition of discrimination under Article 21 of the Constitution (see paragraph 32 above). As from 7 April 2009 a victim of discrimination could in addition pray in aid section 43 of the Prohibition of Discrimination Act, which provided for various forms of injunctive and/or declaratory relief to victims of discrimination (see paragraph 40 above). The civil courts thus had full jurisdiction to examine claims such as those that were in issue in the present case. Indeed, in a number of comparable cases adjudicated between 2002 and early March 2009, where the claims in question had not been deemed time-barred, the first-instance and appellate courts across Serbia had upheld the reservists' claims (see paragraph 24 above). Accordingly, the Court is satisfied that at the material time an appeal to the civil courts constituted an effective remedy for the purposes of Article 35 § 1 of the Convention.

79. In the case under consideration, on 26 March 2009 the applicants filed a civil claim against the respondent State based on the above-mentioned Rules on Travel and Other Expenses in the Yugoslav Army and the decisions adopted by its Chief of Staff (see paragraph 78 above). By way of redress they sought the payment of specific sums on account of the allegedly unpaid *per diems* in issue and also certain other benefits. The applicants did not rely on the prohibition of discrimination in Article 21 of the Constitution, or on the non-discrimination clauses in Article 14 of the Convention and Article 1 of Protocol No. 12, although

these were directly applicable according to Article 18 of the Constitution (see paragraphs 17, 19, 32, 40 and 41 above). Nor did they invoke the Prohibition of Discrimination Act, which entered into force with immediate effect on 7 April 2009, shortly after the above-mentioned civil claim had been filed. In their submissions made in support of their claim, the applicants did however refer to the alleged discrimination stemming from the Agreement.

80. While acknowledging that the applicants' claim had a valid legal basis, on 8 July 2010 the Court of First Instance dismissed it as being time-barred due to the expiry of the three-year limitation period laid down in section 376 § 1 of the Obligations Act, considering that the time-limit had started to run from the moment of their demobilisation. The Appeals Court rejected their appeal on 16 November 2010 on similar grounds, namely that both the three-year and the five-year prescription periods provided for in section 376 §§ 1 and 2 (see paragraph 49 above) had expired. The Court would reiterate that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see *Pérez de Rada Cavanilles v. Spain*, 28 October 1998, § 43, *Reports of Judgments and Decisions* 1998-VIII; *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I; and *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013). According to the interpretation given by the civil courts, the applicants had failed to comply with the applicable national prescription rules, which is one of the conditions that should normally be fulfilled in order to meet the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention (see paragraph 72 above).

81. Thereafter, the applicants lodged an appeal with the Constitutional Court, in which they challenged under Articles 32 and 36 of the Constitution and Article 6 of the Convention the civil courts' above-mentioned application of the rules on statutory limitation, specifically in the judgment of 16 November 2010, which in their view had been erroneous and inconsistent with that made by certain other national courts, which had correctly applied the ten-year rule under section 371 of the Obligations Act (see paragraph 48 above).

82. The Court cannot but note that, although the applicants mentioned the Agreement in their constitutional appeal, and did so against the background of their previous proceedings before the civil courts in which they had alleged discrimination, they did not raise their discrimination complaint before the Constitutional Court, either expressly or in substance. It is also quite understandable that the Constitutional Court did not examine the matter of its own motion (see paragraph 35 above).

83. The Grand Chamber, unlike the Chamber (see paragraphs 71 to 75 of the Chamber judgment), is not convinced that the constitutional remedy would not have been effective in the applicants' case. In this connection, the Grand Chamber has taken note of three decisions by the Constitutional

Court in comparable cases, the first two (of 17 February 2011 and 8 March 2012) pre-dating and the third (of 20 February 2013) post-dating its judgment of 5 December 2012 in the applicants' case. These decisions may shed some light on the effectiveness of this remedy in such matters. In none of these cases did the Constitutional Court decline jurisdiction to examine the complaints made under Article 21 of the Constitution in relation to the allegedly discriminatory effects of the Agreement. In two of them it omitted to deal with the issue but upheld the constitutional appeals in question on other grounds (see paragraphs 38 and 39 above). In the remaining ruling, pre-dating the case now under review, the Constitutional Court did not determine the complaint, referring to the "accessory character" of Article 21 and noting that the appellants had invoked no other constitutional provision to be applied in conjunction with that Article (see paragraph 37 above).

84. In the Grand Chamber's view, the above does not show that the constitutional remedy would have offered no reasonable prospect of success in respect of the applicants' discrimination complaint had they sought to properly raise it before the Constitutional Court. On a number of previous occasions when examining applications lodged against the same respondent State, the Court has held that "a constitutional appeal should, in principle, be considered as an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced [against Serbia] as of 7 August 2008" (see *Vinčić*, cited above, § 51; see also *Rakić and Others v. Serbia*, no. 47460/07 and others, § 39, 5 October 2010, and *Hajnal v. Serbia*, no. 36937/06, §§ 122 and 123, 19 June 2012). The Grand Chamber sees no reason for holding otherwise in the present instance. Indeed, where legal systems provide constitutional protection of fundamental human rights and freedoms, it is in principle incumbent on the aggrieved individual to test the extent of that protection and allow the domestic courts to develop those rights by way of interpretation (see *Vinčić*, cited above, § 51; see also, *mutatis mutandis* and in the common law context, *D v. Ireland* (dec.), no. 26499/02, § 85, 28 June 2006, and *A, B and C v. Ireland* [GC], no. 25579/05, § 142, ECHR 2010). As already stated above, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see paragraph 74 above).

85. Against this background, the Court finds that, although the civil and constitutional remedies were sufficient and available to afford redress in respect of the breaches alleged, the applicants failed to exhaust these remedies.

86. It remains to be considered whether there were any special circumstances that could have dispensed the applicants from their above-mentioned requirement.

87. On this point, the Court observes that, although the applicants' claim to the *per diems* in question dated as far back as 1999, no convincing explanation has been provided as to why they did not institute proceedings to obtain recovery of the alleged debts earlier.

88. The Court also notes that the Constitutional Court did review and indeed uphold the applicants' complaint that the civil courts' case-law on the application of the statutory prescription rules had been inconsistent and, albeit founded on a "constitutionally acceptable interpretation", entailed a violation of the reservists' right to equal protection before the courts. In the Court's understanding this finding indicated that, whilst the interpretation of the statutory limitation rules in the instant case had been deemed "acceptable" when considered in isolation, what was incompatible with the constitutional right in question was the national civil courts' differing practices in this area. Moreover, it appears that the applicants could have relied on the said ruling as a ground for seeking the reopening of their case before the civil courts (see paragraphs 42 and 43 above).

89. In any event, before the Constitutional Court adjudicated the matter the Chamber had examined a corresponding complaint, lodged by the applicants under Article 6 § 1 of the Convention, about the inconsistent case-law of the Serbian courts, on account of the rejection of their own claims by the Appeals Court and the acceptance by other civil courts of identical claims filed by other reservists based on a different interpretation of the applicable prescription periods. In its above-cited judgment of 28 August 2012, the Chamber carried out a detailed review of the relevant circumstances and, considering that the relevant appellate case-law had been harmonised at the material time (see paragraphs 54 to 60 of the judgment), declared the complaint inadmissible as being manifestly ill-founded in a decision which delimits the case referred to the Grand Chamber and which is thus final (see paragraph 56 above).

90. In view of the above and having regard to the circumstances of the case as a whole, the Court does not find that there were any special reasons for dispensing the applicants from the requirement to exhaust domestic remedies in accordance with the applicable rules and procedure of domestic law. On the contrary, had the applicants complied with this requirement, it would have given the domestic courts that opportunity which the rule of exhaustion of domestic remedies is designed to afford States, namely to determine the issue of compatibility of the impugned national measures, or omissions to act, with the Convention and, should the applicants nonetheless have pursued their complaint before the European Court, this Court would have had the benefit of the views of the national courts (see, among other authorities, *Van Oosterwijck*, cited above, § 34, and *Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008). Thus, the applicants failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, that of the

European Court being subsidiary to theirs (see *Burden*, cited above, § 42, and *Akdivar and Others*, cited above, §§ 65-66).

91. Accordingly, the Grand Chamber upholds the preliminary objection of the Government as regards the applicants' discrimination complaint. It cannot therefore consider the merits of this complaint.

B. Other preliminary objections

92. Given the above conclusion it is not necessary for the Court to examine the Government's other preliminary objections regarding whether the applicants abused their right of individual application or could not claim to be victims of the violation alleged, or whether Article 14 of the Convention taken together with Article 1 of Protocol No 1, and Article 1 of Protocol No. 12 may be deemed applicable to the present case.

FOR THESE REASONS, THE COURT

1. *Upholds*, by fourteen votes to three, the preliminary objection of the Government concerning the applicants' failure to exhaust domestic remedies as regards their discrimination complaint under Article 14 of the Convention, taken together with Article 1 of Protocol No. 1, and Article 1 of Protocol No. 12, and consequently holds that it cannot consider the merits of this complaint; and

2. *Holds*, by fourteen votes to three, that it is not necessary to examine the Government's remaining preliminary objections.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg on 25 March 2014.

Michael O'Boyle	Dean Spielmann
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judges Popović, Yudkivska and De Gaetano is annexed to this judgment.

D. S.
M. O'B.

Annex

No.	Application nos.	Applicant's name Date of birth Place of residence
1.	17153/11	**Boban VUČKOVIĆ** 27/09/1971 Niš
2.	17157/11	**Ljubiša VELIČKOVIĆ** 24/08/1954 Selo Prva Kutina
3.	17160/11	**Igor VELIČKOVIĆ** 10/06/1979 Niš
4.	17163/11	**Saša GROZDANOVIĆ** 29/04/1975 Niška Banja
5.	17168/11	**Dragan GROZDANOVIĆ** 05/12/1967 Niška Banja
6.	17173/11	**Ljubiša MILOŠEVIĆ** 03/10/1959 Niš
7.	17178/11	**Miodrag NIKOLIĆ** 29/02/1956 Niška Banja
8.	17181/11	**Siniša MILOŠEVIĆ** 03/10/1958 Niš
9.	17182/11	**Grujica MARKOVIĆ** 25/06/1965 Niš
10.	17186/11	**Radomir TODOROVIĆ** 15/07/1958 Niška Banja
11.	17343/11	**Dejan ZDRAVKOVIĆ** 19/11/1971 Sićevo
12.	17344/11	**Marjan MITIĆ** 10/02/1969 Niš

13.	17362/11	**Branislav MILIĆ** 15/08/1944 Niš
14.	17364/11	**Miroslav STOJKOVIĆ** 01/09/1947 Doljevac
15.	17367/11	**Dejan SEKULIĆ** 09/08/1970 Niška Banja
16.	17370/11	**Slavoljub LUČKOVIĆ** 24/06/1955 Niš
17.	17372/11	**Goran LAZAREVIĆ** 17/08/1970 Niš
18.	17377/11	**Goran MITIĆ** 15/02/1979 Niš
19.	17380/11	**Petar ADAMOVIĆ** 02/08/1952 Niš
20.	17382/11	**Radisav ZLATKOVIĆ** 12/04/1952 Niš
21.	17386/11	**Jovan RANĐELOVIĆ** 25/02/1944 Niš
22.	17421/11	**Bratislav MARKOVIĆ** 26/05/1949 Niška Banja
23.	17424/11	**Desimir MARKOVIĆ** 08/07/1965 Niš
24.	17428/11	**Časlav SPASIĆ** 21/02/1960 Niš
25.	17431/11	**Ljubiša NIKOLIĆ** 05/12/1958 Selo Jelašnica
26.	17435/11	**Dragan ĐORĐEVIĆ** 19/02/1957 Niška Banja

27.	17438/11	**Radiša ĆIRIĆ** 10/02/1958 Niška Banja
28.	17439/11	**Siniša PEŠIĆ** 31/10/1961 Niš
29.	17440/11	**Boban CVETKOVIĆ** 28/08/1967 Niška Banja
30.	17443/11	**Goran JOVANOVIĆ** 15/01/1965 Suvi Do

JOINT DISSENTING OPINION OF JUDGES POPOVIĆ, YUDKIVSKA AND DE GAETANO

1. We respectfully disagree with the majority ruling, expressed in paragraphs 82 and 83 of the judgment and repeated in paragraph 85, that the applicants in this case failed to exhaust domestic remedies.

On 11 January 2008 the respondent Government entered into an agreement with a group of persons who were in a substantially identical situation to that of the applicants, that is to say persons who were claiming *per diems* for the same period of military service. By doing so, the Government applied differential treatment to Army reservists on the basis of their municipality of residence (see paragraph 15 of the judgment).

On 26 March 2009 the applicants filed a civil claim against the State, pointing to the discrimination resulting from the agreement of 11 January 2008 (see paragraph 17).

As the applicants lost their case before the ordinary courts they lodged a constitutional complaint on 21 January 2011 (see paragraph 21) complaining of differential treatment of Army reservists. The differential treatment stemmed in the first place from the inconsistent rulings of the ordinary courts in identical cases, as well as from the agreement of 11 January 2008, which was referred to in the applicants' constitutional complaint.

2. The Constitutional Court of Serbia ruled on 5 December 2012 in favour of the applicants as regards their complaints of inconsistent domestic case-law, but made no mention whatsoever of the agreement of 11 January 2008 (see paragraphs 22 and 23). Besides, the Constitutional Court deemed the publication of its ruling in the *Official Herald* to be sufficient redress for the violation found. The Constitutional Court found a violation of Article 36 § 1 of the Constitution of Serbia (equal protection of rights), but rejected the applicants' complaint under Article 21 of the Constitution (prohibition of discrimination).

The majority's position in respect of the facts as outlined above is that the applicants "did not raise their discrimination complaint before the Constitutional Court, either expressly or in substance" (see paragraph 82); at the same time and in the same paragraph, however, it is acknowledged that "the applicants mentioned the Agreement [of 11 January 2008] in their constitutional appeal". It is therefore evident that the applicants *did rely* on the Agreement in question in their complaint before the Constitutional Court of Serbia. Moreover, the complaint *as a whole and in its very essence* was based on the discrimination issue. The complaint about inconsistent case-law was in substance also a complaint about discriminatory practices existing at the national level.

In our view, the core argument in support of the applicants' contention in this case is the fact that the Constitutional Court of Serbia found in their

favour. The approach taken by the Constitutional Court, when finding a violation of the Constitution, was to base its decision on one ground or argument – supporting the applicants (inconsistent case-law) – and in effect hold that it was unnecessary to take cognisance of any other argument (in this case the argument based on the Agreement). In applying the Convention, our Court adopts the same practice in many cases, the formula generally being that "... it is not necessary to examine the complaint under Article ..."

3. Despite the above factors, the majority are of the view (see paragraph 85) that the applicants failed to exhaust civil and constitutional remedies. We disagree. In our view, the facts point in the opposite direction: the applicants filed a civil claim, and once they had lost their case before the ordinary courts they applied to the Constitutional Court for constitutional redress. The Constitutional Court ruled in their favour, but did not properly redress the violation, which explains why the applicants lodged an application with our Court. With all due respect, we believe that the majority judgment suffers from an excess of formalism: the majority appear to have taken the view that the applicants did not plead (before the domestic courts, including the Constitutional Court) in a "form" that the majority consider to be the only acceptable one.

4. Excessive formalism is frowned upon in the case-law of the Court. In a previous case (see *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, § 116, ECHR 2007-IV), where the principal complaint was one of discrimination, the Court ruled that

> "... Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. [The Court] has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case."

The Court has gone even further along the lines of the flexibility rule. On certain occasions it has dismissed the respondent Government's objection of non-exhaustion of domestic remedies in a situation in which some of the applicants had not availed themselves of the possibility of lodging a constitutional complaint (see *S.H. and Others v. Austria, 57813 [GC],* no. 57813/00, § 47, ECHR 2011).

In connection with an Article 6 complaint, in *M.D. and Others v. Malta* (no. 64791/10, §§ 34-38, 17 July 2012), the Court castigated the very formalistic and blinkered approach of the Constitutional Court in handling an application for constitutional redress. In that judgment, the Court reproduced the quotation from *D.H. and Others*, without referring to it expressly, and provided further references in support of the same rule of flexibility, a rule firmly rooted in the Court's case-law. In the context of the fairness of proceedings at domestic level, in *Kadlec v. the Czech Republic* (no. 49478/99, § 26, 25 May 2004) – a case concerning access to, and

pleadings before, the Constitutional Court – the Court found a violation of Article 6 of the Convention, stating, *inter alia,* that

> "The courts must, in applying the rules of procedure, avoid both excessive formalism which would affect the fairness of the procedure, and excessive flexibility that would result in removing the procedural requirements established by law."

We see no reason why the Court's approach should have been different in the instant case.

The Court also held, in *Walchli v. France* (no. 35787/03, § 32, 26 July 2007), that there had been a violation of Article 6 of the Convention because of the excessive formalism in the position taken by the national court on the issue at stake.

The Court has recently reiterated its stance in the case of *Ateş Mimarlik Mühendislik A.Ş. v. Turkey* (no. 33275/05, § 39, 25 September 2012), stating that excessive formalism must not represent a barrier to a claim being considered on the merits. It referred to its previous case-law on the subject, including *Walchli*.

5. The Court has unswervingly favoured a flexible application of Article 35 § 1 of the Convention. We therefore find it difficult to subscribe to the majority finding in this case, which basically amounts to telling the applicants that they should have pleaded their case at domestic level *in one particular and specific way and not another.*

6. Even if – which we do not believe should be the case – one were to hold that the applicants should have pleaded in a particular manner before the Constitutional Court, we wonder whether a more explicit reference to the agreement and to Article 21 of the Constitution would have had any reasonable prospect of success. The Constitutional Court, in its decision of 7 November 2012 (see paragraph 23), held in effect that discrimination on the basis of *personal qualities* was a *precondition* for determining the existence of a violation of the principle of non-discrimination. Since the applicants' claim is in essence that they were discriminated against on the basis of their *place of residence* – which cannot be considered a "personal quality" – such a claim, no matter how it were pleaded before that domestic court, would have been dismissed.

7. For the above reasons, and in the light of the clear and constant case-law of the Court, we disagree with the majority finding that the applicants did not exhaust domestic remedies. In our opinion, such a finding can be drawn from the facts only by way of an excessively formalistic approach to Article 35 § 1, which is not allowed by the Court's case-law. Accordingly, we find that the Grand Chamber should have considered the merits of the case.