EUROPEAN COURT FOR HUMAN RIGHTS

SECOND SECTION

CASE OF ŽIVIĆ v. SERBIA

(Application no. 37204/08)

JUDGMENT

STRASBOURG

13 September 2011

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 Živić v. Serbia,

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

Françoise Tulkens, *President,*
David Thór Björgvinsson,
Dragoljub Popović,
Giorgio Malinverni,
András Sajó,
Guido Raimondi,
Paulo Pinto de Albuquerque, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 23 August 2011,

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

PROCEDURE

1. The case originated in an application (no. 37204/08) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Dalibor Živić ("the applicant"), on 29 July 2008.

2. The applicant was represented before the Court by Mr N. Vukotić, a lawyer practising in Belgrade. The Government of Serbia ("the Government") were represented by their Agent, Mr S. Carić.

3. The applicant complained that the case-law of the domestic courts concerning the payment of the same salary increase granted to a certain category of police officers was flagrantly inconsistent.

4. On 28 January 2010 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (former Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1975. He resides in Kosovska Mitrovica in Kosovo1, where he is employed as a police officer with the Ministry of

1 All reference to Kosovo, whether to the territory, institutions or population, in this

Internal Affairs of the Republic of Serbia (*Ministarstvo unutrašnjih poslova Republike Srbije*, hereinafter "the Ministry").

6. The facts, as submitted by the parties, may be summarised as follows.

7. On 24 January 2000 and 17 July 2003 respectively, the Serbian Government adopted two decisions whereby, *inter alia*, all of its employees who resided and worked in Kosovo were to be paid double salaries.

8. On 31 January 2000 the Ministry issued a decision stating that the police officers in question were entitled to have their salaries increased by between 2.5% and 4.5%, depending on the circumstances.

9. In reality, the applicant only received the increase approved by the Ministry, amounting to significantly less than the doubling of his salary envisaged by the Government.

10. On 29 August 2006, therefore, the applicant filed a civil claim against the Ministry with the First Municipal Court (*Prvi opštinski sud*) in Belgrade, seeking payment of the difference between the salary increase received and that granted by the Government. The applicant further requested the payment of unspecified amounts on account of the related pension and disability insurance contributions.

11. On 23 July 2007 the First Municipal Court ruled in favour of the applicant and ordered his employer to pay:

i. 145,821.60 Serbian dinars ("RSD") (approximately 1,760 Euros ("EUR") at the relevant time) in respect of the difference between the salary received from 1 July 2003 to August 2006 and that granted by the Government, plus statutory interest;

ii. the extra pension and disability insurance contributions for the above period in respect of this additional salary to the relevant State fund; and

iii. RSD 39,532 (approximately EUR 477) for his legal costs.

12. On 19 December 2007 the District Court (*Okružni sud*) in Belgrade reversed that judgment and rejected the applicant's claim. In its reasoning the District Court held, *inter alia,* that the applicable domestic regulation was contained in the decision of the Ministry adopted on 31 January 2000. This judgment was served on the applicant on 29 January 2008.

13. Many of the applicant's colleagues (hereinafter "the plaintiffs") had lodged separate claims with the District Court concerning the same issue, some of which were successful while others were unsuccessful: in seventy-three other judgments rendered between 25 January 2006 and 1 October 2008, the same District Court ruled in favour of the plaintiffs, notwithstanding the fact that their claims were based on the same facts as those in the applicant's case and concerned identical legal issues. In its reasoning in these other cases, the District Court held, *inter alia*, that the

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judgment shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

plaintiffs' salaries had to be paid in accordance with the Serbian Government's decisions of 24 January 2000 and/or 17 July 2003.

14. Of the seventy-three judgments mentioned above, in fifty cases the respondent lodged appeals on points of law (*revizije*) with the Supreme Court (*Vrhovni sud Srbije*, see paragraphs 21 and 24 below). In the remaining twenty-three cases, however, the respondent lodged no such appeal, apparently in the light of the statutory threshold (see paragraph 22 below).

15. The Government provided examples of relevant case-law adopted by the Supreme Court, in particular six separate judgments, of which one had been issued on 3 July 2008 and the remaining five between 25 December 2008 and 1 October 2009. In each case, deciding upon appeals on points of law, the Supreme Court had ruled against the plaintiffs, albeit with somewhat different reasoning compared with that employed by the District Court. In particular, the Supreme Court had held, *inter alia*, that the Government's decision of 17 July 2003 was not directly applicable.

16. In the meantime, on 23 September 2008, the Civil Division (*Građansko odeljenje*) of the Supreme Court held a meeting which was meant to resolve the issue of how to rule in all cases like the applicant's (see paragraph 26 below). In the minutes of this meeting, it was noted, *inter alia*, that in two cases registered in 2008 where appeals on points of law had been considered, the Supreme Court had in fact confirmed the lower courts' rulings in favour of the plaintiffs (*Rev II 429/08 and Rev 623/08*). The meeting, however, was ultimately adjourned pending the outcome of a case which had been brought before the Constitutional Court (*Ustavni sud Srbije*) concerning the abstract review of the constitutionality of the Government's decision adopted on 17 July 2003. On 16 April 2010 the Constitutional Court held that the impugned decision was unconstitutional.

17. In eighteen separate cases the plaintiffs thereafter lodged their appeals with the Constitutional Court (*ustavne žalbe*), but, according to the information contained in the case file, these proceedings are all still pending.

18. The applicant was not entitled to lodge an appeal on points of law since the value of his claim was below the threshold of 500,000 dinars. He did not attempt to obtain constitutional redress.

II. RELEVANT DOMESTIC LAW

A. Provisions concerning the constitutional appeal procedure

19. The relevant provisions are set out in the *Vinčić and Others v. Serbia* judgment (nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07,

9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, §§ 22-34, 1 December 2009).

B. The Civil Procedure Act 2004 (Zakon o parničnom postupku; published in the Official Gazette of the Republic of Serbia - OG RS - no. 125/04)

20. Article 2 § 1 provides, *inter alia*, that all parties shall be entitled to the equal protection of their rights.

21. Articles 394 § 1, 396 and 398 provide that parties may file an appeal on points of law (*revizija*) with the Supreme Court. They may do so within a period of thirty days following receipt of a final decision rendered at second instance, and only if the relevant legislation, procedural or substantive, has been breached by the lower courts.

22. Article 394 § 2 provides, *inter alia*, that an appeal on points of law is "not admissible" in pecuniary disputes (*kad se tužbeni zahtev odnosi na potraživanje u novcu*) where the "value of the part of the final judgment being contested does not exceed 500,000 dinars".

23. Article 439 provides that an appeal on points of law is admissible in employment-related cases which concern one's hiring or dismissal or the "existence" of one's employment (*u parnicama o sporovima o zasnivanju, postojanju i prestanku radnog odnosa*)

24. In accordance with Articles 396 and 406-409, *inter alia*, the Supreme Court, should it accept an appeal on points of law lodged by one of the parties concerned, has the power to overturn and/or amend the impugned judgment or quash it and order a re-trial before the lower courts.

25. Article 422.10 provides that a case may be re-opened if the European Court of Human Rights has in the meantime rendered a judgment in respect of Serbia concerning the same or a similar legal issue.

C. The Court Organisation Act (Zakon o uređenju sudova; published in OG RS nos. 63/01, 42/02, 27/03, 29/04, 101/05 and 46/06)

26. Article 40 §§ 2 and 3 provides, *inter alia*, that a meeting of a division (*sednica odeljenja*) of the Supreme Court shall be held if there is an issue as regards the consistency of its case-law. Any opinions (*pravna shvatanja*) adopted in such a meeting are binding for all panels (*veća*) of the division in question.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

27. The applicant complained that the case-law of the domestic courts concerning the payment of the same salary increase granted to a certain category of police officers was flagrantly inconsistent.

28. The relevant provisions of the said Article read as follows:

Article 6 § 1

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. Compatibility ratione personae *(the applicant's "victim status")*

29. The Government noted that the applicant, in principle, claimed to be the victim of a violation of the right to fair trial in respect of the inconsistent case-law of the District Court in Belgrade. Referring to the position of the Supreme Court (see paragraph 15 above), the Government maintained that the alleged inconsistency was the result of the erroneous application of domestic law in the judgments adopted in the plaintiffs' favour. If the Constitutional Court was to consider the impugned decision of July 2003 unconstitutional (see paragraph 16 above), the respondent State would, most certainly, request the re-opening of the cases in the plaintiffs' favour (see paragraph 25 above), which would inevitably lead to the annulment of the judgments rendered in those cases. Thus, the applicant would no longer be able to claim that there was inconsistency in the domestic courts' case law and would, accordingly, lose his victim status.

30. The applicant did not comment on the Government's objection.

31. The Court firstly notes that the Government's objection is based on their assumptions and speculations, even assuming that they are relevant in this particular case. Secondly, the Constitutional Court has already held, on 16 April 2010, that the impugned decision was unconstitutional, although it would appear the State has not taken any procedural steps in this respect. In any event, the Court recalls that it had already been made aware of the Constitutional Court's opinion on the constitutionality of the impugned 2003 decision and had found it irrelevant when adjudicating on a practically identical legal issue in the case of *Rakić and Others v. Serbia* (nos. 47460/07, 49257/07, 49265/07, 1028/08, 11746/08, 14387/08, 15094/08, 16159/08, 18876/08, 18882/08, 18997/08, 22997/08, 23007/08, 23100/08,

23102/08, 26892/08, 26908/08, 29305/08, 29306/08, 29323/08, 29389/08, 30792/08, 30795/08, 31202/08, 31968/08, 32120/08, 32537/08, 32661/08, 32666/08 and 36079/08, 5 October 2010, § 17).

32. The Court sees no reason to depart from those findings in the present case and concludes, therefore, that the Government's objection must be dismissed.

(b) Article 35 § 3 (b) of the Convention

33. The Government further argued that the applicant's complaint should be declared inadmissible since "he had not suffered a significant disadvantage" within the meaning of Article 35 § 3 (b) of the Convention as amended by Protocol No. 14, which entered into force on 1 June 2010.

34. In particular, the Government maintained that (a) the matter at stake was not the applicant's increased salary, but the right to a fair trial, which he had adequately enjoyed before the domestic courts; (b) the alleged grievance consisted only of the applicant's subjective "feeling" that a very small number of plaintiffs in rather minor cases might have "slipped through the system" and benefited from positive outcomes on account of omissions of lower courts that could not have been remedied before the Supreme Court because of the low value of the subject matters in issue; (c) respect for human rights did not require further examination of the case, as the applicant could not expect a different outcome and it was of merely "historical importance" (in this regard, the Government referred to the Court's decision in the *Adrian Mihai Ionescu* case (see *Adrian Mihai Ionescu v. Romania* (dec.), no. 36659/04, 1 June 2010)); and (d) this case had been duly considered by the domestic court, and the impugned issue could be remedied before the Constitutional Court of Serbia by lodging a constitutional complaint.

35. The applicant did not comment on the Government's objection.

36. The Court recalls that Article 35 of the Convention, as amended by Protocol No. 14, which entered into force on 1 June 2010, provides, in so far as relevant, as follows:

> "3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
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> ...
>
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

37. As indicated in paragraph 79 of the Explanatory Report to Protocol No. 14,

> "The new criterion may lead to certain cases being declared inadmissible which might have resulted in a judgment without it. Its main effect, however, is likely to be that it will in the longer term enable more rapid disposal of unmeritorious cases".

38. The main aspect of this new criterion is whether the applicant suffered any significant disadvantage, which assessment may itself be based on criteria such as the financial impact of the matter at issue or the importance of the case for the applicant (see, for example, *Adrian Mihai Ionescu v. Romania* (dec.), cited above, § 34).

39. Although the outcome of the applicant's case before domestic courts is not directly the subject matter of the applicant's complaints, the Court notes that it concerns labour rights, for example, the right of everyone to "just and favourable" working conditions. The amount involved in the dispute was RSD 145,821.60 (approximately EUR 1,800 at the time), together with the unspecified amounts on account of the related pension and disability insurance contributions.

40. The Court furthermore considers that the pecuniary interest involved is not the only element to be taken into account in determining whether the applicant has suffered a significant disadvantage. A violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless of pecuniary interest (*Korolev v. Russia (no. 2)*, no. 5447/03, 1 April 2010). Indeed, the underlying issue and the core of the applicant's complaint is the inconsistent case-law of the District Court in Belgrade as regards the right to fair wages and equal pay for equal work, that is, payment of the same salary increase granted to a certain category of police officers. The Court observes that this inconsistent adjudication stemming from the same jurisdiction affected many individuals in the same situation (see *Rakić and Others v. Serbia*, cited above, § 43). The Court further observes that this practice inevitably reduced public confidence in the judicial system and furthermore jeopardized the principle of legal certainty and equality of all before the law, which constitute fundamental attributes of the rule of law and are inherent in the Convention. Thus, this case is to be distinguished from the *Ionescu* case (cited above) that the Government refers to. In that case, which concerned access to a court in a case involving contractual issues between the applicant and a transportation company, the Court did not find that the applicant had suffered any significant disadvantage in the exercise of his right of access to a court (the financial loss was estimated by the applicant himself at EUR 90), or that respect for human rights required further examination in view of the already repealed impugned legislation and similar issues already resolved by this Court. Finally, the Court notes that the applicant in the present case was not obliged to have exhausted the constitutional complaint when he lodged his case before this Court as it was not considered an effective remedy at that time, nor would he be able to file it now because of the time limits for this avenue of redress.

41. The foregoing considerations are sufficient to enable the Court to conclude not only that, owing to the significant financial impact and substantive nature of the matter at stake, the applicant has suffered a significant disadvantage as a result of the alleged violation of the Convention, but also (even assuming that the applicant has not suffered a significant disadvantage) that the case raises issues of general interest.

42. In view of the above, the Government's objection must be dismissed.

(c) Conclusion

43. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

44. As regards the merits, the Government reiterated the same arguments that they had raised in *Rakić and Others v. Serbia* (cited above, § 42).

45. The applicant reaffirmed his complaint.

46. The Court has already considered practically identical circumstances in the above-mentioned *Rakić* case (cited above, §§ 68-75), in which it found, *inter alia*, a violation of Article 6 of the Convention. Whilst acknowledging that certain divergences in interpretation may be accepted as an inherent trait of any judicial system which, like the Serbian one, is based on a network of trial and appeal courts with authority over a certain territory, the Court notes that the conflicting interpretations in the applicants' cases stemmed from the same jurisdiction, namely, the District Court in Belgrade, and involved the inconsistent adjudication of claims brought by many persons in identical situations (see *Vinčić and Others v. Serbia*, cited above, § 56; see also, *mutatis mutandis*, *Tudor Tudor v. Romania*, no. 21911/03, § 29, 24 March 2009). All this created a state of continued uncertainty, which in turn must have reduced the public's confidence in the judiciary. Finally, it would appear that even the Supreme Court's case-law on the matter had not effectively become consistent until, at best, the latter part of 2008 (see paragraphs 15 and 16 above), whilst formally this consistency had apparently never been secured in accordance with Article 40 of the Court Organisation Act (see paragraphs 16 and 26 above).

47. Having examined all the relevant circumstances, the Court does not see any reason to hold otherwise in the present case. Without considering it appropriate to pronounce as to what the actual outcome of the applicant's case should have been (see *Vinčić and Others v. Serbia*, cited above, § 56), the Court finds that there has nevertheless been a breach of Article 6 of the Convention on account of the profound and persistent judicial uncertainty

which had not been remedied by the Supreme Court in a satisfactory manner (see *Rakić and Others v. Serbia,* cited above, § 44; see also, *mutatis mutandis*, *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, §59, ECHR 1999-VII*; Vinčić and Others v. Serbia*, cited above, § 56; *Beian v. Romania (no. 1)*, no. 30658/05, §§ 34-40, ECHR 2007-V (extracts); *Tudor Tudor v. Romania*, no. 21911/03, § 29, 24 March 2009; and *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, § 47-48 and 52, 2 July 2009; see, *au contraire*, *Schwarzkopf and Taussik v. Czech Republic* (dec.), no. 42162/02, 2 December 2008); and *Pérez Arias v. Spain* (no. 32978/03, § 25, 28 June 2007).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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."

49. The applicant claimed EUR 2,905.14 and EUR 3,000 respectively, for pecuniary and non-pecuniary damage suffered as a result of a violation of his right guaranteed under Article 6 § 1 of the Convention. He also claimed the costs and expenses incurred in the domestic civil proceedings (as recognised in the final judgments rendered in his favour) and EUR 296.48 for the costs incurred before the Court. The Government contested these claims.

50. Having regard to the violation found in the present case and its reasons for so doing (see paragraphs 46 and 47 above, particularly the reference to the outcome of the applicant's case), the Court considers that the applicant's claim, in so far as it relates to the payment of the respective sums sought domestically, must be rejected (see *Vinčić and Others v. Serbia*, cited above, § 61).

51. The Court, however, takes the view that the applicant has suffered some non-pecuniary damage as a result of the violation found which cannot be made good by the Court's mere finding of a violation (see, *mutatis mutandis*, *Tudor Tudor v. Romania*, cited above, § 47). Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court therefore awards the applicant EUR 3,000 under this head.

52. As regards the costs and expenses incurred domestically, the Court notes that those relating to the civil proceedings are an integral part of the applicant's pecuniary claim, which has already been dealt with above.

53. 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 are also

reasonable as to their quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the requested sum for the costs and expenses incurred in the proceedings before this Court.

C. Default interest

54. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

3. *Holds*
   (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, the following sums, to be converted into Serbian dinars at the rate applicable on the date of settlement:
      (i) EUR 3,000 (three thousand euros) in respect of the non-pecuniary damage suffered, plus any tax that may be chargeable,
      (ii) EUR 296.48 (two hundred and ninety-six euros and forty-eight cents) for costs and expenses, plus any tax that may be chargeable to the applicant;
   (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 13 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President"