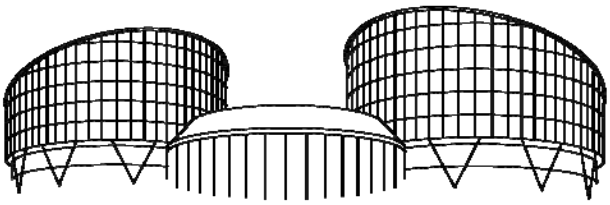

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Applications nos. 17079/07 and 32824/07
Danica RADOVANOVIĆ and Ružica PETROVIĆ
against Serbia

The European Court of Human Rights (Second Section), sitting on 4 June 2013 as a Chamber composed of:

Guido Raimondi, *President,*
Danutė Jočienė,
András Sajó,
Mirjana Lazarova Trajkovska, ad hoc *judge,*
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Stanley Naismith, *Section Registrar,*

Having regard to the above applications lodged on 20 April 2007 and 13 July 2007 respectively,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having regard to the withdrawal of Judge D. Popović, the judge elected in respect of Serbia, from sitting in the Chamber (Rule 28) and to the appointment of Judge M. Lazarova Trajkovska to sit as an *ad hoc* judge in his place (Rule 29),

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Ms Danica Radovanović ("the first applicant") and Ms Ružica Petrović ("the second applicant"), are Serbian nationals who

were born in 1952 and 1925 and lived in Lazarevac and Belgrade, respectively.

2. Both applicants were represented before the Court by the Belgrade Centre for Human Rights, a human rights organisation based in Serbia. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

A. The circumstances of the case

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

1. As regards the first applicant

4. In 1971 the first applicant married M.R., and during their marriage she gave birth to their two children.

5. On 21 November 1989 the first applicant and M.R. were divorced by consent before the District Court in Belgrade. The first applicant's children were awarded child maintenance, while the first applicant herself never sought maintenance from her former husband.

6. The first applicant maintained that after the divorce she and M.R. were reconciled and started living together again. In the years that followed, they continued living as cohabitants (*vanbračni drugovi*).

7. On 14 October 2005 M.R. died as a consequence of an accident at work.

8. On 18 November 2005 the first applicant filed a request with the Pensions and Disability Insurance Fund ("the PDIF"), requesting to be awarded a survivor's pension.

9. On 10 February 2006 the PDIF's branch in Belgrade rejected the first applicant's request, finding that she had no standing to claim a survivor's pension.

10. On 26 April 2006 the PDIF's Directorate confirmed the decision of 10 February 2006.

11. On 20 October 2006 the District Court upheld the decisions of 10 February 2006 and 26 April 2006, while acknowledging that the first applicant and her former husband had continued living as cohabitants. The District Court further explained that the first applicant was not entitled to a survivor's pension since in the divorce proceedings she had not been awarded maintenance (see paragraph 30 below, Article 28 § 2 of the Pensions and Disability Insurance Act).

12. On 26 July 2007 the first applicant acquired the right to a disability pension.

2. As regards the second applicant

13. On 23 December 1948 the second applicant married Č.P.

14. On 29 June 1966 the District Court in Belgrade dissolved their marriage, noting, *inter alia*, that the parties had stopped living together in 1965. The applicant's children were awarded child maintenance, while the applicant herself never sought maintenance from her former husband.

15. The second applicant maintained that following the divorce she and Č.P. continued living together as cohabitants, and that their children were never aware that their parents were in fact not married.

16. Throughout this partnership the second applicant was never employed, and enjoyed benefits based on Č.P.'s health insurance.

17. On 15 November 2004 Č.P. died.

18. On 6 April 2005 the second applicant filed a request with the PDIF, seeking a survivor's pension.

19. On 14 March 2005 the PDIF's branch in Belgrade rejected the second applicant's request, since in the divorce judgment she had not been awarded maintenance (see paragraph 30 below).

20. On 1 June 2005 the PDIF's Directorate confirmed the decision of 14 March 2005, acknowledging that the second applicant and her former husband had continued living as cohabitants.

21. On 6 October 2005 and 20 September 2006 the District Court and the Supreme Court respectively upheld the decision of 14 March 2005. On 28 December 2006 the second applicant received the Supreme Court's decision, rejecting her appeal on points of law (*zahtev za vanredno preispitivanje sudske odluke*) on its merits. The Supreme Court explained that the second applicant was not entitled to a survivor's pension since the divorce court had not awarded her maintenance (see paragraph 30 below).

3. As regards both applicants

22. According to the documents contained in the case file, throughout the above proceedings, the applicants argued that they were entitled to their survivors' pensions, respectively, since they had continued living with their former spouses and the latter had also continued providing them with maintenance on a voluntary basis.

B. Relevant domestic law, commentary and practice

1. The Constitution of the Republic of Serbia 1990 (Ustav Republike Srbije; published in the Official Gazette of the Republic of Serbia – OG RS – no. 1/90)

23. Article 29 guaranteed equality between children born inside and outside of marriage.

2. The Constitutional Charter of the State Union of Serbia and Montenegro (Ustavna povelja državne zajednice Srbija i Crna Gora, published in the Official Gazette of Serbia and Montenegro – OG SCG – no. 1/03)

24. Article 9 § 3 stated that all international human rights treaties valid in the territory of Serbia and Montenegro would be directly applicable.

3. The Charter on Human and Minority Rights and Civic Freedoms of the State Union of Serbia and Montenegro (Povelja o ljudskim i manjinskim pravima i građanskim slobodama državne zajednice Srbija i Crna Gora, published OG SCG no. 6/03)

25. Article 7 provided, *inter alia*, that all human rights guaranteed by a binding international treaty would be directly applicable.

4. The Constitution of the Republic of Serbia 2006 (Ustav Republike Srbije; published in OG RS no. 98/06)

26. Article 18 § 2 provides, *inter alia*, that all ratified international human rights treaties shall be directly applicable.

27. Article 21 § 3 provides that "[a]ll 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."

28. Article 62 § 5 provides that "a cohabiting partnership (*vanbračna zajednica*) shall be equal to marriage, under the conditions set forth by law".

29. This Constitution entered into force on 8 November 2006.

5. The Pensions and Disability Insurance Act (Zakon o penzijskom i invalidskom osiguranju; published in OG RS nos. 34/03, 64/04, 84/04, 85/05, 101/05, 63/06, 5/09, 107/09 and 101/10)

30. The right to a survivor's pension shall be granted, *inter alia*, to family members of a deceased insured person who had paid the relevant contributions for at least five years, as well as to family members of a person who had already been granted a pension (Article 27). Eligible family members shall include, *inter alios*, the married partner (*bračni drug*) of the deceased (Article 28 § 1). The right to a survivor's pension shall likewise apply to a divorced partner (*bračni drug iz razvedenog braka*), where a court had already established his or her right to maintenance in the course of the divorce proceedings (Article 28 § 2).

31. A survivor's pension shall be granted to the deceased's children under the age of 15. Beyond that, children shall be entitled to the said pension if they are attending secondary or higher education, but even then only until the ages of 20 and 26 respectively. Where the children's education has been interrupted due to a disease, they shall be entitled to the

pension for an additional period corresponding to the duration of the disease in question. When the children's education has been interrupted because of their military service, the pension shall be paid until the age of 27. Should the children becomes unable to live and work independently before reaching the relevant age, they shall be entitled to a pension, but should the children become unable to do so only later, but before the insured parent dies, they shall be entitled to a pension only if they had been financially supported by that parent until his or her death. Such children, as well as disabled children, shall also be entitled to a pension should they become unemployed or otherwise cease with their business activities (Article 31).

32. Should one acquire a right to a disability pension, one shall no longer be entitled to a survivor's pension (Articles 117 § 2 and 119, taken together).

33. One's entitlement to a pension or disability insurance (*osnov osiguranja*) cannot be established on the basis of witness statements (Article 138 § 3).

34. The latest amendments to the Act entered into force on 1 January 2011, introducing certain changes to the pension and disability benefits system, mostly relating to the retirement age. When the question of the possibility to grant cohabitants equal rights in respect of the survivor's pension was raised, the State Secretary in the Ministry for Labour and Social Policy, who was at the same time the head of the working group on pension reform, was quoted as having said, "it is hard to prove the existence of such partnerships"; "[i]ntroducing this right would mean a higher number of retired persons, and an increase in expenses" (Ms R.T., in a statement to the "Press" newspaper, 14 January 2011).

6. The Veteran's Entitlements Act (Zakon o osnovnim pravima boraca, vojnih invalida i porodica palih boraca; published in the official Gazette of the Federal Republic of Yugoslavia – OG FRY – nos. 24/98, 29/98 and 25/00, as well as in OG RS nos. 101/05 and 111/09)

35. Articles 13 § 3 and 30, taken together, provide that cohabitants of deceased veterans shall, under certain conditions, be entitled to a survivor's disability pension (*pravo na porodičnu invalidninu*) if they have children in common.

7. The Health Insurance Act (Zakon o zdravstvenom osiguranju; published in OG RS nos. 107/05, 109/05, 57/11, 110/12 and 119/12)

36. Article 24 provides that compulsory health insurance shall be provided to the family members of the insured. Cohabitants are considered to be immediate family and are granted equal rights to married partners on

the condition that they have shared a household for at least two years before filing the request.

8. The Bio-medically Introduced Fertilisation Act (Zakon o lečenju neplodnosti postupcima biomedicinski potpomognutog oplođenja; published in OG RS no. 72/09)

37. This Act, read in conjunction with the Health Insurance Act, provides, *inter alia*, that cohabitants and married partners alike shall enjoy equal treatment as regards the Government-supported programme of *in vitro* fertilisation.

9. The Social Protection and Citizens' Social Security Act (Zakon o socijalnoj zaštiti i obezbeđivanju socijalne sigurnosti građana; published in OG RS nos. 36/91, 79/91, 33/93, 53/93, 67/93, 46/94, 48/94, 52/96, 29/01, 84/04, 101/05 and 115/05)

38. Articles 12, 12a and 13 provide that cohabitants shall be treated the same as married partners in respect of their entitlement to various welfare benefits.

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

39. Article 4 defines cohabitation as a longer partnership (*trajnija zajednica života*) between a man and a woman, where there are no obstacles to them marrying (for example, another marriage, blood relationship and so on), and where the partners have the same rights and duties as those afforded to married partners, "under the conditions set forth in this Act".

40. Articles 152 and 191 provide that cohabitants shall have the right to request maintenance from one another, and that any property obtained during their partnership shall be their common property.

41. Article 187, taken together with Article 191, provides that cohabitants shall also be jointly responsible for certain obligations incurred during their partnership.

11. The Inheritance Act (Zakon o nalseđivanju, published in OG RS nos. 46/95 and 101/03)

42. Article 9 § 2 provides that the deceased's children and married partner shall inherit equal shares of his or her estate.

43. This Act makes no reference to cohabitants. The Čačak District Court, however, found that one cohabitant does not have the right to inherit the property of the other following his or her death (judgment of 18 April 2007, Gž. No. 454/07).

12. The Administrative Disputes Act (Zakon o upravnim sporovima; published in OG FRY no. 46/96)

44. Articles 18 § 2 and 49 provide, *inter alia*, that should an appeal on points of law be accepted by the Supreme Court, the impugned decision may be overturned or quashed, and that in the latter case a re-trial before the lower court may be ordered.

13. Other legislation concerning the status of cohabitants

45. Cohabitants and married partners enjoy equal treatment as regards, *inter alia*, the following: (a) deciding on whether to donate their deceased partner's organs to medical institutions for educational purposes (the Health Protection Act, *Zakon o zdravstvenoj zaštiti*; published in OG RS nos. 107/05, 72/09, 88/10, 99/10, 57/11 and 119/12; Article 226); (b) the assessment of whether an official can be deemed to be in a conflict of interest (the Prevention of Conflicts of Interest Act, *Zakon o sprečavanju sukoba interesa pri vršenju javnih funkcija*; published in OG RS no. 43/04, Article 4); (c) an official's obligation to report his or her property and financial status to the Anti-Corruption Agency (the Anti-Corruption Agency Act, *Zakon o Agenciji za borbu protiv korupcije*, published in OG RS nos. 97/08, 53/10 and 66/11, Article 43 § 2); and (d) various procedural contexts, civil and criminal (see the Code of Criminal Procedure, *Zakonik o krivičnom postupku,* published in the Official Gazette of the Federal Republic of Yugoslavia nos. 70/01 and 68/02, as well as in OG RS nos. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09 and 76/10, Articles 56, 61 § 6, 68 § 2, 98 § 1 (1) and 364 § 2; see also the Civil Proceedings Act, *Zakon o parničnom postupku*, published in OG RS nos. 72/11, Articles 67 § 1 (3) and 249 § 1).

46. The Foreigners Act (*Zakon o strancima*; published in OG RS no. 97/08) provides that temporary residence (longer than ninety days) may be granted to immediate family members for reasons of family reunification (Article 26 § 1 (3)). This includes, *inter alios*, married partners (Article 32 § 2). In practice, however, cohabitants have the same rights.[1]

47. There is no possibility, according to Serbian legislation, to officially register a cohabiting partnership, nor does there exist an equivalent of, or a document similar to, the family record book.[2]

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[1] For these purposes, a cohabiting partnership may be substantiated by providing evidence to the effect that neither of the partners is married to someone else and a certified statement of two witnesses confirming the existence of the partnership in question (http://www.mup.gov.rs/cms_cir/sadrzaj.nsf/uslovi-za-izdsvanje-odobrenja.h, last accessed 8 February 2013).

[2] Family record book (French "*livret de famille*"; Spanish "*libro de familia*"; or Turkish "*aile cüzdanı*") is a document which was introduced by the 1974 Convention establishing an international family record book (which has not been ratified by Serbia) and is generally issued to couples upon entering into marriage.

14. The Constitutional Court's decision of 30 June 2011

48. On 30 June 2011 the Constitutional Court rejected a motion seeking, *inter alia*, to have Article 28 of the Pensions and Disability Insurance Act declared unconstitutional. It did so because it lacked the power to legislate ("*Ustavni sud ... ne stvara normu ... [, on] ... nema ulogu i ovlašćenje tzv. pozitivnog zakonodavca ...*"). In its reasoning, however, the Constitutional Court further opined as follows:

> "... [T]he Constitutional Court notes that the Constitution ... has established that cohabitation is equal to marriage in accordance with the law ... [It has therefore] ... decided to send a letter ... to the Parliament in which it will point out the need for the contested provisions of Article 28 ... to be brought in line ... with the Constitution and ratified international instruments."

COMPLAINTS

49. The applicants complained under Article 1 of Protocol No. 12 about being discriminated against, by virtue of the Pensions and Disability Insurance Act, in respect of the right to a survivor's pension. Specifically, married partners, or divorced partners who had been granted maintenance in the divorce proceedings, were entitled to a survivor's pension whilst the applicants, as cohabitants in their respective relationships, were not.

THE LAW

A. Joinder of the applications

50. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

B. The second applicant's death

51. On 7 May 2008 the second applicant died.

52. On 16 November 2011 her representative informed the Court of this fact, and indicated that Mr Tomislav Petrović (56) and Ms Nadežda Ristić (63), the second applicant's son and daughter respectively, wished to continue with the proceedings brought by their mother.

53. The Government maintained that the second applicant's surviving children had no lawful interest to do so, particularly in view of Article 31 of the Pensions and Disability Insurance Act (see paragraph 31 above).

54. The Court notes that Article 31 of the Pensions and Disability Insurance Act defines the situations in which a deceased person's child would be entitled to a survivor's pension. Since Mr Petrović and Ms Ristić are both well above the age of 27 and there is no evidence that they were ever "disabled" or "unable to live and work independently", it is clear that they, personally, have no right under domestic law to a survivor's pension. However, being their mother's legal heirs (see paragraph 42 above), and given the possible financial implications of her complaint before the Court, in so far as it concerns any back payments due prior to her death, they obviously have a pecuniary interest in the outcome of the proceedings before it (see, *mutatis mutandis*, *Marčić and Others v. Serbia*, no. 17556/05, §§ 35 and 37-39, 30 October 2007).

55. In such circumstances, the Court finds without prejudice to the Government's other preliminary objections that both Mr Petrović and Ms Ristić have standing to proceed in their mother's stead. The Court shall, however, continue referring to the latter as "the second applicant" for practical purposes.

C. The applicants' complaints under Article 1 of Protocol No. 12

56. As noted above, the applicant's complained about being discriminated against in breach of Article 1 of Protocol No. 12. Specifically, they did not claim that Article 1 of Protocol No. 12 required States to treat marriages and cohabiting partnerships equally, or indeed to legally protect the latter at all. Rather their complaint was that in the Serbian context, where cohabiting partnerships have effectively been given almost the same legal recognition as marriages (see paragraphs 23, 26-34, 36-43 and 45-47 above), the few remaining differences would need to be reasonably and objectively justified. The Government, however, had failed to do so.

1. The parties' submissions

57. The Government maintained that the applicants had not complied with the exhaustion requirement. In particular, both had failed to lodge an appeal with the Constitutional Court and had not raised their discrimination complaints in those proceedings which they had issued. The first applicant alone had also failed to make use of an appeal on points of law (see paragraph 44 above).

58. The Government further submitted that the second applicant had failed to bring her case to the Court within a period of six months as of 28 December 2006, which was when she had received the Supreme Court's decision in the matter.

59. The applicants argued that neither an appeal on points of law nor a constitutional appeal could be deemed effective.

60. The second applicant maintained that her application was filed in a timely manner. Her complaint concerned a continuing situation, since the violations alleged stemmed directly from the Pensions and Disability Insurance Act.

2. The Court's assessment

61. The Court reiterates that, under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his or her Convention grievances. It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised at least in substance (see *Castells v. Spain*, 23 April 1992, § 32, Series A no. 236). 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, in that order). 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 v. Turkey*, 16 September 1996, § 71, *Reports of Judgments and Decisions* 1996-IV). Also, 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 v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III).

62. Concerning the timeliness issue, it is recalled that the object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the Court and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see, amongst other authorities, *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I). As a rule, an application must be introduced within six months of the date of the "final decision" in the chain of domestic remedies which have to be exhausted, or where there are no such remedies, from the date of the act complained of, or knowledge thereof. An exception may be made to the six-month' rule in the event of a continuing situation giving rise to a

violation (see *Hilton v. the United Kingdom*, no. 12015/86, Commission decision of 6 July 1988, Decisions and Reports (DR) 57, pp. 113-115).

63. Turning to the present case, the Court notes that the first applicant failed to lodge an appeal on points of law with the Supreme Court wherein she could have relied on Article 1 of Protocol No. 12, in view of its direct applicability (see paragraph 26 above), or on arguments to the same or like effect based on the relevant constitutional provisions (see paragraphs 27, 28 and 48 above). In such circumstances it cannot be said that this appeal would have clearly been devoid of any prospects of success, particularly as it could have resulted in the impugned decisions being overturned or quashed and, in the latter case, the entire matter being re-heard before the District Court (see paragraph 44 above). The fact that a similar appeal on points of law was rejected in the second applicant's case does not, taken alone, suggest otherwise since the second applicant herself had, arguably, not properly or fully developed her discrimination complaint before the Supreme Court (see paragraphs 22, 49 and 56 above). The foregoing is sufficient to allow the Court to conclude that the first applicant's complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies (see, *mutatis mutandis*, *Bogunović v. Croatia* (dec.), no. 18221/03, 11 July 2006).

64. Concerning the second applicant and quite apart from any other admissibility objections raised by the Government, the Court notes that it has already considered that there is no "continuing situation" in cases involving widowers' pensions and/or allowances, since a widower cannot claim to be a victim of discrimination until he has applied for benefits and been refused. It has therefore been the Court's consistent practice in such cases to hold that the six-month time-limit in Article 35 § 1 of the Convention begins to run from the date of the final refusal by the domestic authorities of such benefits (see, for example, *Nelson v. the United Kingdom*, no. 74961/01, § 12, 1 April 2008; and *Barrow and Others v. the United Kingdom (*dec.), nos. 68175/01, 68928/01, 69327/01, 13944/02, 13 December 2005). The Court further recalls that in cases where a decision is not pronounced publicly, the time starts to run on the day following the date on which the applicant or his representative was informed of this final decision (see *K. C. M. v. the Netherlands*, Commission decision of 9 January 1995, no. 21034/92, Decisions and Reports (DR) 80-A, p. 88). In the present case the second applicant received the Supreme Court's decision on 28 December 2006. It is this date that constitutes the date of the final decision for the purposes of the six months rule. Thus the Supreme Court's decision was delivered more than six months before 13 July 2007, which was the date of introduction of the second applicant's case before the Court. It follows that this complaint has been introduced out of time and must, as such, be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

65. Finally, for the sake of clarity, it must also be noted that the Court has consistently held that a constitutional appeal should, in principle, be considered as an effective domestic remedy only in respect of applications introduced as of 7 August 2008 (see *Vinčić and Others v. Serbia*, nos. 44698/06 et seq., § 51, 1 December 2009). There would have been no reason for it to hold otherwise in the present case, where the first and second applicants introduced their complaints before the Court on 20 April 2007 and 13 July 2007 respectively, even had these complaints otherwise been admissible.

For these reasons, the Court

Decides unanimously to join the applications;

Declares by a majority the applications inadmissible.

Stanley Naismith
Registrar

Guido Raimondi
President