SECOND SECTION

DECISION

Application no. 10968/04
Dragoljub KECMAN
against Serbia

The European Court of Human Rights (Second Section), sitting on 5 February 2013 as a Chamber composed of:

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 1 October 2003,

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

Having deliberated, decides as follows:

# THE FACTS

1. The applicant, Mr Dragoljub Kecman, is a citizen of Bosnia and Herzegovina, who was born in 1934 and lives in Banja Luka. He was represented before the Court by Mr D. Ukropina, a lawyer practising in Novi Sad. The Government of Serbia ("the Government") were represented by their Agent, Mr S. Carić.

2. The Government of Bosnia and Herzegovina were invited to intervene in the proceedings (Article 36 § 1 of the Convention), but they did not wish to exercise their right to do so.

## A. The circumstances of the case

### *1. Relevant background to the applicant's case*

3. Until 1989/90, the former Socialist Federal Republic of Yugoslavia (SFRY) made it attractive for its citizens to deposit foreign currency with its banks. They earned high interest and a State guarantee was to be activated at the request of the bank in the event of bankruptcy or "manifest insolvency". The depositors were also entitled to collect their savings from the banks at any time, with accrued interest.

4. The process of dissolution of the SFRY took place from 1991 to 1992.[1] In the successor States, foreign currency deposited prior to that period is customarily referred to as "old" or "frozen" foreign-currency savings. After the savings remained frozen for various periods of time, the successor States enacted their own laws determining how they were to take over the statutory guarantee from the SFRY. In these laws each of the successor States set down the conditions and manner of repaying the "old" foreign-currency savings, either taking into account or regardless of the citizenship or residence of the depositors concerned or the location and origin of the banks in question. Irrespective of the commitments made in their legislation in respect of such savers, the successor States have continued their inter-State negotiations concerning, *inter alia*, the redistribution of liability for "old" foreign-currency savings (for more details, see *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"*, no. 60642/08, §§ 16-39 and 42-47, 6 November 2012, not final).

5. Following the dissolution of the SFRY and the collapse of the banking system in the Federal Republic of Yugoslavia in the 1990s, the respondent State enacted specific legislation in 1998 and 2002, agreeing to the conversion into a public debt of all "old" foreign currency deposited before 18 March 1995 with domestic branches of certain "authorised" domestic banks of its own citizens and citizens of any States except the other successor States of the SFRY (for more details, see *Molnar Gabor v. Serbia*, no. 22762/05, §§ 20-27, 8 December 2009). All savings of citizens of the other SFRY successor States and all savings in branches of domestic banks located in those States remained frozen pending succession negotiations.

6. Furthermore, in the aftermath of the SFRY's dissolution, a number of privately owned "pyramid scheme" banks were opened in the Federal Republic of Yugoslavia, including the Dafiment Bank ("Dafiment"). Although Dafiment was initially founded on 9 October 1991, it would appear that it was re-registered by the appropriate court on several occasions before 2 June 1992. Dafiment was well known for offering extremely high monthly interest rates. Its pyramid scheme eventually collapsed in May1993.

7. In addition to the "old" currency savings deposited with "authorised banks", in 2002 the respondent State agreed to convert the foreign-currency savings deposited with two specific privately owned pyramid scheme banks, including Dafiment, into a public debt (see paragraphs 17-25 below).

### *2. Facts relevant to the applicant's case*

8. The facts of the applicant's case, as submitted by the parties, may be summarised as follows.

9. On 26 October 1992 the applicant made a fixed-term deposit of 10,000 German marks (DEM) at the Belgrade branch of Dafiment.

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[1] The SFRY was replaced by five successor States. The dates of succession were 8 October 1991 in respect of Croatia and Slovenia, 17 November 1991 in respect of "the former Yugoslav Republic of Macedonia", 6 March 1992 in respect of Bosnia and Herzegovina, and 27 April 1992 in respect of the Federal Republic of Yugoslavia (the Republic of Serbia and the Republic of Montenegro) (see Opinion No. 11 of the Arbitration Commission of the International Conference on the Former Yugoslavia – "the Badinter Commission").

10. On 18 January 1993 he made a further fixed-term deposit of DEM 3,000 at the Novi Sad branch of the same bank.

11. Upon maturity of the applicant's fixed-term deposits, Dafiment refused to release his capital and the total amount of accrued interest because the bank's pyramid scheme had collapsed.

12. It appears that on 16 November 1998 the applicant lodged an official claim for compensation with the Belgrade Commercial Court (*prijavio potraživanje kod Privrednog suda u Beogradu*), the judicial body in charge of the ongoing liquidation proceedings against the bank.

13. The applicant issued no legal proceedings against Dafiment. Instead, on an unspecified date, he appears to have sent a request to a special commission, set up by the authorities to verify the existence of foreign-currency deposits as a formal prerequisite to their subsequent conversion into Government bonds (see paragraph 24 below).

14. Having received no response, on 5 December 2002 the applicant sent identical letters to both the Serbian Ministry of Finance and the Yugoslav Central Bank (*Narodna banka Jugoslavije*). Therein he requested the verification of his foreign-currency deposits, which he needed in order to exercise his rights in accordance with the relevant legislation (see paragraphs 7 above and 17-25 below).

15. On 27 October 2003 the Central Bank responded to the applicant's letter, stating that his request was subject to the Act on the Settlement of the Public Debt of the Federal Republic of Yugoslavia arising from Citizens' Foreign Exchange Savings deposited with the Dafiment Bank AD, Belgrade, undergoing liquidation, as well as with the Private Enterprise Bank DD, Podgorica. It went on to explain that, under Article 3 of that Act (see paragraph 19 below), the applicant's deposits with Dafiment could not be converted into Government bonds because he "did not have a registered residence in the Republic of Serbia" at the time when the Act had entered into force (4 July 2002).

16. The letter sent by the Central Bank appears to have been an automatic template used to respond to numerous other requests similar to that of the applicant.

## B. Relevant domestic law and practice

*1. Act on the Settlement of the Public Debt of the Federal Republic of Yugoslavia arising from Citizens' Foreign Exchange Savings deposited with the Dafiment Bank AD, Belgrade, undergoing liquidation, as well as with the Private Enterprise Bank DD, Podgorica (*Zakon o regulisanju javnog duga Savezne Republike Jugoslavije po ugovorima o deviznim depozitima građana oročenim kod Dafiment banke a.d. Beograd, u likvidaciji i po deviznim sredstvima građana položenim kod Banke privatne privrede Crne Gore d.d., Podgorica*; published in the Official Gazette of the Federal Republic of Yugoslavia - OG FRY no. 36/02)*

17. In order to settle and manage the debt arising from the foreign-exchange savings deposited with two privately owned pyramid scheme banks – Dafiment and the Private Enterprise Bank DD, Podgorica – the respondent State passed this Act.

18. Article 2 § 1 of the Act provided that the respondent State would accept as public debt the unreleased ("frozen") foreign-currency deposits, less the accrued interest and any payments to Dafiment depositors prior to the commencement of the liquidation proceedings.

19. The public debt thus created would be shared between the Republic of Serbia and the Republic of Montenegro in proportions to be determined by the total amount of individual savings deposits by customers with a registered residence in each of the republics ("*srazmerno visini deviznih depozita građana čije je prebivalište na teritoriji tih republika*"; Article 3). The governments of the two republics would prescribe the framework for management of the public debt (Article 2 § 3).

20. The foreign-currency deposits accepted as a public debt would be converted into Government bonds due to mature between 2002 and 2016, to be paid in accordance with a schedule and in a number of fixed annual amounts (Article 4 §§ 1 and 2).

21. The relevant governments would provide the necessary funds for that purpose (Article 14 § 1). The Commercial Court of Serbia would be under an obligation to transfer to the Republics of Serbia and Montenegro as much of the assets of the liquidated bank's estate as was within the scope of the bank's responsibility for the deposits (Article 14 § 2).

22. The Act has been in force since 4 July 2002. It was later amended once, but the amendments did not change the depositors' status.

*2. Relevant by-laws*

23. In order to implement the above-mentioned Act, the respondent State enacted numerous by-laws (see, for example, the Decision on the requirements and procedure for the conversion of citizens' foreign-currency deposits into bonds (*Odluka o bližim uslovima i načinu vršenja konverzije deviznih depozita građana oročenih kod "Dafiment banke" a.d. u likvidaciji i deviznih sredstava građana položenih kod Banke privatne privrede Crne Gore d.d., Podgorica*; published in the Official Gazette of the Republic of Serbia – OG RS nos. 48/2002 and 56/2002); the Decision on the procedure and requirements for issuing certificates confirming the State's outstanding debts to depositors (*Odluka o načinu i uslovima izdavanja potvrde o utvrđivanju prava na isplatu dospelih obaveza deponentima Dafiment banke a.d., Beograd, u likvidaciji i građanima koji su sredstva položili kod Banke privatne privrede Crne Gore d.d., Podgorica Banke*; OG RS no. 48/2002); and the Regulations on the conversion of citizens' fixed deposits with the Dafiment and Private Enterprise banks into Government bonds (*Pravilnik o načinu postupanja ovlašćene banke u vršenju konverzije deviznih depozita građana oročenih kod Dafiment banke a.d. Beograd, u likvidaciji i deviznih sredstava građana položenih kod Banke privatne privrede Crne Gore d.d. Podgorica u obveznice Republike Srbije, vođenju knjigovodstvene evidencije i registraciji obveznica*; OG RS no. 60/2002).

24. The relevant by-laws provided that Dafiment's customers in Serbia who had not submitted their compensation claims to the Commercial Court, as the body in charge of the liquidation proceedings against the bank, would be obliged to submit them directly to a specially established three-member commission by 18 November 2002 at the latest. On the basis of the relevant documentation, the commission would then verify the claims and issue certificates confirming the outstanding sums due to each individual customer. The Central Bank would be responsible for dealing with all advisory, administrative and technical matters on the commission's behalf.

25. The presentation of the receipt of the certificate to the National Savings Bank (*Nacionalna stedionica*, later known as Eurobank EFG Štedionica a.d. Beograd) would

be required before the individual deposits were converted into Government bonds, on the basis of the depositor's place of residence and the amount of savings concerned.

*3. Agreement on Succession Issues*

26. As the result of nearly ten years of negotiations among the successor States following the dissolution of the SFRY, this Agreement was signed on 29 June 2001 and entered into force between Bosnia and Herzegovina, Croatia, Serbia and Montenegro (later succeeded by Serbia), Slovenia and "the former Yugoslav Republic of Macedonia" on 2 June 2004.

27. The issue of "old" foreign-currency savings has been a contentious one (for further information, see *Ališić and Others*, cited above). Eventually, it was decided to deal with this issue as a liability of the SFRY under Annex C (Financial Assets and Liabilities) and the following provisions were included therein:

**Article 2 § 3 (a)**

"Other financial liabilities [of the SFRY] include:

(a) guarantees by the SFRY or its National Bank of Yugoslavia of hard currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed independence; ..."

**Article 7**

"Guarantees by the SFRY or its NBY of hard currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed its independence shall be negotiated without delay taking into account in particular the necessity of protecting the hard currency savings of individuals. This negotiation shall take place under the auspices of the Bank for International Settlements."

28. The relevant States could not agree whether the guarantees of the SFRY of "old" foreign-currency savings should be taken over by the State in which the parent bank in issue had its head office or by the State in which the deposit had actually been made.

29. In 2001 and 2002 four rounds of negotiations regarding the distribution of the SFRY's guarantees of "old" foreign-currency savings were held. As the successor States could not reach an agreement, in September 2002 the Bank for International Settlements informed them that it had no further role to play in this regard at that moment.

Negotiations are still pending between the successor States.

## THE LAW

30. The applicant, in essence, complained that he was unable to benefit from the legislation converting certain foreign-currency deposits into public debt for the simple reason that he had not had a registered residence in the Republic of Serbia at the relevant time. The applicant did not rely on a specific Article of the Convention or any of the Protocols thereto.

The Court, being the master of the characterisation to be given in law to the facts of the case (see *Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005), considers that the applicant's complaint falls to be examined under Article 1 of Protocol No. 1 read

separately and in conjunction with Article 14 of the Convention (see, for example, *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, ECHR 2002-VII).

31. The relevant Articles read as follows:

**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 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."

*1. The parties' submissions*

32. The Government disputed the admissibility of the complaints on several grounds.

The Government firstly submitted that the applicant's complaint was incompatible *ratione temporis* with the provisions of the Convention since the entire situation had arisen and the relevant legislation concerning the applicant's foreign-currency deposits had been created prior to 3 March 2004, the date on which the Convention had come into force in respect of the respondent State.

The Government also argued that the applicant's complaint was incompatible *ratione personae* with the provisions of the Convention, given that he had lodged his application on 1 October 2003, at which time the Convention had yet to be ratified by the respondent State.

Furthermore, they maintained that the applicant had not exhausted all effective domestic remedies as required by Article 35 § 1 of the Convention. In particular, he had failed to bring a separate civil lawsuit against Dafiment prior to the enactment of the relevant legislation, had failed to lodge a constitutional complaint with the then Court of Serbia and Montenegro and had failed to raise a discrimination claim before the domestic courts.

Lastly, the Government objected to the complaint's compatibility with the Convention *ratione materiae* given that the applicant had failed to go into any detail about the alleged violation of Article 1 of Protocol No. 1 and that "residence" was not a prohibited ground of discrimination for the purposes of Article 14 of the Convention.

33. In the alternative, the Government contended that there had been no violation of the Convention or of Article 1 of Protocol No. 1.

34. The applicant disagreed with the Government's admissibility objections. He stressed that his application involved a continuing situation and a continuing violation of the Convention. He contested the legislative measures, claiming that the residence requirement set out in the relevant law and the refusal of the competent authorities to recognise his savings as part of the public debt as a result of his inability to comply with that requirement had represented a flagrant breach of the prohibition of discrimination.

As regards the objection of non-exhaustion of domestic remedies, the applicant submitted that his complaint before the Court had not concerned the bank's refusal to pay back his capital and the accrued interest, but rather the content of the legislation in question, which had served to prevent the conversion of foreign-currency deposits made by non-residents into public debt.

*2. The Court's assessment*

35. The Court does not consider it necessary to examine the admissibility objections raised by the Government, as the present case is in any event inadmissible for the reasons outlined below.

36. The Court observes that the applicant's complaint does not concern his claim against Dafiment, but rather his expectation of receiving the payment of his savings deposited with Dafiment from the respondent State.

37. The Court further notes that following the ultimate collapse of Dafiment's pyramidal scheme in May 1993, the respondent State had become liable for repaying foreign-currency savings upon agreeing to convert the savings deposited with that bank, then undergoing liquidation, into a public debt by virtue of the relevant pre-ratification legislation (see paragraphs 17-25 above). However, although it remained in force after the respondent State's ratification of Protocol No. 1, the legislation enacted prior to the ratification cannot be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for the benefit of the applicant, as he had failed to satisfy the statutory requirements for the conversion of his savings into Government bonds, namely having a registered residence in the Republic of Serbia at the relevant time (see paragraphs 15, 16 and 19 above; see, in respect of arrangements for restitution or compensation of property confiscated under a previous regime, *Von Maltzan and Others v. Germany* (dec.) [GC], no. 71916/01 et seq., §§ 74 and 112, ECHR 2005-V; *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX; *Broniowski v. Poland* [GC], no. 31443/96, § 125, ECHR 2004-V; and contrast with *Carson and Others v. United Kingdom* [GC], no. 42184/05, § 64, ECHR 2010). The applicant never denied that this was the case. Therefore, the present case must be distinguished from the previous cases in which the respondent States had converted the applicants' foreign-currency savings into public debts and the Court's examination solely concerned the various aspects of settling such debts under Article 6 of the Convention and Article 1 of Protocol No. 1 (see, in respect of "old" foreign-currency savings, *Molnar Gabor*, cited above, §§ 43-51; *Trajkovski v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 53320/99, ECHR 2002-IV; and *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, 3 November 2009); as regards deposits with Dafiment, see *Ilić v. Serbia* (dec.), no. 21811/09, 14 September 2010; *Ribić v. Serbia* (dec.), no. 16735/02, 14 December 2010; and *Nikač v. Serbia* (dec.), no. 17224/03, 17 May 2011).

38. The present case must also be distinguished from the other cases in which the "old" foreign-currency savings of applicants have not been taken over as a public debt in view of, *inter alia*, the applicants' citizenship, but their claims have never been extinguished and the successor States have already accepted that those "old" foreign-currency savings deposited before the dissolution of the SFRY were part of the latter's financial liabilities which they should divide up among themselves, as any other financial liabilities and assets of the SFRY (see *Ališić and Others v. Bosnia and Herzegovina,*

*Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"* (dec.), no. 60642/08, 17 October 2011, § 54; see also *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, 3 October 2008). By contrast, the present case concerns foreign-currency savings deposited after the dissolution of the SFRY (see paragraph 4 above) with a privately owned bank operating a pyramid scheme. The impugned deposits have therefore never been covered by Annex C to the Succession Agreement or by the subsequent four rounds of negotiations concerning the distribution of the SFRY's guarantees of "old" foreign-currency savings (see paragraphs 26-29 above), but have instead fallen under a special regime (see paragraphs 6, 7 and 17-25 above).

39. Furthermore, even assuming that the applicant's deposits had been transferred to the State from the liquidated bank's estate (see paragraph 21 above), Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the Contracting States to return property which was transferred to them before they ratified the Convention (see *Kopecký*, cited above, § 35(d)). Nor does Article 1 of Protocol No. 1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners (see *Jantner v. Slovakia*, no. 39050/97, § 34, 4 March 2003). Where categories of owners are excluded in this way, their claims for restitution cannot provide the basis for a "legitimate expectation" attracting the protection of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Gratzinger and Gratzingerova*, cited above, §§ 70-74).

40. Lastly, the only way the applicant's claim could succeed is if the residence requirement in question were removed from the relevant domestic legislation. However, the belief that the law in force will be changed for the benefit of the applicant cannot be regarded as a form of legitimate expectation for the purposes of Article 1 of Protocol No. 1. The Court has on numerous occasions held that there is a difference between a mere hope of restitution, however reasonable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope, and be based on a legal provision or a legal act such as a judicial decision (ibid., § 73, and see also *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 31, Series A no. 332). Moreover, the respondent State has never demonstrated any sign of acceptance or acknowledgment of claims such as that made by the applicant (see *Baťa v. the Czech Republic* (dec.), no. 43775/05, 24 June 2008, and contrast with *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"* (dec.), ibid., in which it was held that successor States had on many occasions clearly demonstrated their unequivocal commitment to ensuring that depositors "obtain the payment of their 'old' foreign-currency savings in one way or another").

41. In view of the above considerations, the Court observes that as at 3 March 2004, the date on which Serbia ratified the Convention and Protocol No. 1 thereto, the applicant clearly had neither possessions nor a legitimate expectation under the relevant domestic law, as applied and interpreted by the domestic authorities, that he could acquire an entitlement to collect his foreign-currency savings from the State. Consequently, the facts of the case do not fall within the ambit of Article 1 of Protocol No. 1.

42. It follows that the applicant's complaint under Article 1 of Protocol No. 1 is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

43. Furthermore, the Court reiterates that Article 14 of the Convention complements the other substantive provisions of the Conventions and its Protocols. It has no independent existence since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV, and *Polacek and Polackova v. the Czech Republic* (dec.) [GC], no. 38645/97, § 69, 10 July 2002; and contrast with *Andrejeva v. Latvia* [GC], no. 55707/00, §§ 74-92, ECHR 2009).

44. Given the above finding of incompatibility *ratione materiae* in respect of the applicant's complaint under Article 1 of Protocol No. 1 to the Convention, the complaint under Article 14 in conjunction with that Article is equally incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4 of the Convention (see *Gratzinger and Gratzingerova*, cited above, §§ 73-76).

For these reasons, the Court by a majority

*Declares* the application inadmissible.

Stanley Naismith
Registrar

Guido Raimondi
President