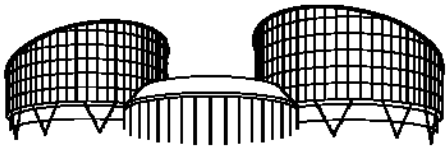

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Application no.10044/11
Slavko GOLUBOVIĆagainst Serbia
and 8 other applications
(see list appended)

The European Court of Human Rights (Second Section), sitting on 17 September 2013 as a Chamber composed of:

Guido Raimondi, *President,*
Danutė Jočienė,
Peer Lorenzen,
Dragoljub Popović,
Işıl Karakaş,
Nebojša Vučinić,
Paulo Pinto de Albuquerque, *judges,*

and Stanley Naismith, *Section Registrar,*

Having regard to the applications listed in the Annex,

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

Having deliberated, decides as follows:

THE FACTS

1. All applicants are Serbian nationals. Additional personal details, as well as the dates of introduction of their complaints before the Court, respectively, are contained in the attached Annex.

2. The applicants were represented by Mr Ž. Vujović, a lawyer practising in Niš. 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.

4. 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.

5. At various points following their demobilisation they were all formally diagnosed as suffering from Post-traumatic Stress Disorder as a result of their military service.

6. In 2007, therefore, they filed separate civil claims against the respondent State with the Municipal Court (*Opštinski sud*) in Niš, seeking payment of non-pecuniary damages.

7. Between 2008 and 2010 the applicants were all unsuccessful before the Municipal Court and the appellate courts (*okružni i apelacioni sudovi*) in Niš, as well as the Supreme Court (*Vrhovni sud Srbije*), subsequently renamed as the Supreme Court of Cassation (*Vrhovni kasacioni sud*), at third instance (except for the second, third and fifth applicants, who were not entitled to bring their cases before the Supreme Court/Supreme Court of Cassation since the values of their respective claims were below the statutory threshold). The said courts opined, *inter alia*, that the applicable negative prescription period was three years as of the applicants' demobilisation, which was when they had "learned" about their medical condition, and further noted that in any event the absolute deadline was five years as of when the damage itself had occurred, all in accordance with Article 376 of the Obligations Act (see paragraph 29 below). The applicants' claims had thus been filed out of time.

8. The applicants maintained, however, that in hundreds of other judgments, rendered between 2007 and 2011, the appellate courts across the country, as well as the Supreme Court and the Supreme Court of Cassation, had ruled in favour of other reservists, notwithstanding the fact that their claims had been based on very similar facts and had concerned identical legal issues. In their reasoning in these other cases, the said courts/different benches of the same court held, *inter alia*, that a plaintiff shall have "learned" of the full extent of the non-pecuniary "damage in question", within the meaning of Article 376 § 1 of the Obligations Act, only once his medical treatment has been concluded. Until such time, the relevant prescription period could not start running.

9. The Government, on the contrary, maintained that the domestic courts' case-law on the issue had been consistent. It was rather the facts in the applicants' cases that were different. Specifically, the principle was that where the plaintiffs had only started their medical treatment following the

expiration of the five-year deadline they could not rely on the interpretation of Article 376 § 1 of the Obligations Act as described in paragraph 8 above.

10. The applicants thereafter lodged their respective appeals with the Constitutional Court (*Ustavni sud*). They complained, *inter alia*, about the lawfulness of the civil courts' decisions adopted in their cases, respectively, as well as the absence of an effective domestic remedy in this regard. In so doing, the applicants further alleged that the judges in their cases had been under pressure to rule against them given the potentially serious financial implications for the respondent State. The judges, ultimately, had given in to this pressure, and rejected the applicants' claims even though such claims had previously been accepted in other cases by the appellate courts in Niš and the Supreme Court at third instance. The applicants relied on Articles 32 §1, 36 § 2, 142 § 2 and 149 § 2 of the Constitution (see paragraph 12 below), as well as Articles 6 § 1 and 13 of the Convention. They did not, however, provide the Constitutional Court with copies of any of the judgments in which the civil courts had allegedly accepted claims such as their own, nor was there any other specific reference in this regard.

11. The Constitutional Court, ultimately, rejected (*odbacio*) the applicants' appeals as being of a third/fourth instance nature and/or manifestly ill-founded. In particular, it was not the Constitutional Court's function to assess the lawfulness of the impugned decisions in general, but to safeguard the fundamental rights set out in the Constitution. The applicants' appeals contained no proper reasoning or, for that matter, any evidence indicating a breach thereof (see paragraph 14 below). The Constitutional Court's decisions were delivered on 19 October 2010, 22 October 2010, 19 October 2010, 11 October 2010, 29 July 2010, 17 December 2010, 23 February 2011, 7 March 2011 and 11 February 2011 as regards the first, second, third, fourth, fifth, sixth, seventh, eight and ninth applicants respectively.

B. Relevant domestic law and practice

1. *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)*

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

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 § 2

"Everyone shall have the right to an appeal or another legal remedy against any decision concerning his [or her] rights, obligations or lawful interests."

Article 142 § 2

"The courts shall be ... independent in their work and shall dispense justice in accordance with the Constitution, the laws and other general regulations ..."

Article 149 § 2

"Any influence on a judge in the performance of his [or her] judicial function shall be prohibited."

Article 170

"A constitutional appeal may be lodged against individual decisions oractions 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."

2. The Constitutional Court Act (Zakon o Ustavnom sudu; published in OG RS no. 109/07)

13. Article 36 § 1 (3) provides, *inter alia*, that the Constitutional Court shall reject (*odbaciće*) a constitutional appeal when an appellant has failed, following an additional request issued in this regard, to furnish the court with all of the relevant details indispensable for the proper conduct of the proceedings before it.

14. Article 36 § 1 (4) provides, *inter alia*, that the Constitutional Court shall reject a constitutional appeal, without any additional warning in this regard, whenever the relevant legal conditions for its examination have not been fulfilled.

15. Article 85 § 1 refers to the necessary information which must be contained in the constitutional appeal. This information includes: (a) the appellant's personal data; (b) information concerning his or her legal counsel; (c) the particulars of the decision being challenged; (d) an indication of the relevant provisions of the Constitution; (e) the description of the violations alleged; (f) the redress sought by the appellant; and (g) the appellant's personal signature.

16. Article 85 § 2 provides that appellants should also substantiate their constitutional appeals with any and all evidence of relevance for the determination of their case, provide a copy of the impugned decision, and document that all other effective remedies have already been exhausted.

3. The Constitutional Court's opinion of 30 October 2008 and 2 April 2009

17. Should a constitutional appeal lack any of the compulsory elements (*obavezni elementi*) mentioned in paragraph 85 of the Constitutional Court Act, the appellant shall be invited to supplement his or her appeal by a

certain deadline or be faced with its rejection pursuant to Article 36 § 1 (3) of the Constitutional Court Act.

4. The Constitutional Court's case-law

18. In decision Už. 61/09, adopted on 3 March 2011, and decisions Už. 553/09, 703/09 and 792/09, all adopted on 17 March 2011, as well as in decisions Už. 2133/09, 1928/09, 1888/09, 1695/09, 1578/09, 1575/09, 1524/09, 1318/09 and 1896/09, rendered between 7 October 2010 and 23 February 2012, the Constitutional Court noted, *inter alia*, the existence of inconsistent domestic case-law in the civil context and then went on to find that this had been in breach of the principle of judicial certainty as an integral part of the appellants' right to a fair trial. It also ordered that the respective decisions be published in the Official Gazette of the Republic of Serbia. The above-cited jurisprudence concerned matters which were factually unrelated to the applicants' situation in the present case.

19. On 4 April 2012, in a case similar to the applicants', insofar as it also concerned the inconsistent application of prescription periods to claims seeking compensation in matters involving severe mental anguish, the Constitutional Court held, *inter alia*, that there had been a breach of Article 32 § 1 of the Constitution since the divergent case-law had undermined the principle of legal certainty. The appellant in this case specifically referred to and provided copies of the inconsistent case-law at issue (Už. 1749/09). On 23 August 2012 the appellant in this case apparently requested the reopening of the civil proceedings in question based on the Constitutional Court's decision of 4 April 2012 and in accordance with Article 426.12 of the Civil Procedure Act 2011 (see paragraph 23 below).

20. On 7 November 2012, in a case such as the applicants', the Constitutional Court again found that there had been a violation of the principle of legal certainty as an integral part of the right to a fair trial. The appellant in this case raised the same issues as the applicants, but specifically referred to and provided copies of the inconsistent case-law at issue. He was represented by Mr Ž. Vujović, that is the same lawyer who was also representing the applicants (Už. 4933/11; see also, to the same effect and in their relevant parts, Už. 4561/10 and Už. 5487/10 of 24 April 2013 and 8 May 2013, respectively).

5. The Civil Procedure Act 2004 (Zakon o parničnom postupku; published in OG RS nos. 125/04 and 111/09)

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

22. Article 422.11 provides that a case may be reopened if the Constitutional Court finds that in the impugned proceedings there was a

breach of one or more of the human and/or minority rights enshrined in the Constitution.

6. The Civil Procedure Act 2011 (Zakon o parničnom postupku; published in OG RS no. 72/11)

23. Article 426.12 provides that a case may be reopened under the same conditions as set out in Article 422.11 of the Civil Procedure Act 2004 if the violation in question could be deemed as having had an adverse effect on the outcome of the impugned proceedings for the claimant.

24. The Civil Procedure Act 2011 entered into force in February 2012, thereby repealing the Civil Procedure Act 2004.

7. The Courts Organisation Act 2001 (Zakon o uređenju sudova; published in OG RS nos. 63/01, 42/02, 27/03, 29/04, 101/05 and 46/06)

25. 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 thereupon shall be binding for the panels (*veća*) of the division in question.

8. The Courts Organisation Act 2008 (Zakon o uređenju sudova; published in OG RS nos. 116/08 and 104/09)

26. The Courts Organisation Act 2008 entered into force in January 2010, thus repealing the Courts Organisation Act 2001.

27. Article 43 §§ 2 and 3 of the 2008 Act substantively corresponds to Article 40 §§ 2 and 3 of the 2001 Act.

9. The Rules of Court (Sudski poslovnik; published in OG RS nos. 110/09 and 70/11)

28. Article 31 provides that all courts shall be obliged to harmonise their own case-law on any given issue, and shall do so by means of adopting specific opinions (*zauzimanjem određenog stava*).

10. 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)

29. Article 376 §§ 1 and 2 provides, *inter alia*, that the negative prescription period for seeking civil compensation shall be three years as of when the claimant learned of the damage in question, but that, in any event, the absolute deadline shall be five years as of when the damage occurred.

30. Articles 387 and 388 provide, *inter alia*, that the running of a negative prescription period shall be interrupted by the debtor's acceptance of the claim at issue, directly or indirectly, as well as by the claimant's lodging of a civil action in this respect.

31. Article 392 §§ 1-3 provides, *inter alia*, that the effect of such an interruption shall be that the applicable period shall start running anew as of the debtor's acceptance of the claim in question and the conclusion of the civil suit, respectively.

COMPLAINTS

32. Under Article 6 § 1 and 13 of the Convention, the applicants complained about the rejection of their own claims by the domestic courts, based on the "erroneous application of the relevant domestic legislation", and the simultaneous acceptance by the same courts of identical claims filed by their fellow reservists.

33. Article 6 § 1, in so far as relevant, and Article 13 of the Convention read as follows:

Article 6 § 1

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

Article 13

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

THE LAW

A. Joinder of the applications

34. 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 applicants' complaints under Articles 6 § 1 and 13 of the Convention

35. As noted above, the applicants complained about the inconsistent case-law of the Serbian courts, in particular the rejection of their own claims

and the simultaneous acceptance of identical claims filed by their fellow reservists based on a different interpretation of the applicable prescription periods.

1. The parties' submissions

36. The Government submitted that the applicants had not properly documented their complaints before the Constitutional Court. Specifically, they had failed to furnish any evidence in support of their allegation regarding the inconsistent case-law.

37. The applicants maintained that the Constitutional Court had only started ruling in favour of reservists in a situation such as the applicants' following the communication of the present case to the Government.

2. The Court's assessment

38. The Court recalls 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).

39. The obligation to exhaust domestic remedies therefore 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; and *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV). The applicants must, however, comply with the applicable rules and procedures of domestic law, failing which their application is likely to fall foul of the condition laid down in Article 35 § 1 (see, for example, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200; and *Akdivar*, cited above, § 66).

40. 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). The Court has 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*, cited above, § 69).

41. In terms of the burden of proof, it is up to the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*,

Vernillo v. France, judgment of 20 February 1991, § 27, Series A no. 198, and *Dalia v. France*, judgment of 19 February 1998, § 38, *Reports* 1998-I). 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 *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003; and *Akdivar*, cited above, § 68).

42. The issue whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). This rule, however, is subject to exceptions which may be justified by the specific circumstances of each case (see, for example, *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII).

43. Turning to the matter at hand, the Court recalls that it has already held that a constitutional appeal should, in principle, be deemed effective 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 and Others v. Serbia*, nos. 44698/06 and others, § 51, 1 December 2009). It sees no reason to hold otherwise in the present case and further notes that the applicants raised their complaints before the Constitutional Court with sufficient clarity (see paragraph 10 above). They did not, however, substantiate them by providing the inconsistent case-law at issue, as envisaged under Article 85 §2 of the Constitutional Court Act (see paragraphs 10 and 16 above). The Constitutional Court, for its part, has likewise consistently held that such substantiation was necessary but that where this requirement had been properly complied with it would be prepared to rule in favour of persons in a situation such as the applicants' (see paragraph 20 above). While, based on the available facts, it may be true that the Constitutional Court only did so following the communication of the present case to the Government, the Court notes that a number of these cases had been lodged in 2010 (ibid.) and that in other related contexts, also involving issues of divergent case-law, it had been willing to rule in favour of the appellants well before the introduction of the applicants' complaints before the Court in the present case (see paragraphs 18 and 19 above). In any event, when it comes to legal systems which provide constitutional protection for 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, *A, B and C v. Ireland* [GC], no. 25579/05, § 142, ECHR 2010). Finally, since the applicants had already decided to seek redress before the Constitutional Court, it cannot be said that the requirement to include proper evidence in support of their complaints was

anything but reasonable. It is further understood that in order to reject their appeals the Constitutional Court was under no obligation to provide the applicants with a prior warning to this effect (see paragraphs 11, 14 and 16 above, relating to the applicants' legal situation, and contrast that to the legal situation discussed in paragraphs 13 and 15 above). Indeed, even the applicants' themselves never claimed otherwise.

44. In view of the foregoing, the Court considers that the applicants' complaints must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Stanley Naismith
Registrar

Guido Raimondi
President

No	Application No	Lodged on	Applicant Date of birth Place of residence
1.	10044/11	20/12/2010	**Slavko GOLUBOVIĆ** 08/10/1954 Leskovac
2.	10048/11	20/12/2010	**Slobodan ĐOROVIĆ** 16/02/1959 Jošanička Banja
3.	10050/11	20/12/2010	**Srđan CVETKOVIĆ** 02/09/1971 Niš
4.	10051/11	20/12/2010	**Dejan MILENKOVIĆ** 07/06/1974 Niš
5.	10052/11	20/12/2010	**Goran DIMITRIJEVIĆ** 11/08/1979 Ravna Dubrava
6.	13180/11	24/12/2010	**Goran MILOŠEVIĆ** 27/04/1961 Gadžin Han
7.	30787/11	05/04/2011	**Dragan ILIĆ** 25/08/1976 Selo Živkovo
8.	30793/11	05/04/2011	**Gradimir MAKSIMOVIĆ** 21/03/1953 Jošanička Banja
9.	33413/11	21/03/2011	**Zoran BLAGOJEVIĆ** 27/07/1961 Selo Suvi Do