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

THIRD SECTION

DECISION

Applications nos. 57691/09 and 19719/10
JKP VODOVOD KRALJEVO
against Serbia

The European Court of Human Rights (Third Section), sitting on 16 October 2018 as a Chamber composed of:

Vincent A. De Gaetano, *President,*
Branko Lubarda,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking, *judges,*

and Stephen Phillips, *Section Registrar,*

Having regard to the above applications lodged on 22 September 2009 and 1 April 2010 respectively,

Having regard to the observations submitted by the parties,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, JKP Vodovod Kraljevo, is a statutory utility company (*javno komunalno preduzeće*). It was represented before the Court by Ms I. Jelenić, a lawyer practising in Belgrade.

2. The Serbian Government ("the Government") were represented by their successive Agents, Ms V. Rodić and Ms N. Plavšić.

A. The circumstances of the case

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

4. The applicant company was founded by a decision of the municipality of Kraljevo in 1990, for the provision of water and sewerage services in that municipality.

5. On 18 October 2004 the competent local court ordered Magnohrom, a socially-owned company (*društveno preduzeće*), to pay the applicant company unpaid water and sewerage charges in the amount of around 450,000 euros (EUR)[1] plus statutory interest and legal costs. On 21 December 2004 the same court slightly reduced the amount of the debt, whilst upholding the remainder of the decision of 18 October 2004.

6. In the meantime, on 9 December 2004 the same court ordered another socially-owned company – Fabrika vagona Kraljevo – to pay the applicant company unpaid charges in the amount of around EUR 350,000 plus statutory interest and legal costs. That decision became final on 10 January 2005.

7. On 1 March 2005 the Privatisation Agency initiated the restructuring of Magnohrom in order to prepare it for privatisation.

8. For the purpose of privatising Fabrika vagona Kraljevo, on 31 March 2005 the Privatisation Agency invited interested parties to submit bids.

9. At the invitation of the Privatisation Agency, the applicant company reported its claims against Magnohrom and Fabrika vagona Kraljevo on 5 July 2005 and 12 August 2005 respectively.

10. In 2006 Magnohrom and Fabrika vagona Kraljevo were privatised. In 2007, from the funds so obtained, the applicant company received approximately EUR 15,000 and EUR 2,000 in respect of its claims against Magnohrom and Fabrika vagona Kraljevo respectively. Despite the fact that the amounts paid were only a fraction of the amounts actually due, this constituted a final settlement of the applicant company's claims against those companies (see paragraph 13 below).

11. Consequently, on 13 February 2009 the competent local court ended the enforcement proceedings against Magnohrom. On 16 March 2009 and 2 November 2011 the competent second-instance court and the Constitutional Court, respectively, upheld that decision. On 7 September 2009 the same first-instance court also ended the enforcement proceedings against Fabrika vagona Kraljevo. On 2 October 2009 and 22 February 2012 the competent second-instance court and the Constitutional Court, respectively, upheld that decision.

12. The privatisation of both Magnohrom and Fabrika vagona Kraljevo has ultimately been annulled, but this is irrelevant in the present case.

1. For ease of reading, all the amounts have been converted from Serbian dinars to euros according to the conversion rate applicable at the relevant time.

B. Relevant domestic law and practice

1. As regards the privatisation of State- and socially-owned companies

13. The Privatisation Act 2001[2] was in force from 2001 until 2014. Pursuant to section 20 of that Act (as amended on 8 June 2005), statutory companies and "other State agencies" had to write off any and all claims against State- and socially-owned companies undergoing restructuring. Other creditors were free, but were not obliged, to do that. If a company undergoing restructuring was eventually privatised, the funds so obtained were distributed pro rata among the creditors whose claims had been written off (see section 20g of that Act). Pursuant to section 20d of that Act, this constituted a final settlement of the claims in question, irrespective of the amount actually distributed. As of 3 January 2008, that legal regime applied to all State- and socially-owned companies (see section 20e of that Act).

2. As regards the status of water and sewerage companies

14. The provision of water and sewerage services was at the relevant time, and still is, a responsibility of the municipalities (see section 6 of the Public Utilities Act 1997[3] and section 4 of the Public Utilities Act 2011[4]). Each municipality had to set up a statutory utility company for that purpose. As a rule, water and sewerage services, unlike other public utility services, could not be operated by private actors as a concession (see section 8 of the Public Utilities Act 1997 and section 5 of the Public Utilities Act 2011).

15. The directors of water and sewerage companies and the members of their executive and supervisory boards were appointed and removed by the founding municipalities (see sections 11-16 of the Statutory Companies Act 2000[5]). Furthermore, the following key decisions required the consent of the founding municipalities: distribution of profits, adoption and alteration of articles of association (*statut*) and setting of the costs charged to consumers (sections 21 and 27 of that Act). The Statutory Companies Act 2016[6], which is currently in force, contains substantially the same provisions (see sections 17, 24, 59(7) and 69).

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2. *Zakon o privatizaciji*, Official Gazette of the Republic of Serbia nos. 38/01, 18/03, 45/05, 123/07, 30/10, 93/12, 119/12, 51/14 and 52/14.
3. *Zakon o komunalnim delatnostima*, published in the Official Gazette of the Republic of Serbia nos. 16/97 and 42/98. That Act was in force from 1997 until 2011.
4. *Zakon o komunalnim delatnostima*, published in the Official Gazette of the Republic of Serbia nos. 88/11 and 104/16. That Act has been in force since 2011.
5. *Zakon o javnim preduzećima i obavljanju delatnosti od opšteg interesa*, published in the Official Gazette of the Republic of Serbia nos. 25/00, 25/02, 107/05, 108/05 and 123/07. That Act was in force from 2000 until 2012.
6. *Zakon o javnim preduzećima*, published in the Official Gazette of the Republic of Serbia no. 15/16.

16. All assets in the possession of water and sewerage companies were, at the relevant time, State-owned; the companies had the right to use them in accordance with the law, and the nature and purpose of the assets in question (sections 1, 4, 7 and 13 of the State Assets Act 1995[7]; the Act was in force from 1996 until 2011). Under the current legal regime (see the Public Assets Act 2011[8]), some assets in the possession of water and sewerage companies may be owned by those companies. However, water, the water supply system and the sewerage system administered by those companies are still public assets.

17. Both the Insolvency Act 2004[9], which was in force from 2004 until 2010 (see section 6 thereof), and the Insolvency Act 2009[10], which has been in force since then (see section 14 thereof), provide that statutory companies which are entirely or predominantly financed by public authorities cannot be declared insolvent; the founders of such companies are liable for their debts. The present applicant company does not belong to that category of companies as it is predominantly financed from water and sewerage charges paid for by the users.

18. Lastly, the decisions of water and sewerage companies concerning access to their services were at the relevant time, and still are, subject to the jurisdiction of administrative courts (see the Water and Sewerage Decisions of the Municipality of Kraljevo[11]; section 2 of the Administrative Procedure Act 1997[12]; and section 31 of the Administrative Procedure Act 2016[13]).

COMPLAINTS

19. The applicant company complained that the court decisions of 18 October and 9 December 2004 had not been enforced. In this regard, it relied on Article 6 of the Convention and Article 1 of Protocol No. 1. It also

7. *Zakon o sredstvima u svojini Republike Srbije*, published in the Official Gazette of the Republic of Serbia nos. 53/95, 3/96, 54/96, 32/97 and 101/05.
8. *Zakon o javnoj svojini*, published in the Official Gazette of the Republic of Serbia nos. 72/11, 88/13, 105/14, 104/16, 108/16 and 113/17.
9. *Zakon o stečajnom postupku*, published in the Official Gazette of the Republic of Serbia nos. 84/04 and 85/05.
10. *Zakon o stečaju*, published in the Official Gazette of the Republic of Serbia nos. 104/09, 99/11, 71/12, 83/14, 113/17 and 44/18.
11. *Odluka o vodovodu i kanalizaciji*, published in the Official Gazette of the Municipality of Kraljevo nos. 2/98, 15/99 and 10/05, and *Odluka o vodovodu i kanalizaciji*, published in the Official Gazette of the Municipality of Kraljevo nos. 3/15, 29/15 and 2/18.
12. *Zakon o opštem upravnom postupku*, published in the Official Gazette of the Republic of Serbia nos. 33/97, 31/01 and 20/10. That Act was in force from 1997 until 2017.
13. *Zakon o opštem upravnom postupku*, published in the Official Gazette of the Republic of Serbia nos. 18/16. That Act has been in force since 2017.

complained, under Article 13 of the Convention, that it had not had an "effective remedy before a national authority" for its Convention complaints.

THE LAW

A. Joinder of the applications

20. Given their common factual and legal background, the Court finds it appropriate to examine the applications jointly in a single decision.

B. Admissibility of the applications

21. The Government maintained that the applicant company was a "governmental organisation" and that it accordingly lacked *locus standi* under Article 34 of the Convention. They relied in this regard on the provisions of the domestic laws set out in paragraphs 14-18 above.

22. The applicant company recognised that the industry in which it operated was a natural monopoly and heavily regulated. This was simply because water and sewerage services were of public interest and used natural resources which were State-owned. For the same reason, the applicant company indeed exercised some governmental powers. That being said, the applicant company submitted that the same regime would have applied to a private water and sewerage company. While acknowledging that the municipality of Kraljevo had the power to appoint and remove its management, the applicant company maintained that it nevertheless enjoyed sufficient institutional and operational independence and that it was accordingly a "non-governmental organisation" for the purposes of Article 34 of the Convention.

23. A legal entity claiming to be the victim of a violation by a member State of the rights set forth in the Convention and the Protocols has standing before the Court only if it is a "non-governmental organisation" within the meaning of Article 34 of the Convention. The category of "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities (see *Radio France and Others v. France* (dec.), no. 53984/00, § 26, ECHR 2003-X (extracts)).

24. To begin with, the present case must be distinguished from *Zastava It Turs v. Serbia* (dec.), no. 24922/12, 9 April 2013, in which the Court dealt with the *locus standi* of a socially-owned company. In that case, like in *R. Kačapor and Others v. Serbia*, nos. 2269/06 and 5 others, 15 January 2008, and thousands of other cases, the Court held that socially-owned companies, which were at different stages of the privatisation process, did not enjoy "sufficient institutional and operational independence from the State" (see *R. Kačapor and Others*, cited above, § 98, and as concerns the status of socially-owned companies in Serbia see *R. Kačapor and Others*, cited above, §§ 71-76). Unlike the applicant in *Zastava It Turs*, cited above, the applicant company in the present case is a statutory utility company, which falls under a different legal regime.

25. The Court notes that the applicant company is incorporated under the domestic law as a separate legal entity. However, the company's legal status under domestic law is not decisive in determining whether it is a "non-governmental organisation" within the meaning of Article 34 of the Convention. The Court has held on several occasions that companies lacked *locus standi* under Article 34, regardless of their formal classification under domestic law (see, for example, *State Holding Company Luganksvugillya v. Ukraine* (dec.), no. 23938/05, 27 January 2009; *Transpetrol, a.s. v. Slovakia* (dec.), no. 28502/08, 15 November 2011; and *Zastava It Turs*, cited above).

26. What is more relevant is the special nature of the applicant company's activity. As the only water and sewerage company in the municipality of Kraljevo, it provides a public service of vital importance to the municipality population (see, *mutatis mutandis*, *Yershova v. Russia*, no. 1387/04, § 58, 8 April 2010, and *Liseytseva and Maslov v. Russia*, nos. 39483/05 and 40527/10, § 209, 9 October 2014). The assets used by the company for those purposes (notably, water, the water supply system and the sewerage system) were (and continue to be) public assets (see paragraph 16 above). Furthermore, it has not been disputed that the tariffs of the water and sewerage services provided by the applicant company required the consent of the local authorities (see paragraph 15 above). Because of the special nature of those services, only statutory utility companies were (and continue to be) allowed to provide them (see paragraph 14 above). The applicant company's claim that water and sewerage services could have been operated by private actors, which would have been subject to the same rules, does not seem to properly reflect the content of the domestic law. The present case should therefore be distinguished from *Islamic Republic of Iran Shipping Lines v. Turkey*, no. 40998/98, § 80, ECHR 2007-V, in which the Court found that the applicant company was a "non-governmental organisation" within the meaning of Article 34 of the Convention, despite the fact that it was wholly owned by the Iranian State and that a majority of the members of the board of directors were appointed by the State, because, among other reasons, it did

not have a public-service role or a monopoly. It should further be distinguished from *Radio France and Others*, cited above, in which the Court held that the applicant company was a "non-governmental organisation" within the meaning of Article 34, although it was wholly owned by the French State and performed "public-service missions in the general interest", because, *inter alia*, it did not hold a monopoly over radio broadcasting and there was little difference between Radio France and the companies operating "private" radio stations, which were themselves also subject to various legal and regulatory constraints.

27. Lastly, the Court observes that the applicant company was required to write off its large claims against State- and socially-owned companies (see paragraphs 10 and 13 above). The State thus disposed of the applicant's assets as it saw fit. This shows that the applicant company does not enjoy sufficient independence from the political authorities (compare *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 117, ECHR 2014, and *Liseytseva and Maslov*, cited above, §§ 211 and 217).

28. In view of the above, the applicant company cannot be regarded as a "non-governmental organisation" within the meaning of Article 34 of the Convention (compare *RENFE v. Spain*, no. 35216/97, Commission decision of 8 September 1997, Decisions and Reports 90-B).

29. Therefore the present applications are incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4 thereof.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 15 November 2018.

Stephen Phillips
Registrar

Vincent A. De Gaetano
President