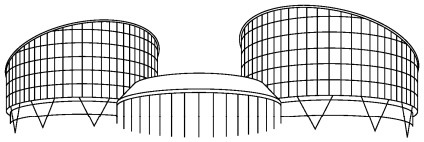

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Applications nos. 24501/11 and 13797/13
Sadri SADIKI against Serbia
and Ruzhdi NURA against Serbia

The European Court of Human Rights (Fourth Section), sitting on 11 February and 24 March 2020 as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Branko Lubarda,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Jolien Schukking,
Péter Paczolay, *judges,*

and Andrea Tamietti, *Section Registrar,*

Having regard to the above applications lodged on 8 March 2011 and 16 February 2013 respectively,

Having deliberated, decides as follows:

THE FACTS

1. The applicant in the first case, Mr Sadri Sadiki ("the first applicant"), is a Swiss and Kosovar[1] national who was born in 1955 and lives in Oberwil (Switzerland). The first applicant was granted leave to represent himself (Rule 36 § 2 of the Rules of Court).

2. The applicant in the second case, Mr Ruzhdi Nura ("the second applicant"), is a Kosovar national who was born in 1940 and lives in Đakovica (Kosovo). The second applicant was granted leave to represent himself.

1. All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo

3. The Serbian Government ("the Government") were represented by their acting Agent and State Attorney, Ms O. Stanimirović, who was recently substituted by their current Agent, Ms Z. Jadrijević Mladar.

A. The circumstances of the cases

4. The facts of the cases, as submitted by the parties, may be summarised as follows.

1. The background to the cases

5. Following the financial collapse of numerous banks in Serbia, in 1998 and 2002 the Serbian State adopted specific legislation converting the foreign-currency deposits in these banks, including the Jugobanka AD branch in Kosovska Mitrovica (hereinafter, "Jugobanka AD"), into public debt, and then went on to set the time frame within which those amounts were to be paid back to the banks' former clients, and the amounts, including interest, which were to be repaid (see paragraphs 18-20 and 21-25 below). In the case of *Molnar Gabor v. Serbia* (no. 22762/05, § 50, 8 December 2009), the Court found, *inter alia*, that given the dire reality of the Serbian economy at the relevant time and the wide margin of appreciation afforded to States in respect of matters involving economic policy, the impugned legislation providing for the gradual repayment of the deposits in question struck a fair balance between the general interest of the community and the applicant's persisting legitimate claim to his original savings, as well as the property rights of all others in the same situation as him.

6. In 2004 the Serbian authorities adopted a decree stating that all persons with foreign-currency savings in Jugobanka AD would have the same rights as other savers, providing that they could prove that they had been resident in Serbia on 4 July 2002 and were Serbian taxpayers (see paragraphs 26-27 below).

7. In 2004 Jugobanka AD and Nacionalna štedionica – Banka AD concluded an agreement in accordance with the above legislation, by which the latter bank would service the foreign-currency savings deposited in Jugobanka AD. In 2010 an annex to this agreement was concluded between Jugobanka AD and Eurobank AD (the latter being the successor bank to Nacionalna štedionica – Banka AD), by which Eurobank AD took over the servicing of the foreign-currency savings deposited with Jugobanka AD.

8. In 2013 the Constitutional Court of Serbia declared the 2004 decree (see paragraph 6 above) unconstitutional (see paragraph 30 below).

9. In 2016 the Serbian Government amended the relevant foreign-currency savings legislation, providing that it would designate a bank to service the foreign-currency savings deposited with Jugobanka AD, and that it would further regulate this issue subsequently (see paragraph 28 below).

According to the latest information provided by the Government on 13 January 2020, they have yet to fulfil those commitments.

2. The case of the first applicant

10. The first applicant has had a registered residence in Gnjilane, Kosovo since 1997.

11. The first applicant had three foreign-currency accounts with Jugobanka AD into which he made deposits between 1990 and 1997. The deposits totalled 17,661 Swiss francs (CHF) and 362 German marks (DM).

12. It appears that attempts by the first applicant to retrieve his deposits in Kosovo proved unsuccessful. He has not provided evidence indicating that he addressed either Nacionalna štedionica – Banka AD or, later, Eurobank AD (see paragraph 7 above) for the purpose of converting his foreign-currency savings into bonds (see paragraph 22 below).

3. The case of the second applicant

13. The second applicant has had a registered residence in Đakovica, Kosovo since 1977.

14. Between 20 April 1988 and 9 February 1995 the second applicant deposited CHF 10,366.74 into his foreign-currency account with Jugobanka AD.

15. As of 18 August 2002 the total sum in that account, including deposits and interest, amounted to CHF 11,750.80.

16. On 2 December 2008 Eurobank AD informed the second applicant of the conditions that had to be fulfilled under the decree concerning foreign-currency savings deposited with Jugobanka AD (see paragraph 26-27 below), and advised him that the conversion of his savings could be initiated only once he had complied with those conditions. He took no further steps in this regard, alleging that it was not possible to obtain the required documents, particularly proof of his Serbian taxpayer status (see paragraph 26 below), as he was living in Kosovo.

B. Relevant domestic law and practice

1. The Constitution

17. The Constitution, published in the Official Gazette of the Republic of Serbia (hereinafter, "the OG RS") no. 98/06, which came into force on 8 November 2006, provides in Article 170 that "a constitutional appeal may be lodged against the individual decisions or actions 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 1998 Act on the Settlement of Obligations Arising from Citizens' Foreign Currency Savings

18. The 1998 Act on the Settlement of Obligations Arising from Citizens' Foreign Currency Savings (hereinafter, "the 1998 Act"), published in the Official Gazette of the Federal Republic of Yugoslavia (hereinafter, "the OG FRY") nos. 59/98, 44/99 and 53/01, provided in Articles 1, 2, 3 and 4 that all foreign-currency savings deposited with "authorised banks" before 18 March 1995 were to become public debt, including, specifically, the deposits in the relevant bank in the present cases.

19. Under Article 10, the State's responsibility in that regard was to be fully honoured by 2012 through the payment of specified amounts, plus interest, in accordance with a certain time frame.

20. Article 22 provided that as of the date of this Act's entry into force (12 December 1998), "all ongoing lawsuits, including judicial enforcement proceedings, aimed at the collection of the foreign currency covered by this Act [should] be discontinued."

3. The 2002 Act on the Settlement of the Public Debt of the Federal Republic of Yugoslavia Arising from Citizens' Foreign Currency Savings

21. The 2002 Act on the Settlement of the Public Debt of the Federal Republic of Yugoslavia Arising from Citizens' Foreign Currency Savings (hereinafter, "the 2002 Act"), published in OG FRY no. 36/02, 80/04 and 101/05, repeals the 1998 Act (see paragraphs 18-20 above). In so doing, *inter alia*, it explicitly acknowledges that all foreign-currency deposits previously recognised as being part of the public debt of the Federal Republic of Yugoslavia are still to be recognised as such, modifies the time frame for the honouring the debt in question (by changing the relevant year from 2012 to 2016), and specifies the amended amounts, plus interest, to be paid annually.

22. Under Article 13, foreign-currency savers can make use of their deposits converted into Government bonds in order to pay taxes. Or, under Articles 12 and 14, before the expiry of the relevant time-limit, they can use them for a number of purposes, such as buying State property, taking part in the privatisation of State-owned businesses and banks, and, in certain circumstances and up to a specified amount, paying for medical treatment, medication and funeral costs.

23. In accordance with Articles 10 and 11, foreign-currency savers are able to sell those bonds and thus immediately obtain their funds in cash, as such trading is exempt from all taxation.

24. Lastly, Article 36 reaffirms that upon the entry into force of the 2002 Act "all lawsuits aimed at the collection of the foreign-currency savings

covered by this Act, including judicial enforcement proceedings, shall be discontinued."

25. This Act entered into force on 4 July 2002.

4. The 2004 decree concerning foreign-currency savings deposited with Jugobanka AD

26. The decree concerning foreign-currency savings deposited with Jugobanka AD (hereinafter, "the 2004 Decree" – see paragraph 6 above), published in OG RS no. 37/04, provided in Article 2 that persons who had foreign-currency savings with Jugobanka AD were entitled to the rights set out under the 2002 Act (see paragraphs 22-25 above), providing that they could prove that they had been resident in Serbia on 4 July 2002 and were Serbian taxpayers. This decree entered into force on 7 April 2004.

27. The decree lost its legal validity on 26 November 2013, after the decision of the Constitutional Court of 23 May 2013 was published in the Official Gazette (see paragraph 30 below).

5. Amendments to the 2002 Act on the Settlement of the Public Debt of the Federal Republic of Yugoslavia Arising from Citizens' Foreign Currency Savings

28. On 29 December 2016 the Serbian Parliament amended the 2002 Act (see paragraphs 21-25 above) so that, *inter alia*, it included Article 21(a), which provided that the Government would designate a bank to service the foreign-currency savings deposited with Jugobanka AD, and that they would further regulate this issue subsequently.

6. The 2004 and 2011 Civil Procedure Acts

29. The 2004 Civil Procedure Act, published in OG RS no. 125/04 and 111/09, set out, in Articles 186-198, the rules relating to civil actions in civil proceedings. It provided for, *inter alia*, a claimant's right to demand, by means of such a civil action, the determination of the existence of a certain right, legal relationship or fact, and also for his right to demand that a court order that a certain action be performed. This Act was repealed by the 2011 Civil Procedure Act, published in OG RS no. 72/11, 49/13, 74/13, 55/14 and 87/18, which provides, in Articles 191-204, for claimants having the same rights.

7. The Constitutional Court's decision of 23 May 2013

30. In decision no. IUo-107/2009 of 23 May 2013, the Constitutional Court declared the 2004 Decree (see paragraphs 26-27 above) unconstitutional.

31. In decision no. Už-5861/2013 of 25 April 2016, the Constitutional Court held that the limitation of the right of access to court, under Article 36 of the 2002 Act (see paragraph 24 above), was not absolute, as it did not apply to situations where the State did not abide by its duties under the 2002 Act; in cases of non-compliance, under the cited provision, claimants were not precluded from demanding that courts enforce those duties.

8. The practice of other domestic courts

32. In decision no. 26.P.br.42576/13 of 11 December 2015, the First Municipal Court in Belgrade allowed a claimant's lawsuit against the Republic of Serbia and Eurobank AD, so they were obliged to convert his foreign-currency savings with Jugobanka AD into bonds and pay him the bonds that were due.

33. The court observed that the claimant in that case had not fulfilled the conditions set out in the 2004 Decree (see paragraphs 26-27 above), and that his request to convert his savings had been dismissed by Eurobank AD on 13 August 2010. It held:

> "The provision of Article 3 of the [2002] Act did not prescribe the conditions that needed to be fulfilled [in order to have] the right to have savings converted into bonds and paid out. The right to have foreign-currency savings paid out is established by the very fact of depositing the savings with the bank with which [the claimant] has concluded the contract on the monetary deposits ... in accordance with the law. The State started to address the problem that arose due to the impossibility of honouring the banks' obligations based on the old foreign currency by enacting a law in 1998 which precisely defined the concept of (old) foreign-currency savings and transformed [the savings] into an obligation – the public debt of [the Socialist Republic of Yugoslavia] ...
>
> ...
>
> Since the parties who were sued were deciding on the human right of property guaranteed by the Constitution, a right which is applied directly pursuant to the Constitution in the manner provided for by law, and which can only be limited by statute and not by an act of lesser legal force, namely a decree, [those] parties were obliged to apply the provisions of the Constitution and the [2002] Act directly when deciding on the claimant's request."

34. That decision was upheld by the Appeals Court in Belgrade on 13 July 2017, which held:

> "[C]ontrary to what Eurobank AD has argued in its appeal, the first-instance court correctly held that, as a legal successor to Nacionalna štedionica – Banka AD, and in accordance with the agreement of 16 April 2004 concluded with Jugobanka AD and the annexes to this agreement of 12 May 2014 and 30 July 2010, [Eurobank AD] was also obliged to service and pay out the old foreign-currency savings deposited with Jugobanka AD. The claims in the appeal – that the agreement and its annexes ceased to be enforceable after the Constitutional Court determined that the decree concerning the foreign-currency savings deposited with Jugobanka AD was unconstitutional – are also unfounded, bearing in mind that the agreement and its annexes were concluded on the basis of the 2002 Act ... and not only on the basis of the decree ... Thus, the

> determination that the decree was unconstitutional does not affect the validity of the concluded agreements and Eurobanka AD's obligation ... to fulfil its obligations regarding the servicing and paying out of old foreign-currency savings deposited with Jugobanka AD in accordance with the concluded agreement."

35. The Government provided a certificate dated 30 October 2018 which confirmed that the foreign-currency savings of the claimant in that case had been converted into bonds.

COMPLAINTS

36. The applicants complained that they had been deprived of their property in circumstances which were incompatible with the requirements of Article 1 of Protocol No. 1 to the Convention.

THE LAW

A. Joinder of the applications

37. Having regard to the similar subject matter of the applications, the Court decides to order their joinder (Rule 42 § 1 of the Rules of Court).

B. The applicants' complaints

38. The applicants complained that the refusal of the Serbian authorities to release all or any of their foreign-currency savings, firstly as a result of the application of the 2004 Decree, and later because of a legal void created by the amendments to the 2002 Act, had violated their rights under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "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."

39. The Court notes at the outset that on 4 February 2020 a letter sent to the second applicant was returned to the Registry undelivered because of the demise of the addressee. The Court considers that it is unnecessary, in the circumstances, to ascertain whether the application introduced by the second applicant should be struck off the list of cases in accordance with Article 37 of the Convention, both applications being in any event inadmissible for the following reasons.

40. The Court further observes that the Government disputed the admissibility of the complaints on several grounds. However, it considers that it is not necessary to examine all of them, because the applications are inadmissible on the following ground.

41. The Government submitted that the applicants had failed to properly exhaust domestic remedies. Specifically, they claimed that before lodging the applications with the Court, the applicants had been obliged to file with the competent banks a request to convert their foreign-currency savings into bonds (see paragraphs 5, 7, 22, 23 and 26 above), and then, in the event that such a request were unsuccessful, they would have been obliged to pursue civil proceedings against the banks, requesting that their savings be converted into bonds. Ultimately, they should have made use of a constitutional appeal in the event that their requests were rejected. In support of their argument, the Government referred to the domestic case-law (see paragraphs 32-35 above), where a similar request had been upheld.

42. The first applicant made no comments in this regard, while the second applicant reiterated that there were no effective legal remedies to be exhausted.

43. The general principles concerning the rule of exhaustion of domestic remedies were restated in *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014). In particular, the Court reiterates that the States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. Those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, among many authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV, and *Vučković and Others*, cited above, § 72).

44. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others*, § 66, and *Vučković and Others*, § 71, both cited above).

45. Article 35 § 1 also requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I) and in compliance with the formal requirements and time-limits laid down in domestic law (see *Akdivar and Others*, § 66, and *Vučković and Others*, § 72, both cited above).

46. 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). 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*, cited above, § 71; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 70, 17 September 2009; and *Vučković and Others*, cited above, § 74).

47. As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, and was available in theory and in practice at the relevant time. 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 *Akdivar and Others*, cited above, § 68; *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010; and *Vučković and Others*, cited above, § 77).

48. Turning to the present case, the Court notes that the applicants, in order to realise their rights under the 2002 Act, had been obliged to file with the competent banks a request to convert their foreign-currency savings into bonds (see paragraphs 5, 7, 22, 23 and 26 above), and if unsuccessful had a possibility of instituting civil proceedings. In that respect the Court observes that under domestic law (see paragraph 29 above), a civil action may be brought to determine the existence of a certain fact, but also in order to demand that a certain action be performed. The Court notes that the cited domestic case-law (see paragraphs 32-35 above) supports the Government's claim that the applicants could have demanded, by means of such a civil action, that the domestic courts order their foreign-currency savings to be converted into bonds, pursuant to the 2002 Act (see paragraphs 21-25 above). In this respect, the Court recalls that it has already found that the legislation providing for the gradual repayment of the foreign-currency deposits was in principle compatible with the requirements of Article 1 of Protocol No. 1 to the Convention (see paragraph 5 above) and that foreign-currency savers are able to sell State bonds on the market, thus converting them into cash, such trading being exempt from all taxation (see paragraph 23 above). It is also to be noted that in the view of the time frame for honouring the debt in question (see paragraph 21 above), the payments to which the applicants are entitled under the 2002 Act will no longer be staggered.

49. The Court further observes that the 2002 Act does not exclude the possibility of the proceedings for the conversion of savings into bonds being initiated in circumstances where claimants allege that a competent bank has

violated its obligations under that Act (see paragraphs 30 and 32-35 above). As to the Government's argument that the applicants should have made use of a constitutional remedy in the event that their civil proceedings were unsuccessful (see paragraph 41 above), the Court notes that it has previously held that "a constitutional appeal should, in principle, be considered as an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced [against Serbia] as of 7 August 2008" (see *Vučković and Others*, cited above, § 84). The Court observes that the applicants lodged their applications on 8 March 2011 and 16 February 2013 respectively.

50. The Court notes that the applicants have not explained why such a civil-law remedy would have been inadequate and ineffective in the particular circumstances of their case, or whether special circumstances existed which absolved them from this requirement (see paragraph 47 above). As already noted above, the existence of mere doubts as to the prospects of success of a remedy which is not obviously futile is not a valid reason for failing to use it. In view of the cited domestic case-law (see paragraphs 32-35 above), such a remedy was indeed fully adequate in respect of the applicants' Convention grievances, and cannot be considered merely hypothetical or speculative. In the present case, the applicants not only failed to make use of that remedy, but the first applicant did not provide evidence indicating that he had even attempted to exercise his right to have his foreign-currency savings converted into bonds (see paragraph 12 above), and the second applicant was informed by the competent bank of the conditions that had to be fulfilled before such a conversion could be carried out, but did not take any further steps in this regard (see paragraph 16 above). By way of observation, the Court notes that the cited civil-law remedy is still available, to the applicants and anyone in a similar situation.

51. The Court further notes that the 2004 Decree has in the meantime been declared unconstitutional (see paragraph 30 above), and that the conditions it imposed in order to obtain the rights under the 2002 Act (notably, the proof of being Serbian taxpayers – see paragraph 26 above) are no longer applicable. It is true that the respondent State has not yet designated a bank to service the foreign-currency savings deposited with Jugobanka AD pursuant to the amendments to the 2002 Act adopted in 2016 (see paragraphs 9 and 28 above). Nevertheless, the Court notes that the domestic case-law which postdates that amendment (see paragraph 34 above) indicates that Eurobanka AD services foreign-currency savings deposited with Jugobanka AD, in view of the existing legal commitments (see paragraph 7 above); as a consequence, the applicants can turn to the former bank in order to realise their rights from the 2002 Act.

52. In view of the above, the Court considers that the applicants had at their disposal a legal remedy which was available and sufficient in respect

of their Convention grievances. As no use was made of the said legal remedy, the applications 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.

Done in English and notified in writing on 28 May 2020.

Andrea Tamietti Registrar	Jon Fridrik Kjølbro President