SECOND SECTION

CASE OF MLADENOVIĆ v. SERBIA

(Application no. 1099/08)

JUDGMENT

STRASBOURG

22 May 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mladenović v. Serbia,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
Işıl Karakaş,
Guido Raimondi,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 17 April 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1099/08) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Ms Milijana Mladenović ("the applicant"), on 12 December 2007.

2. The applicant was represented by Mr J. Pavlica, a lawyer practising in Belgrade. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. The applicant complained about the respondent State's failure to carry out a prompt, thorough and effective investigation into her son's death, as well as the excessive length of the criminal proceedings at issue.

4. On 5 January 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Belgrade.

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

7. On 30 July 1991, in the course of a fight between two groups of youths, the applicant's son (hereinafter "A"), aged 21, was fatally shot by an off-duty police officer (hereinafter "B"), who had apparently attempted to assist his own brother as one of the participants in the said incident.

8. On an unspecified date thereafter the District Public Prosecutor's Office (*Okružno javno tužilaštvo*) in Belgrade charged B with murder, as well as a number of other persons for several related crimes.

9. The decision to institute a formal judicial investigation (*rešenje o sprovođenju istrage*) was adopted on 5 August 1991.

10. On 30 December 1991, however, the charges against B were dropped, and on 13 January 1992 the investigating judge (*istražni sudija*) of the District Court (*Okružni sud*) in Belgrade decided to terminate the proceedings against him (*obustavi istragu*).

11. During the said investigation the defendants had all been heard in person, as had several witnesses, including A's own brother. The investigating judge had further obtained relevant medical and ballistics reports, as well as other expert testimony. The autopsy report had also been produced.

12. On 4 February 1992 the applicant filed an indictment (*optužnica*) against B with the District Court, and thus took over the prosecution of the case in the capacity of a "subsidiary prosecutor" (see paragraph 32 below).

13. On 29 January 1996 the District Court acquitted B, stating that he had acted in self-defence.

14. Between 4 February 1992 and 29 January 1996 more than a dozen hearings had been held before the District Court. The applicant and numerous witnesses, as well as medical and ballistics experts, had all been heard, and a re-construction of the events in question had been carried out.

15. On 24 March 1999 the Supreme Court (*Vrhovni sud Srbije*) quashed the judgment of 29 January 1996 and ordered that the case be re-examined at first instance. In so doing, it described the District Court's reasoning as incoherent and noted that its establishment of the facts and its assessment of evidence had been fundamentally flawed.

16. On 4 November 2002 the District Court again acquitted B, re-affirming that he had acted in self-defence.

17. On 20 April 2004 the Supreme Court quashed the District Court's judgment. It noted that the said court's reasoning had almost exclusively taken into account the evidence in favour of B, having ignored or misrepresented the rest. The District Court was thus ordered to thoroughly review the case and re-assess the evidence. The District Court received the Supreme Court's decision on 21 September 2004.

18. The next hearing before the District Court was scheduled for September 2006, but was subsequently cancelled by the court itself because it had, apparently, been unable to secure the proper composition of its bench.

19. On 18 December 2006 the District Court adjourned the hearing because of the inability of B's lawyer to appear in court due to a prior professional commitment.

20. Following an additional adjournment on 27 June 2007, a new hearing was set for 19 September 2007.

21. On 19 September 2007 the District Court again adjourned the hearing, this time because it had been informed that B, still an active police officer, had been sent, as a member of the Serbian contingent, to take part in the United Nations' mission in Liberia. The decision of the Ministry of Internal Affairs (*Ministarstvo unutrašnjih poslova*) issued in this respect, on 3 August 2007, stated that B's posting would last for a period of one year, but that it could be extended. The District Court scheduled the next hearing for 2 November 2007, which was apparently when B was supposed to briefly visit Belgrade.

22. On 4 October 2007, however, the applicant was informed that the next hearing would instead be held "on 3 October 2007".

23. The applicant thereafter went physically to the District Court's registry and was told that the upcoming hearing was still scheduled for 2 November 2007.

24. On 2 November 2007 the applicant therefore appeared before the District Court, but was informed by the presiding judge that the hearing had been set for 30 October 2007. The judge ultimately accepted to schedule a new hearing for 14 December 2007.

25. On 23 November 2007, however, the applicant received the District Court's decision of 30 October 2007, declaring that the proceedings had been terminated due to the applicant's failure to appear before the court on the latter date.

26. On 26 November 2007 the applicant complained about this decision, and on 6 December 2007 the District Court re-instituted the proceedings in question.

27. Between 20 February 2008 and 4 December 2008 a total of six hearings were adjourned by the District Court, the reasons for this being: (i) B's failure to appear in court (on three occasions); (ii) the presiding judge's wish to withdraw from the case in view of the applicant's complaints against him (once); and (iii) the inability of B's lawyer to appear in court as a result of a traffic accident (twice).

28. By October 2009 the District Court had held another three and adjourned another two hearings. Specifically, the hearings of 24 April 2009, 29 June 2009 and 9 October 2009 had been held, during which B and a number of witnesses had been re-heard, whilst the hearings of 28 January 2009 and 30 November 2009 had been adjourned due to B's failure to appear in court and the presiding judge's absence, respectively.

29. In December 2009 the presiding judge was not re-elected to the bench. The case was therefore assigned to another judge and the proceedings started anew.

30. It would appear that no hearings have been scheduled thereafter.

II. RELEVANT DOMESTIC LAW

31. Articles 19 and 20 of the Code of Criminal Procedure (*Zakonik o krivičnom postupku*, published in the Official Gazette of the Federal Republic of Yugoslavia nos. 70/01 and 68/02, as well as in the Official Gazette of the Republic of Serbia nos. 58/04, 85/05, 115/05, 46/06, 49/07, 122/08, 20/09, 72/09 and 76/10) provide, *inter alia*, that formal criminal proceedings can be instituted at the request of an authorised prosecutor. In respect of crimes subject to prosecution *ex officio*, including murder, the authorised prosecutor is the public prosecutor personally. The latter's authority to decide whether to press charges, however, is bound by the principle of legality which requires that he must act whenever there is a reasonable suspicion that a crime subject to prosecution *ex officio* has been committed.

32. Article 61 provides that should the public prosecutor decide that there is no basis to prosecute, he must inform the victim of this decision, who shall then have the right to take over the prosecution of the case on his own behalf, in the capacity of a "subsidiary prosecutor".

33. Articles 64 § 2 and 379 provide that in a case where the prosecution has already been taken over by a subsidiary prosecutor, the public prosecutor shall nevertheless have the power, up until the conclusion of the main hearing (*do završetka glavnog pretresa*), to resume the

prosecution of the matter *ex officio*. It is understood that this refers to the main hearing at first instance, including the main hearing following a possible quashing of a first instance judgment, as well as a potential main hearing on appeal (see *Komentar Zakonika o krivičnom postupku*, Prof. dr Tihomir Vasiljević and Prof. dr Momčilo Grubač, IDP Justinijan, Belgrade, 2005, p. 136, paragraphs 3 and 4).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

34. The applicant complained about the respondent State's failure to carry out a prompt, thorough and effective investigation into the death of her son.

35. Being the "master of the characterisation" to be given in law to the facts of any case before it (see *Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005), the Court considers that this complaint falls to be examined under Article 2 of the Convention, which provision reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. Admissibility

1. Compatibility ratione temporis

36. The Government noted that the fatal shooting had happened in 1991, that the official investigation into this incident had ended by 13 January 1992 and that Serbia ratified the Convention on 3 March 2004. The Government further maintained that "the most significant part of the proceedings" which ensued beyond 13 January 1992, at the applicant's own initiative, also took place before the Serbian ratification of the Convention. Lastly, no relevant new evidence was discovered as of 3 March 2004, and the criminal proceedings have since then mostly revolved around the assessment of evidence collected earlier. The Government therefore opined that the applicant's complaint under Article 2 should be rejected as incompatible with the Convention *ratione temporis*.

37. The applicant maintained that her complaint could not be dismissed on this ground since the impugned proceedings were still ongoing.

38. Pursuant to the general rules of international law (notably, Article 28 of the Vienna Convention on the Law of Treaties), the Convention does not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before its entry into force with respect to that Party (see *Blečić v. Croatia* [GC], no. 59532/00, § 70, ECHR 2006-III). However, it is clear from the Court's case-law concerning Article 2 that the procedural obligation to investigate has evolved into a separate and autonomous duty, capable of binding the State even when the death took place before ratification (see *Šilih v. Slovenia* [GC], no. 71463/01, § 159, 9 April 2009). Given the principle of legal certainty, the Court's temporal jurisdiction in this regard is nevertheless not open-ended (ibid, § 161). Where the death occurred before ratification, only procedural acts or omissions occurring after that date can fall within the Court's temporal jurisdiction (ibid, § 162). Furthermore, there must be a genuine connection between the death and the entry into force of the Convention in respect of that State for the procedural obligation to come into effect. In practice, this means that a significant proportion of the procedural steps required by this provision have been, or should have been, carried out after ratification. The Court has also held that circumstances may emerge which cast doubt on the effectiveness of the original investigation and an obligation may arise for further investigations to be pursued (see *Hackett v. the United Kingdom* (dec.), no. 34698/04, 10 May 2005).

39. In view of the above, and given that there have been more than eight years of various procedural acts/omissions in the impugned criminal proceedings as of 3 March 2004, including the quashing of the defendant's second acquittal by the Supreme Court indicating serious deficiencies in the earlier proceedings (see paragraphs 17-30 above), the Court considers that the applicant's complaint is compatible *ratione temporis* with the Convention in so far as it concerns events as of the entry into force of the Convention in respect of Serbia. It is further understood that where a national system allows for a possibility for the victim's family to take over the prosecution of the case on their own behalf, i.e. in the capacity of a "subsidiary prosecutor", such post-ratification proceedings must also be taken into account (see, *mutatis mutandis*, *V.D. v. Croatia*, no. 15526/10, § 53, 8 November 2011, albeit in the context of Article 3 and non-exhaustion).

40. The Government's objection must therefore be dismissed.

2. The six-month time-limit

41. The Government also argued that the applicant had not complied with the six-month requirement provided for in Article 35 § 1 of the Convention. In particular, the official investigation into the incident had ended by 13 January 1992 and, as already noted above, Serbia ratified the Convention on 3 March 2004. The applicant should therefore have lodged her application with the Court within six months as of that latter date.

42. The applicant maintained that she had complied with the six-month time-limit since she had filed her application less than three months as of when it became apparent that no redress could be obtained domestically, i.e. as of 19 September 2007 (see paragraph 21 above).

43. The purpose of the six-month rule is to promote security of the law (see *P.M. v. the United Kingdom* (dec.), no. 6638/03, 24 August 2004). It should ensure that it is possible to ascertain the facts of a case before that possibility fades away, making a fair examination of the question in issue next to impossible (see *Pavlenko v. Russia*, no. 42371/02, § 69, 1 April 2010).

44. The six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. That being said, where it is clear from the outset that no effective remedy is available to the applicant, the period runs from the date of the act in issue, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). Nor can Article 35 § 1 be interpreted in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. Where, therefore, an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001).

45. The Court has held in cases concerning the obligation to investigate under Article 2 of the Convention that where a death has occurred, applicant relatives are expected to keep track of the progress of the proceedings and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective redress (see *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002; *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III; and *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 158, 18 September 2009).

46. Turning to the present case, the Court considers that the Supreme Courts decision of 20 April 2004 must have raised the applicant's expectations to the effect that she may yet obtain redress domestically (see paragraph 17 above). At the same time, however, it seems reasonable that, as argued by the applicant herself, on 19 September 2007 she had lost hope in this regard, having learnt that B had been sent by the respondent State to a possibly open-ended United Nations' Mission in Liberia (see paragraph 21 above). Less than three months later she lodged her application with the Court.

47. In such circumstances, the Government's objection concerning the timeliness of the applicant's complaint must also be dismissed. Once again, it is recalled that where a national system allows for a possibility for the victim's family to take over the prosecution of the case on their own behalf such post-ratification proceedings must also be taken into account, including for exhaustion and six-month purposes (see paragraph 39 above).

3. Conclusion

48. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

49. The applicant re-affirmed her complaint. She further added that the Serbian judicial authorities had not been effective, objective or impartial. In particular, and as regards the *ex officio* investigation, the medical experts who had given their opinions were employed with the Ministry of Internal Affairs, and even the ballistics expert himself had been the said ministry's employee almost up until his participation in the proceedings. Further, prior to the adoption of the judgment of 29 January 1996, the presiding judge in the case had been removed, and a new one appointed, for no apparent reason and in breach of the relevant procedural rules. Most delays, throughout the proceedings, occurred as a result the defendant's tactics and the District Court's inability or unwillingness to proceed promptly. Lastly, the applicant maintained that the respondent State's decision to send B, a defendant in an ongoing criminal case, to a United Nations' mission abroad could not but be construed as yet another attempt to avoid his conviction.

50. The Government maintained that there had been no violation of Article 2 of the Convention. They argued that the official investigation, which had ended by 13 January 1992, had been independent and effective. Also, as noted above, no relevant new evidence was discovered as of the date of ratification, i.e. 3 March 2004, and the criminal proceedings have since then mostly concerned the assessment of evidence collected earlier, specifically whether B should be convicted of murder or, instead, acquitted on the basis of self-defence. In any event, the State could not have initiated an *ex officio* investigation once the applicant had already taken over the prosecution of the case in her capacity as a subsidiary prosecutor.

2. *The Court's assessment*

51. The Court has consistently held that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or by private individuals (see, for example, *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 62, 15 January 2009). This investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Oğur v. Turkey* [GC], no. 21594/93, § 88, ECHR 1999-III). This is not an obligation of result, but of means. The authorities must therefore have taken all reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines this ability may risk falling foul of the said standard (see, among other authorities, *Bazorkina v. Russia*, no. 69481/01, § 118, 27 July 2006). Also, there is an implicit requirement of promptness and reasonable expedition (see *Yaşa v. Turkey*, 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, §§ 102-04, and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-07, ECHR 2000-III). Whilst there may be genuine difficulties which prevent progress in a particular investigation, a prompt response by the authorities in situations involving the use of lethal force may generally be regarded as

essential in maintaining public confidence in the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Jularić v. Croatia*, no. 20106/06, § 43, 20 January 2011). Finally, even if a prosecution is brought and suspects stand trial, the Court will examine whether this is a "meaningful" or serious exercise with any realistic prospects of bringing the perpetrator to account (see, *mutatis mutandis*, *Akkum and Others v. Turkey*, no. 21894/93, §§ 231, 250 and 251, ECHR 2005-II (extracts). Violations have also been found where the trial had continued unduly (see *Opuz v. Turkey*, no. 33401/02, § 151, ECHR 2009, a case where the criminal proceedings at issue had lasted for more than six years and were still pending) or had ended by prescription allowing the accused perpetrators to escape accountability (see, *mutatis mutandis*, *Teren Aksakal v. Turkey*, no. 51967/99, § 88, 11 September 2007).

52. Turning to the present case, even though it has temporal jurisdiction to examine the applicant's complaint only in so far as it concerns events as of 3 March 2004 (see paragraph 39 above), the Court shall nevertheless, for reasons of context, take note of all relevant events prior to that date (see, albeit in the context of Article 3, *Milanović v. Serbia*, no. 44614/07, § 78, 14 December 2010).

53. The Court therefore recalls that the criminal proceedings in question had formally commenced on 5 August 1991. They were, however, terminated by 13 January 1992, and by 4 February 1992 the applicant took over the prosecution of the case in her capacity as a subsidiary prosecutor. On 29 January 1996 the District Court acquitted B, stating that he had acted in self-defence, but on 24 March 1999 the Supreme Court quashed this judgment and ordered that the case be re-examined at first instance. On 4 November 2002 the District Court again acquitted B, re-affirming that he had acted in self-defence. On 20 April 2004, following the respondent State's ratification of the Convention, the Supreme Court quashed the District Court's judgment, noting that its reasoning had almost exclusively taken into account the evidence in favour of B and had ignored or misrepresented the rest. The Supreme Court hence ordered the District Court to thoroughly review the case and re-assess the evidence. More than eight years later the proceedings in question are still pending at first instance.

54. Further, if it is accepted that the post-ratification proceedings have been mostly concerned with the assessment of evidence, as argued by the Government, it remains unclear as to why there is still no final acquittal or conviction in the case, it being noted that there have apparently been no procedural developments whatsoever since December 2009.

55. Lastly, the Government's suggestion to the effect that the respondent State could not have initiated an *ex officio* investigation after the applicant had already taken over the prosecution of the case in the capacity of a subsidiary prosecutor neglects Articles 64 § 2 and 379 of the Code on Criminal Procedure, which provide that the public prosecutor shall always have the power, up until the conclusion of the main hearing, to resume the prosecution of the matter *ex officio* (see paragraph 33 above).

56. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of the procedural obligation under Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

57. The applicant further complained about the excessive length of the criminal proceedings at issue. She relied on Article 6 § 1 of the Convention, the relevant part of which reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

58. The Court notes that the requirement of promptness is inherent in the procedural aspect of Article 2 (see paragraph 51 above).

59. Having regard to its findings in that context (see paragraphs 52-56 above), the Court considers that it is not necessary to examine separately the admissibility or the merits of the applicant's complaint made under Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

61. The applicant claimed a total of 9,322.97 euros (EUR) in respect of pecuniary damage, consisting of funeral and commemoration costs, as well as the costs of a gravestone, plus interest.

62. As regards the non-pecuniary damage, the applicant claimed EUR 4,000 for herself, as well as another EUR 4,000 and EUR 3,000 for her son's father and brother, respectively.

63. The Government contested these claims.

64. The Court does not discern any causal link between the procedural violation of Article 2 of the Convention found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant the EUR 4,000 sought in respect of the non-pecuniary damage suffered. Lastly, the Court rejects the just satisfaction claim as regards B's father and brother since they were never applicants in the proceedings before it.

B. Costs and expenses

65. The applicant claimed EUR 17,700 for the costs and expenses incurred domestically, and an unspecified sum "for [her] representation" before the Court.

66. The Government contested these claims.

67. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily

incurred and are also reasonable as to their quantum. In the present case, regard being had to the documents in its possession and the above criteria, as well as the domestic procedural developments as of the date of entry of the Convention in respect of Serbia, the Court considers it reasonable to award the sum of EUR 5,000 covering costs under all heads.

C. Default interest

68. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 2 of the Convention admissible;

2. *Holds* that there has been a violation of Article 2 of the Convention;

3. *Holds* that it is not necessary to examine separately the complaint under Article 6 § 1 of the Convention;

4. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Serbian dinars at the rate applicable at the date of settlement:

      (i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

      (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President