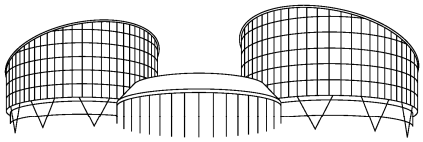

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF CUPARA v. SERBIA
(Application no. 34683/08)

JUDGMENT

STRASBOURG

12 July 2016

FINAL

12/10/2016

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Cupara v. Serbia,

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

Luis López Guerra, *President,*
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 21 June 2016,

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

PROCEDURE

1. The case originated in an application (no. 34683/08) 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, Mr Dragomir Cupara ("the applicant"), on 4 July 2008.

2. The applicant was represented by Mr Đ. Drobac, a lawyer practising in Užice. The Serbian Government ("the Government") were represented by their Agent at the time, Mr S. Carić.

3. The applicant's allegations concern the existence of inconsistent domestic case-law relating to the payment of unemployment benefits.

4. On 17 September 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1950 and lives in Sevojno.

A. Proceedings concerning the applicant's unemployment benefits

6. On 30 May 2001 the Užice department of the Central Employment Office (*Republicki zavod za tržiste rada – Nacionalna služba za zapošljavanje – Organizaciona jedinica Užice*, hereinafter "the Employment Office") granted unemployment benefits to the applicant until

he found a new job or became eligible for retirement (*novčana naknada do zaposlenja ili ispunjavanja uslova za starosnu penziju*).

7. On 1 June 2001 the Law on Changes and Amendments to the Law on Employment and Rights of Unemployed Persons ("the 2001 Law") came into force. The law provided for different coefficients and a different methodology for calculating such benefits. It also provided, in Article 20, that any administrative proceedings which had not been concluded by the date on which the new law came into force were to be finalised in accordance with the new law (Article 17 of the 2001 Law provided that Article 20 was applicable as of 1 September 2001).

8. The applicant was receiving the full amount of the benefits he was entitled to until October 2001. From that date the benefits were decreased to 70-80% of the amount he had initially been awarded, although the decision of 30 May 2001 had not been amended or superseded by a new decision.

9. Consequently, on 12 November 2007 the applicant brought a civil claim against the Employment Office in the Užice Municipal Court (*Opštinski sud u Užicu*), seeking payment of the difference between the benefits he had received and those he had been granted by the Employment Office and which had been due from 1 November 2004 (a claim for any earlier sum was statute-barred), plus statutory interest and legal costs.

10. On 26 December 2007 the Municipal Court rejected the applicant's claim. It found that his benefits had been correctly calculated, in accordance with the 2001 Law, as the Employment Office's decision in his case had not yet been final on the date on which the relevant law had come into force.

11. On 18 March 2008 the Užice District Court (*Okružni sud u Užicu*) upheld that judgment following an appeal by the applicant.

B. Other relevant facts

12. The applicant's lawyer brought separate claims on behalf of numerous individuals (hereinafter "the plaintiffs"), seeking outstanding benefits.

13. On 22 November 2007 the same Municipal Court ruled in favour of M.Đ., one of the plaintiffs, whose claim was factually and legally identical to that of the applicant (M.Đ.'s administrative decision had also been delivered on 30 May 2001). That judgment became final on 19 December 2007.

14. The Municipal Court ruled in favour of several of the plaintiffs in nine judgments delivered between 24 August 2007 and 17 April 2008, although it appears that the dates on which the respective administrative decisions had come into force differed.

15. On 26 February 2008 and 19 May 2008 the Arilje Municipal Court delivered two judgments in which it ruled against plaintiffs whose claims

were identical to the applicant's. The Užice District Court upheld those two judgments on 20 March 2008 and 15 September 2008 respectively.

16. A number of plaintiffs who were in an identical situation to that of the applicant lodged constitutional appeals with the Constitutional Court of Serbia. Between 4 November 2010 and 1 March 2012 the Constitutional Court adopted a number of decisions in those cases, finding a violation of the right to a fair trial. It quashed the civil judgments and ordered the reopening of the civil proceedings.

17. Acting upon the decisions of the Constitutional Court, the Kragujevac Court of Appeal (which became the competent court of second instance for the applicant's case after a reorganisation of courts in Serbia in 2010, instead of the Užice District Court) and the Belgrade Court of Appeal reopened proceedings in cases in which the Constitutional Court had made such an order and ruled in favour of the plaintiffs.

18. On 1 April 2014 the Supreme Court of Cassation adopted a detailed action plan aimed at ensuring the general harmonisation of case-law throughout the Serbian judicial system. The plan contained a series of measures to be taken at various levels of jurisdiction, and, *inter alia*, included the following: (i) the adoption of guiding legal opinions based on the principles developed in the case-law of the European Court of Human Rights; (ii) the dissemination of such opinions; (iii) regular information sharing between the courts; (iv) an increased number of thematic discussions and training programmes; (v) the adoption of specific action plans by the courts at various levels; and (vi) the development of various IT tools and related intranet databases.

II. RELEVANT DOMESTIC LAW

A. The Constitution of the Republic of Serbia 2006 (Ustav Republike Srbije; published in OG RS no. 98/06)

19. 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

"Equal protection of rights before courts and other State bodies, entities exercising public powers and bodies of an autonomous province or local self-government shall be guaranteed.

Everyone shall have the right to an appeal or other legal remedy against any decision on his rights, obligations or lawful interests."

B. The Courts Organisation Act 2001 (*Zakon o uređenju sudova*; published in the Official Gazette of the Republic of Serbia – OG RS – nos. 63/01, 42/02, 27/03, 29/04, 101/05 and 46/06)

20. Article 40 §§ 2 and 3 of this Act provide, *inter alia*, that a meeting of a division (*sednica odeljenja*) of the Supreme Court is to be held if there is an issue as regards the consistency of its case-law. Any guiding opinions (*pravna shvatanja*) adopted thereupon will be binding for the panels (*veća*) of the division in question.

C. The Courts Organisation Act 2008 (*Zakon o uređenju sudova*; published in OG RS nos. 116/08, 104/09, 101/10, 31/11, 101/11 and 101/13)

21. The substance of Article 43 §§ 2 and 3 of the Courts Organisation Act 2008 corresponds to the substance of Article 40 §§ 2 and 3 of the Courts Organisation Act 2001.

D. The Rules of Court 2003 (*Sudski poslovnik*; published in OG RS nos. 65/03, 115/05, 4/06 and 50/06)

22. Article 28 § 1 provides that all courts are obliged to harmonise their own case-law on any given issue, and that they must do so by means of adopting specific opinions.

E. The Rules of Court 2009 (*Sudski poslovnik*; published in OG RS nos. 110/09, 70/11, 19/12 and 89/13)

23. Articles 27, 28, 29 and 31 provide, *inter alia*, that: (i) courts with a larger number of judges may have case-law departments entrusted with the monitoring of relevant domestic and international case-law; (ii) the courts must keep a register of all legal opinions which are deemed to be of significance for case-law; (iii) the courts may hold joint consultations on case-law related issues, including with the Supreme Court of Cassation; and (iv) the case-law departments are to prepare proposals for judges' plenary sessions with a view to securing harmonisation of the relevant case-law.

F. Civil Procedure Act 2011 (*Zakon o parničnom postupku*; published in OG RS nos. 72/2011, 49/2013 – Constitutional Court decisions nos. 74/2013 and 55/2014)

24. Article 426 of the Civil Procedure Act provides that a case may be reopened if a party to civil proceedings gains an opportunity to rely on a

judgment of the European Court of Human Rights finding a violation of a human right which may have precluded a more favourable outcome of the civil proceedings in question.

THE LAW

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

25. The applicant complained under Article 6 § 1 of the Convention about the rejection of his civil claims by the domestic courts and the simultaneous acceptance by the same courts of identical claims filed by other plaintiffs.

26. The relevant part of Article 6 § 1 reads as follows:

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

A. Admissibility

27. The Government noted that the applicant had failed to make use of the possibility of a constitutional appeal. He had thus not exhausted the available and effective domestic remedies.

28. The applicant maintained that a constitutional appeal had not been an effective domestic remedy at the relevant time.

29. The Court observes that it has consistently held that a constitutional appeal should, in principle, be considered an effective domestic remedy, within the meaning of Article 35 § 1 of the Convention, in respect of all applications lodged against Serbia from 7 August 2008 onwards (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 notes that the applicant lodged his application with the Court on 4 July 2008. The Government's objection in this regard must therefore be rejected (see, among other authorities, *Stanković and Trajković v. Serbia*, nos. 37194/08 and 37260/08, § 36, 22 December 2015; *Šorgić v. Serbia*, no. 34973/06, §§ 76 and 77, 3 November 2011; and *Lakatoš and Others v. Serbia*, no. 3363/08, § 87, 7 January 2014).

30. The Court further notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also notes that they are not inadmissible on any other ground. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

31. The Government did not dispute the fact that in the applicant's case, and in other cases based on similar facts, the courts had adopted conflicting decisions.

32. The Government pointed out that the Constitutional Court had found a violation of the right to legal certainty in a number of cases in which the plaintiffs had submitted constitutional appeals (see paragraphs 16 and 17 above). As the civil courts had reopened proceedings in the cases where the Constitutional Court had ordered them to do so, the Government argued that there had not been such profound and long-standing differences in terms of the Court's case-law as to violate the principle of legal certainty.

33. The applicant maintained his complaints.

2. The Court's assessment

34. In the Grand Chamber judgment in *Nejdet Şahin and Perihan Şahin v. Turkey* ([GC], no. 13279/05, 20 October 2011), the Court reiterated the main principles applicable in cases concerning the issue of conflicting court decisions (§§ 49-58). They can be summarised as follows:

(i) It is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). Likewise, it is not its function, save in the event of evident arbitrariness, to compare different decisions of national courts, even if given in apparently similar proceedings, as the independence of those courts must be respected (see *Ādamsons v. Latvia*, no. 3669/03, § 118, 24 June 2008);

(ii) The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see *Santos Pinto v. Portugal*, no. 39005/04, § 41, 20 May 2008, and *Tudor Tudor v. Romania*, no. 21911/03, § 29, 24 March 2009);

(iii) The criteria that guide the Court's assessment of the conditions in which conflicting decisions of different domestic courts, ruling at last instance, are in breach of the fair-trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of the domestic courts, whether domestic law provides for a machinery capable of overcoming those inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see *Iordan Iordanov and Others v. Bulgaria*,

no. 23530/02, §§ 49-50, 2 July 2009; *Beian v. Romania (no. 1)*, no. 30658/05, §§ 34-40, ECHR 2007-V (extracts); *Ştefan and Ştef v. Romania*, nos. 24428/03 and 26977/03, §§ 33-36, 27 January 2009; *Schwarzkopf and Taussik v. the Czech Republic* (dec.), no. 42162/02, 2 December 2008; *Tudor Tudor*, cited above, § 31; and *Ştefănică and Others v. Romania*, no. 38155/02, § 36, 2 November 2010);

(iv) The Court's assessment has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (see, among other authorities, *Beian (no. 1)*, cited above, § 39; *Iordan Iordanov and Others*, cited above, § 47; and *Ştefănică and Others*, cited above, § 31);

(v) The principle of legal certainty guarantees, *inter alia*, a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see *Paduraru v. Romania*, § 98, no. 63252/00, ECHR 2005-XII (extracts); *Vinčić and Others*, cited above, § 56; and *Ştefănică and Others*, cited above, § 38);

(vi) However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see *Unédic v. France*, no. 20153/04, § 74, 18 December 2008). Case-law development is not, in itself, contrary to the proper administration of justice, since failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see *Atanasovski v. "the Former Yugoslav Republic of Macedonia"*, no. 36815/03, § 38, 14 January 2010).

35. Turning to the present case, the Court notes that the parties did not dispute the fact that there were inconsistencies in the adjudication of civil claims brought by many persons who were in identical or similar situations.

36. The Court notes that domestic law provides for machinery capable for overcoming these inconsistencies (see paragraphs 20-23 above). The Court also notes that in a number of cases that were factually and legally identical to that of the applicant the Constitutional Court found a violation of the right to a fair trial, quashed the impugned civil judgments and ordered the reopening of the civil proceedings (see paragraphs 16-17 above). In view of the above, even though the applicant was not required to have exhausted that avenue of redress in terms of admissibility of the application (see paragraphs 27-30), the mechanism provided by the Constitutional Court, and which was available to the applicant, is nevertheless an important consideration when looking at the system as a whole. Given that the Constitutional Court was at the relevant time a part of the mechanism capable of remedying the case-law inconsistencies, as illustrated in its case-law (see paragraphs 16-17 above), the Court finds that in the specific

circumstances of this case and given the nature of the applicant's complaint, the Serbian legal system provided the applicant with a mechanism capable of overcoming the inconsistencies complained of.

37. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 12 July 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Deputy Registrar	Luis López Guerra President