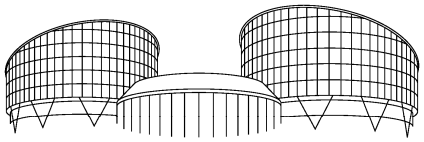

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF POPOVIĆ AND OTHERS v. SERBIA

(Applications nos. 26944/13 and 3 others – see appended list)

JUDGMENT

Art 14 + Art 1 P 1 • Discrimination • Alleged discrimination in provision of disability benefits to civilian as opposed to military beneficiaries • Impugned difference in treatment having an objective and reasonable justification • Legislator's choice based on relevant and sufficient grounds

STRASBOURG

30 June 2020

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 Popović and Others v. Serbia,

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

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Branko Lubarda,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Jolien Schukking,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the applications (nos. 26944/13, 14616/16, 14619/16 and 22233/16) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by 4 Serbian nationals, Mr Dejan Popović ("the first applicant"), Mr Josip Vlček ("the second applicant"), Mr Miroslav Homa ("the third applicant") and Mr Zvonko Nikolić ("the fourth applicant"), on the various dates indicated in the appended table;

the decision to give notice of the applications to the Serbian Government ("the Government");

the parties' observations;

Having deliberated in private on 14 January, 11 February, 12 May and 26 May 2020,

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

INTRODUCTION

1. The applications concern alleged discrimination by the respondent State, based on the relevant domestic legislation, in the provision of benefits to disabled civilians (*civilni invalidi*) compared to disabled war veterans (*vojni invalidi*) in situations involving the same paraplegic disability.

THE FACTS

2. A list of the applicants is set out in the appendix, as are the applicants' personal details, the dates of introduction of their applications before the Court and the information regarding their legal counsel, respectively.

3. The Government were initially represented by their acting Agent and State Attorney, Ms Olivera Stanimirović. The Government were subsequently represented by their current Agent, Ms Zorana Jadrijević Mladar.

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

I. THE FIRST APPLICANT (MR DEJAN POPOVIĆ, APPLICATION NO. 26944/13)

5. On 10 July 2005 the applicant fell from a height of approximately five metres and sustained a paraplegic disability which left him unable to use his legs and reliant on a wheelchair.

6. In 2006 the applicant was diagnosed by the relevant authorities as being 100% disabled, and was then granted an assisted living allowance followed by an increased assisted living allowance, that is, an allowance for necessary assistance from another person because of the seriousness of his injury (*dodatak za pomoć i negu drugog lica*).

7. On 18 December 2008 the applicant brought a civil discrimination claim against the competent branch of the respondent State – the Ministry of Labour, Employment and Social Policy (*Ministarstvo rada, zapošljavanja i socijalne politike*) – seeking damages for mental anguish. The applicant maintained that in accordance with the relevant legislation, as a disabled civilian, he had been awarded fewer types of benefits and a much smaller amount in total than those classified as disabled war veterans, despite having exactly the same disability. In particular, the applicant submitted that unlike disabled war veterans, he had not been entitled to a personal disability allowance (*lična invalidnina*) or an orthopaedic allowance (*ortopedski dodatak*), and that even the increased assisted living allowance which he had been granted had been significantly lower than that granted to such individuals (see paragraphs 32 and 34-37 below).

8. On 23 October 2009 the Novi Sad Municipal Court (*Opštinski sud u Novom Sadu*) ruled against the applicant. In so doing, it noted that disabled civilians had indeed been placed in a less favourable position (*stavljeni u nepovoljniji položaj*) than disabled war veterans, but this had been based on the applicable provisions of domestic law, and the relevant administrative authorities therefore had no choice but to apply them in the applicant's case.

9. Following an appeal lodged by the applicant, on 17 March 2011 the Novi Sad Court of Appeal (*Apelacioni sud u Novom Sadu*) upheld the judgment rendered at first instance. In its reasoning, the court expressed the opinion that the mere fact that different categories of disabled persons were entitled to different benefits "did not amount to discrimination", particularly in view of the State's margin of appreciation in matters involving social policy. Furthermore, affirmative action or positive discrimination was aimed at achieving substantive equality for a particular group of persons who were in a fundamentally different situation to others, including disabled war veterans in the context of the present case. Lastly, the court considered that "discrimination could only occur in the application of the ... [relevant] ...

legislation if the persons in question were treated differently from other persons in an identical or similar situation".

10. On 27 April 2011 the applicant lodged an appeal on points of law (*revizija*).

11. On 25 August 2011 the Supreme Court of Cassation (*Vrhovni kasacioni sud*) dismissed that appeal and endorsed the reasoning of the lower courts. Furthermore, it held that the assessment of the "constitutionality" (*ustavnost*) of any piece of legislation was a matter within the competence of the Constitutional Court itself.

12. On 8 December 2011 the applicant lodged a constitutional appeal (*ustavna žalba*) in which he: (i) restated the facts of his case; (ii) complained in the same manner as before of being discriminated against; (iii) referred to various domestic provisions prohibiting discrimination; (iv) cited related international legal instruments, including Article 14 of the Convention and Protocol No. 12 thereto; and (v) relied on the constitutional principles of equality and the direct applicability of human rights as guaranteed in ratified international treaties.

13. On 11 September 2012 the Constitutional Court (*Ustavni sud*) rejected that appeal, noting that the applicant had complained of a breach of two constitutional principles, not of a violation of specific constitutional rights, and that such principles were of an "accessory character". Hence, in the absence of a finding of a violation of a specific constitutional right, no breach of a constitutional principle could be established. According to the information contained in the case-file, the applicant's lawyer was served with that decision on 2 October 2012.

II. THE SECOND, THIRD AND FOURTH APPLICANTS (MR JOSIP VLČEK, MR MIROSLAV HOMA AND MR ZVONKO NIKOLIĆ, APPLICATIONS NOS. 14616/16, 14619/16 AND 22233/16 RESPECTIVELY)

14. On 9 May 1970 and 15 June 1986 the second and third applicants respectively were injured in traffic accidents, and on 30 August 1994 the fourth applicant was injured in a shooting incident. They all sustained paraplegic disabilities which left them unable to use their legs and reliant on wheelchairs.

15. Between 1987 and 2007 the applicants were all diagnosed by the relevant authorities as being 100% disabled, and they were then granted an assisted living allowance followed by an increased assisted living allowance. All the applicants also became active in promoting disability rights, as founders, leaders and/or members of a number of organisations dedicated to this cause.

16. On 27 November 2007 the applicants brought a joint civil discrimination claim against the competent branch of the respondent State –

the Ministry of Labour and Social Policy (*Ministarstvo rada i socijalne politike*) – seeking damages for mental anguish. The applicants maintained that in accordance with the relevant legislation, disabled civilians like them had been awarded fewer types of benefits and much smaller amounts in total than those classified as disabled war veterans, despite having exactly the same disability. In particular, unlike disabled war veterans, disabled civilians had not been entitled to a personal disability allowance or an orthopaedic allowance, while the assisted living allowance had also been significantly reduced (see paragraphs 32 and 34-37 below).

17. On 1 October 2008 the Novi Sad Municipal Court ruled in favour of the applicants and ordered that they should each be paid 500,000 Serbian dinars (RSD), approximately 6,440 euros (EUR) at that time, on account of the mental anguish suffered as a consequence of the discrimination to which they had been subjected. Furthermore, the applicants were awarded costs in the total amount of RSD 186,000, approximately EUR 2,400 at that time. In its reasoning, the court focused on and accepted the fact that disabled civilians had indeed been placed in a less favourable position than disabled war veterans with regard to the assisted living allowance. Notably, despite having the same disability and the same needs in terms of their situation, disabled civilians were granted significantly lower amounts.

18. Following an appeal by the respondent State, on 9 September 2010 the Novi Sad Court of Appeal overturned that judgment and ruled against the applicants. It held, as in the first applicant's case (see paragraph 9 above), that the mere fact that different categories of disabled persons were entitled to different benefits "did not amount to discrimination", particularly in view of the State's margin of appreciation in matters involving social policy. Furthermore, positive discrimination was aimed at achieving substantive equality for a particular group which was in a fundamentally different situation to others – disabled war veterans in the context of the present case. The court noted, again just like in the first applicant's case, that "discrimination could only occur in the application of the ... [relevant] ... legislation if the persons in question were treated differently from other persons in an identical or similar situation", but on this occasion the court also referred to the case-law of the European Court of Human Rights. Lastly, the Court of Appeal expressed the opinion that groups of persons who were not covered by measures or acts of positive discrimination might not be deemed as having suffered a breach of their rights guaranteed by law solely because they were not covered by such measures or acts.

19. Following an appeal on points of law lodged by the applicants, on 16 November 2011 the Supreme Court of Cassation upheld the ruling and the reasoning of the Court of Appeal. Furthermore, it held that the assessment of the constitutionality of any piece of legislation was a matter within the competence of the Constitutional Court itself.

20. On 19 March 2012 the applicants lodged a constitutional appeal. In the appeal, they restated the facts of their case, complained of the alleged discrimination in question in the same manner in which they had previously complained before the other courts, and disagreed with the views expressed by the Court of Appeal and the Supreme Court of Cassation.

21. In its decision dispatched on 10 September 2015 the Constitutional Court concluded that the applicants had effectively relied on Articles 21, 23 and 32 of the Constitution, which contained the prohibition on discrimination, the right to respect for one's human dignity and the right to a fair trial respectively. The court, however, then went on to reject their appeal in its entirety. In particular, the Constitutional Court held that: (i) it could not act as a court of fourth instance, in the absence of "manifest arbitrariness" in the lower courts' reasoning; (ii) the applicants' arguments had at times been confusing and/or contradictory; and (iii) the applicants' claims to the effect that different pieces of legislation were inconsistent with each other and/or unconstitutional should have been raised in separate constitutional proceedings focused on these issues alone (*u postupku za ocenu ustavnosti zakona*). According to the information contained in the case-files, the applicants' lawyer was served with that decision on 11 September 2015.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

A. 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)

22. Article 21 provides that "everyone shall be equal before the Constitution and the law" and "shall have the right to equal legal protection, without discrimination". All "direct or indirect discrimination based on any ground, particularly on grounds of race, sex, national or social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited". Special measures which may be introduced in order to achieve full equality of individuals or group of individuals who are otherwise in a substantively unequal position compared to other citizens shall not be deemed as discrimination.

23. Article 69 § 1 provides, *inter alia*, that persons and families in need are entitled to assistance based on the principles of social justice, humanism, and respect for human dignity.

24. Article 69 § 4 provides, *inter alia*, that disabled persons, war veterans and victims of war are afforded special protection, in accordance with the law.

25. Article 168 § 2 provides, *inter alia*, that every natural person has the right to lodge an application (*inicijativa*) for the institution of proceedings regarding the assessment of the "constitutionality" (*ustavnost*) and/or "legality" (*zakonitost*) of a specific piece of legislation.

26. Article 170 provides that "a constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers that violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies [for the protection of those rights or freedoms] have already been exhausted or have not been prescribed".

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

27. Article 50, Article 53 § 1, Article 58 § 1, Article 61 and Article 62 of this Act provided, *inter alia*, that the Constitutional Court could institute proceedings for the assessment of the constitutionality and/or legality of a piece of legislation of its own motion, providing that two thirds of its judges decided to do so. When, however, an application for the assessment of the constitutionality and/or legality of a piece of legislation was lodged by a natural person, it would be up to the Constitutional Court itself to rule as to whether formal proceedings would be brought. If it decided to do so, a formal decision to this effect would be rendered. If proceedings were brought and a breach of the Constitution or a ratified international treaty was established, the impugned legislation, or certain provisions thereof, would cease to be in force as of the date of publication of the Constitutional Court's decision in the Official Gazette of the Republic of Serbia. Anyone whose rights had been violated by an individual decision based on the application of that legislation was entitled, within six months of the Constitutional Court's decision being published, to ask the relevant authorities to amend any such decision. In the alternative, the Constitutional Court could decide to order other measures or award compensation to the aggrieved parties if it considered that effective redress could not otherwise be secured.

C. The Amendments to the Constitutional Court Act adopted in 2011 (*Zakon o izmenama i dopunama Zakona o Ustavnom sudu*; published in OG RS no. 99/11)

28. Article 50, Article 53 § 1, Article 58 § 1, Article 61 and Article 62 of the Constitutional Court Act, as summarised above, remained, in so far as relevant, substantively unaffected by the adoption of the amendments to this Act in 2011.

29. The Constitutional Court Act was subsequently again amended in 2013 and 2015.

D. The 1991 Social Welfare Act (*Zakon o socijalnoj zaštiti i obezbeđivanju socijalne sigurnosti građana*, published in OG RS nos. 36/91, 79/91, 33/93, 53/93, 67/93, 46/94, 48/94, 52/96, 29/01, 84/04, 101/05 and 115/05)

30. Article 9 provided, *inter alia*, that persons who lacked the means to support themselves were, depending on the circumstances, entitled to one or more of the following benefits: (i) a basic monthly social security allowance; (ii) a monthly assisted living allowance; (iii) work-related training services; (iv) home assistance, family placement and institutional care services; (v) general social care services; and (vi) a benefit consisting of a one-off payment, in situations of particular urgency.

31. Articles 10 and 11 provided, *inter alia*, that individuals who required social assistance were entitled, under the further conditions set out in the Act itself, to a basic monthly social security allowance (*pravo na materijalno obezbeđenje*) equating to 16% of the average salary, adjusted according to the cost-of-living index on a monthly basis.

32. Articles 23, 25 and 25 (a) provided, *inter alia*, that an assisted living allowance could be granted to an individual in need of another person's help because of the seriousness of his or her injury. An increased assisted living allowance, for persons classified as being 100% disabled, amounted to 70% of the average net salary, which sum was subject to a cost-of-living adjustment twice a year.

33. This Act was repealed by the 2011 Social Welfare Act (*Zakon o socijalnoj zaštiti*, published in OG RS no. 24/11) in April 2011.

E. The Veterans' Entitlements Act (*Zakon o osnovnim pravima boraca, vojnih invalida i porodica palih boraca*, published in the Official Gazette of the Federal Republic of Yugoslavia nos. 24/98, 29/98, 25/00 and in OG RS no. 101/05)

34. Article 21 provided, *inter alia*, that disabled war veterans were entitled to the following monthly allowances: (i) a personal disability allowance; (ii) an assisted living allowance; (iii) an orthopaedic allowance; and (iv) an unemployment allowance. The same provisions then went on to list a number of other entitlements related to veterans' healthcare and nutritional and mobility needs, and the provision of orthopaedic products.

35. With respect to veterans who were 100% disabled, Articles 28 and 29 provided that their personal disability allowance was equal to the average net salary, increased by 80%.

36. Articles 39 and 40 provided that veterans who were 100% disabled were also entitled to an assisted living allowance in the same amount.

37. Articles 43 and 44 provided, *inter alia*, that veterans who were 100% disabled and who had suffered a serious injury to their limbs were entitled to an orthopaedic allowance amounting to 29% of the average net salary increased by 80%.

38. This Act was subsequently amended in 2009 and 2018 and was ultimately repealed by the Veterans' and War-related Entitlements Act (*Zakon o pravima boraca, vojnih invalida, civilnih invalida rata i članova njihovih porodica*, published in OG RS no. 18/20) in March 2020. Article 2 of the 2020 Act proclaims, *inter alia*, that the benefits granted to veterans in this legislation are based also on "the principle of national recognition".

II. RELEVANT INTERNATIONAL AND EUROPEAN MATERIALS

A. United Nations Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Serbia, CRPD/C/SRB/CO/1, 23 May 2016

39. The relevant sections of this document read as follows:

Equality and non-discrimination (art. 5)

"9. The Committee is concerned that anti-discrimination legislation is not systematically applied, that legislation lacks a clear definition of disability-based discrimination and does not address all forms of discrimination. It is further concerned that neither the concept of reasonable accommodation nor recognition that the denial of such accommodation is a form of discrimination are explicitly included in anti-discrimination laws. The Committee also expresses its concern that little information has been provided on sanctions available for contravening the rights of persons with disabilities.

10. **The Committee recommends that the State party review its legislative framework to incorporate a definition of disability-based discrimination that explicitly deals with all forms of discrimination and the concept of reasonable accommodation and ensure that the relevant laws and regulations define the denial of reasonable accommodation as a form of discrimination on grounds of disability. The Committee also recommends that the State party introduce effective and proportional remedies, including dissuasive penalties.**"

B. United Nations Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Croatia, CRPD/C/HRV/CO/1, 15 May 2015

40. The relevant sections of this document read as follows:

Equality and non-discrimination (art. 5)

"7. The Committee is concerned that, for the purposes of entitlement to social services and benefits, a distinction is made between different causes of impairments, such as war or accidents ...

8. **The Committee recommends that disability-based services and benefits be made available to all persons with disabilities, irrespective of the cause of their impairment ...**"

C. United Nations Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Bosnia and Herzegovina, CRPD/C/BIH/CO/1, 2 May 2017

41. The relevant sections of this document read as follows:

Equality and non-discrimination (art. 5)

"10. The Committee is concerned at:

...

(b) Different legal entitlements for persons with disabilities whose impairment is not a consequence of the war, in comparison with those for civilian victims of war and for war veterans with disabilities;

...

11. **The Committee recommends that the State party:**

...

(b) Develop and apply harmonized criteria, assessment procedures and entitlements for assessing the degree of impairment for all persons with disabilities regardless of the cause of the impairment ..."

D. The Explanatory Report to the European Convention on Social and Medical Assistance and Protocol thereto

42. Paragraph 7 of this report provides, *inter alia*, that the term "assistance" within the meaning of that Convention "does not cover ... benefits paid in respect of war injuries" and that such benefits "are generally governed by different laws to those governing social security and social assistance benefits".

THE LAW

I. JOINDER OF THE APPLICATIONS

43. Given the similar factual and legal background of the present applications, the Court decides to order their joinder pursuant to Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATIONS OF ARTICLE 14 OF THE CONVENTION, READ IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1, AND OF ARTICLE 1 OF PROTOCOL NO. 12

44. The applicants complained under Article 14 of the Convention and/or Article 1 of Protocol No. 12 to the Convention of being discriminated against by the respondent State in the provision of disability benefits in accordance with the relevant domestic legislation. Specifically,

they complained that, having been classified as disabled civilians, they had, compared to disabled war veterans with the same disability, been granted a much smaller assisted living allowance and had also not been entitled to a personal disability allowance or an orthopaedic allowance.

45. These provisions read as follows:

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol No. 1

"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."

Article 1 of Protocol No. 12

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

A. Admissibility

1. The Court's jurisdiction ratione materiae

46. As the question of applicability is an issue of the Court's jurisdiction *ratione materiae*, the general rule of dealing with applications should be respected and the relevant analysis should be carried out at the admissibility stage unless there is a particular reason to join this question to the merits. No such particular reason exists in the present case and the issue of the applicability of Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1, falls therefore to be examined at the admissibility stage (see, *mutatis mutandis*, *Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018).

47. The Government, in the present case, argued that the applicants had failed to prove that they had indeed been entitled to the benefits provided for in the Social Welfare Act, notably the increased assisted living

allowance which required that they be classified as persons who were 100% disabled. Neither Article 1 of Protocol No. 1 nor Article 14 of the Convention was therefore applicable.

48. The applicants contended that social security allowances were pecuniary rights for the purposes of Article 1 of Protocol No. 1, which meant that this provision, and by implication Article 14 of the Convention, were both applicable in the present case.

49. The Court has consistently held that Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols thereto. Article 14 has no independent existence, since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of them. The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide (see, among many other authorities, *Molla Sali v. Greece* [GC], no. 20452/14, § 123, 19 December 2018).

50. The Court notes that the complaints in question concerned the applicants' own formally recognised disability entitlements and the entitlements granted to disabled war veterans (see paragraphs 6, 15, 30-38 above). Also, the applicants were in fact all officially classified as being 100% disabled, which is why they were entitled to the increased assisted living allowance (see paragraphs 6, 15 and 32 above). Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1, is therefore clearly applicable to the present case (see, *mutatis mutandis*, *Willis v. United Kingdom*, no. 36042/97, § 36, ECHR 2002-IV, and *Koua Poirrez v. France*, no. 40892/98, §§ 36-42, ECHR 2003-X). The Government's objection in this regard must therefore be rejected.

51. Lastly, the Court would note in this connection that the notion of discrimination has been interpreted consistently in the Court's case-law with regard to Article 14 of the Convention. The same term, discrimination, is also used in Article 1 of Protocol No. 12. Notwithstanding the difference in scope between those provisions – specifically, Article 1 of Protocol No. 12 extending the scope of protection to "any right set forth by law" – the meaning of discrimination in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 55, ECHR 2009, and *Baralija v. Bosnia and Herzegovina*, no. 30100/18, § 45, 29 October 2019).

52. In view of the above, having already held that Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1, is

applicable to the present case, and it being the master of characterisation to be given in law to the facts of the cases before it (see, among many other authorities, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018), the Court shall proceed to examine the applicants' discrimination complaints under the said provisions only, there being no need for an additional assessment thereof under Article 1 of Protocol No. 12.

2. The Government's objections regarding non-exhaustion of domestic remedies and failure to respect the six-month time-limit

(a) The Government's objections

53. The Government submitted that the alleged violations concerned legislation which the applicants deemed to be contrary to the Convention. The applicants should therefore have lodged an application for the assessment of the constitutionality of the legislation in question under Article 168 § 2 of the Constitution, rather than a constitutional appeal under Article 170 thereof, the latter having been specifically designed to deal with complaints addressed against "individual decisions or actions" amounting to a violation of the Constitution (see paragraphs 25-28 above). Indeed, in the Government's view, the applicants could also, if needed, have made use of the redress envisaged in Article 61 and Article 62 of the Constitutional Court Act (see paragraphs 27 and 28 above). In support of their contentions the Government provided domestic case-law and relied, *mutatis mutandis*, on the Court's decisions adopted in two cases brought against Latvia (*Grišankova and Grišankovs v. Latvia* (dec.), no. 36117/02, ECHR 2003-II (extracts), and *Liepājnieks v. Latvia* (dec.), no. 37586/06, 2 November 2010) and on its judgment in *Mirković and Others v. Serbia* (nos. 27471/15 and 12 others, §§ 91, 92, 98-101 and 108-128, 26 June 2018). Finally, in addition or in the alternative, the Government argued that in the very specific circumstances of the present case, and for the above reasons, the constitutional appeal under Article 170 of the Constitution could not be deemed an effective domestic remedy, meaning that the applicants should have lodged their applications with the Court several years earlier. In view of the foregoing, the Government maintained that the applicants' complaints should be rejected, either on the basis of non-exhaustion or for having been lodged with the Court after the six-month time-limit had already expired.

(b) The applicants' reply

54. The applicants argued that an application for the assessment of the constitutionality of the legislation in question, referred to by the Government, would clearly have been an ineffective remedy; this was best evidenced by the fact that anyone could have lodged such an application, not only the persons directly concerned, and that ultimately it was always up

to the Constitutional Court whether to act upon it (see paragraphs 25, 27 and 28 above). In contrast, the constitutional appeal (see paragraph 26 above), which the applicants had in fact lodged, had long been recognised by the Court as an effective domestic remedy in respect of all complaints alleging human rights abuse. The applicants therefore maintained that having made use of this avenue of redress, and having also lodged their applications with the Court within six months of receiving the Constitutional Court's decisions rendered in their respective cases, they had complied with both the exhaustion requirement and the six-month time-limit within the meaning of Article 35 § 1 of the Convention.

(c) The Court's assessment

55. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring a case against a State before the Court to firstly use the remedies provided by the national legal system. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right domestically (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 70, 25 March 2014).

56. As regards legal systems which provide constitutional protection for fundamental human rights and freedoms, such as the one in Serbia, it is incumbent on the aggrieved individual to test the extent of that protection (see, *inter alia*, *Vinčić and Others v. Serbia*, nos. 44698/06 and 30 others, § 51, 1 December 2009).

57. An applicant's failure to make use of an available domestic remedy or to make proper use of it (that is to say by bringing a complaint at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law) will result in an application being declared inadmissible before this Court (see, for example, *Vučković*, cited above, § 72).

58. The Court has, however, 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 and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV). For example, where more than one potentially effective remedy is available, the applicant is only required to use one remedy of his or her own choosing (see, among many other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009; *Nada v. Switzerland* [GC], no. 10593/08, § 142, ECHR 2012; *Göthlin v. Sweden*, no. 8307/11, § 45, 16 October 2014; and *O'Keeffe v. Ireland* [GC], no. 35810/09, §§ 109-111, ECHR 2014 (extracts)).

59. Concerning the timeliness issue, the Court reiterates that the object of the six-month time-limit under Article 35 § 1 is to promote legal

certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the Court and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see, amongst other authorities, *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I). As a rule, an application must be introduced within six months of the date of the "final decision" in the chain of domestic remedies which have to be exhausted (see, *mutatis mutandis*, *Nelson v. the United Kingdom*, no. 74961/01, § 12, 1 April 2008).

60. Turning to the present case and in view of the above, the Court recalls that it has repeatedly held that a constitutional appeal under Article 170 of the Constitution (see paragraph 26 above) should, in principle, be considered an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced against Serbia after 7 August 2008 (see *Vučković*, cited above, § 84, and *Vinčić*, cited above, § 51). It sees no reason to depart from this practice in the present case, particularly since having already made use of the relevant civil remedies and of the constitutional appeal procedure, the latter in accordance with Article 170 of the Constitution, the applicants could not have been required to pursue yet another avenue of potential redress before the very same court (see paragraph 58 above). In any event, the Constitutional Court in the present case could itself have instituted proceedings for the assessment of the constitutionality and/or legality of the legislation in question of its own motion, once it had learnt of the issue and had two thirds of its judges decided to do so (see paragraphs 27 and 28 above).

61. The present case, in the Court's view, is also very different to the case-law referred to by the Government in their observations (see paragraph 53 above). In particular, in the above-cited *Grišankova and Grišankovs* case and the above-cited *Liepājnieks* case (see §§ 12-24 and 71-76), *inter alia*, the applicants never brought their complaints to the Constitutional Court and, moreover, this court itself, unlike in Serbia, only had jurisdiction to review the constitutionality of legal provisions and their compatibility with provisions of superior legal force. Also, in the *Mirković and Others* judgment, cited above (see §§ 91, 92, 98-101 and 108-128), the situation was different altogether, involving, *inter alia*, a possible reopening of civil proceedings based on a Constitutional Court decision adopted in respect of a third person and, additionally, the applicants' separate obligation to properly raise the substance of their claims in their constitutional appeals and to adequately substantiate them.

62. In those circumstances, the Court considers that the Government's objection to the effect that the applicants failed to exhaust domestic remedies, within the meaning of Article 35 § 1 of the Convention, must be

rejected. The Court would further note that the first applicant's lawyer and the lawyer of the remaining three applicants were served with the decisions of the Constitutional Court in their cases on 2 October 2012 and 11 September 2015 respectively (see paragraphs 13 and 21, *in fine*, above) and that the applicants then went on to lodge their applications with the Court on 1 April 2013 and 9 March 2016 respectively (see the table apprehended to the present judgment). It follows that the applicants complied with the six-month requirement and that the Government's objection in this respect must therefore likewise be rejected.

3. As regards other grounds of inadmissibility

63. The Court notes that the applicants' complaints are also not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicants

64. The applicants maintained that the total amount of their benefits, given their civilian status, was up to five times lower than the amount granted to disabled war veterans who suffered from the same disability and had exactly the same need of social assistance.

65. Furthermore, social security cover with respect to both groups of disabled persons was rooted in the principle of solidarity, not tort-related liability. In fact, the latter entailed the notion of full payment for damage sustained, which was something quite different to the idea of providing social assistance to persons in need. The applicants also submitted that under Serbian law, both disabled civilians and disabled war veterans could sue in tort or in contract in exactly the same way.

66. In any event, according to the applicants, the Government had conceded that disabled civilians such as themselves had indeed been treated differently from disabled war veterans, but had effectively relied on the idea of positive discrimination to justify this situation. However, the concept of affirmative action or positive discrimination always rested on the idea of achieving substantive equality between a particular disadvantaged group and the rest of society, not unjustifiably favouring one disadvantaged group over another.

67. The applicants lastly pleaded that the scarcity of financial resources, referred to by the Government, was not a valid argument for the differential treatment in question. Where resources were limited, Serbia not being an

exception in this regard, it was through the principles of fairness and proportionality that the rights of interested groups had to be secured.

(b) The Government

68. The Government maintained that there had been no violation of Article 14 of the Convention, taken together with Article 1 of Protocol No. 1, since disabled civilians and disabled war veterans were two groups of persons in different situations. In particular, the way in which they sustained their injuries was very different, and so was the underlying reason for the respondent State's obligation to provide them with benefits varying in scope and/or amount.

69. Furthermore, the Government argued that disabled civilians were entitled to a plethora of benefits provided for in the respondent State's legislation – in the Social Welfare Act itself (see paragraphs 30-32 above) or elsewhere. They also had the right to compensation, by means of litigation or otherwise, from a liable third party, an employer and/or an insurance company, for any physical or mental injuries sustained as a result of wrongful acts. In these circumstances, the Government maintained that the extent of the difference in treatment between disabled civilians and disabled war veterans was in fact not as great as the applicants had alleged.

70. The Government lastly considered that it was vital to point out that, according to the Court's own case-law, the respondent State had a particularly wide margin of appreciation when it came to general matters of economic and social policy, which included the issue of how best to regulate the social security entitlements of disabled persons, war veterans and civilians alike. Ultimately, the Government stated that the respondent State simply did not have sufficient financial resources to provide each disabled person in its territory – some 700,000 to 800,000 persons in all – with the same benefits as those already granted to disabled war veterans.

2. The Court's assessment

(a) General principles

71. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (see *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017). Moreover, in order for an issue to arise under Article 14, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see *Molla Sali*, cited above, § 133). Such a difference in treatment is discriminatory if it has no objective and reasonable justification, or in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (ibid., § 135).

72. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and its background (see, for example, *Stummer v. Austria* [GC], no. 37452/02, § 88, ECHR 2011).

73. As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that the difference in treatment was justified (see, for example, *Molla Sali*, cited above, § 137, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 85, ECHR 2013 (extracts).

(b) Application of these principles to the present case

74. The Court reiterates that the applicants complained of being discriminated against by the respondent State in the provision of disability benefits in accordance with the relevant domestic legislation. Specifically, they complained that, having been classified as disabled civilians, they had, compared to disabled war veterans with the same disability, been granted a much smaller amount in the form of an assisted living allowance and had also not been entitled to a personal disability allowance or an orthopaedic allowance.

75. In these circumstances, the first issue that would normally have to be examined is whether the applicants (as disabled civilians) and disabled war veterans can be considered two groups in "analogous or relevantly similar situations" within the meaning of the Court's case-law, cited in paragraph 71 above. However, in the specific context of the present case, the Court does not find it necessary to adopt a firm view on this matter (see, *inter alia*, paragraph 42 above), because in any event the impugned difference in treatment had an objective and reasonable justification.

76. In this regard, the Court notes at the outset that what, according to the Government, essentially justified the difference in treatment was the way in which the two groups had sustained their injuries. Indeed, one group was comprised of war veterans who had suffered injuries during their military service, in the course of which, by the nature of things, they had been exposed to a higher level of risk and engaged in the performance of State-imposed duties. Their injuries would also, because of the said risk, be otherwise difficult to insure and it would likewise be onerous, if at all possible, for them to obtain, by means of litigation, any redress for the injuries caused to them by, for example, the agents of an opposing State engaged in a military confrontation. The other group, however, was comprised of civilians, including the applicants, who had sustained their injuries in situations unrelated to the performance of such duties, mostly involving accidents or illnesses or the actions of third parties. The Court furthermore notes that the relevant difference in treatment was a

consequence of their distinct positions and the corresponding undertakings on the part of the respondent State to provide them with benefits to a greater or lesser extent. This includes a moral debt which States may feel obliged to honour in response to the service provided by their war veterans (see paragraph 38 above).

77. Since the applicants complained of inequalities in a welfare system, the Court underlines that the Convention does not include a right to acquire property. It places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 53, ECHR 2006-VI). Turning to the present cases, the Court notes that it transpires from the respondent State's legislation (see paragraph 30 above) that disabled civilians lacking means might have been entitled to a number of benefits to which certain war veterans might not, and that, taking that into account, the real difference in treatment between the two groups might have been lesser than alleged.

78. The Court also reiterates that since the national authorities make the initial assessment as to where the fair balance lies in a case before a final evaluation by this Court, a certain margin of appreciation is, in principle, accorded by this Court to those authorities as regards that assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the restrictions and the aims pursued by them (see, for example, *Dickson v. the United Kingdom* [GC], no. 44362/04, § 77, ECHR 2007-V, and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 88, ECHR 1999-VI, as well as the case-law quoted in paragraph 72 above). When it comes to general measures of economic or social strategy in particular, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest. The Court will therefore generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see, *mutatis mutandis*, *Dickson*, cited above, § 78, and *Stummer*, cited above, § 89). In the circumstances of the present cases, for the reasons given in paragraphs 76 and 77 above, the Court is of the opinion that the choices made by the Serbian legislator as concerns the differential treatment in pecuniary social benefits between disabled civilians and disabled war veterans (see paragraph 64 above) was not lacking such a reasonable foundation and was based on relevant and sufficient grounds.

79. Lastly, the Court observes that when interpreting the provisions of the Convention, on a number of occasions it has had regard to the views adopted by other international bodies. Indeed, the Convention cannot be

interpreted in a vacuum, and should as far as possible be construed in harmony with other rules of international law concerning the international protection of human rights. However, even where the provisions of the Convention and those of another international human rights instrument are almost identical, the interpretation of the same fundamental right by another international body and by this Court may not always correspond (see, for example and with regard to the provisions of the International Covenant on Civil and Political Rights, *Correia de Matos v. Portugal* [GC], no. 56402/12, §§ 134 and 135, 4 April 2018, and the references contained therein). In any event, the Court notes, in this context and as regards the Concluding observations of the United Nations Committee on the Rights of Persons with Disabilities, that the committee's views, despite a detailed analysis of the situations in Serbia, Bosnia and Herzegovina and Croatia only identified potential issues in respect of the latter two countries (see paragraphs 39-41 above).

80. In view of the foregoing, the Court finds that the difference in treatment at issue had an objective and reasonable justification. There has accordingly been no violation of Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1.

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

81. In their written observations of 17 September 2019, the applicants also complained that the Constitutional Court had refused to consider the constitutionality of the domestic legislation in question and thus provide them with effective redress for the discrimination which they had suffered.

82. They invoked Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

83. The Court notes, however, that the first applicant's lawyer and the lawyer of the remaining three applicants were served with the decisions of the Constitutional Court in their cases on 2 October 2012 and 11 September 2015 respectively (see paragraphs 13 and 21, *in fine*, above). It follows that their complaints under Article 6 § 1 of the Convention, raised for the first time on 17 September 2019, were lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Declares*, by a majority, the applicants' discrimination complaints, examined under Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1, admissible and their complaints under Article 6 § 1 of the Convention inadmissible;

3. *Holds*, by five votes to two, that there has been no violation of Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1.

Done in English, and notified in writing on 30 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Registrar

Jon Fridrik Kjølbro
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Ravarani and Schukking;

(b) dissenting opinion of Judge Vehabović joined by Judge Paczolay.

J.F.K.
A.N.T

List of applications

No.	Applications nos.	Case name	Lodged on	Applicant Year of Birth Place of Residence Nationality	Represented by
1	26944/13	Popović v. Serbia	01/04/2013	**Dejan POPOVIĆ** 1983 Novi Sad Serbian	Dragoljub POPOVIĆ
2	14616/16	Vlček v. Serbia	09/03/2016	**Josip VLČEK** 1947 Novi Sad Serbian	Dragoljub POPOVIĆ
3	14619/16	Homa v. Serbia	09/03/2016	**Miroslav HOMA** 1959 Novi Sad Serbian	Dragoljub POPOVIĆ
4	22233/16	Nikolić v. Serbia	09/03/2016	**Zvonko NIKOLIĆ** 1977 Novi Sad Serbian	Dragoljub POPOVIĆ

JOINT CONCURRING OPINION OF JUDGES RAVARANI AND SCHUKKING

1. While we agree with the majority's view regarding the finding of no violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1, we are unable to agree with the reasoning leading to that conclusion. Indeed, we consider that one of the key issues before the Court in the present case – and which arises, in principle, in any case involving a difference in treatment that is alleged to constitute discrimination – namely the question of the comparability of situations, should have been examined at the outset. Only after having applied the comparability test should the Court, in our view, have addressed the question of the justification for differential treatment.

2. ***The issue at stake.*** The instant case concerns the entitlement to various disability-related social benefits, the number and amounts of which vary according to the status of the persons concerned. While the position of disabled civilians is covered by the Social Welfare Act, the situation of disabled war veterans is governed by a special law, the Veterans' Entitlements Act. The applicants are civilians suffering from disabilities who complain that war veterans with the same disabilities and degree of incapacity as themselves are entitled to sums which, according to the applicants, are five times higher than the amounts to which they are entitled and, moreover, to benefits in kind to which the applicants, as disabled civilians, do not have access. They therefore allege a quantitative and qualitative difference in treatment and consider that this difference in treatment is not justified by any difference as regards the relevant circumstances.

3. ***A problematic shortcut.*** The two-part structure which should in principle characterise the reasoning to be followed within the scope of Article 14 of the Convention is quite obvious. The first question to be addressed is that of determining whether the situations giving rise to differential treatment are similar or comparable. If so and only if so, the second question is whether the difference in treatment is reasonable and justified. In the present case, the majority chose not to address the issue of the comparability of situations, finding that in any event the difference in treatment was justified. This type of reasoning is in our view problematic as comparability appears to be a logical precondition for any assessment of the justification of a difference in treatment, even if the comparability exercise itself is not a mathematical equation.

4. ***A difference in treatment does not always amount to discrimination.*** Article 14 of the Convention does not prohibit all differences in treatment between persons in different situations. The Court has thus long recognised that "[t]he competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein,

call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities"[1]. This possibility for the national authorities to treat different situations differently can, moreover, turn into an obligation: the Court has indeed found a violation of Article 14 "when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different"[2].

5. ***A precondition for discrimination: comparability.*** For a problem to arise under Article 14 there must be a difference in the treatment of persons in "analogous, or relevantly similar, situations"[3]. As noted by Judges O'Leary and Koskelo in their joint concurring opinion in *Fábián v. Hungary*[4], "the first, critical, question in an Article 14 analysis is whether two persons or groups of persons are in an analogous or relevantly similar situation" (§ 12). It is only if such comparability is verified that the question arises as to the difference in treatment between these persons in comparable situations and whether it is justified. There is in fact no conceptual problem of treating situations which are not analogous or comparable in a different way: the very question of the different treatment of non-comparable situations does not make any sense. Comparability is the logical precondition for engaging in the exercise of examining the justification for a difference in treatment. Why, in fact, try to justify the "different treatment" of situations which, if they are not comparable, are therefore necessarily different? In a word, without comparability, the question of differential treatment and hence discrimination does not arise.

6. ***Skipping the comparability assessment is problematic.*** With regard to the *Popović* case, the majority's choice to avoid addressing this question of comparability is indicative of a methodological shortcut which alters the logic of the exercise. The avoidance reflected in paragraph 74 of the judgment seems all the more detrimental, in terms of clarity and consistency, since the various elements highlighted in the context of the assessment of the justification for the difference in treatment – namely the origin of the disabilities and the possibility for civilians to benefit from private insurance services – could just as well (or even should) have been assessed as elements of comparison of the respective situations of the various disabled persons with respect to their entitlement to disability benefits.

7. ***The choice of the comparator is essential.*** Not only does the question of comparability play an essential role in any case involving differential

[1] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, § 10, Series A no. 6.
[2] *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV.
[3] *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 64, 24 January 2017; *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017; *X and Others v. Austria* [GC], no. 19010/07, § 98, ECHR 2013; and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 125, ECHR 2012 (extracts).
[4] Cited above.

treatment of two groups of persons, one of which considers itself to be in a similar situation to the other, but this question must also be decided in accordance with certain principles. Judges O'Leary and Koskelo pertinently state, in paragraph 10 of their concurring opinion, cited above, that "the long and open-ended list of prohibited grounds in Article 14 means that a lack of rigour in cases where the comparator is central mean all 'eggs' are placed in the justification and reasonableness basket. When that happens ... it may be all too easy for a lacklustre defence by a respondent Government on the question of objective and reasonable justification to lead to the finding of a violation". They point to the consequences that this may have for the respondent State or for other States with social protection mechanisms involving similar distinctions, or which are planning reforms in the area concerned. In addition, we note that the fundamental principle of comparison seems to be founded in the tautology that one can only compare what is comparable, which obviously does not lead very far. The question of the basis of comparison is raised by Kelsen in the following way: "To say that two cases are similar is simply to ask that they coincide in certain essential points"[5]. This, according to Perelman, raises "a problem of value, namely what differences are negligible or not negligible for the equal treatment of the objects under consideration"[6].

8. ***The analysis must be specific and contextual.*** In the *Fábián* judgment, cited above, the Grand Chamber held that comparability had to be assessed, from the point of view of the persons to be compared, "only if the persons subjected to different treatment are in a relevantly similar situation, taking into account the elements that characterise their circumstances in the particular context", such elements having to "be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question" (§ 121). In short, as noted by Judges O'Leary and Koskelo in their concurring opinion, "the analysis is both specific and contextual" (§ 26). It is therefore necessary to examine the question of comparability "with reference to all the differences, past and present, which characterise the situation of the applicant and those who belong to his chosen comparator group" (§ 25 of the concurring opinion cited above), an operation which makes it necessary to "include not only the beneficiaries' circumstances at the point in time where the impugned measures took effect and the impact of those measures but also the factors that determine the nature of the entitlements or benefits at the outset, the basis on which those entitlements have accrued and the State guarantee which supports them" (§ 19). In *Fábián* the origin of the benefits, which constituted the difference between the retirement schemes under which the rights had been acquired, played an essential role.

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[5] H. Kelsen, *Théorie pure du droit*, trad. Ch. Eisenmann, 1962.

[6] C. Perelman, « *Egalité et valeurs* », *L'Egalité*, vol. 1, Travaux du centre de philosophie du droit de l'ULB, 1971.

9. ***The starting-point in the instant case: disability.*** In the instant case, the comparator put forward by the applicants is their disability and, in general, the fact that like war veterans, civilians suffer disabilities that need to be taken care of and that this makes their respective situations comparable. This is certainly the starting-point of the analysis of comparability; however, in order for that analysis to be specific and contextual, the disabilities suffered by civilians and war veterans respectively have to be considered in a broader framework.

10. ***The origin of the disability as sole comparator.*** The majority chose to focus – in the context of justifying differential treatment, when it could and should have done so in examining comparability – largely on the idea that the applicants had not sustained their disabilities in the same way or within the same legal framework. In short, their disabilities had different origins. Taking into account the origin of the disability[7] in this way is not in itself open to criticism. However, it can be criticised if it establishes the origin of the disability as the sole element of comparison. It would simply be too easy, not to say simplistic, to see in the origin of the disability a difference of such magnitude that the situation of the various disabled persons is not even comparable (leaving aside the justification for a difference in treatment which takes into account the difference in the origin of the disability). Proceeding in such a way would lead to almost as many distinct situations as there are disabilities and would lose sight of something essential: the disability itself.

11. ***A missing element: the object of the legislative measures taken in favour of disabled persons.*** It seems therefore essential to take into account, for the assessment of comparability (and, once again, not for the assessment of the differential treatment), the object of the legislative measures taken in favour of disabled persons. The content and objective of the Social Welfare Act and the Veterans' Entitlements Act concern the regulation of social benefits, reflecting a system by which the community provides assistance to its most vulnerable members, a category which obviously includes disabled persons (Article 69 § 4 of the Serbian Constitution mentions disabled persons and war veterans as beneficiaries of special protection – incidentally, without making any distinction, see paragraph 23 of the judgment). A specific and contextual analysis of the respective situations implies that the comparison must be made on the basis not only of the origin of the disabilities of the members of the two groups, but also of their respective needs. On the question of needs, it must be noted that the two groups are similar, given that civilians can have the same disabilities and the same degree of incapacity as war veterans. In this regard, the names of the

[7] The approach may be compared to the idea developed in *Stubbings and Others v. the United Kingdom*, 22 October 1996, *Reports of Judgments and Decisions* 1996-IV, according to which it is possible for the State to make a distinction according to the intentional or unintentional nature of the damage suffered by crime victims and to apply differential treatment to them accordingly.

various benefits to which disabled persons are entitled, be they civilians or war veterans – assisted living allowance, orthopaedic allowance, etc. – are quite telling.

12. ***Relevance of the different legal frameworks?*** A specific and contextual assessment under the heading of comparability cannot therefore dispense with an analysis of the legal framework applicable to the situations being compared. However, it should at the same time be noted that the latter entails a risk of basing a decision on a circular reasoning at the end of which it is the difference in treatment (the norm) which gives rise to the finding of a difference in situation (presented, precisely, as justifying the difference in treatment – hence the idea of a "pitfall of circularity").

13. ***An interesting "comparable" precedent: are two siblings living together comparable to a married couple as regards inheritance tax?*** In *Burden v. the United Kingdom*[8], two sisters who had been living together for decades in a stable, committed and mutually supportive relationship complained about the different treatment they would suffer, in terms of inheritance rules and *vis-à-vis* married couples, upon the death of one of them. The Grand Chamber concluded that the situations were dissimilar, and consequently validated the difference in treatment between the applicants and married couples or couples in a civil partnership. The Court's comparison exercise was based on the "essence" of the different types of relationships involved (consanguinity versus voluntary union), the particularity of the status conferred on individuals by marriage, and the difference between marriage and civil partnership, which are 'legally binding agreements', on the one hand, and cohabitation or any situation where individuals simply live together, on the other[9].

14. ***The pitfall of circularity by choosing the wrong comparator: the different legal frameworks applicable to the two categories.*** In his concurring opinion in that case, Judge Björgvinsson pointed out a "flaw" in the majority's reasoning. This reasoning, he argued "is based to a large extent on the reference to the specific legal framework which is applicable to married couples and civil partnership couples". He noted, however, that "although in the strict sense the complaint only relates to a difference in treatment as concerns inheritance tax, in the wider context it relates, in essence, to the facts that different rules apply and that consanguinity between the applicants prevents them from entering into a legally binding agreement similar to marriage or civil partnership, which would make the legal framework applicable to them, including the relevant provisions of the law on inheritance tax." Accordingly, "any comparison of the relationship between the applicants, on the one hand, and the relationship between married couples and civil partnership couples, on the other, should be made

[8] *Burden v. the United Kingdom* [GC], no. 13378/05, ECHR 2008.
[9] Ibid., §§ 62-65.

without specific reference to the different legal framework applicable, and should focus only on the substantive or material differences in the nature of the relationship as such"[10].

15. ***The decisive criterion: living together in a stable relationship.*** In short, focusing on the differences between the applicable legal regimes, even though it is precisely the coexistence of these different legal regimes that constitutes the difference in treatment complained of by the applicants, leads to circular reasoning – hence the need to refocus the analysis on "substantive or material differences". Applied to the case of the Burden sisters, such a refocusing led Judge Björgvinsson to find that, despite significant differences, "when it comes to the decision to live together, the closeness of the personal attachment and most practical aspects of daily life and financial matters, the relationship between the applicants in this case has ... more in common with the relationship between married or civil partnership couples, than there are differences between them." It followed that there was a "difference in treatment of persons in situations which are, as a matter of fact, to a large extent similar and analogous"[11].

16. ***In terms of comparability, the different legal frameworks are irrelevant.*** Can such reasoning be transposed to the *Popović* case? A first, relatively straightforward way of answering this question would be to say that, in accordance with the line drawn by Judge Björgvinsson, the comparison must relate to material characteristics and that in this case the situation of disabled civilians and war veterans is the same with regard to their disability. A second way would be to first admit that the difference between civilian and military status is rooted in reality (some have fought in war, others have not). However, at this stage, one could consider that this difference in the status of the protagonists is precisely a material characteristic and not an inequality, leaving untouched the comparability of their situations which, under certain conditions, could justify differentiated measures in favour of war veterans. In other words, the difference in the treatment of civilians and war veterans by way of legislative provisions – based on the different origins of their disabilities – leaves their comparability unaffected.

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[10] In ruling out any specific reference to the different legal frameworks, the author of the concurring opinion seems to go a bit far. However, he very pertinently emphasises that one should not lose sight of the main element that made the situations comparable.

[11] This criticism seems to have been shared: Judge Borrego Borrego, in his dissenting opinion, considered that the Grand Chamber "restricted itself to a description of the facts, saying for example that two sisters are linked by consanguinity or that a civil partnership has legal consequences" and did not give an answer to the applicants. The question was "whether or not granting inheritance-tax exemption to same-sex couples in a civil partnership but not to the applicant sisters, who are also a same-sex couple, is a measure proportionate to the legitimate aim pursued." Some commentators have criticised the Court's "*art consommé de l'esquive*", see C. Picheral, "*L'incertaine détermination des différences de traitement*", in F. Sudre and H. Surrel (eds.), *Le droit à la non-discrimination au sens de la CEDH*, Bruylant, 2008.

17. ***The* ratio legis *of the various laws at stake is* a fortiori *irrelevant for comparability.*** It is true that the Veterans' Entitlements Act explicitly relies on a "moral debt" of the Serbian people to its war veterans (see paragraph 75 of the judgment) and on "national recognition" (see paragraph 37). This specific rationale, which may – at least in part – be at the origin of the benefits granted to this specific group and which may therefore be relevant for the question of justification, does not however affect the comparability of disabled war veterans with disabled civilians. Firstly, both groups are expressly recognised by the Serbian Constitution as beneficiaries of social justice (see Article 69 § 1 of the Serbian Constitution, cited in paragraph 22 of the judgment) and both are recognised as vulnerable members of society (Article 69 § 4 of the Constitution). Secondly and more importantly, such *ratio legis* can have a bearing on the differential treatment of the members of the two groups – and the judgment explicitly relies on such reasons for considering the difference in treatment justified – but it cannot, at an earlier stage and, as a matter of principle, rule out the comparability of the two groups of disabled persons, even less than can the existence of different legal provisions establishing a difference in treatment.

Conclusion

18. ***A specific and contextual analysis leads to comparability.*** In view of the connection to the content and purpose of the legal provisions governing the various social benefits to which the applicants and the disabled veterans are entitled, it appears that the debate over the origin and outcome of the situations being compared must be settled to the effect that the origin of the different situations should play a limited role. As regards a system designed to meet the specific needs of vulnerable categories of the population, it would therefore seem neither relevant nor fair that, in the context of the comparison exercise, the difference in the origin of those needs should take precedence over the similarity of those needs themselves. It should be reiterated that the Serbian Constitution places disabled civilians and war veterans on an equal footing, without any distinction, as beneficiaries of special protection (see paragraph 11 above).

The reverse would be true in cases where the objective of the measure giving rise to the difference in treatment was such as to make that origin particularly relevant. In this regard, remaining with comparability, the *Fábián* case, where two different pension systems were competing essentially because of the origin of the funds constituting the basis for the subsequent benefits, is not comparable to the instant case. It is all the less comparable given that the entitlement to a pension is a relatively normal and foreseeable end state of a professional career, one which entails a close link between the origin (contribution to the pension scheme) and the result (entitlement to a pension), whereas a disability is essentially unforeseeable and accidental and therefore the relationship between the origin (the way the

disability was sustained) and the result (the disability itself) is much looser and less important.

19. ***The difference in treatment of the two comparable groups concerned does not lack justification.*** Having come to the conclusion that the situation of the applicants and that of war veterans entitled to the benefits provided for by the Veterans' Entitlements Act are comparable, it remained for us to assess whether the difference in treatment in fact infringed the requirements of Article 14.

The reasons given in the judgment, namely the moral debt of the State *vis-à-vis* disabled veterans arising from the fact that they sustained their disabilities in the performance of duties imposed by the State during which they were exposed to a high risk, and the possibility for disabled civilians to obtain benefits not available to veterans or available to them at significantly higher cost, especially by way of private insurance, viewed in the light of the margin of appreciation of the State authorities in the field of social policy, have led us – not without hesitation – to the conclusion that the difference in treatment of disabled civilians and war veterans through the Social Welfare Act and the Veterans' Entitlements Act respectively is not manifestly devoid of any reasonable basis. (It should be emphasised that this applies both to the higher amounts paid for some identical disability benefits and to the granting of different benefits, as it all comes down to the capacity to fund such benefits.) Accordingly, the difference in treatment does not amount to discrimination as prohibited by Article 14 of the Convention.

DISSENTING OPINION OF JUDGE VEHABOVIĆ JOINED BY JUDGE PACZOLAY

I regret that I am unable to subscribe to the view of the majority that there has been no violation of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention.

I disagree with the outcome in this case mainly for two reasons:

1. I cannot accept the position that the Chamber took in paragraph 75 of the judgment, accepting the justification for the difference in treatment on the sole basis of the way in which the two groups had sustained their injuries.

2. I cannot agree with the argument that the difference in treatment was a reasonable consequence of their "distinct positions and the corresponding undertakings". The judgment does not reflect this difference. It appears from both laws regulating the rights and benefits of the two groups that the war veterans enjoy far more benefits than the other group (including a driver to take war veterans from point A to point B as well as spa treatments, and so on).

It would be acceptable if the difference in treatment were reflected only in financial benefits but not if it is reflected in the level of medical care. My opinion is that "moral debt" has nothing to do with such a difference in the level of medical care provided to the two groups. As an example, a person in the other group could be a police officer who sustained injuries on duty. I disagree that there is no moral debt, for instance, towards a police officer who sustained injuries while on duty. Consequently, I disagree with the fair balance test and its outcome.