SECOND SECTION

CASE OF VUČKOVIĆ AND OTHERS v. SERBIA

(Application no. 17153/11 and the 29 others listed in the Annex to the attached judgment)

JUDGMENT

STRASBOURG

28 August 2012

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

In the case of Vučković and Others v. Serbia**,**

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *judges,*

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 10 July 2012,

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

PROCEDURE

1. The case originated in thirty separate applications against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 14 February 2011. The applicants' were all Serbian nationals, and their further personal details are set out in the Annex to this judgment.

2. The applicants were represented by Mr S. Aleksić, a lawyer practising in Niš. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. The applicants complained about discrimination and inconsistent domestic case-law as regards the payment of *per diems* granted to all reservists who had served in the Yugoslav Army between March and June 1999.

4. On 24 August 2011 the applications were communicated to the Government. It was also decided to rule on their admissibility and merits at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. The context and the proceedings brought by the applicants

6. The applicants were all reservists who had been drafted by the Yugoslav Army in connection with the North Atlantic Treaty Organisation's intervention in Serbia. They remained in military service between March and June 1999, and were thus entitled to a certain *per diem*, as recognised in a number of decisions and orders of April 1999 signed by the then Chief of Staff of the Yugoslav Army. These decisions and orders were themselves based on the relevant bylaws adopted in accordance with the armed services legislation, specifically the Army Rules on the Reimbursement of Expenses (*Pravilnik o naknadi putnih i drugih troškova u Vojsci Jugoslavije*) as amended in March 1999.

7. However, following the demobilisation the Government refused to honour their obligation to the reservists, including the applicants.

8. The reservists subsequently organised a series of public protests, some of which ended in open confrontation with the police. Ultimately, following protracted negotiations, on 11 January 2008 the Government reached an agreement with some of the reservists, in particular those residing in the municipalities of Kuršumlija, Lebane, Bojnik, Žitorađa, Doljevac, Prokuplje and Blace, whereby the latter were guaranteed payment in six monthly instalments. This payment was to be effected through their respective municipalities, aggregate sums having been specified per each municipality. The said municipalities were chosen because of their "underdeveloped" status, implying the reservists' indigence. For their part, the reservists in question accepted to renounce all of their outstanding claims based on their military service in 1999 which were still pending before the civil courts, as well as any other claims in this connection. It was, lastly, stipulated that the criteria for the distribution of the "financial aid" in question shall be set out by a Commission consisting of local government representatives and the representatives of the reservists themselves.

9. The applicants, just like all other reservists without a registered residence in the listed municipalities, could not benefit from the agreement of 11 January 2008.

10. On 26 March 2009 the applicants therefore filed a civil claim against the respondent State, seeking payment of their *per diems* and alleging discrimination.

11. On 8 July 2010 the Court of First Instance (*Osnovni sud*) in Niš ruled against the applicants. In so doing, it acknowledged the valid legal basis of their claim but noted that, as pointed out by the respondent, the applicable prescription period had been three years as of their demobilisation, in accordance with Article 376 § 1 of the Obligations Act. The applicants' claim had thus been filed out of time.

12. On 16 November 2010 the Appeals Court (*Apelacioni sud*) in Niš upheld this judgment on appeal, and it thereby became final. In its reasoning

the Appeals Court noted that both the three-year and the five-year prescription periods provided in Article 376 §§ 1 and 2 of the Obligations Act had already elapsed before the applicants filed their civil claim (see paragraph 40 below).

13. Having been served with the Appeals Court's decision, on 21 January 2011 the applicants lodged a further appeal with the Constitutional Court (*Ustavni sud*). Therein they maintained, *inter alia*, that the impugned judgment of the Appeals Court in Niš was inconsistent with numerous judgments adopted by the other appellate courts in Serbia – i.e. the district courts (*okružni sudovi*) while they existed, as well as the high courts and the appeals courts (*viši i apelacioni sudovi*) thereafter – which on the same facts applied a longer, ten-year, prescription period and thus ruled in favour of the plaintiffs (see Article 371 of the Obligations Act at paragraph 39 below). The applicants also referred to the agreement concluded between the Government and some of the reservists of 11 January 2008, which agreement excluded all of the remaining reservists including themselves.

14. The proceedings before the Constitutional Court are still pending.

B. Other civil suits

15. Between 2002 and early March 2009 the first instance and appellate courts across Serbia ruled both in favour of the reservists in a situation such as the applicants' and against them, relying on the three-year/five-year or the ten-year prescription periods respectively.

16. In the meantime, in 2003 and 2004, the Supreme Court adopted two legal opinions (*pravna shvatanja*), both of which implied that the applicable prescription period should be three/five years pursuant to Article 376 §§ 1 and 2 of the Obligations Act (see paragraphs 40, 43 and 44 below).

17. It was also alleged by the Government that the Supreme Court had adopted a further legal opinion on the matter in 2009, to the same effect but in more specific terms, but no such opinion has ever been published in its official Bulletin (*Bilten sudske prakse*).

18. Between 25 February 2010 and 15 September 2011 various appellate courts substantively ruled in compliance with the Supreme Court's opinions of 2003 and 2004 (see, for example, the decisions of the High Court in Kraljevo, Gž. 1476/11 of 15 September 2011; the High Court in Valjevo, Gž. 252/10 of 25 February 2010, 806/10 of 27 May 2010, 1301/10 of 30 September 2010, 1364/10 of 4 November 2010 and 355/11 of 24 March 2011; the High Court in Kruševac, Gž. 38/11 of 27 January 2011, 282/11 of 7 April 2011 and 280/11 of 26 April 2011; as well as the Appeals Court in Niš, Gž. 2396/10 of 23 June 2010, 3379/2010 of 2 July 2010, 2373/2010 of 21 July 2010 and 4117/2010 of 30 November 2010).

19. Between 17 June 2009 and 23 November 2011 there were also a number of decisions where the appellate courts ruled against the reservists, albeit on a different ground. Specifically, their claims, unlike the claims of the applicants in the present case, were rejected as administrative in nature, and as such outside the competence of the civil courts (see the decision of the District Court in Belgrade Gž. 7773/09 of 17 June 2009, as well as the decisions of the High Court in Belgrade Gž. 11139/10, 11636/10 and 10897/10 of 17 November 2010, 23 November 2011 and 23 November 2011 respectively).

20. On 17 July 2010 the Court of First Instance in Leskovac adopted a default judgment in favour of a reservist (P.br. 1745/07). According to the information provided by the parties, there is no evidence that this judgment had ever become final.

C. Additional facts as regards the agreement of 11 January 2008

21. On 17 January 2008 the Government endorsed the agreement of 11 January 2008, and decided to pay to the municipalities in question the amounts specified therein.

22. On 28 August 2008 the Government set up a working group tasked with addressing the requests of all other reservists, i.e. those not resident in the said seven municipalities. However, having discussed the issue with various groups of reservists, this working group ultimately concluded that their demands were not acceptable, *inter alia*, because: (i) they had not harmonised or specified their requests; (ii) some of their representatives had had dubious standing to represent them; (iii) there had been a lack of State funds which could be used for this purpose; and (iv) in most cases, war *per diems* had already been paid to the reservists.

23. On 26 July 2011 the Commissioner for the Protection of Equality (*Poverenica za zaštitu ravnopravnosti*), an Ombudsman-type office established on the basis of the Prohibition of Discrimination Act (published in OG RS no. 22/09), considered the complaints brought by an organisation representing the interests of reservists in a situation such as the applicants'. In so doing, she concluded that they had been discriminated against on the basis of their registered residence, i.e. as non-residents of the seven privileged municipalities, and recommended to the Government to take all necessary measures in order to ensure that all reservists be afforded the payments recognised by their decision of 17 January 2008. The Government was also invited to provide the Commissioner with an appropriate "action plan" within a period of thirty days. In its reasoning, the Commissioner's decision noted, *inter alia*, that the payments in question were *per diems*, notwithstanding that the Government had chosen to consider them as social benefits awarded to persons in need (*socijalna pomoć*), and that this was best exemplified by the fact that the reservists in question had had to

renounce their legal claims concerning the *per diems* as well as the fact that the individual reservists resident in the seven municipalities at issue were never under an obligation to prove their indigence (*imovinsko stanje i socijalnu ugroženost*). This being so, there was clearly no objective and reasonable justification for the differential treatment of reservists merely on the basis of their residence.

24. On 7 December 2011 the Ministry for Labour and Social Affairs (*Ministarstvo rada i socijalne politike*) noted that the discussions should continue with the various groups of reservists and that, if possible, financial support should be offered to the most indigent among them.

D. The memorandum of 16 March 2009

25. On 16 March 2009 the Ministry of Economy and Regional Development (*Ministarstvo ekonomije i regionalnog razvoja*) sent a memorandum to the Ministry of Justice (*Ministarstvo pravde*), stating, *inter alia*, that there were numerous employment-related civil suits, brought against current or former socially-owned companies, which could endanger the country's economic stability. It thus urged the Ministry of Justice to review the possibility of advising the courts to suspend certain types of these suits until the end of 2009, as well as to desist from the enforcement of any final judgments already adopted in these proceedings. According to numerous media reports, having received it, the Ministry of Justice forwarded the memorandum to the Supreme Court (*Vrhovni sud*), which then faxed it to the presidents of the appellate courts for information.

26. On 23 March 2009 the Supreme Court informed the public that it had rejected the recommendation of the Ministry of Economy and Regional Development. In so doing, it noted, *inter alia*, that the Serbian judiciary was independent of the executive as well as the legislative branches of Government.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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)

27. The relevant provisions of the Constitution read as follows:

Article 21 §§ 2 and 3

"Everyone shall have the right to equal legal protection, without discrimination.

All direct or indirect discrimination based on any grounds, particularly on the 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."

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 § 1

"Equal protection of rights before the courts of law ... shall be guaranteed."

Article 170

"A constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed."

B. The Constitutional Court's case-law

28. On 9 June 2010 and 17 February 2011 the Constitutional Court rejected two separate constitutional appeals lodged by reservists who were in a situation such as the applicants'. The said court noted, *inter alia*, that the civil courts' decisions rendered against them, respectively, had been "based on the applicable domestic legislation". The appellants, however, never specifically complained about the inconsistency of the relevant case-law or being discriminated against (Už. 460/08 and Už. 2293/10).

29. On 17 February 2011, in another case such as the applicants', the Constitutional Court, *inter alia*, effectively ignored a complaint about the differential treatment of the two groups of reservists stemming from the agreement of 11 January 2008. In particular, it offered no substantive assessment of the issue raised by the appellants, noting further that they had not offered adequate proof as regards the existence of inconsistent case-law on the matter (Už. 2901/10).

30. On 7 April 2011, in yet another case such as the applicants', the Constitutional Court ruled against the appellants as regards their complaint about the outcome of their case before the lower courts. There was no reference in the decision itself to the agreement of 11 January 2008 and it remains unclear as to whether this issue was ever raised by the appellants (Už. 4421/10).

31. On 8 March 2012, in a case such as the applicants' but where the civil courts had rejected the reservists claims as being outside of their competence *ratione materiae* (see, for example, paragraph 19 above), the Constitutional Court ruled in favour of the appellants who had alleged inconsistent case-law (between the judgments adopted in their cases and several other judgments adopted by the courts in 2002) and ordered that the

impugned civil proceedings be re-opened. As regards the appellants' discrimination complaint, the Constitutional Court reasoned that the said inconsistency did not amount to discrimination since the impugned court decisions had not been rendered on the basis of the appellants' personal status (*ličnog svojstva*). There was also no reference in the court's reasoning to the agreement of 11 January 2008 (Už. 2289/09).

32. In decision Už. 61/09, adopted on 3 March 2011, and decisions Už. 553/09, 703/09 and 792/09, all adopted on 17 March 2011, as well as in decisions Už. 2133/09, 1928/09, 1888/09, 1695/09, 1578/09, 1575/09, 1524/09, 1318/09 and 1896/09, rendered between 7 October 2010 and 23 February 2012, the Constitutional Court noted the existence of inconsistent domestic case-law in the civil context and then went on to find that this had been in breach of the principle of judicial certainty as an integral part of the appellants' right to a fair trial. The appellants' complaints to the effect that the same situation had also resulted in discrimination against them, was rejected by the Constitutional Court as manifestly ill-founded, since the impugned court decisions had not been rendered on the basis of the appellants' personal status. No re-opening of the proceedings was ordered. The above-cited decisions concerned matters which were factually unrelated to the applicants' situation in the present case.

C. The Civil Procedure Act (Zakon o parničnom postupku; published in OG RS nos. 125/04 and 111/09)

33. Article 2 § 1 provides, *inter alia*, that all parties shall be entitled to the equal protection of their rights.

34. Article 476 sets out the circumstances in which a default judgment (*presuda zbog izostanka*) may be adopted, based on, *inter alia*, the respondent's failure to appear before the court despite being duly served with the summons.

35. Article 422.10 provides that a case may be reopened if the European Court of Human Rights has in the meantime rendered a judgment in respect of Serbia concerning the same or a similar legal issue.

D. The Courts Organisation Act (Zakon o uređenju sudova; published in OG RS nos. 63/01, 42/02, 27/03, 29/04, 101/05 and 46/06)

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

E. The Army Rules on the Reimbursement of Expenses (Pravilnik o naknadi putnih i drugih troškova u Vojsci Jugoslavije, published in the Official Military Gazette nos. 38/93, 23/93, 3/97, 11/97, 12/98, 6/99 and 7/99)

37. These Rules set out the relevant details concerning the reimbursement of expenses incurred in connection with military service.

F. The Obligations Act (Zakon o obligacionim odnosima, published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 29/78, 39/85, 45/89, 57/89 and the Official Gazette of the Federal Republic of Yugoslavia no. 31/93)

38. Article 360 § 3 provides that courts may not, in the course of proceedings before them, take into account negative prescription periods unless an objection to this effect has been made by the debtor.

39. Article 371 states that the general negative prescription period for civil claims shall be ten years, unless provided otherwise.

40. Article 376 §§ 1 and 2 provides, *inter alia*, that the negative prescription period for seeking civil compensation shall be three years as of when the claimant learned of the damage in question, but that, in any event, the absolute deadline shall be five years as of when the damage occurred.

41. Articles 387 and 388 provide, *inter alia*, that the running of a negative prescription period shall be interrupted by the debtor's acceptance of the claim at issue, directly or indirectly, as well as by the claimant's lodging of a civil action in this respect.

42. Article 392 §§ 1-3 provides, *inter alia*, that the effect of such an interruption shall be that the applicable period shall start running anew as of the debtor's acceptance of the claim in question and the conclusion of the civil suit, respectively.

G. The legal opinions adopted by the Supreme Court

43. On 26 May 2003 the Supreme Court held, *inter alia*, that, quite apart from the competence of the administrative authorities in respect of the reservists' claims concerning their *per diems*, civil courts shall have jurisdiction to rule on the merits in all related cases where they *seek damages* (see paragraph 40 above) based on the State's alleged malfeasance (*pravno shvatanje Građanskog odeljenja Vrhovnog suda Srbije utvrđeno na sednici od 26. maja 2003. godine*, published in the Supreme Court's Bulletin no. 1/04).

44. On 6 April 2004 the Supreme Court essentially reaffirmed the opinion of 26 May 2003, extending its application to certain other "military entitlements". It also noted that there have been some inconsistencies before

the courts in the meantime (*pravno shvatanje Građanskog odeljenja Vrhovnog suda Srbije utvrđeno na sednici od 6. aprila 2004. godine*, published in the Supreme Court's Bulletin no. 1/04).

THE LAW

I. JOINDER OF THE APPLICATIONS

45. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

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

46. Under Article 6 § 1 of the Convention, the applicants complained about the inconsistent case-law of the Serbian courts, in particular the rejection of their own claims by the Appeals Court in Niš and the acceptance by other civil courts of identical claims filed by their fellow reservists based on a different interpretation of the applicable prescription periods.

47. Article 6 § 1, 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 ..."

A. The parties' submissions

48. The Government stated that the Constitutional Court had to date ruled in twenty-three cases such as the applicants'. In twenty-one of those cases, in the relevant part, it had rejected the complaints on their merits, and in the remaining two it had dismissed the complaints on procedural grounds. The Government maintained, however, that none of the appellants in those cases had properly argued and/or documented their complaints of inconsistent case-law (see, for example, paragraphs 28-30 above).

49. The Government further provided the Court with a copy of the Constitutional Court's decision of 8 March 2012 (see paragraph 31 above), which, they argued, exemplified the effectiveness of the constitutional appeal, albeit in a slightly different context.

50. Since the applicants' appeal was still pending before the Constitutional Court, the Government maintained that their complaints were premature within the meaning of Article 35 § 1 of the Convention.

51. In the alternative, the Government contended that the facts of the present case clearly disclosed no violation of Article 6 § 1 of the

Convention. In particular: (i) the Supreme Court had adopted two legal opinions, in 2003 and 2004 respectively, indicating that the applicable prescription periods should be three/five years; (ii) in 2009 it had adopted a specific opinion to this effect, removing any residual uncertainty; (iii) as of that time the domestic case-law on the issue has been consistent, i.e. the first and second instance courts universally applying the three/five-year prescription periods, except for the odd default judgment rendered at fist instance where the competent civil court could not take prescription into account because of the respondent's failure to raise this objection before it. The Government concluded that it should therefore have been obvious to the applicants from the outset that their claims would be rejected as time-barred.

52. Finally, the Government stated that the recommendation contained in the memorandum issued by the Ministry of Economy on 16 March 2009 was never implemented (see paragraphs 25 and 26 above). It was therefore of no relevance to the present case.

53. The applicants' observations, following the communication of their case to the Government, were submitted after the expiration of the time-limit set by the Court. The President of the Chamber, therefore decided, pursuant to Rule 38 § 1 of the Rules of Court, that they should not be included in the case file for the Court's consideration (see also paragraph 20 of the Practice Direction on Written Pleadings). All factual updates, however, were admitted to the file and transmitted to the Government for information.

B. The Court's assessment

54. In its recent 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). These 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,* cited above, § 29);

(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 the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see *Iordan Iordanov and Others*, cited above, §§ 49-50; see also *Beian (no. 1)*, cited above, §§ 34-40; *Ştefan and Ştef v. Romania*, nos. 24428/03 and 26977/03, §§ 33-36, 27 January 2009; *Schwarzkopf and Taussik*, cited above, 2 December 2008; *Tudor Tudor*, cited above, § 31; and *Ştefănică and Others*, cited above, § 36);

(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, amongst 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 v. Serbia*, nos. 44698/06 and others, § 56, 1 December 2009; 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 a 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).

55. Turning to the present case, the Court firstly notes that the applicants complained about the rejection of their own claims by the Appeals Court in Niš and the acceptance by other civil courts of identical claims filed by their fellow reservists based on a different interpretation of *the applicable prescription periods*.

56. Secondly, there had clearly been conflicting case-law between 2002 and early March 2009 on this issue, and perhaps beyond that, but as of February 2010 it would appear to have been effectively harmonised at

second instance in accordance with the Supreme Court's opinions of 2003 and 2004, i.e. by consistent application of the three/five-year prescription periods rather than the general ten-year deadline (see paragraphs 15-18, 39 and 40 above). It is in this context of little relevance as to whether an additional opinion was adopted by the Supreme Court in 2009 (see paragraph 17 above).

57. Thirdly, the applicants filed their claim on 26 March 2009, whilst the Court of First Instance ruled against them on 8 July 2010, applying the three-year prescription period (see paragraphs 10 and 11 above). It follows therefore that the relevant appellate case-law had been harmonised less than a year after the introduction of the applicants' claim and, in any event, more than four months before the adoption of the first instance judgment in their case.

58. Fourthly, it is noted that on 17 July 2010 the Court of First Instance in Leskovac adopted a default judgment in favour of a reservist, i.e. a judgment based on the respondent's failure to appear in court despite being duly summoned (see paragraph 34 above). However, according to the information provided by the parties, there is no evidence that this judgment had ever become final (see paragraph 20 above). It is further noted that, as pointed out by the Government, Article 360 § 3 of the Obligations Act provides that civil courts may not, in the course of proceedings before them, take prescription into account unless a specific objection to this effect has been made by the debtor (see paragraph 38 above). There is no indication that in the case at issue the debtor/respondent had actually done so. The Court lastly notes that it is the said judgment of the Court of First Instance in Leskovac that could be considered as an exception to the case-law which had already been harmonised by February 2010, rather than the other way round (see, *mutatis mutandis*, *Tomić and Others v. Montenegro*, nos. 18650/09 and others, § 57, 17 April 2012, not yet final).

59. Fifthly, however regrettable its content may be, the memorandum of 16 March 2009, prepared by the Ministry of Economy, was irrelevant to the applicants' complaints since it referred to a different type of case and was, in any event, never implemented (see paragraphs 25 and 26 above).

60. In such circumstances, it cannot be said, at least in so far as the applicants are concerned, that there had been "profound and long-standing differences" in the relevant case-law, nor that this had resulted in judicial uncertainty, during the period in question. The Court therefore considers that the applicants' complaints in this respect are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

61. The Court further finds that in the light of this conclusion it is not necessary to rule on the Government's objection as to whether the same complaints should be rejected as premature.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

62. The applicants further complained about discrimination against them stemming from the agreement of 11 January 2008 (see paragraphs 8 and 21 above). In so doing, they relied on Article 14 of the Convention.

63. The Court communicated these complaints to the Government under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1.

64. The said two provisions read as follows:

Article 14 of the Convention

"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."

A. Admissibility

65. The Government maintained that the applicants' complaints should be rejected as premature since their appeal was still pending before the Constitutional Court.

66. In this respect they referred to the Constitutional Court's decision Už. 2901/10 of 17 February 2011, noting that it did not compare the appellants' situation to that of the reservists who had benefited from the agreement of 11 January 2008 since there had been no evidence that the appellants had ever sought to conclude an agreement of this sort with the Government (see paragraph 29 above). However, in numerous other cases the Constitutional Court had repeatedly ruled in favour of the appellants (see paragraphs 31 and 32 above).

67. In their submissions prior to the communication of the present case to the Government, the applicants maintained that, despite making use of it, the constitutional appeal could not, in the specific circumstances of their case, be considered as an effective domestic remedy.

68. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been

exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his or her Convention grievances. To be effective, a remedy must be capable of remedying directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

69. In terms of the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11–12, § 27, and *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38). Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Dankevich v. Ukraine,* no. 40679/98, § 107, 29 April 2003).

70. As regards legal systems which provide constitutional protection for fundamental human rights and freedoms, the Court notes that, in principle, it is incumbent on the aggrieved individual to test the extent of that protection (see *Vinčić and Others v. Serbia*, cited above, § 51).

71. Turning to the present case, the Court notes that the applicants' complaints before it concern discrimination *stemming from the agreement of 11 January 2008*, which are to be distinguished from possible separate complaints to the effect that the impugned inconsistent case-law had resulted in discrimination against the reservists before the civil courts themselves (see, for example, paragraphs 31 and 32 above).

72. Further, according to the information which has been made available to the Court, the complaints such as the applicant's were specifically made by the appellants in case Už. 2901/10, but on 17 February 2011 the Constitutional Court effectively ignored them, offering no substantive assessment of the issue whatsoever (see paragraph 29 above). Indeed, the Government in their observations admit as much, but maintain that there was no evidence that the appellants in those cases had ever sought to conclude an agreement such as the one of 11 January 2008. However, this assertion, even assuming its relevance to the applicants in the present case, is not born out by the facts since there had been extensive negotiations between the Government and the reservists in general, albeit to no avail, on extending the principles accepted on 11 January 2008 to everyone else, and the applicants personally had clearly shown their adherence to this position

by bringing their own civil case on 26 March 2009 (see paragraphs 8, 23 and 10 above, in that order).

73. Finally, the remaining Constitutional Court jurisprudence referred to by the Government is irrelevant since it concerned the inconsistent case-law and/or any discrimination resulting from this inconsistency only, or matters which were entirely unrelated to the applicants' situation in the present case. In any event, even in those cases no discrimination had been established by the Constitutional Court (see paragraphs 31 and 32 above).

74. In such circumstances, it is clear that notwithstanding the fact that "a constitutional appeal should, in principle, be considered as an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced [against Serbia] as of 7 August 2008" (see *Vinčić and Others v. Serbia*, cited above, § 51), this particular avenue of redress cannot be deemed effective as regards cases involving complaints such as the ones put forth by the applicants.

75. The Court, therefore, rejects the Government's objection in this respect. It finds, moreover, that the applicants' complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring them inadmissible have been established. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

76. The Government maintained that the applicants had not been discriminated against.

77. Firstly, the agreement of 11 January 2008 concerned a sort of social benefit rather than the payment of *per diems*. Secondly, Government's resources were finite, which was why it was decided to support those reservists in the greatest need of assistance, i.e. those residing in the most underdeveloped municipalities in Serbia. Thirdly, these reservists had had to renounce any and all of their legal claims concerning their military service whilst the applicants, as well as all other persons in their situation, had retained the possibility to turn to the civil courts for redress.

78. In view of the above, accepting that the applicants had indeed been treated differently compared to their colleagues with a registered residence in one of the seven municipalities, the Government argued that there was a reasonable and objective justification for this course of action.

79. As already noted above, the applicants' observations following the communication of their case to the Government were submitted after the expiration of the time-limit set by the Court. The President of the Chamber therefore decided, pursuant to Rule 38 § 1 of the Rules of Court, that they should not be included in the case file for the Court's consideration (see also

paragraph 20 of the Practice Direction on Written Pleadings). All factual updates, however, were admitted to the file and transmitted to the Government for information.

2. The relevant principles

80. The Court recalls that Article 14 complements the other substantive provisions of the Convention and the Protocols, but has no independent existence since it applies solely in relation to the "enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive Convention rights. It is sufficient – and also necessary – for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 58, ECHR 2008-). The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the Contracting State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law. It was expressed for the first time in the *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits)* (judgment of 23 July 1968, Series A no. 6, § 9).

81. The Court has also 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 (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23). 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 (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007; *Burden v. the United Kingdom* [GC], cited above, § 60). Such a difference of treatment is discriminatory if it has no objective and reasonable justification, 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. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden v. the United Kingdom* [GC], cited above, § 60).

3. The Court's assessment

(a) Applicability of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1

82. The Court notes that the applicants' *per diems* had been formally recognised as the respondent State's outstanding pecuniary obligation as of 1999 (see paragraph 6 above). The Court also notes that the payments referred to in the agreement of 11 January 2008, i.e. the applicants' exclusion therefrom, were themselves connected to the said entitlements (see paragraphs 8 and 21 above). It follows, therefore, that the applicants' complaints concern rights which are of a "sufficiently pecuniary" nature to fall within the ambit of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Willis v. United Kingdom*, no. 36042/97, § 36, ECHR 2002-IV).

83. The Court considers further that, since the applicants were allegedly discriminated against on a ground of distinction covered by Article 14 of the Convention, namely their registered residence (see, *mutatis mutandis*, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 66, ECHR 2010, respectively), that provision must also be applicable to their complaints.

(b) Compliance with Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1

84. The Court notes that the payments referred to in the agreement of 11 January 2008 and endorsed by the Government on 17 January 2008, were clearly *per diems*, not social benefits awarded to persons in need. In this respect it fully endorses the reasoning offered by the Serbian Commissioner for the Protection of Equality described at paragraph 23 above.

85. Further, the said agreement provided that the reservists residing in the municipalities of Kuršumlija, Lebane, Bojnik, Žitorađa, Doljevac, Prokuplje and Blace would be guaranteed gradual payment of a part of their entitlements. These municipalities were apparently chosen because of their "underdeveloped status", which implied the reservists' indigence. The reservists themselves, however, were never under an obligation to provide any proof in this regard, whilst the applicants in the present case, just like all other reservists without a registered residence in these municipalities, could not benefit from the agreement, i.e. the Government's subsequent decision endorsing it, *irrespective of their means*. Hence, even though the Government's submission regarding their limited resources is not to be taken lightly, in the context of a possible "legitimate aim", their response to the entire situation was nothing short of arbitrary (see paragraph 23 above).

86. Finally, the Government's suggestion that, unlike the reservists with a residence in one of the said seven municipalities, the applicants had an

opportunity to turn to the civil courts for redress is a circular one since this is exactly what the applicants attempted to do, but to no avail.

87. In view of the foregoing and notwithstanding the State's margin of appreciation, the Court cannot but conclude that there was no "objective and reasonable justification" for the differential treatment of the applicants merely on the basis of their residence. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 12

88. The applicants' discrimination complaints were also communicated by the Court to the Government under Article 1 of Protocol No. 12.

89. However, having regard to its finding under Article 14 above, the Court declares these complaints admissible but considers that they need not be examined separately on their merits (see, *mutatis mutandis*, *Savez crkava "Riječ života" and Others v. Croatia*, no. 7798/08, §§ 114 and 115, 9 December 2010).

V. ARTICLE 41 OF THE CONVENTION

90. Article 41 of the Convention provides:

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

91. Each applicant claimed EUR 3,000 for the pecuniary and non-pecuniary damage suffered, as well as EUR 250 for the costs and expenses incurred in connection with the proceedings before the Court. The applicants also noted that the civil proceedings at issue could be re-opened (see paragraph 35 above).

92. The Government maintained that these claims were belated.

93. The Court notes that the applicants' just satisfaction claims were set out on the application form but were only resubmitted (posted) on 5 March 2012, four days after the expiry of their time-limit for so doing, which time-limit had itself been imposed upon the Court's transmission of the Government's initial observations. The applicants have therefore failed to comply with Rule 60 §§ 2 and 3 of the Rules of Court, as well as paragraph 5 of the Practice Direction on Just Satisfaction Claims, which, in so far as relevant, provides that the Court "will also reject claims set out on the application form but not resubmitted at the appropriate stage of the proceedings and claims lodged out of time". The applicants' just satisfaction claims must therefore be dismissed.

VI. APPLICATION OF ARTICLE 46 OF THE CONVENTION

94. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

95. Given these provisions, it follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned any sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress, in so far as possible, the effects thereof (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

96. In view of the above, as well as more than 3,000 applications currently pending before the Court raising the same discrimination issue (directly or indirectly), the respondent Government must, within six months from the date on which the present judgment becomes final in accordance with Article 44 § 2 of the Convention, take all appropriate measures to secure non-discriminatory payment of the war *per diems* in question to all those entitled. It is understood that certain reasonable and speedy factual and/or administrative verification procedures may be necessary in this regard.

97. As regards many similar applications already pending before it, the Court decides to adjourn them during the said interval. This decision is without prejudice to the Court's power at any moment to declare inadmissible any such case or to strike it out of its list in accordance with the Convention.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously to join the applications;

2. *Declares* by a majority the complaints under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1, as well as the complaints under Article 1 of Protocol No. 12, admissible;

3. *Declares* unanimously the remaining complaints inadmissible;

4. *Holds* by 6 votes to 1 that there has been a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1;

5. *Holds* unanimously that there is no need to examine separately the complaints under Article 1 of Protocol No. 12;

6. *Holds* by 6 votes to 1 that the respondent Government must, within six months from the date on which the present judgment becomes final in accordance with Article 44 § 2 of the Convention, take all appropriate measures to secure non-discriminatory payment of the war *per diems* in question to all those entitled, it being understood that certain reasonable and speedy factual and/or administrative verification procedures may be necessary in this regard;

7. *Decides* by a majority to adjourn, for six months from the date on which the present judgment becomes final, all similar applications already pending before the Court, without prejudice to the Court's power at any moment to declare inadmissible any such case or to strike it out of its list of cases in accordance with the Convention;

8. *Dismisses* unanimously the applicants' claims for just satisfaction.

Done in English, and notified in writing on 28 August 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Françoise Tulkens
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sajó is annexed to this judgment.

F.T.
F.E.P.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÒ

I am in full agreement with my colleagues regarding their conclusion that the complaints with regard to the alleged violation of Article 6 § 1 of the Convention must be rejected. However, to my regret I have to dissent regarding the finding of a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. I voted against the admissibility of the complaint submitted in that regard, partly in view of the facts established in the context of the admissibility of the Article 6 § 1 complaint.

The applicant's appeal is pending before the Constitutional Court. In respect of Serbia a constitutional appeal is considered a generally effective remedy to be exhausted (*Vinčić and Others v. Serbia*, nos. 44698/06 and others, December 2009). In that case the Court stated that "a constitutional appeal should, in principle, be considered an effective domestic remedy ... in respect of all applications" (paragraph 51). The present judgment argues that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one at the relevant time. This position disregards the fact that *Vinčić* reversed that burden. Moreover, one cannot prove a negative. As the Government have demonstrated, the Constitutional Court dealt with decisions concerning other reservists, considering inconsistencies in the case law. In a case decided on 17 February 2011 where the applicants also referred to discrimination (paragraph 29) the Constitutional Court accepted that the complaint could be related to the right to equal protection, but it stated that the issue was the statute of limitations. These considerations apply to the applicants' claims both under Article 6 and under Article 14 in conjunction with Article 1 of Protocol No. 1.

It seems that the Court is of the opinion that the 2008 Agreement on the payment to some groups of reservists created a right that is not subject to the statute of limitations. Of course, the legal nature of the Agreement and its applicability to the applicants are matters intimately related to the interpretation of domestic law. It is not for an international court to offer its interpretation of this law in the absence of domestic interpretation, especially where the Constitutional Court is considering the matter.

Even assuming that the application is admissible, I am not convinced that Article 14 is applicable as there is no possession right in the present case that would trigger the applicability of Article 14. The Court notes, in paragraph 82 of the judgment, that "the applicants' *per diems* had been formally recognised as the respondent State's outstanding pecuniary obligation as of 1999 (see paragraph 6 above)", and states that the applicants' complaints concern rights which are of a "sufficiently pecuniary" nature to fall within the ambit of Article 1 of Protocol No. 1

(see, *mutatis mutandis*, *Willis v. the United Kingdom*, no. 36042/97, § 36, ECHR 2002-IV). In *Willis*, however, the amount and the conditions of applicability of a statutorily defined benefit were not contested, only that the applicant was not entitled to it on discriminatory grounds. The present case is different. A "claim" can constitute a "possession" within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established to be enforceable (*Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B). No court ever established an enforceable claim in respect of the applicants, whose entitlement remains unrecognised; nor do they have a recognised specific claim that is not enforceable only because of the statute of limitations. No court ever recognised a specific claim. The court of first instance recognised the claim only in the sense that it had the legal nature of a damage compensation claim, but it could not rule on the merits (that is, whether the applicants were or were not entitled to a given amount of compensation) because it was barred from doing so by its correct finding that the statute of limitations applied. Therefore the applicants' claim for damages remains speculative.

One could, of course, argue that the applicants had a legitimate expectation under the Agreement. In that context, at least arguably, the statute of limitations would not apply. In that case, however, the Court should have waited for the final judgment of the Constitutional Court, also in view of the fact that in so far as the Agreement was applicable to the applicants (a disputed matter) it was certainly to be implemented gradually. There is a working group tasked with addressing the requests of all reservists, though it is not clear that the group is charged to act *ex gratia* or in recognition of specific claims. Given the *prima facie* more favourable handling of the claims of some other reservists, I fully respect and understand the position of my colleagues, but I find that in the circumstances of the case, even in view of the troubling delays, considerations of subsidiarity should have prevailed.

Annex

No.	Application nos.	Applicant's name Date of birth Place of residence
1.	17153/11	**Boban VUČKOVIĆ** 27/09/1971 Niš
2.	17157/11	**Ljubiša VELIČKOVIĆ** 24/08/1954 Selo Prva Kutina
3.	17160/11	**Igor VELIČKOVIĆ** 10/06/1979 Niš
4.	17163/11	**Saša GROZDANOVIĆ** 29/04/1975 Niška Banja
5.	17168/11	**Dragan GROZDANOVIĆ** 05/12/1967 Niška Banja
6.	17173/11	**Ljubiša MILOŠEVIĆ** 03/10/1959 Niš
7.	17178/11	**Miodrag NIKOLIĆ** 29/02/1956 Niška Banja
8.	17181/11	**Siniša MILOŠEVIĆ** 03/10/1958 Niš
9.	17182/11	**Grujica MARKOVIĆ** 25/06/1965 Niš
10.	17186/11	**Radomir TODOROVIĆ** 15/07/1958 Niška Banja
11.	17343/11	**Dejan ZDRAVKOVIĆ** 19/11/1971 Sićevo
12.	17344/11	**Marjan MITIĆ** 10/02/1969 Niš
13.	17362/11	**Branislav MILIĆ** 15/08/1944 Niš

14.	17364/11	**Miroslav STOJKOVIĆ** 01/09/1947 Doljevac
15.	17367/11	**Dejan SEKULIĆ** 09/08/1970 Niška Banja
16.	17370/11	**Slavoljub LUČKOVIĆ** 24/06/1955 Niš
17.	17372/11	**Goran LAZAREVIĆ** 17/08/1970 Niš
18.	17377/11	**Goran MITIĆ** 15/02/1979 Niš
19.	17380/11	**Petar ADAMOVIĆ** 02/08/1952 Niš
20.	17382/11	**Radisav ZLATKOVIĆ** 12/04/1952 Niš
21.	17386/11	**Jovan RANĐELOVIĆ** 25/02/1944 Niš
22.	17421/11	**Bratislav MARKOVIĆ** 26/05/1949 Niška Banja
23.	17424/11	**Desimir MARKOVIĆ** 08/07/1965 Niš
24.	17428/11	**Časlav SPASIĆ** 21/02/1960 Niš
25.	17431/11	**Ljubiša NIKOLIĆ** 05/12/1958 Selo Jelašnica
26.	17435/11	**Dragan ĐORĐEVIĆ** 19/02/1957 Niška Banja
27.	17438/11	**Radiša ĆIRIĆ** 10/02/1958 Niška Banja
28.	17439/11	**Siniša PEŠIĆ** 31/10/1961 Niš
29.	17440/11	**Boban CVETKOVIĆ** 28/08/1967 Niška Banja

30.	17443/11	**Goran JOVANOVIĆ** 15/01/1965 Suvi Do