R. KACAPOR v. Serbia

Leading Repetitive | Case | 2269/06 | Pending | Enhanced Procedure | Judgment date: 15/01/2008 | Final judgment date: 07/07/2008

Case Description:

The majority of these cases concerns violations of the applicants' rights to access to a court where:

(i) the authorities since 1996, failed to enforce or enforced with significant delays final decisions ordering socially-owned companies to pay their debts for salary arrears (*Kačapor group*) or their commercial debts (*Kin-Stib and Majkić)* owing to the significant number of failing socially-owned companies lacking funds to service their debts for which the State was not responsible;

(ii) the municipal authorities failed to enforce judgments ordering them to pay their commercial debts (from 2001 to 2018) in the *Rafailović and Stevanović* group owing to the lack of funds;

(iii) the municipal authorities failed to enforce demolition orders concerning an unauthorised construction in *Kostić* (since 1998) (violations of Article 6 § 1).

These cases (apart from *Golić*, *Knežević*, *Ljajić* and *Radovanović*) also concern violations of the applicants' right to peaceful enjoyment of their possessions on this ground (violations of Article 1 of Protocol No. 1).

Status of Execution:

Individual measures: Just satisfaction in respect of non-pecuniary damage was paid in all cases except in the case of *Stevanović.* Domestic judgments were enforced except in *Špoljarić* and *Kostić*.

In *Špoljarić,* the authorities faced obstacles in establishing whether any amounts awarded under the domestic judgments had already been paid to the applicant. In the absence of conclusive information from the applicant before 1 June 2020, the authorities committed to pay him the amounts awarded by the domestic courts in full, including the default interest.

In *Kostić,* following the European Court's judgment, the Constitutional Court expressly referred to Article 46 of the Convention having concluded that the applicants' constitutional rights were breached due to the non-enforcement of a demolition order in respect of an unauthorised construction (decision of 29 May 2014). Giving full effect to the European Court's judgment, the Constitutional Court stated that the applicants should be considered victims of the breach of their property rights until the demolition orders concerned were enforced. In the alternative, the applicants would remain victims until it was established that reinstatement of the situation which existed prior to violation would be materially impossible or enforcement would constitute a disproportionate burden emerging from restitution au lieu of compensation.

The demolition orders have not been enforced to date as to date because proceedings seeking the legalisation of the construction without a permit are pending.

On 27 April 2020 the Government Agent addressed a letter to the mayor of the municipality where the "legalisation" procedure was transferred in January 2020 requesting the matter be resolved within three months and to report back to the Government Agent monthly.

Relying on the Committee of Ministers' practice in similar cases (notably, *Dactylidi group v. Greece,* Resolution CM/ResDH(2019)253, *Savov v. North Macedonia,* Resolution CM/ResDH(2016)35 and *Jakub group v. Slovak Republic*, Resolution CM/ResDH(2012)59), the authorities suggested thatthe Committee close its supervision of individual measures in this case.

General measures: In their revised action plan of 30 April 2020 the authorities provided the following information, which can be summarised as follows:

A. **Measures to ensure enforcement of decisions rendered against socially-owned companies**:

In their previous communications, including the most recent action plan dated 30 April 2020, the authorities recalled that since the adoption of the current Constitution in 2006, it is no longer possible to set up socially-owned companies, which used to be the dominant form of companies in the socialist economy. The existing companies are gradually being privatised. There are now only 73 such companies remaining. They will either be privatised or could potentially be declared bankrupt and liquidated. The problem of non-enforcement of court decisions concerning these companies is thus of a historic nature.

1. Strategy deployed*:* The authorities initially envisaged setting up a repayment scheme for settlement of all unenforced decisions rendered against socially owned companies (for further details see Notes prepared for the 1259th meeting CM/Notes/1259/H46-31). Subsequently, the authorities abandoned this idea and opted to ensure enforcement through the system of effective domestic remedies.

2. System of remedies introduced: The remedies were introduced first before the Constitutional Court and subsequently before ordinary courts.

a) *Constitutional appeal:* The constitutional appeal for individuals and entities was introduced with the current Constitution in 2006. The European Court considered it to constitute in general an effective remedy after 7 August 2008 in the *Vinčić case*.[1]

Holding that an appellant was a victim of violations of his right to a trial within a reasonable time and his property rights on account of non-enforcement of a judgment ordering a socially-owned company to pay salary arrears to him, the Constitutional Court enjoined the State to pay that appellant from its own funds the sums awarded in the judgment. In doing so, the Constitutional Court gave full effect to the European Court's indications on this point. This Constitutional Court's judgment was published in the Official Gazette on 22 June 2012.

Assessing the Constitutional Court's case-law in inadmissibility decisions in the cases of *Marinković* (no. 5353/11 29 January 2013) and *Ferizović* (no. 65713/13, 16 November 2013), the European Court considered that the constitutional appeal should be considered effective in respect of applications concerning socially-owned companies as of 22 June 2012, the date of publication of the Constitutional Court's decision mentioned above.

In its recent decision dated 18 June 2018, expressly referring to the European Court's decisions above, the Constitutional Court held that apart from amounts awarded in domestic judgments (pecuniary damage), the State should also pay from its own funds just satisfaction in respect of non-pecuniary damage sustained on account of non-enforcement or late enforcement of judgments ordering these companies to pay their debts. Presently, the amount of non-pecuniary damage awarded by the Constitutional Court is roughly around 120 EUR per year of enforcement proceedings flawed with excessive length.

b) *Remedies before ordinary courts:* In view of the significant success of the constitutional appeal among creditors unable to collect their debts from socially-owned companies, in 2015, the Right to a Trial within a Reasonable Time Act was adopted to alleviate the workload of the Constitutional Court. It reformed the system of remedies. Pursuant to its provisions, any request regarding the excessive length of enforcement proceedings can be brought before the president of the court where the

[1] No. 44698/06, 1 December 2009, § 51.

enforcement proceedings are pending. If the request is considered well-founded, the president will order their acceleration. A party that applied for acceleration of the proceedings is entitled to file an action for fair redress. The courts are entitled to award just satisfaction in respect of damage sustained, notably in respect of pecuniary and non-pecuniary damage up to EUR 3,000. The Constitutional Court has retained jurisdiction to decide on complaints of excessive length of enforcement proceedings only after such proceedings are completed.

c) *The European Court's assessment of the remedies introduced:* The European Court has recently dismissed an application in the *Kolašinac*[2] case concerning the non-enforcement of judgments given against a socially/State-owned company lodged by an applicant who failed to exhaust the remedies provided by the Right to a Trial within a Reasonable Time Act and the constitutional appeal. The European Court again held that the constitutional appeal is an effective remedy in this type of cases as from 22 June 2012. As it concerns the remedies provided by the Right to a Trial within a Reasonable Time Act, it indicated that the Constitutional Court that, if the applicant, for any reason, considered them ineffective, she should have raised that issue in her constitutional appeal.

3. Statistics: The authorities provided the following statistics to demonstrate that remedies under Right to a Trial within a Reasonable Time Act are functioning well in practice. It clarified that no separate statistics are kept for requests concerning socially-owned companies. The figures show overall efficiency of the system. The statistics were also given on the functioning of remedies in bankruptcy proceedings given that these frequently involved socially-owned companies.

	2018		***2019***	
	Filed	Decided	Filed	Decided
Requests for expediting enforcement proceedings	8 649	7 292	7 434	7 470
Requests for expediting bankruptcy proceedings,	28 829	26 408	33 805	31 491
Actions for redress	13 713	11 111	21 078	19 472

4. Aligning of the domestic case-law*:* Since 2018 the Constitutional Court and the Supreme Court of Cassation, highest judicial instances, have adopted binding positions that the State shall be considered responsible for payment of obligations emerging from judgments rendered against socially-owned companies. To this end the Civil Department of the Supreme Court of Cassation adopted a conclusion on 2 November 2018, which are binding upon domestic courts.

Pursuant to this conclusion, in case of non-enforcement or partial enforcement of judgments rendered against socially-owned/State companies, the State shall be bound to pay from its own funds both pecuniary damage (being the amounts awarded in the domestic judgments) and the non-pecuniary damage non-enforcement or late enforcement of such judgments.

5. The only outstanding issue – amounts awarded for non-pecuniary damage*:* It concerns the adequacy of amounts awarded in respect of non-pecuniary damage (which is a part of a wider problem of redress for non-pecuniary damage awarded domestically in cases of excessive length of proceedings[3]). In this respect, the European Court's case-law has also evolved over the time. Initially, the European Court was awarding a lump sum of EUR 4,700 and subsequently reduced it to EUR 2,000 in view of a very large number of non-enforced judgments against socially/State-owned companies and in view of the economic situation in Serbia.

In its most recent development, in *Stanković*[4] the Court has dismissed an application lodged by the applicant who received EUR 800 at domestic level in respect of non-pecuniary damage. The Court considered that the sum awarded could be deemed sufficient and appropriate redress for the alleged

[2] No. 64233/16, 29 August 2019.
[3] See Notes prepared for *Jevremović group* for the 1369th meeting (CM/Notes/1369/H46-31).
[4] No. 41285/19, 3 December 2019.

violation of the applicant's rights and that the applicant could no longer claim to be a "victim" within the meaning of Article 34 of the Convention.

In an effort to fully align the practice of the domestic courts with the European Court's findings, the *Stanković* decision was disseminated to the Constitutional Court, Supreme Court of Cassation and four appeal courts. The domestic courts have rendered no judgments in a similar case following the decision in *Stanković* and they are now expected to align their practice to the European Court's standards on this point.

6. Cases pending before the European Court*:* With a view to reducing the European Court's docket, the authorities ensured that 2,095 friendly settlements were reached with the applicants in similar cases. Consequently, the number of similar applications pending before the European Court has been reduced. Six similar communicated cases involving 246 applicants are pending before the Court. The domestic decisions in these cases had already been enforced and the complaints now challenge the amounts of just satisfaction awarded at domestic level in respect of non-pecuniary damage. The authorities will continue their policy concluding friendly settlements in these cases as well.

B. Measures to ensure enforcement of decisions against municipal authorities:

In 2012, new legislation was adopted providing for strict deadlines in commercial transactions concluded by municipalities. Local communities are now under a statutory obligation to settle all financial liabilities, assumed on the basis of commercial contracts within 45 days at the latest. Pursuant to new legislation, if the above deadline is not complied with, the Minister of Finance may temporarily suspend the transfer of money from the state budget to the local municipality concerned.

C. Measures to secure enforcement of demolition orders:

The major challenge in enforcing demolition orders concerns demolitions of structures, installed without authorisations, *inter alia*, during the socialist regime or by the refugees fleeing from military conflict. Pursuant to the applicable legislation, owners of such constructions are entitled to initiate procedure to seek their "legalisation". Pursuant to the 2015 legislative amendments, final demolition orders shall not be enforced until the "legalisation" procedure is brought to an end. In 2018, the legislation was further amended to provide that demolition of unlawful construction shall be carried out when the appeal before the second-instance administrative body can no longer be filed against the decision dismissing or rejecting the request for "legalisation". These amendments also provide that cities comprised of city municipalities may entrust legalisation procedures to their municipalities. On this basis, large municipalities, such as Belgrade, have transferred the "legalisation" case files to municipalities expecting that their examination will be accelerated. The authorities also highlighted that the violation found in *Kostić* remains confined to this case alone for eleven years now and that since then no similar application has been communicated.

D. Awareness-raising measures:

A large number of training and awareness-raising activities aimed at preventing similar violations were carried out. The major issue of adequate compensation in respect of non-pecuniary damage for excessive length of enforcement proceedings involving socially-owned companies was also raised in April 2018 during a conference organised in cooperation with the Supreme Court of Cassation and the EU/Council of Europe Horizontal Facility project "Supporting Effective Remedies and Mutual legal Assistance in Serbia" (2017-2019), which featured as a keynote speaker Director General Mr Giakomoupoulos of the Council of Europe and a member of the Department for Execution, and in February 2019 during the bilateral consultations between the then Deputy President and now the President of the Constitutional Court Marković and the Council of Europe Human Rights Director Mr Poirel. As a part of the above-mentioned project, in 2018 a publication "Criteria for Assessing Violations of the Right to Trial within Reasonable Time" was prepared and disseminated mostly among judges, including those dealing with enforcement proceedings (also available online).

E. Publication and dissemination:

The European Court's judgments and respective case-law were disseminated to the relevant authorities, including highest domestic courts and the courts of appeal.

Last Exam of the Committee of Ministers:

Reference Texts:

DH-DD(2020)392, CM/Del/Dec(2017)1288/H46-28

Notes/Issues:

Application	Case	Judgment of	Final on	Indicator for the classification
2269/06+	KAČAPOR AND OTHERS	15/01/2008	07/08/2008	Complex problem
12312/05	KIN-STIB AND MAJKIC	20/04/2010	04/10/2010	
41760/04	KOSTIC	25/11/2008	25/02/2009	
38629/07+	RAFAILOVIĆ AND STEVANOVIĆ	16/06/2015	16/09/2015	
43326/11	ISENI	09/10/2018	09/10/2018	
54787/16+	KNEŽEVIĆ AND OTHERS	09/10/2018	09/10/2018	
41820/16	LJAJIĆ	23/10/2018	23/10/2018	
60162/16+	GOLIĆ AND OTHERS	03/10/2019	03/10/2019	
65474/16	JOVIČIĆ	03/10/2019	03/10/2019	
45727/16+	KOSTIĆ AND OTHERS	03/10/2019	03/10/2019	
11362/17+	MIHAJLOVIĆ AND OTHERS	03/10/2019	03/10/2019	
55003/16+	RADOVANOVIĆ AND OTHERS	27/08/2019	27/08/2019	
36709/12	ŠPOLJARIĆ	19/092019	19/092019	
43815/17+	STEVANOVIĆ AND OTHERS	27/08/2019	27/08/2019	

1377th meeting, 4 June 2020 (DH) (Written procedure):
Individual measures: Given that the domestic decisions were enforced and the just satisfaction paid, apart from the cases of *Špoljarić* and *Kostić*, no further individual measures are required.

In *Špoljarić* the authorities should be urged to take the necessary steps to ensure enforcement of the domestic judgments that still remain unenforced.

In *Kostić,* the enforcement proceedings were suspended pending the outcome of the "legalisation" procedure, initiated after the Court's judgment. Therefore the authorities should be encouraged to finalise "legalisation" procedure without undue delay and inform the Committee of its outcome, in order to clarify whether the individual measures have been resolved in this case and provide proof that the demolition orders became obsolete and thus non-enforceable (see, for similar approach, CM/ResDH(2019)253 in *Dactylidi group v. Greece*).

General measures:

A. Measures to ensure enforcement of decisions rendered against socially-owned companies:

The majority of the cases presently examined concern socially-owned companies (11 cases out of 14, while 60 such cases from this group have already been closed on the basis of individual measures taken).

It appears that the authorities devised the alternative strategy to ensure enforcement of decisions rendered against socially-owned companies through domestic remedies, which provide for compensation of pecuniary and non-pecuniary damage. In this context, it is recalled that the States remain free to choose, subject to the Committee's supervision, the means to comply with the Court's judgment, including the general measures with a view to preventing similar violations.

In the instant case, the individuals in the applicants' situation are able to obtain enforcement of domestic decisions and award for non-pecuniary damage sustained on account of the delayed enforcement at domestic level on the basis of domestic remedies. Such a remedy is, as a matter of principle, compatible with the Court's case-law requirements – the judiciary both acknowledges the breach and affords redress for it. In addition, to that, the national authorities provide redress which is *prima facie* appropriate and sufficient. This consistent case-law approach in domestic law to awards of compensation was reconfirmed by the European Court in the case of *Stanković,* where an award of EUR 800 for non-pecuniary damage was considered sufficient. The Court considered these remedies to be effective in view of the fact that in addition to finding violations of the relevant constitutional rights, the Constitutional Court awards compensation for pecuniary and non-pecuniary damage, i.e. was ordering the State to pay from its own funds the specified sums awarded in the domestic decisions against the socially-owned companies.

It is important that the highest courts have taken a firm position that the State is strictly liable for payment of the amounts awarded at domestic level against the socially-owned companies, including in the context of bankruptcy proceedings against such companies. Thus, sums awarded under these decisions are now routinely paid from the State budget.

Recent statistics on the functioning of the remedies in place to challenge the length of all types of enforcement proceedings, including those conducted against socially-owned/State companies, do not reveal any dysfunction.

The EU/Council of Europe Horizontal Facility two-year project "Supporting Effective Remedies and Mutual legal Assistance in Serbia" that ended in 2019 appears to have played a positive role in streamlining the efforts of Serbian judiciary in its productive dialogue with the Strasbourg Court and offering an advantage of technical expertise in direct contact with the Department for Execution. That being said, for the long-term functioning of remedies, it is important to guarantee that the level of compensation in respect of non-pecuniary damage is not unreasonable in comparison with the awards made by the Court in similar cases. The authorities acknowledged that the issue of adequacy of compensation in respect of non-pecuniary damage remains outstanding. In this respect it should be noted that, in the case of *Stošić*[5], the Court awarded a lump-sum of EUR 2,000, which was meant to cover any non-pecuniary damage, as well as costs and expenses. The Court, in this specific case, took into account not merely the duration of the enforcement proceedings in question, but the value of the award, in the context of the standard of living, and the fact that, under the national system, compensation will in general be awarded and paid more promptly than if decided by the Court (compare to the approach in *Stanković above*). The authorities might be thus urged to ensure that these amounts are compatible with those foreseen in the case-law of the Court and invited to rapidly provide information on the developments of the domestic case-law on this point.

The authorities' determination to resolve similar cases pending with the Court through *ad hoc* solutions, such as friendly settlements is welcome. The authorities might be therefore encouraged to enhance their efforts to find *ad hoc* solutions for the applications already pending before the Court.

B. Measures to ensure enforcement of decisions rendered against municipal authorities:

It appears that the legislative amendments introduced were designed to improve control over financial liabilities of municipal authorities, with the aim of preventing delays in enforcement of decisions

[5] See, *Stošić v. Serbia*, No. 64931/10, §§ 66-68, 1 October 2013.

rendered against them. This development is welcome as furthermore, to date, there are no similar applications pending before the Court.

C. Measures aimed at ensuring enforcement of demolition orders:

It appears that following the 2014 change of the case-law of the Constitutional Court, individuals in the applicants' situation can now complain to this court about delayed enforcement of demolition orders in respect of unauthorised constructions. The Constitutional Court has jurisdiction over the matter and is able to order acceleration of those proceedings and award victims compensation on account of delays. No similar applications have been lodged before the Court since its judgment in *Kostić* in 2008. This confirms that there is a judicial remedy domestically that has a potential of resolving issues of delay in enforcement of the demolition orders.

D. Conclusion:

In view of the resolution of individual measures, the Committee might wish to close all cases concerning debts of socially-owned companies in which necessary individual measures have been taken. The authorities should further provide information on the enforcement of judgments and payment of just satisfaction in the remaining cases. The Committee might also wish to close the cases concerning non-enforcement of domestic decisions rendered against municipal authorities. The issue of adequacy of compensation in respect of non-pecuniary damage granted by the domestic courts for delayed enforcement of domestic decisions rendered against socially-owned companies will remain examined within the framework of the *Kačapor* case and the closure of the individual cases will in no way prejudge the Committee's evaluation of the general measures in relation to this issue.

Decisions:

The Deputies

1. recalled that these cases concern the problem of non-enforcement or delayed enforcement of domestic judgments given against the State, notably decisions rendered against socially-owned companies, municipal authorities and demolition orders in respect of an unauthorised construction;

As regards individual measures

2. noted that in *Kostić* the enforcement proceedings were suspended pending the outcome of the "legalisation" procedure, which is expected to be rapidly brought to an end and invited the authorities to provide further information as to the outcome of these proceedings;

3. noted that domestic decisions were enforced except in the *Špoljarić* case and urged the authorities to enforce without further delay the remaining domestic decisions in that case;

As regards general measures

4. recalling that the authorities initially envisaged setting up of a repayment scheme to ensure enforcement of domestic decisions concerning debts of socially-owned companies, noted that they subsequently decided to follow an alternative strategy with a view to ensuring enforcement of such decisions through domestic remedies which are now considered to provide adequate and sufficient

redress by the European Court and that these remedies appear to function without major hindrance in practice;

5. within this context, while welcoming the close cooperation within the framework of the tailor-made EU/Council of Europe Horizontal Facility project “Supporting Effective Remedies and Mutual Legal Assistance in Serbia” (2017-2019), urged the authorities to ensure that the amounts of compensation for non-pecuniary damage awarded by domestic courts for delayed enforcement of domestic judgments rendered against socially-owned companies are substantially compliant with the requirements of the European Court’s case-law;

6. welcomed the authorities’ determination to resolve the similar individual cases concerning socially-owned companies lodged with the Court and encouraged them to enhance these efforts;

7. noted further with satisfaction the legislative measures taken to ensure swift enforcement of domestic decisions rendered against municipal authorities; noted also that victims of delayed enforcement of demolition orders can now complain to the Constitutional Court which may order acceleration of these proceedings and award compensation and thus has the potential of offering adequate and sufficient redress, as required by the Court’s case-law;

8. adopted Final Resolution CM/ResDH(2020)101 with respect to cases, where the decisions at issue were enforced as well as cases concerning municipal authorities, without prejudice to the Committee’s evaluation of the remaining general measures, which are being supervised in this group of cases.