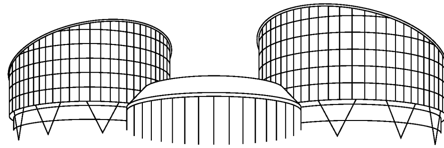

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 73865/16
M.Đ. and Others
against Serbia

The European Court of Human Rights (Fourth Section), sitting on 5 September 2023 as a Committee composed of:
Tim Eicke, *President*,
Branko Lubarda,
Ana Maria Guerra Martins, *judges*,
and Branimir Pleše, *Acting Deputy Section Registrar,*

Having regard to:

the application (no. 73865/16) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 25 November 2016 by the applicants listed in the appended table ("the applicants"), who were represented by Ms S. Čipak Katić, a lawyer practising in Subotica;

the decision to give notice of the application to the Serbian Government ("the Government"), represented by their Agent, Ms Z. Jadrijević Mladar;

the decision not to have the applicants' names disclosed;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. On 21 October 2009 B.Đ., the applicants' husband and father respectively, was placed in pre-trial detention on suspicion that he had committed two sex-related offences (*nedozvoljene polne radnje*).

2. On 23 October 2009 he was examined by a prison doctor, who noted that he had pre-existing hypertension and tachycardia, and a deviated septum. The prison doctor prescribed him his four regular medications for hypertension. One of those medications was not available in the prison and B.Đ. was advised that his family should obtain it for him. Three days later he

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was examined again as he had complained of insomnia, and the dosage of one of his medications was adjusted accordingly.

3. On 4 November 2009 B.Đ. committed suicide. His cellmate found him hanging in the cell toilet in the early morning and alerted the prison guards, who called an ambulance. After a doctor declared him dead, the prison staff immediately informed the investigating judge of the District Court, who conducted an on-site inspection and ordered an autopsy and toxicological analysis. Statements were taken from B.Đ.'s wife (the first applicant), his lawyer, his cellmate (in Albanian), and three prison officers. B.Đ.'s diary, which was found in his cell and which contained a note, was also included in the case-file.

4. B.Đ.'s wife and his lawyer told the police that during their visits, they had not noticed any changes in his behaviour indicating any suicidal intention. The autopsy report, prepared by the Forensic Medicine Institute, concluded that the death had been caused by hanging, and that there were no other signs of mechanical injuries indicating any other possible cause of death. The toxicological reports showed no trace of drugs, medication or alcohol in B.Đ.'s blood. B.Đ.'s cellmate was not heard as he had been released on 19 November 2009 and was apparently unavailable.

5. On 19 May 2010, in view of the evidence collected, the High Public Prosecutor's Office found no grounds for public prosecution.

6. On 16 June 2010 the applicants brought a compensation claim against the State. They submitted that the State had failed to monitor B.Đ. continually and adequately, and to provide him with appropriate medical care. In particular, he had been psychologically shaken (*potresen*) by his detention and the criminal proceedings against him, as well as the harm caused to his family's reputation. The applicants also argued that during the first few days of his detention he had been unable to take his long-term medication for his heart condition and blood pressure, which had caused him additional psychological distress.

7. During the proceedings, the court heard evidence from the applicants, B.Đ.'s lawyer, a prison doctor and the relevant prison officers, as well as from an expert witness (a neuropsychiatrist). The court also examined the statements given at an earlier stage (see paragraph 4 *in limine* above), a copy of B.Đ.'s diary, his medical records, including his prison medical file, and the expert witness's findings. The court also enquired about B.Đ.'s cellmate, but was informed that he had been released and was apparently unavailable.

8. The expert witness found that there had been no evidence in the medical records that B.Đ. had any depressive disorder. The analysis of his diary apparently showed that although he had had "a guilty conscience (*grižu savesti*) for being in detention, he had not felt guilty of the criminal offences of which he had been suspected". Quite apart from this note in his diary, he had not told anyone of his suicidal intentions, nor had he shown any psychopathological symptoms indicating a change in behaviour or mood

requiring psychological or psychiatric treatment, or indicating any mental disorder or suicidal intentions. The absence of one of his medications prescribed for blood pressure could not have affected his psychological state. While the expert was not a cardiologist and was therefore unable to give his opinion on the treatment in that regard, he considered that the treatment for insomnia had been adequate.

9. On 12 April 2013 the Court of First Instance dismissed the applicants' claim. The court found that B.Đ. had not had any mental disorder or any other condition requiring psychiatric treatment or indicating suicidal intentions. There had been no causal link between his chronic cardiological condition and his suicide. He had not complained of any psychological problems that would require specialist psychiatric examination. His psychological state had not indicated any risk of suicide and therefore he had not required additional protective measures. He had been visited by both his wife and his lawyer and neither had informed prison staff of any suicide risk or a suspicion of it. He had had adequate medical care and had been adequately monitored. In view of all the evidence before it, the court found that the prison staff could not have known that there had been a real and immediate risk that he would commit suicide, nor had there been anything unlawful or irregular in their work. Accordingly, no liability arose on the part of the State.

10. The court did not accept the first applicant's statement that B.Đ. had had "problems with nerves" even before his detention as this was contradicted by other evidence. It also did not accept the lawyer's statement that B.Đ. had asked for a medical examination, as he had been examined twice by a prison doctor and there was no evidence that he had asked for another examination.

11. On 9 April 2014 the Court of Appeal upheld the first-instance judgment, agreeing with its reasoning. It also noted that, according to the relevant rules, a defendant's lawyer could have requested a medical examination of the defendant, but that B.Đ.'s lawyer had not done so. Lastly, the court considered that "adequate surveillance" did not mean permanent surveillance of detainees, especially in circumstances where B.Đ. had not indicated any suicidal intentions and nobody else had noticed any such indications. In view of all the evidence, the prison staff had had no reason to apply special surveillance measures in respect of B.Đ. The court also found that the first-instance court could not hear B.Đ.'s cellmate for justified reasons (see paragraphs 4 *in fine* and 7 *in fine* above).

12. The applicants thereafter lodged a constitutional appeal. They complained of failures by prison staff and of the outcome of the civil proceedings and referred to the right to a fair trial. They did not complain that the investigation had been ineffective.

13. On 25 July 2016 the Constitutional Court rejected the applicants' constitutional appeal. It found that the disputed judgments had been well-reasoned and that the reasoning had not been arbitrary.

14. The applicants complained under Articles 2, 3, 6 and 13 of the Convention that the prison staff should have known that B.Đ. had posed a real and immediate risk of suicide and that they had failed to take reasonable measures to prevent that risk. They also complained that the respondent State had failed to conduct an effective investigation thereafter.

THE COURT'S ASSESSMENT

15. The Government submitted that the applicants had not raised their complaints in their constitutional appeal, and had thus failed to properly exhaust effective domestic remedies. They also argued that the applicants had made false submissions in their application form (in particular, that no autopsy had been performed after the suicide), which could be considered an abuse of the right of individual petition. In any event, the prison authorities could not have known that there had been a suicide risk, and the State had conducted an effective investigation afterwards. There was hence no violation of Article 2 of the Convention.

16. The applicants reaffirmed their complaints.

17. The Court considers that the applicants' complaints, made under various Articles, fall to be examined solely under Article 2 of the Convention (see, *mutatis mutandis*, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018, and, *mutatis mutandis*, *Hubert Nowak v. Poland*, no. 57916/16, §§ 59-60, 16 February 2023).

I. THE STATE'S POSITIVE OBLIGATION TO PROTECT LIFE

18. The Court does not consider it necessary to examine the Government's objection as to the alleged abuse of the right of individual application or the one concerning the proper exhaustion of domestic remedies since, in any event, the complaint in question is inadmissible on other grounds.

19. The relevant principles as regards the State's positive obligations under Article 2 can be found in, for example, *Renolde v. France* (no. 5608/05, §§ 80-83, ECHR 2008 (extracts)), and the authorities cited therein. Specifically, Article 2 may imply, in particular circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual from himself or herself. (ibid., § 81). In a series of cases where the risk to life derived from self-harm by a detained person, the Court has found that a positive obligation arose where the authorities knew or ought to have known that the person posed a real and immediate risk of suicide. Where the Court has found that the authorities knew or ought to have known of that risk it has proceeded to analyse whether the authorities did all that could reasonably have been expected of them to prevent that risk from materialising (see *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14,

§ 110, 31 January 2019, and the authorities cited therein). In order to establish whether the authorities knew or ought to have known that the life of a particular individual was subject to a real and immediate risk, triggering the duty to take appropriate preventive measures, the Court takes into account a number of factors, such as the history of mental health problems, the gravity of the mental condition, previous attempts to commit suicide or self-harm, suicidal thoughts or threats and signs of physical or mental distress (ibid., § 115, and the authorities cited therein).

20. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see, among many other authorities, *Klaas v. Germany*, 22 September 1993, § 29, Series A no. 269). Though the Court is not bound by the findings of domestic courts and remains free to make its own assessment in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 180, ECHR 2011 (extracts), and *Ražnatović v. Montenegro*, no. 14742/18, § 39, 2 September 2021).

21. Turning to the present case, the Court observes that B.Đ. had no history of any mental health disorders (see paragraph 8 above). The first time the first applicant mentioned that B.Đ. had "problems with his nerves" was during the civil proceedings, but that was uncorroborated by any evidence (see paragraph 10 above). His mental condition did not appear to be serious, nor had he threatened to commit suicide or displayed any suicidal thoughts or intention, or any signs of physical or mental distress (see paragraph 8 above; contrast *Renolde*, § 86, and *Ražnatović*, § 40, both cited above). He had not previously attempted suicide or self-harm. None of the persons interviewed, including the first applicant and B.Đ.'s lawyer, had noticed any changes in his behaviour or any possible suicidal intentions (see paragraph 9 above). He was examined twice by a prison doctor, once on his arrival at the prison, and again three days later, when he received treatment for hypertension and insomnia respectively (see paragraph 2 above). The expert witness found the latter treatment to be adequate and found that B.Đ. had not shown any psychopathological symptoms requiring psychological or psychiatric treatment or indicating mental disorder or suicidal intentions (see paragraph 8 above). On the basis of all the evidence the domestic courts found that the prison staff could not have known that there had been a risk of suicide (see paragraphs 9 and 11 above).

22. The Court approaches the question of risk with a view to assessing whether it is both real and immediate and notes that the positive obligation incumbent on the State must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (see *Fernandes de Oliveira*, cited above, § 131, *in fine*). In the light of the circumstances of

the present case, no cogent elements have been provided which could lead the Court to depart from the findings of fact of the national courts. The Court concludes that it has not been established that the authorities knew or ought to have known that B.Đ. posed a real and immediate risk of suicide or that there were reasons requiring the prison authorities to put in place a special monitoring regime. Accordingly, the Court does not need to assess whether the authorities took measures which could reasonably have been expected of them (ibid., § 132).

23. In view of the foregoing, this part of the application is manifestly ill-founded and must, as such, be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED LACK OF AN EFFECTIVE INVESTIGATION

24. As the applicants did not raise their complaint in this respect in their constitutional appeal (see paragraph 12 *in fine* above), it must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 28 September 2023.

Branimir Pleše Acting Deputy Section Registrar	Tim Eicke President

Appendix

Application no. 73865/16

No.	Applicant's initials	Year of birth	Nationality
1.	M.Đ.	1960	Serbian
2.	S.Đ.	1989	Serbian
3.	A.K.	1984	Serbian