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

FOURTH SECTION

DECISION

Application no. 57699/13
Nenad AKSENTIJEVIĆ
against Serbia

The European Court of Human Rights (Fourth Section), sitting on 23 June 2020 as a Committee composed of:

Carlo Ranzoni, *President,*
Branko Lubarda,
Péter Paczolay, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to the above application lodged on 16 August 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Nenad Aksentijević, is a Serbian national, who was born in 1973 and was detained in Požarevac. He was represented before the Court by Mr M. Jovanović, a lawyer practising in Niš.

2. The Serbian Government ("the Government") were represented by their Agent, Ms Z. Jadrijević Mladar.

A. The circumstances of the case

1. Facts as submitted by the applicant

3. Over a period of many years, the applicant has been convicted of numerous property-related offences by various courts in Serbia.

4. On 22 September 2010 the First Belgrade Court of First Instance (*Prvi osnovni sud u Beogradu*), in a sentencing procedure (see paragraph 17 below), took into account the final judgments rendered by the Belgrade Second Municipal Court (*Drugi opštinski sud u Beogradu*) and the Belgrade

Fourth Municipal Court (*Četvrti opštinski sud u Beogradu*) on 23 February 2009 and 15 May 2009, respectively, and sentenced the applicant to a single concurrent sentence of 15 years' imprisonment. This judgment itself subsequently became final.

5. On 25 January 2011 the First Belgrade Court of First Instance, in a sentencing procedure (see paragraph 17 below), took into account its own final judgment of 22 September 2010, mentioned above, and the final judgment rendered by the Belgrade Appeals Court (*Apelacioni sud u Beogradu*) on 28 September 2010 and sentenced the applicant to a single concurrent sentence of 16 years and 9 months' imprisonment. This judgment itself also subsequently became final.

6. On 26 March 2012 the First Belgrade Court of First Instance, in a sentencing procedure (see paragraph 17 below), took into account its own final judgments of 25 January 2011, mentioned above, and 23 January 2012 and sentenced the applicant to a single concurrent sentence of 17 years and 9 months' imprisonment. On 5 September 2012 the Appeals Court upheld this judgment and it thereby became final.

7. On 5 December 2012 the applicant lodged an appeal with the Constitutional Court (*Ustavni sud*) against the above-mentioned judgments rendered on 26 March 2012 and 5 September 2012 (see paragraph 6 above). In so doing, he maintained that he had already spent more than 15 years in prison while serving his sentence which had itself been imposed in breach of Article 34 of the Constitution (see paragraph 11 below). Moreover, the applicant submitted that he had been sentenced to a single concurrent sentence in excess of 15 years' imprisonment even though this had been contrary to the General Criminal Code as the more lenient law compared to the subsequently adopted Criminal Code of the Republic of Serbia (see paragraphs 12-16 below). Finally, the applicant submitted that all of the offences in question had taken place before the latter Code had even entered into force (see paragraph 16 below).

8. On 19 June 2013 the Constitutional Court rejected the applicant's appeal, stating merely that the allegations contained therein were "manifestly ill-founded" (*očigledno neosnovani*).

2. Facts as submitted by the Government

9. Generally, the Government did not dispute the facts submitted by the applicant, except for his claims to the effect that all of the offences in question had been committed before the entry into force of the Criminal Code of the Republic of Serbia on 1 January 2006 (see paragraph 7 above). In this regard, the Government pointed out that three of the offences of which the applicant had been convicted, on 23 February 2009 and 28 September 2010 respectively (see paragraphs 4 and 5 above), had in fact been committed in March 2006, hence following the entry into force of the Criminal Code of the Republic of Serbia which provided for a maximum of 20 years' imprisonment

compared to a maximum of 15 years' imprisonment as set out in the earlier legislation. The Government provided copies of the said two judgments confirming their assertions. They also submitted that the applicant had not yet served more than 15 years of his prison term at the time when he had lodged his appeal with the Constitutional Court.

B. Relevant domestic law

1. *Constitution of the Republic of Serbia (*Ustav Republike Srbije*; published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/06)*

10. Article 34 § 1 provides, *inter alia*, that no person may be found guilty of any act which did not constitute a criminal offence under law at the time when it was committed, nor shall a penalty be imposed which was not prescribed for this act.

11. Article 34 § 2 provides, *inter alia*, that penalties shall be determined pursuant to legislation which was in force at the time when the act was committed, except when subsequent legislation is deemed more lenient for the defendant.

2. *General Criminal Code (*Osnovni krivični zakon*, published in the Official Gazette of the Socialist Federal Republic of Yugoslavia – OG SFRY – nos. 44/76, 46/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90, the Official Gazette of the Federal Republic of Yugoslavia – OG FRY – nos. 35/92, 16/93, 31/93, 37/93, 24/94 and 61/01, as well as in OG RS no. 39/03)*

12. Article 38 § 1 provided that the sentence of imprisonment could not be shorter than 30 days nor longer than 15 years.

13. Article 48 provided, *inter alia*, that when a court of law engaged in concurrent sentencing, that is in imposing a single sentence with respect to a number of separate offences committed by the same defendant, the overall sentence had to be greater than any of the individual sentences in question but could not attain their sum total.

3. *Criminal Code of the Republic of Serbia (*Krivični zakonik*, published in OG RS nos. 85/05, 88/05, 107/05, 72/09 and 111/09)*

14. Article 45 § 1 provided that the sentence of imprisonment could not be shorter than 30 days nor longer than 20 years.

15. Article 60 provided, *inter alia*, that when a court of law engaged in concurrent sentencing, that is in imposing a single sentence with respect to a number of separate offences committed by the same defendant, it would increase the most severe sentence established regarding any of the individual

offences in question but the overall sentence could not attain their sum total nor exceed 20 years of imprisonment.

16. On 1 January 2006 this Code repealed and replaced the General Criminal Code referred to above. Beyond 2009, it was also amended in 2012, 2013, 2014, 2016 and 2019.

*4. Code of Criminal Procedure (*Zakonik o krivičnom postupku*, published in OG FRY nos. 70/01 and 68/02, as well as in OG RS nos. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09 and 76/10)*

17. Article 405 provided, *inter alia*, that, at the request of a public prosecutor or a defendant, a criminal court could take into account the already existing final convictions rendered against the latter and then adopt a single sentence in respect of them all. In so doing, the court was to apply the provisions contained in the Criminal Code concerning the rules on concurrent sentencing (see paragraphs 12-15 above).

18. As of October 2013, regarding the type of criminal proceedings at issue in the present case, this Code was repealed and replaced by a new Code of Criminal Procedure.

COMPLAINT

19. The applicant complained under Articles 6 and 7 of the Convention that he had been sentenced to a longer prison term than the one which had been applicable when the offences in question had been committed. In particular, he maintained that, given a number of existing final convictions which had already been rendered against him, he had been concurrently sentenced (*primenom odredaba o odmeravanju kazne za krivična dela izvršena u sticaju, a povodom predloga za nepravo ponavljanje krivičnog postupka*), based on the subsequently adopted criminal legislation, to a single sentence of 17 years and 9 months' imprisonment (see paragraph 6 above) even though this had been in excess of the maximum prison sentence of 15 years envisaged in the earlier General Criminal Code (see paragraphs 12-16 above).

THE LAW

20. The applicant reaffirmed that the concurrent sentencing as carried out in his case had been in breach of the Convention.

21. In the application form lodged with the Court, it was furthermore stated that: (i) all of the offences at issue had taken place before the subsequent criminal legislation, that is the Criminal Code of the Republic of Serbia, had even entered into force on 1 January 2006, and (ii) the applicant

had already served more than 15 years of his sentence at the time when he had lodged his appeal with the Constitutional Court.

22. The Court, being the master of the characterisation to be given in law to the facts of the cases before it (see, among many other authorities, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018), considers that the above complaint falls to be examined under Article 7 of the Convention, which provision, in so far as relevant reads as follows:

Article 7

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed ..."

A. The parties' submissions

1. The Government

23. The Government maintained that the applicant had falsely stated in his application form some of the facts relevant to his complaint. In particular, they reiterated that it was not the case that all of the offences in question had been committed before the entry into force of the Criminal Code of the Republic of Serbia on 1 January 2006 since three among them had in fact been carried out in March of the same year (see paragraphs 4, 5, 9 and 21 above). This was of great significance, according to the Government, because the Criminal Code of the Republic of Serbia, unlike the earlier General Criminal Code, had provided for a maximum of 20 years of imprisonment, meaning that the domestic courts had not breached the relevant national law when they had ultimately sentenced the applicant to a prison term in excess of 15 years in all (see paragraphs 12-16 above).

24. The Government furthermore noted that the applicant had also stated in his constitutional appeal, as well as in the application form subsequently lodged with the Court, that at the time when he had brought his case before the Constitutional Court he had already been serving his prison sentence for a period of more than 15 years (see paragraphs 7 and 21 above). According to the Government, however, this claim was also "untrue".

25. In view of the above, the Government considered that the applicant had abused his right of individual application, within the meaning of Article 35 § 3 (a) of the Convention.

26. The Government lastly noted that the applicant had failed to lodge a constitutional appeal against the judgment rendered by the First Belgrade Court of First Instance on 25 January 2011, even though this had been the first time that he had been sentenced to a prison term in excess of 15 years of imprisonment (see paragraph 5 above). His application was therefore, in any

event, inadmissible on the basis of non-exhaustion within the meaning of Article 35 § 1 of the Convention.

2. The applicant

27. The applicant's lawyer submitted that the applicant himself had informed him that all of the offences in question had indeed been committed before 2002, which had been when the applicant had been first detained. Furthermore, the applicant maintained that he had continued serving his prison sentence ever since. At the same time, however, the applicant's lawyer acknowledged that it was nevertheless questionable whether the applicant had properly remembered the exact dates on which many of the offences had been committed. As regards himself personally, the applicant's lawyer stated that he had not taken part in any of the relevant proceedings regarding the applicant's conviction of 28 September 2010 (see paragraph 5 above) and that he therefore had no direct knowledge of the matter. In any event, neither the Appeals Court in its decision of 5 September 2012 nor the Constitutional Court in its ruling of 19 June 2013 had specifically addressed this issue (see paragraphs 6 and 8 above). The applicant's lawyer lastly submitted that the applicant should regardless have been sentenced to a concurrent prison term of no more than 15 years since the General Criminal Code remained the more lenient legislation compared to the subsequently adopted Criminal Code of the Republic of Serbia (see paragraphs 12-16 above).

28. With respect to the exhaustion of domestic remedies (see paragraph 26 above), the applicant's lawyer maintained that the applicant had complied with this requirement in so far as possible and that no additional constitutional appeals needed to be lodged. Indeed, even the constitutional appeal which had been made use of by the applicant had not been properly considered by the Constitutional Court (see paragraph 8 above).

B. The Court's assessment

1. Relevant principles

29. The Court reiterates that an application may be rejected as abusive under Article 35 § 3 of the Convention if, among other reasons, it was knowingly based on untrue facts and false declarations (see *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000 X; *Rehak v. the Czech Republic* (dec.), no. 67208/01, 18 May 2004; *Kerechasvili v. Georgia* (dec.), no. 5667/02, ECHR 2006 V; *Bagheri and Maliki v. the Netherlands* (dec.), no. 30164/06, 15 May 2007; *Poznanski and Others v. Germany* (dec.), no. 25101/05, 3 July 2007; *Miroļubovs and Others v. Latvia*, no. 798/05, § 63, 15 September 2009; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 97, ECHR 2012; and *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014). The submission of incomplete and thus misleading

information may also amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation has been provided for the failure to disclose that information (see *Hüttner v. Germany* (dec.), no. 23130/04, 19 June 2006; *Kowal v. Poland* (dec.), no. 2912/11, 18 September 2012; and *Gross*, cited above, § 28). However, even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 89, 20 June 2002; *Melnik v. Ukraine*, no. 72286/01, §§ 58-60, 28 March 2006; and *Nold v. Germany*, no. 27250/02, § 87, 29 June 2006). The applicant is lastly entirely responsible for the conduct of his lawyer or of any other person representing him before the Court. Any and all omissions on the representative's part are therefore, in principle, attributable to the applicant and may lead to the application being rejected as an abuse of the right of application (see, for example, *Bekauri v. Georgia* (preliminary objection), no. 14102/02, §§ 22-25, 10 April 2012, and, *mutatis mutandis, Gross*, cited above, § 33).

2. Application of these principles to the present case

30. Turning to the present case, the Court notes that in the application form, prepared and signed by the applicant's lawyer on his client's behalf, it was specifically stated that all of the offences involving the applicant had taken place prior to 1 January 2006, which was when the Criminal Code of the Republic of Serbia had entered into force (see paragraphs 21 and 16 above, in that order). Indeed, the same allegation had also been made in the applicant's appeal which had been lodged with the Constitutional Court before that (see paragraph 7 above). This, however, was not true given that three of the offences of which the applicant had been convicted, on 23 February 2009 and 28 September 2010 respectively (see paragraphs 4 and 5 above), had in fact been committed in March 2006 and therefore clearly after the entry into force of the Criminal Code of the Republic of Serbia (see paragraph 16 above above). While the applicant did not provide copies of the said two judgments, among others, in the course of the proceedings before the Court, the Government attached them to their written observations.

31. It is also undisputed that all of the judgments mentioned in the present case had been properly served on the applicant, which is why it cannot but be inferred that he had been aware of their contents, including the exact dates of commission of the offences in question, but had nevertheless decided, intentionally, to mislead the Court as regards the two judgments rendered on 23 February 2009 and 28 September 2010 respectively. Certainly, neither the applicant nor his representative offered any evidence or compelling arguments to the contrary, and it would be difficult to imagine an alternative reasonable explanation as to why the applicant would have duly submitted to the Court various other judgments but not those which would have factually undermined his allegations made under Article 7 of the Convention.

However, even assuming that the applicant's conduct was somehow merely a "vexing manifestation of irresponsibility", this in itself would be incompatible with the purpose of the right of individual application (see *Bekauri*, cited above, § 24). In any event, the Court reiterates that all omissions on the part of an applicant's lawyer are, in principle, attributable to the applicant personally and may also lead to the application being rejected as an abuse of the right of petition (see paragraph 29 above, *in fine*). Specifically and in the context of the present case, the Court considers that the applicant's lawyer was professionally obliged to but did not closely inspect the material relevant for the submission of the application, which should have included all of the judgments related to the applicant's concurrent sentencing even if he personally had not taken part in some or any of the related proceedings. In general, lawyers must understand that, having due regard to the Court's duty to examine allegations of human rights violations, they must show a high level of professional prudence and meaningful cooperation with the Court by sparing it from the introduction of unmeritorious complaints and, once proceedings have been instituted, then meticulously abide by all the relevant rules of the procedure and urge their clients to do the same. Otherwise, the wilful or negligent misuse of the Court's resources may undermine the credibility of lawyers' work in the eyes of the Court and even, if done systematically, may result in them being banned from representing applicants under the Rules of Court (see *Bekauri*, cited above, § 24, and *Petrović v. Serbia* (dec.), no. 56551/11, 18 October 2011).

32. The Court lastly notes that on 26 March 2012 the First Belgrade Court of First Instance sentenced the applicant to a single concurrent sentence of 17 years and 9 months' imprisonment and in so doing took into account all of his earlier convictions, including those of 23 February 2009 and 28 September 2010 which concerned offences that had been committed in March 2006 (see paragraphs 6, 5 and 4 above, describing the sentencing cascade in reverse order, where each judgment issuing a concurrent sentence also took into account earlier such judgments). On 5 September 2012 the Appeals Court upheld the judgment of 26 March 2012 and it thereby became final. Also, while Article 38 § 1 of the General Criminal Code provided that a prison sentence could not be shorter than 30 days nor longer than 15 years, Article 45 § 1 of the Criminal Code of the Republic of Serbia stated that it could not be shorter than 30 days nor in excess of 20 years. On 1 January 2006 the latter Code repealed and replaced the former (see paragraphs 12-16 above). At the same time, Article 34 § 2 of the Constitution provided that criminal penalties were to be determined pursuant to legislation which had been in force at the time when the offence had been committed, unless subsequent legislation was deemed more lenient for the defendant (see paragraph 11 above). In those circumstances, the factual issue of when the offences had been committed, that is whether this had happened before or after the entry into force of the

Criminal Code of the Republic of Serbia, was clearly one of great significance for the applicant's concurrent sentencing and, as such, also a matter that goes to the very core of the applicant's complaint before the Court itself (see paragraphs 19-21 and 29 above).

33. In view of the foregoing, the Court considers that this application as a whole must be rejected as abusive within the meaning of Article 35 §§ 3 (a) and 4 of the Convention. Given this conclusion, the Court does not find it necessary to rule on the Government's other abuse-related objection (see paragraph 24 above), particularly given the lack of information contained in the case file in this regard, or their separate objection to the effect that the applicant did not properly comply with the exhaustion requirement (see paragraph 26 above).

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 16 July 2020.

Ilse Freiwirth Deputy Registrar	Carlo Ranzoni President