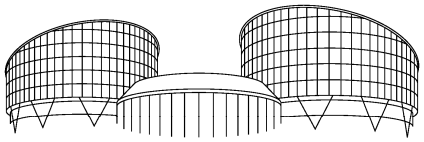

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 53661/13
Stojan MARKOVIĆ
against Serbia

The European Court of Human Rights (Third Section), sitting on 17 September 2019 as a Committee composed of:

Georgios A. Serghides, *President,*
Branko Lubarda,
Erik Wennerström, *judges*,
and Stephen Phillips, *Section Registrar*,

Having regard to the above application lodged on 28 May 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 Stojan Marković, is a Serbian national who was born in 1959 and lives in Serbia. He was represented before the Court by Mr D. Lazarević, a lawyer practising in Kragujevac.

2. The Serbian Government ("the Government") were represented by their former Agent, Ms Nataša Plavšić.

A. The circumstances of the case

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

1. The articles in question

3. The applicant was a journalist and the editor-in-chief of a local weekly newspaper.

4. On 17 February 2009 the applicant published an article entitled "The enfeebled Mandarin ("*Zanemoćali mandarin*") which, in so far as relevant, reads as follows:

> "Once upon a time a Mandarin lived in a certain town in a certain country.
>
> ... In troubled and unstable times he acquired power [by making] plenty of fine promises. He became rich, fat, got his hair done, spent all the tax revenues, bought new houses and flats, new cars, and opened a bank account in Cyprus and filled it.
>
> ... Nothing came of the monumental promises he had made to the people – no factories, no highway, no jobs, and no well-being. And then, again, elections were held in the Mandarin State.
>
> ... The Mandarin is no longer in power – just when he had got used to it. Just like we Serbs, so do the Mandarin people say that habit is second nature [*navika je teška odvika*]. Now that he is in enfeebled [*u slabašnoj*] opposition in Parliament, the Mandarin must be cocky [*da se kurči*] in the hope that someone will notice him. He also has to be cocky at his pad, as young Mandarinettes are demanding, and age, fat, cholesterol, triglycerides and the constant fear of those damnable genital warts [*kondiloma pustih*] have caught up with him. He has become enfeebled [*zanemoćalo se*].
>
> However, the Mandarin's reputation is at stake. When diet, the gym or the [sight of a] young bare-arsed female body do not help the Mandarin, chemistry does. That twenty-first century wonder for macho Mandarins – Viagra. The breaking news on all the television stations was that the Mandarin had been injured at his Mandarin pad. With injuries to his Mandarin head he was brought to a Mandarin hospital. Mandarin journalists gathered to find out and publish what had happened. The following morning some Mandarin newspapers announced that it had been a stroke, although there were no reasonable grounds for assuming so. From the hospital it leaked that the head injuries were due to nausea caused by high blood pressure, which had caused the Mandarin's head to hit the wall and the floor. The injuries were quickly mended. The Mandarin's head is thick. The doctors were prepared to release him, but the Mandarin did not feel like going home. He asked to stay until the morning. Given the way things were, EEG and blood tests were conducted and from the medical standpoint it became clear: Viagra was the cause of it all.
>
> Approval was granted to keep the Mandarin hospitalised until the effects of the little pill had worn off. There was no official press release, except that the little Mandarins from his political party announced that the reason was exhaustion from all his concern for the Mandarin people and the State.
>
> Lest we forget, any resemblance between this true story of the Mandarin State and events in Serbia is coincidental."

5. On 24 February 2009 the applicant published an article entitled "The hour of reckoning is approaching – D., J., Š., the next one is ..." which, in so far as relevant, reads as follows:

> "After the recent arrests and announcements of indictments one gets the impression that all the [members of] mobster organisations in Serbia have been unmasked and, in part, arrested ...
>
> The logical question the public is asking these days is whether and to what extent the leader of a certain political party ... is involved in the dirty business of which his closest associates are accused.

> Although he is prone to claiming that he has never met these people, many facts – including our photograph – bear witness to the contrary. In any event, the boss is not innocent in this story because if he was not aware of what his associates were doing then he is an ignorant boss, and if he did know, then ...
>
> Leave it to justice, which is slow but sure, to do its job. For now, the party officials ... have been caught in what the Master of Arts calls 'petty theft' [*kraduckanje*]. The first one was caught and arrested, the second one was indicted, and the third one is under investigation. The next one is ..."

6. The article was illustrated by a photograph of Mr A. and B.J. The photograph was also accompanied by the following caption:

> "At the end of the tunnel: [Mr A.] ... and B.J."

7. It is lastly noted that Mr A. was a well-known Serbian political figure who had held various offices throughout his career. At the time when the above-mentioned articles were published, he was a member of the Serbian Parliament and the leader of a political party.

2. The civil proceedings

8. Shortly after the publication of the above-mentioned articles, Mr A. brought a civil action for non-pecuniary damages against the applicant, submitting that the articles had harmed his honour and reputation.

9. On 9 March 2010 the High Court (*Viši sud*) gave judgment, ordering the applicant to pay Mr A. 180,000 Serbian dinars (RSD) in compensation for the non-pecuniary damage suffered and RSD 58,300 in costs (approximately 2,370 euros (EUR)) – plus statutory interest).

10. On 21 April 2010 the Court of Appeal (*Apelacioni sud*) reduced the costs awarded to RSD 19,855 and upheld the remainder of the first-instance judgment (that is the total amount awarded in respect of compensation and costs, excluding interest – a total of approximately EUR 1,990).

11. Regarding the article entitled "The enfeebled Mandarin" the court found, *inter alia*, as follows:

> "... [T]he defendant published false information about the plaintiff. Among other things [he published] false information about the reasons for the plaintiff being hospitalised. The court found that the plaintiff had been hospitalised for injury caused by high blood pressure and intensive emotional stress ... and not because he had used Viagra, as was falsely reported in the disputed article, in which the name of the plaintiff is not mentioned but ... [the reference to him personally] ... is clear from the description of events ..."

12. Regarding the article "The hour of reckoning is approaching" the court held that:

> "... the defendant pointed to the plaintiff as the potential perpetrator of a crime, even though no final court judgment had found the plaintiff guilty [of anything]."

13. The court then went on to opine:

> "The press cannot overstep, invoking freedom of expression, certain boundaries, especially when the reputation and rights of others are at stake, and protection awarded to journalists by Article 10 of the European Convention on Human Rights in matters of general interest is conditional upon their acting in good faith in order to provide accurate and reliable information, in accordance with journalistic ethics."

3. The proceedings before the Constitutional Court

14. On 28 May 2010 the applicant lodged an appeal with the Constitutional Court (*Ustavni sud Srbije*). Relying on Articles 32 and 46 of the Constitution he complained that his right to a fair trial and his freedom of expression had been breached because: (i) the civil courts had found him liable for something that had not even been mentioned in the published articles – a bank account in Cyprus and the spending by Mr A. of certain municipal funds in order to buy real estate; and (ii) his views, as presented in the article entitled "The enfeebled Mandarin", had initially been accepted as part of a humorous story by the civil courts but had later been described by them as having been based on a false representation of facts – two positions that were clearly simultaneously untenable.

15. On 5 March 2013 the Constitutional Court rejected the applicant's appeal as lacking proper constitutional reasoning, deeming it (the appeal itself) as yet another attempt to seek the mere reassessment of the outcome of the civil proceedings in question, as well as to complain of the allegedly erroneous assessment of the relevant facts and the inadequate application of the pertinent law.

4. The criminal proceedings

16. On 23 February 2011, as part of the criminal proceedings initiated by Mr A. in the capacity of a private prosecutor, the Court of First Instance (*Osnovni sud*) convicted the applicant of criminal defamation (*kleveta*) and ordered him to pay a fine.

17. Following an appeal by the applicant, on 27 May 2011 the Court of Appeal quashed that judgment and remitted the matter for re-examination.

18. On 14 May 2012 the first-instance court again convicted the applicant of the offence in question and ordered him to pay a fine in respect of the article entitled the "The hour of reckoning is approaching". At the same time, however, it acquitted the applicant as regards the other article entitled "The enfeebled Mandarin".

19. Following an appeal by the applicant, on 3 December 2012 the Court of Appeal upheld the said acquittal but overturned the applicant's conviction. In acquitting the applicant, the court noted, *inter alia*, that the article entitled "The enfeebled Mandarin" had been written allegorically and could not therefore amount to a crime. It had moreover contained no statements of fact or indeed even an indication of the identity of the person referred to as "the Mandarin". Regarding the other published article, the

court stated, *inter alia*, that it had focused on current events and that it had referred to the private prosecutor (Mr A.) as the holder of a public function (*vršilac javnih funkcija*). That, in turn, meant that he should have a higher degree of tolerance for any criticisms levelled against him and that any criminal responsibility on the part of the applicant was thus excluded. The applicant received that judgment on 24 January 2013.

5. The applicant's attempts to reopen the civil proceedings

20. On 19 February 2013 the applicant lodged a request for the reopening of the above civil proceedings on the basis of his ultimate acquittal in the criminal case.

21. On 25 February 2013 the High Court refused that request owing to the failure of the applicant's legal representative to (as required under domestic law) to hold a special power of attorney to represent the applicant and to present it to the court.

22. On 5 March 2013 the applicant lodged a new, albeit identical, request for the reopening of the civil proceedings in question. This time, however, it was accompanied by a proper power of attorney.

23. On 4 April 2013 the High Court refused that request for having been submitted belatedly.

24. Following an appeal by the applicant, on 10 May 2013 the Court of Appeal upheld that decision at second instance. The applicant's legal representative received the said appellate decision on 27 May 2013.

B. Relevant domestic law

1. The Constitution of the Republic of Serbia 2006 (Ustav Republike Srbije; published in the Official Gazette of the Republic of Serbia no. 98/06)

25. Article 170 provides:

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

2. 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 and 57/89, as well as in the Official Gazette of the Federal Republic of Yugoslavia no. 31/93)

26. Under Article 200 of the Act anyone who has suffered mental anguish as a consequence of a breach of his or her honour or reputation may, depending on its duration and intensity, sue for financial compensation

before the civil courts and, in addition, request other forms of redress "which may be capable" of affording adequate non-pecuniary satisfaction.

COMPLAINTS

27. The applicant complained, relying on Articles 6 and 10 of the Convention, that the rulings of the civil courts rendered against him had amounted to a violation of his right to a fair hearing and his freedom of expression, given his subsequent acquittal in the criminal proceedings in respect of the same two newspaper articles. In the reasoning for the said acquittal, those articles were described as constituting a social critique, which as such could not attract criminal liability.

THE LAW

28. Article 6 § 1, in so far as relevant, and Article 10 of the Convention, referred to by the applicant in his complaints above, read as follows:

Article 6 § 1 (right to a fair trial)

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Article 10 (freedom of expression)

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The alleged abuse of the applicant's right of petition

29. The Government argued that the applicant had failed to provide the Court with all the facts relevant to his complaint. In particular, they argued that he had omitted to submit any information as regards his attempts to reopen the civil case following his ultimate acquittal in the criminal proceedings. In the Government's view, therefore, the applicant had abused his right of petition, within the meaning of Article 35 § 3 of the Convention.

30. The applicant maintained that the facts referred to by the Government were of no relevance to the complaints that he had raised in the present case. Notably, his request for the reopening of the civil suit had been refused and the situation as regards those proceedings had hence remained the same (that is to say as if the request had never been lodged).

31. The Court reiterates that an application may be rejected as an abuse of the right of individual application within the meaning of Article 35 § 3 (a) of the Convention if, among other reasons, it was knowingly based on false information (see *Kerechashvili v. Georgia* (dec.), no. 5667/02, 2 May 2006; *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; and *Simitzi-Papachristou and Others v. Greece* (dec.), no. 50634/11, § 36, 5 November 2013) or if significant information and documents were deliberately omitted, either where they were known from the outset (see *Kerechashvili*, cited above) or where new significant developments occurred during the procedure (see *Predescu v. Romania*, no. 21447/03, §§ 25-27, 2 December 2008, and *Tatalović and Dekić v. Serbia* (dec.), no. 15433/07, 29 May 2012). However, not every omission of such information will amount to abuse; the information in question must concern the very core of the case being adjudicated (see, for example, *Komatinović v. Serbia* (dec.), no. 75381/10, 29 January 2013).

32. Turning to the present case, it is noted that the applicant indeed failed to inform the Court of his attempts to have the civil suit reopened following his acquittal in the criminal proceedings. The Court, however, also notes that the civil proceedings were never reopened and that the final civil court judgment itself thus remained unaffected. Given the circumstances, while the facts relating to the attempted reopening cannot be deemed as being of no relevance (and might have been mentioned for reasons of general context), they certainly cannot either be described as concerning "the very core of the case being adjudicated".

33. The Court therefore dismisses the Government's objection regarding the abuse of the right to individual application.

B. The exhaustion of the domestic remedies

1. The parties' observation

34. The Government maintained that the applicant had failed to properly raise the factual aspect of his complaints before the Constitutional Court. In particular, he had made no reference to the criminal proceedings in his constitutional appeal and had also failed to supplement the said appeal once he had been served with his acquittal on 24 January 2013 – that is well before the Constitutional Court's own ruling of 5 March 2013. The Government furthermore argued that the applicant had not lodged his

request for the reopening of the civil proceedings in a manner that was in accordance with the relevant domestic procedural requirements.

35. The applicant, in response, stated that there had been "no legal grounds for mentioning" the criminal case in his constitutional appeal, since it had been "lodged on the basis of [the] civil judgments, [and] not [in respect of the] criminal proceedings". Moreover, there had been "no conditions" for any additional submissions before the Constitutional Court regarding the criminal proceedings, and "even ... [had that been] ... possible ..., it would ... [have been] ... pointless", since the constitutional appeal itself had only concerned the civil judgments. Lastly, the applicant maintained that, given the ultimate negative outcome, his attempts to have the civil proceedings reopened had ended up as being of no relevance to the present case.

2. The Court's assessment

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

37. As regards legal systems that provide constitutional protection for fundamental human rights and freedoms, such as the one in Serbia, it is incumbent on the aggrieved individual to test the extent of that protection (see, *inter alia*, *Vinčić and Others v. Serbia*, nos. 44698/06 and 30 others, § 51, 1 December 2009). An applicant's failure to make use of an available domestic remedy or to make proper use of it (by bringing a complaint at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law) will result in an application being declared inadmissible before this Court (see *Gäfgen v. Germany* [GC], no. 22978/05, § 142, ECHR 2010, and *Vučković*, § 72, cited above).

38. The Court furthermore reiterates that the wording of Article 34 of the Convention indicates that a "claim" or complaint in Convention terms comprises two elements – namely, factual allegations and the legal arguments underpinning them. Those two elements are intertwined because the facts complained of ought to be seen in the light of the legal arguments adduced and vice versa. A complaint is thus characterised by the facts alleged in it and not merely by the legal grounds or arguments advanced (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 110 and 113, 20 March 2018).

39. Within the context of the exhaustion of domestic remedies, most notably in cases involving issues of exhaustion in substance, the Court has

consistently placed emphasis on the factual situation presented in the light of national law, as well as the Convention arguments relied upon at the national level. To genuinely afford a Contracting State the opportunity of preventing or redressing an alleged violation, both the factual situation and the Convention arguments must be taken into account for the purposes of determining whether the complaint submitted to the Court was indeed raised beforehand, in substance, before the domestic authorities. That is because it would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument. That, however, does not prevent an applicant from clarifying or elaborating upon his or her initial submissions during the Convention proceedings. The Court has to take account not only of the original application but also of the additional documents intended to complete that original application by eliminating any initial omissions or obscurities. Likewise, the Court may clarify those facts *ex officio* (ibid., §§ 116, 117 and 122, as well as the authorities cited therein).

40. Turning to the present case, the Court notes that in the application form the applicant complained, relying on Articles 6 and 10 of the Convention, that the rulings of the civil courts rendered against him had amounted to a violation of his right to a fair hearing and of his freedom of expression given his subsequent acquittal in the criminal proceedings in respect of the same two newspaper articles.

41. In his constitutional complaint, however, the applicant maintained that his right to a fair trial and to his freedom of expression had been breached because (i) the civil courts had found him liable for something that had not even been mentioned in the published articles, and (ii) his views, as represented in the article entitled "The enfeebled Mandarin", had first been accepted as part of a humorous story by the civil courts but had later been described by them as having been based on a false representation of facts – two positions that were clearly simultaneously untenable.

42. In response to the Government's observations, as already noted above, the applicant furthermore stated, *inter alia*, that any additional submissions before the Constitutional Court regarding the criminal proceedings would have been "pointless" since the constitutional appeal itself had only concerned the civil judgments.

43. Under the circumstances, the Court notes that the allegation that the applicant's Convention rights were breached "given his subsequent acquittal in the criminal proceedings in respect of the same two articles" was absent from the constitutional appeal. While it is true that the criminal case was only concluded following the applicant's lodging of the said appeal, the applicant could have, as noted by the Government (see paragraph 35 above), supplemented his arguments before the Constitutional Court after his

acquittal. Specifically, the applicant was served with the acquittal on 24 January 2013 and the Constitutional Court's decision was rendered almost six weeks later, on 5 March 2013 (see paragraphs 20 and 16 above, in that order). The applicant, however, never did so and instead went on to admit, in his observations before the Court, that his constitutional case only concerned the civil judgments.

44. In view of the foregoing, the Court finds that the applicant did not raise before the Constitutional Court the only factual element of his complaints subsequently raised in Strasbourg, that is the alleged inconsistency in the adjudication of the same matter between the civil and the criminal courts domestically. Accordingly, the application as a whole must be rejected under Article 35 §§ 1 and 4 of the Convention for failure to properly exhaust domestic remedies.

45. It is lastly understood that for the Court to rule otherwise would be contrary to the subsidiary character of the Convention machinery and would amount to depriving the respondent State of the opportunity to put matters right through its own legal system.

46. In view of this conclusion, as well as its pronouncement in paragraphs 30-34 above, the Court does not find it necessary to rule on the Government's other exhaustion-related objection to the effect that the applicant had not lodged his request for the reopening of the civil proceedings in a manner that was in accordance with the relevant domestic procedural requirements.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 10 October 2019.

Stephen Phillips
Registrar

Georgios A. Serghides
President