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

FOURTH SECTION

DECISION

Application no. 26278/07
Nebojša OBRADOVIĆ
against Serbia

The European Court of Human Rights (Fourth Section), sitting on 28 April 2020 as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Branko Lubarda,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Jolien Schukking, *judges,*
and Andrea Tamietti, *Section Registrar,*

Having regard to the above application lodged on 4 June 2007,

Having regard to the observations submitted by the respondent Government,

Having deliberated, decides as follows:

FACTS AND PROCEDURE

1. The applicant, Mr Nebojša Obradović, is a Serbian national, who was born in 1977 and lives in Arilje. He was represented before the Court by Mr N. Mrvošević, a lawyer practising in Ivanjica.

2. The Serbian Government ("the Government") were represented by their Agent, Mr Slavoljub Carić.

A. The circumstances of the case

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

4. The applicant is employed as police officer at the police station in Arilje by the Ministry of Internal Affairs of the Republic of Serbia

(*Ministarstvo unutrašnjih poslova Republike Srbije*, hereinafter "the Ministry").

1. The first set of civil proceedings (facts submitted by the applicant at the time of lodging the application)

5. On an unspecified date in 2006 the applicant filed a civil claim against the Ministry with the Arilje Municipal Court (*Opštinski sud*, hereinafter "the Municipal Court"), seeking payment for overtime and work done on night shifts and public holidays from 1 January 2003 to 31 December 2005, plus statutory interest and legal costs. In arguing his claim, the applicant referred to the Labour Act as the applicable law in his case, claiming that the Internal Affairs Act and the Police Act failed to regulate this particular issue.

6. On 18 July 2006 the Municipal Court held the main hearing, for which it provided an expert report and certain Ministry documents on the applicant's tasks, completed working hours and salaries. Following the examination of this evidence at the hearing, both parties to the proceedings agreed that the court would obtain and examine the Regulation on the Salaries of Officials of the Ministry of Internal Affairs (hereinafter, "the Regulation"), issued by the Minister of Internal Affairs, outside the context of the main hearing (*van ročista*), and that the Ministry would send a copy of the Regulation to the applicant's representative.

7. On 1 August 2006 the Municipal Court examined the Regulation.

8. On the same date the Municipal Court ruled against the applicant. In doing so, it found, *inter alia*, that the applicable domestic regulation was contained in the Internal Affairs Act and the Police Act, as well as in the Regulation, as they were considered to be *lex specialis* in relation to general labour law. Lastly, the court ordered the applicant to cover the legal costs of the Ministry.

9. The applicant appealed, claiming that the Municipal Court had made errors of fact and law. He also drew the court's attention to the practice of other municipal and district courts, which was completely different, and claimed that the first-instance court had breached the principle of an adversarial hearing by failing to give him an opportunity to access and comment on the Regulation.

10. On 9 November 2006 the Užice District Court (*Okružni sud*, hereinafter "the District Court") endorsed the reasoning of the first-instance court on the merits, but reversed the decision on costs and ordered the parties to cover their own costs. In doing so, the court: (a) found the reasoning of the first-instance decision to be clear, concise and convincing; (b) found the decisions of the other domestic courts which had granted the same kind of payments to a certain number of the applicant's colleagues to be inconclusive and incomprehensible; (c) reiterated that a judgment of the Supreme Court of Serbia of 6 May 2004 (Rev. II. 1676/03) adjudicating on

the same legal issue had found that the Ministry's employees were not entitled to overtime benefits; and (d) rejected as ill-founded the applicant's complaint that the first-instance court had breached the principle of an adversarial hearing, as, according to the court's transcript of the main hearing before the Municipal Court (see paragraph 6 above), both parties had explicitly entrusted the court with the examination of this "evidence" after the main hearing had finished, and thus had waived their rights in this regard. That conclusion was particularly derived from the fact that the Regulation "concerned legal issues and the application of the material law in question in any event".

11. The applicant received that judgment on 4 December 2006.

12. On 31 January 2007 the Municipal Court rejected an application by the applicant to reopen the impugned proceedings.

13. On 5 April 2007 the District Court upheld that decision.

14. In the meantime, on 2 March 2007 the Chief Public Prosecutor (*Republičko javno tužilaštvo*) had informed the applicant that his application for the protection of legality (*inicijativa za podizanje zahteva za zaštitu zakonitosti*) had been rejected.

15. The applicant was not entitled to lodge an appeal on points of law, since the value of his claim was below the threshold of 500,000 Serbian dinars (RSD – approximately 6,100 euros (EUR) at the relevant time). He did not attempt to obtain constitutional redress, as it was unavailable at that time.

2. New set of civil proceedings (facts submitted by the Government after their receipt of notice of the application)

16. The Government did not dispute the above facts submitted by the applicant. However, in their observations of 11 May 2012 and their further factual update and comments of 26 February 2013, they provided additional information on the facts concerning a new set of civil proceedings before the domestic courts. The additional information was as follows.

17. On 8 November 2011 the applicant lodged a fresh application to reopen the above proceedings (see paragraphs 5-15 above), relying on Article 422.11 of the 2004 Civil Procedure Act (see paragraph 36 below) and the fact that the Constitutional Court had found violations of the right to a fair wage and the right to a fair trial in cases identical to his own, and had decided that the relevant decisions should have effect on individuals in identical situations (see, for example, paragraphs 42-45 below).

18. On 2 December 2011 the Požega Court of First Instance (Unit in Arilje) allowed the applicant's fresh application and quashed the judgments of 1 August and 9 November 2006 (see paragraphs 8 and 10 above).

19. On 21 February 2012 the Požega Court of First Instance opened the main hearing in the fresh proceedings, requesting an additional expert report

and noting that it should be finished within fifteen days, as the case was pending before the European Court of Human Rights.

20. Following the fresh proceedings, on 6 April 2012 the Požega Court of First Instance allowed the applicant's claim (*radi isplate zarade/naknade/dodataka na platu*) for payment (*naknada*) for overtime and work done on night shifts and public holidays from 1 January 2003 to 31 December 2005, plus statutory interest and legal costs, for 291 hours in total on account of overtime, 1,597 hours on account of night shifts, and 172 hours for work done during public holidays. The court relied, *inter alia*, on the interpretation provided by the Constitutional Court in decision Už. 1530/08 (see paragraph 42 below) and awarded to the applicant RSD 85,911.61 (approximately EUR 765 at the relevant time) in respect of his main claim, together with statutory interest, and RSD 126,513 for the expenses incurred in the civil proceedings (approximately EUR 1,130 at the relevant time).

21. On 24 January 2013 the Kragujevac Court of Appeal upheld that judgment at second instance, relying on the findings of the Constitutional Court in decision Už. 2007/2010 of 13 June 2012 in another set of proceedings (see paragraph 45 below).

3. Other civil actions

22. It would appear that hundreds of the applicant's colleagues (hereinafter, "the claimants") lodged separate claims with the domestic courts concerning the same legal issue. In the relevant judgments, rendered between 3 November 2005 and 9 February 2010, courts of appeals in Serbia ruled both in favour of and against the claimants, notwithstanding the fact that their claims were based on the same or similar facts and concerned identical legal issues.

B. Relevant domestic law and practice

*1. The Constitution of the Republic of Serbia 1990 (*Ustav Republike Srbije*, published in the Official Gazette of the Republic of Serbia - OG RS - no. 1/90)*

23. Article 22 § 1 of the Constitution provided, *inter alia*, "[everyone] shall be entitled to the equal protection of his or her rights in proceedings before a court of law".

24. That Constitution was repealed in November 2006, which is when the new Constitution, published in OG RS no. 98/06, entered into force.

*2. The Constitution of the Republic of Serbia 2006 (*Ustav Republike Srbije*, published in OG RS no. 98/06)*

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

Article 21 § 2

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

Article 32 § 1

"Everyone shall have the right to a public hearing before an independent and impartial tribunal established by law within a reasonable time ... [in the determination] ... of his [or her] rights and obligations ..."

Article 36 § 1

"Equal protection of rights before courts and other State bodies, entities exercising public powers and bodies of the autonomous province or local self-government shall be guaranteed."

Article 60 § 4

"Everyone shall have the right to respect for his [or her] personal dignity at work, safe and healthy working conditions, the necessary protection at work, limited working hours, daily and weekly intervals for rest, annual holiday pay, a fair wage for work done, and legal protection in the event of termination of employment. No person may waive these rights."

Article 142 § 2 and 3

"2. Courts ... shall adjudicate in accordance with the Constitution, Acts, other general legal acts (*opšti akti*) ..., generally accepted rules of international law and ratified international treaties.

3. A hearing before a court shall be public and may be restricted only in accordance with the Constitution."

*3. The Constitutional Court Act (*Zakon o Ustavnom sudu – *published in OG RS nos. 109/07, 99/2011, 18/13 – decisions nos. 40/15 and 103/15 of the Constitutional Court)*

26. Article 87 provides that where a human or minority right or freedom guaranteed by the Constitution has been violated or denied by an individual act or action in respect of several individuals, and only some of those individuals have lodged a constitutional appeal, the decision of the Constitutional Court also relates to those individuals who have not lodged a constitutional appeal, if they are in the same legal situation.

*4. The Civil Procedure Act 2004 (*Zakon o parničnom postupku*, published in OG RS nos. 125/04 and 111/2009)*

27. The Civil Procedure Act 2004 (hereinafter "the former Civil Procedure Act") was in force from 22 February 2005 until 1 February 2012. However, in accordance with Article 506 § 1 of the new Civil Procedure Act (*Zakon o parničnom postupku*, published in OG RS nos. 72/2011, 49/2013 – decisions nos. 74/2013 and 55/2014 of the Constitutional Court – hereinafter "the new Civil Procedure Act"), provisions of the former Civil

Procedure Act are applicable to all proceedings which commenced before the new Civil Procedure Act entered into force.

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

29. Article 232 § 3 provides that if a document which contains proof of a party's argument is held by a State authority or enterprise or other organisation with delegated public authority, and a party is unable to have that document provided or shown to the court, the court shall obtain such a document following a party's request, or of its own motion.

30. Article 288 provides that in a summons for a preliminary hearing, parties will be instructed to bring to the hearing all documents which they will use as evidence, as well as all objects that should be examined by the court. If it is necessary to acquire files, documents or objects for the preliminary hearing which are in the possession of the court or any other government authority or enterprise or other organisation with public competence, the court will ensure that these objects or documents are acquired in due time.

31. Article 298 § 4 provides that in the course of proceedings, parties may present courts with their legal opinions related to the subject matter of the dispute.

32. Article 305 § 1 provides that when the court's bench deems that the case has been discussed to such an extent that a decision can be made, the court shall announce that the main hearing is closed.

33. Article 305 § 2 provides that the court may decide to close the main hearing where certain documents containing evidence necessary for adjudication still need to be obtained or if the evidence taken by another authorised judge (by delegation) is yet to arrive, if the parties to the proceedings waive their right to discuss such documents or evidence, or if the court deems that a discussion is not necessary.

34. Article 422.9 provides that a case may be reopened if a party to proceedings learns about new facts or finds or acquires an opportunity to use new evidence which may have resulted in a more favourable outcome for him or her in the civil proceedings in question had those facts or evidence been used by the court in the course of the initial proceedings.

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

36. Article 422.11 provides that a case may be reopened for a retrial if the Constitutional Court has in the meantime, following the submission of a constitutional appeal, found a breach of the appellant's human or minority rights and freedoms enshrined by the Constitution.

37. Article 424 § 3 provides that a party to proceedings is not entitled to lodge an application to reopen the proceedings more than five years after the relevant judgment has become final and enforceable, unless reopening is

sought, *inter alia*, on the basis of Articles 422.10 and 422.11 (see paragraphs 35 and 36 above).

*5. The Civil Procedure Act (*Zakon o parničnom postupku*, published in OG RS no. 72/11, 49/13 - US, 74/13 - US, 55/14, 87/18)*

38. The new Civil Procedure Act has been in force since 1 February 2012. It applies to all proceedings which commenced after its entry into force, and to proceedings which were reopened after its entry into force.

39. Article 426.11 provides that a case in which a final decision has been adopted by a court may be reopened if, in the meantime, the European Court of Human Rights has rendered a decision in respect of Serbia concerning the same legal issue or a similar issue which is relevant to a more favourable outcome in the proceedings for the party applying to reopen the case.

40. Article 426.12 provides that a case may be reopened if, in the meantime, the Constitutional Court has found a breach of the appellant's human or minority rights and freedoms enshrined in the Constitution, and this may have resulted in a more favourable outcome for him or her in the civil proceedings in question.

41. Article 428 § 1.4 provides, *inter alia*, that in the situations described in paragraphs 39 and 40 above, an application to reopen proceedings may be lodged within sixty days of the party concerned being able to "use" (*mogla da upotrebi*) the respective decisions of the European Court of Human Rights or the Constitutional Court.

6. The Constitutional Court's case-law

42. In its decision of 21 January 2010 (Už. 1530/08), the Constitutional Court found that the competent courts had breached an appellant's right to a fair wage (see Article 60 § 4 of the Constitution, quoted in paragraph 25 above) by rejecting a claim for compensation for overtime, night shifts and shifts on public holidays on the basis of an incorrect interpretation of the relevant domestic law. It further ordered that its decision be published in Official Gazette due to its importance for the protection of human and minority rights and freedoms enshrined by the Constitution (paragraph 8.3 of the court's decision; the decision was published in OG RS, no. 16/10 of 20 March 2010).

43. On 17 March 2010 the Constitutional Court found that the Valjevo District Court had breached the right to a fair wage of an appellant (Už. 292/08), who had been in the same legal situation as the appellant referred to in paragraph 42 above. The Constitutional Court also quashed the second-instance decision against the appellant and ordered that a new decision on appeal be rendered by the Belgrade Court of Appeal in accordance with the given legal interpretation. It lastly stated that its

judgment should have effect on all individuals who had not lodged a constitutional appeal but were in the same legal situation (paragraph 3 of the operative part of the court's decision), particularly the appellant's co-claimants (paragraph 6.3 of the decision; see also Article 87 of the Constitution, quoted in paragraph 26 above).

44. On 1 April 2010 the Constitutional Court rendered the same decision as the one of 17 March 2010 in another case submitted by a police officer (Už. 109/08).

45. Furthermore, on 13 June 2012 the Constitutional Court found that first-instance courts had breached the right to equal protection before the law (*pravo na jednaku zaštitu prava*; see Article 36 of the Constitution, quoted in paragraph 25 above) and the right to a fair wage for work (*pravo na pravičnu naknadu za rad*) when they had rejected a claim by claimants for supplemented salaries on account of overtime, night shifts and shifts on public holidays (Už. 2007/2010). It also ordered the Novi Sad Court of Appeal to reopen the appellants' appeal proceedings within sixty days of the Constitutional Court's decision being served on it.

46. The Constitutional Court also found that certain courts in Valjevo and Novi Sad had issued divergent judgments in similar cases with the same factual and legal situations (see paragraph 22 above).

47. According to a report of the Belgrade Court of Appeal of 22 February 2012 (Su br. VIII 144/12), the divergent case-law challenged in the present cases has irrevocably been repealed following the Constitutional Court's rulings. The domestic courts continued with the consistent adjudication of similar claims in all reopened cases whose outcome depended only on whether the claimants had already received supplemented salaries or not.

COMPLAINTS

48. The applicant complained under various Articles of the Convention and under Protocol No. 12 about that his rights had been breached on two counts: firstly, on account of the inconsistent case-law of various Serbian courts concerning the payment of police officers; and secondly, owing to the lack of disclosure of and his inability to comment on the Regulation, an inaccessible document enacted by his opponent in the proceedings (namely the Ministry of Internal Affairs), which was relied upon by the domestic courts in their decisions.

THE LAW

49. The applicant complained under various Articles of the Convention and under Protocol No. 12 about the inconsistent domestic case-law and his

inability to comment on the Regulation, which was relied upon by the domestic courts in their decisions.

50. Being the master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114, 124 and 126, 20 March 2018), the Court considers that both complaints fall to be examined under Article 6 § 1 of the Convention, which, 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 ..."

51. The Government contested the applicant's allegations and also disputed the admissibility of his application. In their observations of 11 May 2012, they asserted that the applicant had failed to comply with his procedural obligations under Rule 44C § 1 of the Rules of Court to inform the Court about the civil proceedings being reopened at his request following the Constitutional Court's decisions (see paragraphs 17-19 above), and that his application should be rejected as premature. In their further factual update and comments of 26 February 2013, the Government argued that the applicant had lost his victim status by virtue of the fresh civil proceedings which had been opened and which had meanwhile resulted in an outcome in his favour, paying him his claim in full (see paragraphs 20-21 above).

52. The Court sent both sets of the Government's submissions to the applicant's representative for, *inter alia*, his comments on their pleadings. Having received no response from the applicant about any of the Government's submissions, on 4 April 2013 the Registry made enquiries with the applicant's lawyer about the applicant's interest in pursuing the case, as the periods allowed for the submission of observations had expired and no extension of the time-limit had been requested. His representative confirmed that he had received both of the Court's letters inviting him to reply to the Government's observations. He stated that he did not intend to send any reply to those submissions, and invited the Court to decide the case on the basis of the existing documents in the file, without the applicant's observations or just satisfaction claims.

53. The Court must ascertain whether the new facts brought to its attention – namely the Constitutional Court's decisions and the reopening of the civil proceedings in the applicant's case (see paragraphs 42-45 and 18-21 above) – lead it to conclude that the matter has now been resolved (see, for example, *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 42, 24 October 2002; *El Majjaoui and Stichting Touba Moskee v. the Netherlands* (striking out) [GC], no. 25525/03, § 30, 20 December 2007; and *Harabin v. Slovakia* (dec.), no. 18006/14, 19 June 2018) or that, for any other reason, it is no longer justified to continue the examination of the application (see, for example, *Belošević v. Croatia* (dec.), no. 57242/13,

§ 48, 9 January 2020) and that the application may consequently be struck out of its list of cases in accordance with Article 37 § 1 of the Convention, which provides:

> "The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires"

54. While an indication by the applicant's lawyer that his client wished to pursue his application (see paragraph 52 above) excludes the applicability of sub-paragraph (a) of Article 37 § 1, it does not rule out the possibility of applying sub-paragraphs (b) and (c), the applicant's consent not being a prerequisite for the application of those provisions (see *Pisano*, cited above, § 41).

55. In order to conclude that the matter has been resolved within the meaning of Article 37 § 1 (b) and that there is therefore no longer any objective justification for the applicant to pursue his application, the Court must examine, firstly, whether the circumstances complained of directly by the applicant still obtain and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Pisano*, cited above, § 42).

56. With this in mind, the Court observes that certain claimants in other cases like that of the applicant lodged constitutional appeals about the inconsistent case-law of the Serbian courts, on account of their own claims being rejected by the Appeals Court and identical claims filed by other policemen being accepted by other civil courts on the basis of a different interpretation of the applicable law. It would appear that they did not raise a second complaint concerning equality of arms and adversarial proceedings. The Constitutional Court carried out a detailed review of the relevant circumstances adjudicating on the matter. It not only found violations of the right to equal protection before the law and/or the right to fair wages (see Articles 36 and 60 of the Constitution, quoted in paragraph 25 above) in cases similar to that of the applicant, but also, in doing so, declared what the actual outcome of those claimants' actions should have been, interpreting domestic law extensively, including the unavailable Regulation. The court further ordered that its decisions be published in the Official Gazette of the Republic of Serbia, and also stated that its decision of 17 March 2010 would have effect on other individuals in identical situations (see paragraphs 42-45 above).

57. Prevailing himself of the Constitutional Court's case-law, the applicant requested the reopening of the first set of civil proceedings (see paragraph 17 above). He was subsequently able to have the impugned decisions quashed, his civil proceedings reopened, and fresh final judgments issued in his favour in respect of his main claim, which were fully in accordance with the ruling of the Constitutional Court; he was also able to obtain statutory interest and the costs of the proceedings (see paragraphs 18-21 above). Despite some factual uncertainties as to whether he was able to access a copy of the Regulation, and in the absence of any clarification by the applicant in that regard, the Court considers that the fresh proceedings put an end to the alleged violations of the Convention and redressed so far as possible the effects of the situation of which the applicant complained to the Court (see, *mutatis mutandis*, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII). Also, there is an indication that the divergent case-law challenged in the present case has been repealed as a result of the Constitutional Court's practice (see paragraph 47 above).

58. In the light of the above, the Court does not consider it necessary to examine the Government's objections to the applicant's complaints (see paragraph 51 above), since the matter giving rise to them can now be considered to have been "resolved" in the domestic legal order within the meaning of Article 37 § 1 (b) of the Convention. It is noted that the applicant made no claim in respect of costs and expenses (see paragraph 52 above). Moreover, the Court is satisfied that respect for human rights as defined in the Convention and its Protocols does not require it to continue the examination of the application under Article 37 § 1 *in fine*.

59. Accordingly, the case should be struck out of the list.

For these reasons, the Court, unanimously,

Decides to strike the application out of its list of cases.

Done in English and notified in writing on 19 May 2020.

Andrea Tamietti Registrar	Jon Fridrik Kjølbro President