Centar za građansko obrazovanje
Centre for Civic Education

JUDGEMENTS OF THE EUROPEAN COURT FOR HUMAN RIGHTS RELATED TO MONTENEGRO

Podgorica, March 2015

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INTRODUCTION

Given the fact that Montenegro is in the process of negotiations with the European Union, that reforms of society are needed in order to meet the criteria and obtain status of full member, and that those reforms are not carried out either easy or in smooth manner, we have come up with the idea to combine passed verdicts of the European Court of Human Rights (ECHR) in relation to Montenegro and thus to provide certain contribution to the establishment of rule of law. Negotiations regarding Chapter 23 (Judiciary and Fundamental rights) represent the backbone of Montenegro's progress in meeting numerous standards related to depoliticisation and professionalization of state institutions, as well as the strict implementation of laws harmonised with the acquis communitaire, which has to provide legal security and certainty, or rule of law, as a final result. Full implementation of law greatly depends on the character and range of reform of judiciary system of Montenegro. In that respect, ECHR's verdicts represent source of law and clear guidelines for Montenegrin judiciary system, which is recognised also by constitutional provisions.

Right to individual complaint to ECHR is guaranteed to Montenegrin citizen, foreigner, stateless person, business entity and non-governmental organisation, in accordance with Article 34 of European Convention on Human Rights and Freedoms (ECHR), in case of violation of right prescribed by Convention, as well as to every other legal subject treated by public authority body. Mechanism of protection of rights prescribed by Convention presents direct affirmation of civic principles through the acting of ECHR, protection of citizen as an individual and his/her fundamental right, and thereby protection of public interest and society as a whole.

Since 2009, when ECHR passed first judgement in relation to Montenegro, this court passed another 18 verdicts by the end of 2014, whereby 17 were related to violation of at least one right prescribed by the Convention to which those complaints related, and in one case it did not determine violation of any right under the Convention. Those verdicts determined that the right to fair trial was the most violated one (11 cases, Art. 6 ECHR), then the right to property (two cases, Art. 1 of Protocol 1 to ECHR), right to freedom of expression (two cases, Art. 10 ECHR), right to family and private life (one case, Art. 8 ECHR) and prohibition of torture, inhuman or degrading treatment or punishment (one case, Art. 3 ECHR). Generally, submitters of the complaints against Montenegro, that passed administrative eligibility check, usually referred to violation of Article 6 (right to fair trial), Art. 13 (right to efficient legal remedy), Art. 14 (prohibition of discrimination), Art. 1 of Protocol 1 (right to property), Art. 3 (prohibition of torture, inhuman or degrading treatment or punishment), Art. 5 (right to liberty and security of person), Art. 2 (right to life) and Art. 10 (freedom of expression).

All of this is important for further establishment of court practice before Montenegrin courts, which has to be in line with verdicts of ECHR. Montenegrin judges have to be aligned with their decisions to the positive legal norms and case law of ECHR. This kind of path leads directly to establishment of rule of law in Montenegro, same as avoiding this path would cause legal wandering, uncertainty, inappropriate political influence and unnecessary delay in reforms essential for Montenegrin society.

We hope that this compilation of verdicts of ECHR[1] will stimulate both citizens to search for their rights and trust that justice can be achieved, and the ones responsible in judiciary system, system of public authority, civil society to further improve their knowledge and skills by familiarising and harmonising with case law of ECHR, thereby protecting rights prescribed by Convention in practice much more effectively.

Petar Đukanović

1 Verdicts in this English version were integrally taken from http://www.echr.coe.int/

SECOND SECTION

CASE OF BIJELIĆ v. MONTENEGRO AND SERBIA

(Application no. 11890/05)

JUDGMENT

STRASBOURG

28 April 2009

FINAL

06/11/2009

This judgment may be subject to editorial revision.

In the case of Bijelić v. Montenegro and Serbia**,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
Dragoljub Popović,
Nona Tsotsoria,
Nebojša Vučinić, *judges,*

and Sally Dollé, *Section Registrar*,

Having deliberated in private on 7 April 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 11890/05) against the State Union of Serbia and Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Ms Nadezda Bijelić ("the first applicant"), Ms Svetlana Bijelić ("the second applicant") and Ms Ljiljana Bijelić ("the third applicant"), all Serbian nationals, on 24 March 2005 and 31 January 2006, respectively.

2. The applicants complained, in particular, about the non-enforcement of a final eviction order and their consequent inability to live in the flat at issue.

3. On 28 November 2005, as regards the first applicant, and 7 February 2006, as regards the other two applicants, who were subsequently recognised as such, these complaints were communicated to the Government of the State Union of Serbia and Montenegro.

4. On 7 April 2006 the said Government submitted their written observations and on 22 May 2006 the applicants responded.

5. On 3 June 2006 Montenegro declared its independence.

6. On 27 June 2006 the Court decided to adjourn the consideration of the application pending clarification of the relevant issues (see paragraphs 53-56 below).

7. On 9 August 2007, in response to the Court's question, the applicants stated that they wished to proceed against both Montenegro and Serbia, as two independent States.

8. The applicants were represented by Mr M. Savatović, a lawyer practising in Belgrade. The Montenegrin Government were represented by

their Minister of Justice, Mr M. Radović, and the Serbian Government by their Agent, Mr S. Carić.

9. On 10 April 2008 the President of the Second Section decided to re-communicate the application, in its entirety, to the Governments of Montenegro and Serbia, respectively, informing them that, for reasons of clarity, no prior observations submitted by the parties would be taken into account. It was also decided that the merits of the application would be examined at the same time as its admissibility (Article 29 § 3). The parties replied in writing to each other's observations. In addition, third-party comments were received from the Venice Commission and the Human Rights Action, a non-governmental human rights organisation based in Montenegro, which had both been granted leave to intervene in accordance with Article 36 § 2 of the Convention and Rule 44 § 2 (a) of the Rules of Court. The parties replied to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The first, second and third applicants were born in 1950, 1973 and 1971, respectively, and currently live in Belgrade, Serbia.

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

A. The eviction suit

12. The first applicant, her husband and the other two applicants were holders of a specially protected tenancy concerning a flat in Podgorica (*nosioci odnosno korisnici stanarskog prava*), Montenegro, where they lived.

13. In 1989 the first applicant and her husband divorced and the former was granted custody of the other two applicants.

14. On 26 January 1994 the first applicant obtained a decision from the Court of First Instance (*Osnovni sud u Podgorici*) declaring her the sole holder of the specially protected tenancy on the family's flat. In addition, her former husband ("the respondent") was ordered to vacate the flat within fifteen days from the date when the decision became final.

15. On 27 April 1994 the decision of the Court of First Instance was upheld on appeal by the High Court (*Viši sud u Podgorici*) and thereby became final.

B. The enforcement proceedings

16. Given that the respondent did not comply with the court order to vacate the flat, on 31 May 1994 the first applicant instituted a formal judicial enforcement procedure before the Court of First Instance.

17. The enforcement order was issued on the same date.

18. On 8 July 1994 the bailiffs attempted to evict the respondent together with his new wife and minor children but the eviction was adjourned because he threatened to use force.

19. On 14 July 1994 they tried again, this time assisted by the police, but apparently the planned eviction was adjourned for the same reason.

20. On 15 July 1994 the first applicant bought the flat and became its owner.

21. On 26 October 1994 the bailiffs and the police once again failed to evict the respondent who kept threatening the first applicant in their presence and bore arms on his person. There also appear to have been additional weapons, ammunition and even a bomb in the flat at the time. The police took the respondent to their station but released him shortly afterwards without pressing charges.

22. On 28 November 1994 and 16 March 1995 another two scheduled evictions failed, the latter due to the "respondent's request for the provision of social assistance" in respect of his minor children.

23. On 23 October 1995 the first applicant gifted the flat to the second and third applicants.

24. On 3 June 1996 and 1 August 1996, respectively, another two scheduled evictions failed.

25. On 3 June 1998 the Ministry of Justice informed the first applicant that the Court of First Instance had committed to enforce the eviction order before the end of the month.

26. On 27 October 1998 and 1 November 1999 another two scheduled evictions failed.

27. In the meantime, on 13 August 1999, the Real Estate Directorate (*Direkcija za nekretnine*) issued a formal decision recognising the second and the third applicants as the new owners of the flat in question.

28. In March of 2004 another eviction was attempted but failed. In the presence of police officers, fire fighters, paramedics, bailiffs and the enforcement judge herself, as well as his wife and their children, the respondent threatened to blow up the entire flat. His neighbours also seem to have opposed the eviction, some of them apparently going so far as to physically confront the police.

29. Throughout the years the first applicant complained to numerous State bodies about the non-enforcement of the judgment rendered in her favour, but to no avail.

30. On 9 February 2006 another scheduled enforcement failed because the respondent had threatened to "spill blood" rather than be evicted.

31. On 5 May 2006 and 31 January 2007, respectively, the enforcement judge sent letters to the Ministry of Internal Affairs, seeking assistance.

32. On 15 February 2007 the enforcement judge was told, at a meeting with the police, that the eviction in question was too dangerous to be carried out, that the respondent could blow up the entire building by means of a remote control device, and that the officers themselves were not equipped to deal with a situation of this sort. The police therefore proposed that the applicants be provided with another flat instead of the one in question.

33. On 19 November 2007 the enforcement judge urged the Ministry of Justice to secure the kind of police assistance needed for the respondent's ultimate eviction.

C. Other relevant facts

34. On 26 March 2004 the second applicant, on her own behalf and on behalf of the third applicant, authorised the first applicant to sell the flat in question.

35. On 30 January 2006 the second and third applicants authorised the first applicant, *inter alia*, to represent them in the enforcement proceedings.

36. The applicants maintain that the gift contract of 1995 (see paragraph 23 above) and the said powers of attorney were submitted to the enforcement court. The first applicant was therefore the second and third applicants' legal representative in the enforcement proceedings.

II. RELEVANT DOMESTIC LAW

A. Constitutional Charter of the State Union of Serbia and Montenegro (Ustavna povelja državne zajednice Srbija i Crna Gora; published in the Official Gazette of Serbia and Montenegro - OG SCG - no. 1/03)

37. The relevant provisions of this Charter read as follows:

Article 9 §§ 1 and 3

"The Member States shall regulate, ensure and protect human and minority rights and civic freedoms in their respective territories.

...

[The State Union of] ... Serbia and Montenegro shall monitor the implementation of human and minority rights and civic freedoms and ensure their protection if such protection has not been provided in the Member States."

Article 60 §§ 4 and 5

"Should Montenegro break away from the State Union of Serbia and Montenegro, the international documents pertaining to the Federal Republic of Yugoslavia, particularly the United Nations Security Council Resolution 1244, would concern and apply ... to Serbia as the successor.

The Member State which ... [breaks away] ... shall not inherit the right to international legal personality, and any disputable issues shall be regulated separately between the successor State and the newly independent State."

B. Charter on Human and Minority Rights and Civic Freedoms of the State Union of Serbia and Montenegro (*Povelja o ljudskim i manjinskim pravima i građanskim slobodama državne zajednice Srbija i Crna Gora*; published in OG SCG no. 6/03)

38. The relevant provisions of this Charter read as follows:

Article 2 § 3

"The human and minority rights guaranteed under this Charter shall be directly regulated, secured and protected by the constitutions, laws and policies of the Member States."

C. Opinion issued by the Supreme Court of Montenegro on 26 June 2006 (Pravni stav Vrhovnog suda Republike Crne Gore; SU VI br. 38/2006)

39. The relevant part of this Opinion reads as follows:

"The domestic legal system offers no legal remedy against violations of the right to a hearing within a reasonable time, which is why the courts in the Republic of Montenegro have no jurisdiction to rule in respect of claims seeking non-pecuniary damages caused by a breach of this right. Any person who considers himself a victim of a violation of this right may therefore lodge an application with the European Court of Human Rights, within six months as of the adoption of the final judgment by the domestic courts.

[When asked to rule in respect of the compensation claims referred to above] ... the courts in the Republic of Montenegro must refuse jurisdiction ... and declare ... [them] ... inadmissible (pursuant to Article 19 para. 3 of the Civil Procedure Code)."

D. Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

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

Article 149

"The Constitutional Court shall ...

(3) ... [rule on a] ... constitutional appeal ... [filed in respect of an alleged] ... violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted ..."

41. This Constitution entered into force on 22 October 2007.

E. Constitutional Law on the Implementation of the Constitution of Montenegro (Ustavni zakon za sprovodjenje Ustava Crne Gore; published in OGM nos. 01/07, 9/08 and 4/09)

42. The relevant provisions of this Act read as follows:

Article 5

"Provisions of international treaties on human rights and freedoms, to which Montenegro acceded before 3 June 2006, shall be applied to legal relations which have arisen after their signature."

43. This Act also entered into force on 22 October 2007.

F. Constitutional Court Act of Montenegro (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

44. Articles 48-59 provide additional details as regards the processing of constitutional appeals.

45. This Act entered into force in November 2008.

G. Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in OGM no. 11/07)

46. This Act provides, under certain circumstances, for the possibility to have lengthy proceedings expedited, as well as an opportunity for the claimants to be awarded compensation therefor.

47. Article 44, in particular, provides that this Act shall be applied retroactively to all proceedings as of 3 March 2004, but that the duration of proceedings before that date shall also be taken into account.

48. This Act entered into force on 21 December 2007, but contained no reference to the applications involving procedural delay already lodged with the Court.

H. Police Act (Zakon o policiji; published in OGM no. 28/05)

49. Pursuant to Article 7 § 1 the police are obliged to assist other State bodies in the enforcement of their decisions if there is physical resistance or such resistance may reasonably be expected.

I. Enforcement Procedure Act (Zakon o izvršnom postupku; published in the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - no. 28/00, 73/00 and 71/01)

50. Article 4 § 1 provides that the enforcement court is obliged to proceed urgently.

51. Under Article 47, if needed, the bailiff may request police assistance; should the police fail to provide such assistance, the enforcement court shall inform thereof the Minister of Internal Affairs, the Government, or the competent parliamentary body.

52. Finally, Article 23 § 1 states that enforcement proceedings shall also be carried out at the request of a person not specifically named as the creditor in the final court decision, providing he or she can prove, by means of an "official or another legally certified document", that the entitlement in question has subsequently been transferred to that individual from the original creditor.

III. THE CONVENTION STATUS OF THE FORMER STATE UNION OF SERBIA AND MONTENEGRO, AS WELL AS OF SERBIA AND OF MONTENEGRO, RESPECTIVELY, FOLLOWING THE LATTER'S DECLARATION OF INDEPENDENCE

53. On 3 March 2004 the Convention and Article 1 of Protocol No. 1 entered into force in respect of the State Union of Serbia and Montenegro.

54. On 3 June 2006 the Montenegrin Parliament adopted its Declaration of Independence.

55. On 14 June 2006 the Committee of Ministers of the Council of Europe, *inter alia*, noted that:

> "1. ... the Republic of Serbia will continue the membership of the Council of Europe hitherto exercised by the ... [State Union] ... of Serbia and Montenegro, and the obligations and commitments arising from it;
>
> 2. ... the Republic of Serbia is continuing the membership of [the State Union of] Serbia and Montenegro in the Council of Europe with effect from 3 June 2006; ...
>
> 4. ... the Republic of Serbia was either a signatory or a party to the Council of Europe conventions referred to in the appendix ... to which [the State Union of] Serbia and Montenegro had been a signatory or party [including the European Convention on Human Rights]; ..."

56. Finally, on 7 and 9 May 2007 the Committee of Ministers decided, *inter alia*, that:

> "2. ... a. ... the Republic of Montenegro is to be regarded as a Party to the European Convention on Human Rights and its Protocols No. 1, 4, 6, 7, 12, 13 and 14 thereto with effect from 6 June 2006; ..."

IV. STATUTE OF THE COUNCIL OF EUROPE

57. The relevant provisions of the Statute read as follows:

Article 4

"Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute."

Article 16

"The Committee of Ministers shall, subject to the provisions of Articles 24, 28, 30, 32, 33 and 35, relating to the powers of the Consultative Assembly, decide with binding effect all matters relating to the internal organisation and arrangements of the Council of Europe. For this purpose the Committee of Ministers shall adopt such financial and administrative arrangements as may be necessary."

V. UNITED NATIONS HUMAN RIGHTS COMMITTEE

58. The Human Rights Committee has made clear, in the context of obligations arising from the International Covenant on Civil and Political Rights, that fundamental rights protected by international treaties "belong to the people living in the territory of the State party" concerned. In particular, "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession" (General Comment No. 26: Continuity of obligations: 08/12/97, CCPR/C/21/Rev.1/Add. 8/ Rev.1).

THE LAW

59. The applicants complained about the non-enforcement of the final decision issued by the Court of First Instance on 26 January 1994, as well as their consequent inability to live in the flat at issue in that litigation.

60. The Court communicated these complaints under Articles 6 § 1 and 8 of the Convention, as well as under Article 1 of Protocol No. 1, which, in their relevant parts, read as follows:

Article 6 § 1

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

Article 8

"Everyone has the right to respect for his ... home ...

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

I. THE COMPATIBILITY OF THE APPLICATION WITH THE CONVENTION

61. As noted above, following the Montenegrin declaration of independence, the applicants stated that they wished to proceed against both Montenegro and Serbia, as two independent States. The President of the Second Section, therefore, decided to re-communicate the application to both Governments. One of the questions put to them read as follows: "Which State, Montenegro or Serbia, could be held responsible for the impugned inaction of the authorities between 3 March 2004 and 5 June 2006?" (see paragraphs 53-56 above).

A. The parties' submissions

1. The Serbian Government

62. The Serbian Government firstly noted that each constituent republic of the State Union of Serbia and Montenegro had the obligation to protect human rights in its own territory (see paragraph 37, Article 9 above). Secondly, the impugned enforcement proceedings were themselves solely conducted by the competent Montenegrin authorities. Thirdly, although the sole successor of the State Union of Serbia and Montenegro (see paragraph 37, Article 60 above), Serbia cannot be deemed responsible for any violations of the Convention which might have occurred in Montenegro prior to its declaration of independence. Lastly, Serbia could not, within the meaning of Article 46 of the Convention, realistically be expected to implement any individual and/or general measures in the territory of another

State. In view of the above, the Serbian Government concluded that the application as regards Serbia was incompatible *ratione personae* and maintained that, to hold otherwise, would be contrary to the universal principles of international law.

2. The Montenegrin Government

63. The Montenegrin Government "support[ed] the remarks presented to the Court" by the Serbian Government "relating to the issue of ... [succession as regards] ... the enforcement of the judgment ... [in question] ...". In addition, the Government referred to Article 5 of the Constitutional Act on the Implementation of the Constitution of the Republic of Montenegro (see paragraph 42 above).

3. The applicants

64. The applicants reaffirmed that both Montenegro and Serbia should be held responsible for the non-enforcement of the judgement in question. The former due to the fact that the enforcement proceedings had taken place before Montenegrin authorities, and the latter because Serbia was the sole successor of the State Union of Serbia and Montenegro.

4. The third-party interveners

(a) European Commission for Democracy through Law ("the Venice Commission")

65. In its written opinion (adopted by the 76th Plenary Session held on 17-18 October 2008, CDL-AD (2008) 021), the Venice Commission maintained that it would both further the protection of European human rights and be in accordance with the Court's earlier practice, if the Court were now to hold Montenegro responsible for the breaches of the applicants' Convention rights which might have been caused by its authorities between 3 March 2004 and 5 June 2006. In the opinion of the Venice Commission, there are no difficulties of international or constitutional law which should lead the Court to a different conclusion. Accordingly, the Venice Commission did not consider it necessary for the Committee of Ministers of the Council of Europe to be requested to amend its decision of May 2007.

(b) The Human Rights Action

66. In their written submissions, the Human Rights Action argued that Montenegro should be deemed responsible for any and all violations of the Convention and/or its Protocols committed by its authorities as of 3 March 2004, which is when these instruments had entered into force in respect of the State Union of Serbia and Montenegro. In support of this argument they

referred to practical considerations, the domestic and international context surrounding the Montenegrin declaration of independence, as well as the Court's own established practice regarding similar issues following the separation of the Czech and Slovak republics.

B. The Court's assessment

67. The Court notes at the outset that the Committee of Ministers has the power under Articles 4 and 16 of the Statute of the Council of Europe to invite a State to join the organisation as well as to decide "all matters relating to ... [the Council's] ... internal organisation and arrangements" (see paragraph 57 above). The Court, however, notwithstanding Article 54 of the Convention, has the sole competence under Article 32 thereof to determine all issues concerning "the interpretation and application of the Convention", including those involving its temporal jurisdiction and/or the compatibility of the applicants' complaints *ratione personae*.

68. With this in mind and in addition to the events detailed at paragraphs 53-56 above, the Court observes, as regards the present case, that:

(i) the only reasonable interpretation of Article 5 of the Constitutional Act on the Implementation of the Constitution of the Republic of Montenegro (see paragraph 42 above), the wording of Article 44 of the Montenegrin Right to a Trial within a Reasonable Time Act (see paragraphs 46-48 above), and indeed the Montenegrin Government's own observations, would all suggest that Montenegro should be considered bound by the Convention, as well as the Protocols thereto, as of 3 March 2004, that being the date when these instruments had entered into force in respect of the State Union of Serbia and Montenegro;

(ii) the Committee of Ministers had itself accepted, apparently because of the earlier ratification of the Convention by the State Union of Serbia and Montenegro, that it was not necessary for Montenegro to deposit its own formal ratification of the Convention;

(iii) although the circumstances of the creation of the Czech and Slovak Republics as separate States were clearly not identical to the present case, the Court's response to this situation is relevant: namely, notwithstanding the fact that the Czech and Slovak Federal Republic had been a party to the Convention since 18 March 1992 and that on 30 June 1993 the Committee of Ministers had admitted the two new States to the Council of Europe and had decided that they would be regarded as having succeeded to the Convention retroactively with effect from their independence on 1 January 1993, the Court's practice has been to regard the operative date in cases of continuing violations which arose before the creation of the two separate States as being 18 March 1992 rather than 1 January 1993 (see, for example, *Konečný v. the Czech Republic*, nos. 47269/99, 64656/01 and 65002/01, § 62, 26 October 2004).

69. In view of the above, given the practical requirements of Article 46 of the Convention, as well as the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession (see, *mutatis mutandis*, paragraph 58 above), the Court considers that both the Convention and Protocol No. 1 should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004, between 3 March 2004 and 5 June 2006 as well as thereafter (see paragraphs 53-56 above).

70. Lastly, given the fact that the impugned proceedings have been solely within the competence of the Montenegrin authorities, the Court, without prejudging the merits of the case, finds the applicants' complaints in respect of Montenegro compatible *ratione personae* with the provisions of the Convention and Protocol No. 1 thereto. For the same reason, however, their complaints in respect of Serbia are incompatible *ratione personae*, within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

A. Admissibility

1. As regards the first applicant

71. In the Court's view, although the Montenegrin Government have not raised an objection as to the Court's competence *ratione personae* in this respect, the first applicant's victim status nevertheless calls for its consideration (see, *mutatis mutandis*, *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-...). The Court, therefore, observes that on 23 October 1995 the first applicant had transferred ownership of the flat in question to the second and third applicants (see paragraph 23 above) and concludes that the first applicant's complaint in respect of Montenegro is incompatible *ratione personae* with the provisions of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Kuljanin v. Croatia* (dec.), no. 77627/01, 3 June 2004).

2. As regards the second and third applicants

(a) Compatibility *ratione personae*

72. The Court further considers that it must also, of its own motion, examine the compatibility of the second and third applicants' complaints *ratione personae* and notes that the said two applicants have been the owners of the flat at issue since 23 October 1995, which is why, without prejudging the merits of the case, their complaints in respect of Montenegro are compatible *ratione personae* with Article 1 of Protocol No. 1 (see,

mutatis mutandis, *Marčić and Others v. Serbia*, no. 17556/05, § 49, 30 October 2007).

(b) Exhaustion of domestic remedies

73. The Montenegrin Government submitted that the second and third applicants had not exhausted all effective domestic remedies. In particular, they had failed to lodge an appeal with the Constitutional Court (see paragraph 40 above), and make use of the newly adopted Right to a Trial within a Reasonable Time Act (see paragraphs 46-48 above).

74. The applicants contested the effectiveness of these remedies, particularly in view of the fact that they were introduced long after their application had been lodged.

75. The Court reiterates that, according to Article 35 § 1 of the Convention, it may only deal with a complaint after all domestic remedies have been exhausted and recalls that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11–12, § 27, and *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38).

76. In the present case, the impugned enforcement proceedings had already been pending domestically for more than thirteen years before the legislation referred to at paragraph 73 above had entered into force. Furthermore, these proceedings are currently still ongoing and the Montenegrin Government have failed to provide any case-law to the effect that the remedies in question can be deemed effective in a case such as the one here at issue. The Court considers, therefore, that it would be disproportionate to now require the second and third applicants to try those avenues of redress (see, *mutatis mutandis*, *Parizov v. "the former Yugoslav Republic of Macedonia*", no. 14258/03, § 46, 7 February 2008).

77. It follows that the Montenegrin Government's objection must be dismissed.

(c) Conclusion

78. The Court notes that the first and second applicants' complaints in respect of Montenegro are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits as regards the second and third applicants

79. The applicants reaffirmed their complaints whilst the Montenegrin Government maintained that efforts were being made to have the judgment in question enforced.

80. Article 1 of Protocol No. 1 guarantees, *inter alia*, the right of property, which includes the right to enjoy one's property peacefully, as well as the right to dispose of it (see, among many other authorities, *Marckx v. Belgium*, 13 June 1979, § 63, Series A no. 31).

81. By virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention.

82. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, § 143, ECHR 2004-V), particularly where there is a direct link between the measures which an applicant may legitimately expect the authorities to undertake and the effective enjoyment of his or her possessions (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 134, ECHR 2004-XII).

83. It is thus the State's responsibility to make use of all available legal means at its disposal in order to enforce a final court decision, notwithstanding the fact that it has been issued against a private party, as well as to make sure that all relevant domestic procedures are duly complied with (see, *mutatis mutandis*, *Marčić and Others v. Serbia*, cited above, § 56).

84. Turning to the present case, the Court firstly notes that the inability of the second and third applicants to have the respondent evicted from the flat in question amounts to an interference with their property rights (see paragraph 80 above). Secondly, the judgment at issue had become final by 27 April 1994 (see paragraph 15 above), its enforcement had been sanctioned on 31 May 1994 (see paragraphs 16 and 17 above), and Protocol No. 1 had entered into force in respect of Montenegro on 3 March 2004 (see paragraph 69 above), meaning that the impugned non-enforcement has been within the Court's competence *ratione temporis* for a period of almost five

years, another ten years having already elapsed before that date. Lastly, but most importantly, the police themselves conceded that they were unable to fulfil their duties under the law (see paragraphs 32, 49 and 51 above), which is what ultimately caused the delay in question.

85. In view of the foregoing, the Court finds that the Montenegrin authorities have failed to fulfil their positive obligation, within the meaning of Article 1 of Protocol No. 1, to enforce the judgment of 31 May 1994. There has, accordingly, been a violation of the said provision.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. As regards the first applicant

86. The Court notes that, as of October 1995, the first applicant was neither the holder of the protected tenancy nor the owner of the flat in question (see paragraph 23 above). Further, on 30 January 2006 the second and third applicants authorised the first applicant to represent them in the impugned proceedings (see paragraph 35 above). Finally, this never became an issue before the enforcement court itself, which is why the second and third applicants may be deemed to have implicitly assumed the role of creditors in the first applicant's stead (see paragraph 52 above).

87. It follows that the first applicant's complaint in respect of Montenegro is incompatible *ratione personae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 and 4 (see *Kuljanin v. Croatia* (dec.), cited above).

B. As regards the second and third applicants

88. Having regard to its findings in relation to Article 1 Protocol No. 1 and the fact that it was the non-enforcement which was at the heart of the applicants complaints, the Court considers that, whilst this complaint is admissible, it is not necessary to examine separately the merits of whether, in this case, there has also been a violation of Article 6 § 1 (see, *mutatis mutandis*, *Davidescu v. Romania*, no. 2252/02, § 57, 16 November 2006).

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

89. The Court refers to its case-law concerning the notion of a home. In the case of *Gillow v. the United Kingdom* (judgment of 24 November 1986, Series A no. 109), the Court held that the applicants, who had owned but not lived in their house for nineteen years, could call it their "home" within the meaning of Article 8 of the Convention. This was because, despite the length of their absence, they had always intended to return and had retained

sufficient continuing links with the property. Moreover, in the case of *Menteş and Others v. Turkey* (judgment of 28 November 1997, § 73, *Reports of Judgments and Decisions* 1997-VIII), it was clarified that there was also no need for the applicant to be the owner of the flat or even for his or her presence there to be permanent in order for it to be considered "home", provided that the individual had lived there "for significant periods on an annual basis" and had a "strong family connection" to the premises.

90. However, in the present case, the Court observes that on 26 March 2004 the second applicant, on her own behalf and on behalf of the third applicant, authorised the first applicant to sell the flat in question (see paragraph 34 above). It follows that from then on, at the latest, the applicants, who now all appear to be residents of Belgrade, clearly had no intention of returning to live in the flat. They thus cut the family's connection to the property. Accordingly, the Court finds that by the time the applicants lodged their case with the Court, that property could no longer be considered to have been their "home" for the purposes of Article 8. The Court therefore finds that the applicants' complaints in respect of Montenegro must be rejected as being incompatible *ratione materiae* with the Convention, pursuant to Article 35 §§ 3 and 4.

V. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

91. Articles 41 and 46 read as follows:

Article 41

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Article 46

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

A. Damage

92. The applicants claimed 97,200 euros (EUR) in respect of pecuniary and non-pecuniary damage.

93. The Montenegrin Government did not comment in this respect.

94. The Court considers that the second and third applicants in the present case have certainly suffered some non-pecuniary damage, in respect of which it awards them, jointly, the sum of EUR 4,500. In addition, the

Montenegrin Government must secure, by appropriate means, the speedy enforcement of the final judgment adopted by the Court of First Instance on 26 January 1994 (see, *mutatis mutandis*, *Ilić v. Serbia*, no. 30132/04, § 112, 9 October 2007).

95. Should the Montenegrin Government fail to enforce the said domestic decision, within three months from the date on which the present judgment becomes final, that Government should pay the second and third applicants, jointly, the global sum of EUR 92,000, instead of the lesser award of EUR 4,500 made in the preceding paragraph (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, Series A no. 330-B). The Court has so decided on an equitable basis, in view of the very specific circumstances of the present case, and the fact that the Montenegrin Government have themselves not commented on the applicants' claim for damages (see, *mutatis mutandis*, *Jasar v. the former Yugoslav Republic of Macedonia*, no. 69908/01, § 71, 15 February 2007).

B. Costs and expenses

96. The applicants also claimed EUR 4,500 for the costs and expenses incurred before the Court.

97. The Montenegrin Government did not comment in this respect.

98. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were also reasonable as to their quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

99. In the present case, regard being had to the documents in its possession and the above criteria, as well as the fact that the applicants have already been granted EUR 850 under the Council of Europe's legal aid scheme, the Court considers it reasonable to award the second and third applicant, jointly, the additional sum of EUR 700 for the proceedings before it.

C. Default interest

100. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously admissible the second and third applicants' complaints in respect of Montenegro, considered under Article 1 of Protocol No. 1 and Article 6 § 1 of the Convention;

2. *Declares* unanimously the remainder of the application inadmissible;

3. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 by Montenegro;

4. *Holds* unanimously that it is not necessary to examine separately the complaint under Article 6 § 1 of the Convention;

5. *Holds* by 6 votes to 1

(a) that the Government of Montenegro shall ensure, by appropriate means, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the enforcement of the final judgment adopted by the Court of First Instance on 26 January 1994;
(b) that the Government of Montenegro is to pay the second and third applicants, jointly, within the same three month period, the following sums:
(i) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, for the non-pecuniary damage suffered, and
(ii) EUR 700 (seven hundred euros), plus any tax that may be chargeable to the said two applicants, for costs and expenses;
(c) that, failing the enforcement ordered under (a) above, the Government of Montenegro is to pay, within the same three month period, the second and third applicants, jointly, the global sum of EUR 92,000 (ninety-two thousand euros), plus any tax that may be chargeable (instead of the award of 4,500 under (b)(i) above) ;
(d) that from the expiry of the said time-limit until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé	Françoise Tulkens
Registrar	President

FOURTH SECTION

CASE OF GARZIČIĆ v. MONTENEGRO

(Application no. 17931/07)

JUDGMENT

STRASBOURG

21 September 2010

FINAL

21/12/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Garzičić v. Montenegro**,**

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

Nicolas Bratza, *President,*
Giovanni Bonello,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 31 August 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 17931/07) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Ms Desanka Garzičić ("the applicant"), on 9 April 2007.

2. The applicant was represented by Mr D. Marković, a lawyer practising in Podgorica. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicant alleged, in particular, that her right of access to a court had been violated by the Supreme Court, which had refused to consider her appeal on points of law on its merits.

4. On 9 September 2009 the President of the Fourth Section decided to give notice of the application to the Government. Under Article 29 § 3 of the Convention, it was also decided that the merits of the application would be examined together with its admissibility and that priority would be given to the application in accordance with Rule 41 of the Rules of the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1924 and lives in Podgorica. She is also a paraplegic.

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

7. On 4 October 2000 the applicant lodged a property-related claim with the Court of First Instance (*Osnovni sud*) in Podgorica, seeking declaratory relief. In so doing, she failed to specify the exact value of the claim in question (*vrijednost spora*). However, on 2 November 2000 she paid court fees of approximately 10 euros (EUR), which corresponded to the value of claims ranging between EUR 50 and EUR 150.

8. On 29 April 2004, at the end of the main hearing (*glavna rasprava*) and after additional evidence had been examined, the applicant specified that the value of the claim was EUR 37,000.

9. On the same day the Court of First Instance ruled in favour of the applicant. The judgment stated, *inter alia*, that the value of the claim was EUR 37,000 and noted that "[an expert witness had assessed that] on 10 October 1984 ... the total value of ... the property ... [at issue had been] ... EUR 72,877.79".

10. On 22 October 2004 the High Court (*Viši sud*) in Podgorica quashed that judgment and ordered a re-trial.

11. On 15 June 2005 the applicant, after the main hearing had ended and on the court's request, specified that the value of the claim was EUR 9,900. On the same day the respondent's representative submitted his claim for costs based on the value of the claim being EUR 11,637.

12. On 19 July 2005 the Court of First Instance ruled against the applicant. The judgment specified, *inter alia*, that the value of the claim was EUR 11,500 and once again referred to the said expert's findings.

13. On 7 April 2006 the High Court upheld that judgment on appeal.

14. On 10 October 2006 the Supreme Court (*Vrhovni sud*) in Podgorica rejected the applicant's appeal on points of law (*revizija*) as inadmissible, stating that the court fees (*sudska taksa*) paid by the applicant had indirectly set the value of the claim significantly below the statutory threshold (see Article 382 § 3 at paragraph 19 below).

II. RELEVANT DOMESTIC LAW

A. Civil Proceedings Act 1977 (Zakon o parničnom postupku; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia – OG SFRY – nos. 4/77, 36/77, 6/80, 36/80, 43/82, 72/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90 and 35/91, as well as in the Official Gazette of the Federal Republic of Yugoslavia – OG FRY – nos. 27/92, 31/93, 24/94, 12/98 and 15/98)

15. Sections 35-40 provide general rules as regards the means of establishing the value of a civil claim.

16. Section 40 § 2 provides that in cases not relating to pecuniary requests the relevant value of the claim shall be the one indicated by the plaintiff in his/her claim.

17. Section 40 § 3 further provides that when the value specified by the plaintiff appears to be obviously incorrect, the competent first-instance court shall "at the latest at the preliminary hearing (*pripremno ročište*) or, if there was no preliminary hearing, at the main hearing before the examination of merits, speedily and in an adequate manner, check the accuracy" of the specified value.

18. Section 186 § 2 provides that when the right to an appeal on points of law depends on the value of the claim "the plaintiff has a duty to indicate [the value of the claim] in the statement of claim".

19. Section 382 § 3 provides that an appeal on points of law shall not be admissible in non-pecuniary matters where the value of the claim does not exceed approximately EUR 1,470.

20. Under sections 383 and 394-397, *inter alia*, the Supreme Court may, should it accept an appeal on points of law lodged by one of the parties concerned, overturn the impugned judgment or quash it and order a re-trial before the lower courts.

B. Family Law Act 1989 (Porodični zakon, published in the Official Gazette of the Socialist Republic of Montenegro – OG SRM – no. 7/89)

21. Sections 8 and 154 of this Act stipulate that legal guardianship shall be provided only to persons not capable of taking care of their "person, rights and interests".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicant complained under Article 6 § 1 of the Convention that her right of access to court had been violated by the Supreme Court's refusal to consider her appeal on points of law on its merits.

23. Article 6 reads as follows:

> "In the determination of his/her civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

24. The Government submitted that the applicant's complaint was incompatible *ratione temporis* on the grounds that the final judgment in the domestic proceedings had been rendered by the High Court on 19 July 2005 and the Committee of Ministers of the Council of Europe had decided that Montenegro was a party to the Convention as of 6 June 2006.

25. The applicant maintained that her complaints were admissible.

26. The Court notes that it has already held that the Convention should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004 (see *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 69, 28 April 2009). It sees no reason to depart from this finding in the present case. The Government's *ratione temporis* objection must, therefore, be dismissed.

27. The Court also considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and finds no other ground to declare it inadmissible. It must therefore be declared admissible.

B. Merits

28. The Government submitted that section 186 § 2 of the Civil Proceedings Act 1977 provided for the applicant's duty to indicate the value of the claim (see paragraph 18 above). The Government further maintained that the domestic courts only had to check the accuracy of the indicated value, and did not have to establish the value if the applicant did not give an indication thereof. In the Government's opinion, both the courts and the parties were precluded from discussing the value of the claim if they had not done so by the end of the first main hearing. In addition, the Government submitted that: (a) the value of 37,000 EUR was established arbitrarily, (b) the sum of EUR 9,900 was specified by the applicant in the re-trial only

after the main hearing, which is not allowed by the Civil Proceedings Act 1977, and (c) the sum of EUR 11,637 was specified also arbitrarily by the defendant's representative when seeking his expenses and not by the applicant. That being so, the Government concluded that the Supreme Court could not have been bound by any of the above indicated values and therefore there was no violation of the applicant's right.

29. The applicant reaffirmed her complaint.

30. In its *Golder v. the United Kingdom* judgment of 21 February 1975, the Court held that Article 6 § 1 "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal" (§ 36, Series A no. 18). The "right to a court", of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his or her (civil) rights is unlawful and complains that no possibility was afforded to submit that claim to a court meeting the requirements of Article 6 § 1 (see, *inter alia*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X).

31. Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation. Where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations" (see, among many authorities, *Levages Prestations Services v. France*, 23 October 1996, § 44, *Reports of Judgments and Decisions* 1996-V).

32. The "right to a court", however, is not absolute; it is subject to limitations permitted by implication, in particular where the "conditions of admissibility of an appeal are concerned" since by its very nature it calls for regulation by a State, which enjoys a certain margin of appreciation in this regard (see *García Manibardo v. Spain*, no. 38695/97, § 36, ECHR 2000-II, and *Mortier v. France*, no. 42195/98, § 33, 31 July 2001). Nonetheless, these limitations must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Moreover, they will only be compatible with Article 6 § 1 if they are in accordance with the relevant domestic legislation, pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued (see *Guérin v. France*, 29 July 1998, § 37, *Reports of Judgments and Decisions* 1998-V).

33. Turning to the present case, the Court notes that the Civil Proceedings Act requires the plaintiff to indicate the value of the claim in dispute. When this value is set at an unrealistic level, either too low or too high, the first-instance court shall check the accuracy thereof (see paragraph 17 above). However, the Court considers that, even though the domestic courts have no obligation in that respect, there is no provision in the Civil Proceedings Act that would prohibit the courts from establishing the value

when the plaintiff has failed to indicate it in the statement of claim. In the present case the domestic courts established the value of the claim in both the first and second remittal, taking into account the expert's findings as well as the value specified by the parties themselves. Although these values differed, the Court does not consider it necessary to determine which of the two was more accurate as both of them allowed for the appeal on points of law in accordance with Article 382 § 3 of the Civil Proceedings Act 1977 (see paragraph 19 above). In any event, the applicant should not suffer any detriment on account of the courts' failure to order the applicant to pay the difference between the court fees that had been paid and the fees that corresponded to the established values of the claim. Therefore, the Court finds that there has been a breach of the applicant's right of access to the Supreme Court.

34. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

35. The applicant also complained about: (a) the domestic courts' assessment of evidence, (b) the outcome of the proceedings before the Court of First Instance and the High Court under Article 1 of Protocol No. 1, and (c) being discriminated against by the domestic courts on account of her disability and the domestic courts' failure to involve the Social Care Centre in the proceedings.

36. The Court points out that it is not within its province to substitute its own assessment of the facts for that of the domestic courts and that, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in issue, considered as a whole, were fair as required by Article 6 § 1 (see, amongst many authorities, *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247 B; *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235 B). In the present case, there is nothing to suggest that the courts' approach was in any way arbitrary or unfair. Therefore, this complaint must be declared inadmissible as manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

37. The Court observes that Article 1 of Protocol No. 1 does not concern the regulation of civil law rights between parties under private law. In the instant case, therefore, the courts' decisions against the applicant, according to the rules of private law, cannot be seen as an unjustified State interference with the property rights of the losing party. Indeed, it is the very function of the courts to determine such disputes, the regulation of which falls within the province of domestic law and outside the scope of the Convention (see, *mutatis mutandis*, *Kuchar and Stis v. Czech Republic* (dec.), no. 37527/97, 21 October 1998; see also *S.Ö., A.K., Ar.K. and*

Y.S.P.E.H.V. v. Turkey (dec.) 31138/96, 14 September 1999; *H. v. the United Kingdom*, no. 10000/82, Commission decision of. 4 July 1983, DR 33 p.247, at p. 257; and *Bramelind and Malmström v. Sweden*, no.8588/79, Commission decision of 12 October 1982, DR 29, p.64, at p. 82). Therefore, this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4 thereof.

38. Lastly, the Court notes that there is no evidence in the case file that there has been any discrimination against the applicant on any grounds. As for the involvement of the Social Care Centre, the relevant sections of the Family Law Act 1989, which was in force at the time when the proceedings were conducted, provided for legal guardianship only in respect of persons not capable of managing their own rights and interests (see paragraph 21 above). However, this was not the case with the applicant, whose disability was physical not mental, and who was, in addition, represented by a lawyer throughout the proceedings. Hence, this complaint must also be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

40. The applicant requested EUR 150,000 in respect of pecuniary damage.

41. The Government contested this claim.

42. The Court is of the view that it has not been duly substantiated that the applicant sustained pecuniary damage as a result of the violation of her right of access to the Supreme Court. Even if not the subject of a specific claim, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be sufficiently compensated by the sole finding of a violation. Making its assessment on an equitable basis and having regard to the particular circumstances of the case, the Court awards the applicant EUR 1,500 under this head (see, *mutatis mutandis*, *Staroszczyk v. Poland*, no. 59519/00, §§ 141-143, 22 March 2007).

B. Costs and expenses

43. The applicant claimed EUR 10,000 for "costs of proceedings".

44. The Government contested that claim.

45. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were also reasonable as to their quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

46. In the present case, regard being had to the fact that the applicant failed to submit evidence, such as itemised bills and invoices, that those expenses had been actually incurred, the Court, accordingly, rejects that claim.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the applicant's access to the Supreme Court admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of the applicant's right of access to the Supreme Court under Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President

FOURTH SECTION

CASE OF MIJUŠKOVIĆ v. MONTENEGRO

(Application no. 49337/07)

JUDGMENT

STRASBOURG

21 September 2010

FINAL

21/12/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mijušković v. Montenegro,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Mihai Poalelungi,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 31 August 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 49337/07) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Ms Svetlana Mijušković ("the applicant"), on 2 November 2007.

2. The applicant was represented by Mr D. Kovačević, a lawyer practising in Nikšić. The Montenegrin Government ("the Government") were represented by their Agent, Mr. Z. Pažin.

3. The applicant primarily complained, under Article 8 of the Convention, of the belated enforcement of a final custody judgment, as well as the respondent State's prior failure to enforce an interim custody order.

4. On 2 September 2009 the President of the Fourth Section decided to give notice of the application to the Government. Under Article 29 § 3 of the Convention, it was also decided to examine the merits of the application at the same time as its admissibility and to give priority to the application in accordance with Rule 41 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Introduction

5. The applicant was born in 1971 and currently lives in Budva.

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

7. On 26 April 1998 the applicant and V.K. married and on 12 October 1998 their twins, A and B, were born.

8. On 5 June 2003, due to marital problems, the applicant moved back to her parents' house in Nikšić, together with the children.

9. On 22 July 2004 the Social Care Centre in Nikšić ("the NSCC") issued a decision regulating V.K.'s access to A and B.

10. It would appear that during this period V.K. had been seeing the children in accordance with this decision.

11. On 5 January 2005 V.K. took the children for the winter holiday and subsequently refused to return them to the applicant.

12. On 8 March 2005 the NSCC ordered that the children be returned to the applicant and entrusted the enforcement of that order to the Social Care Centre in Budva ("the BSCC").

13. On 14 March 2005 the BSCC, with police assistance, attempted to enforce the order in question, but it appears that V.K.'s parents physically prevented that from happening.

14. Between April and June 2005, at the applicant's requests, the NSCC issued three additional decisions, urging V.K. to surrender the children. They provided that should V.K. fail to comply with the applicant's custody rights he would be fined, and that, ultimately, forcible enforcement might be called for.

15. On one occasion thereafter V.K. brought the children to the BSCC but refused to surrender them to the applicant, claiming that the children did not want to live with her.

16. There is no evidence in the case file indicating that V.K. had been fined or, indeed, that a forcible transfer of custody had been attempted again.

B. The first set of civil proceedings

17. On 23 June 2003 V.K. lodged a claim with the Court of First Instance in Kotor, seeking the dissolution of his marriage to the applicant as well as custody of the children.

18. On 1 September 2003 the applicant lodged a counter-claim to the same effect.

19. On 9 March 2004 the presiding judge joined the two claims into a single set of proceedings.

20. On 5 January 2006 the Court of First Instance: (i) dissolved the marriage, (ii) granted custody of the children to the applicant, and (iii) ordered V.K. to pay monthly child maintenance.

21. On 5 May 2006 the High Court upheld that judgment and it thereby became final.

22. On 12 September 2006 the Supreme Court dismissed V.K.'s appeal on points of law (*revizija*).

C. The enforcement proceedings

23. On 12 June 2006 the applicant submitted a request for the enforcement of the final judgment.

24. On 22 June 2006 the Court of First Instance in Kotor issued an enforcement order whereby V.K. was given three days to surrender the children to the applicant. He was also warned that if he failed to comply he could be fined or even subjected to a forcible transfer of custody.

25. On 21 July 2006 the High Court upheld this order.

26. On 26 February 2009 the applicant submitted a request for a review (*kontrolni zahtjev*; see paragraph 46 below) with the Court of First Instance, seeking execution of the enforcement order.

27. On 5 March 2009 the execution judge (*izvršni sudija*) informed the President of the court that as it was "impossible to reach an agreement [...] by which the children would be surrendered" to the applicant, the bailiff was ordered to enforce "without delay" the fine of EUR 500 in respect of V.K. He finished his report by stating "that it [was] impossible to say when and how the enforcement proceedings at issue shall be concluded".

28. On 7 March 2009 the bailiff made an attempt to enforce the fine, but it was to no avail due to the verbal and physical resistance of V.K.'s parents. Subsequently, the bailiff requested the President of the court to release her of the duty to enforce the fine.

29. On 9 March 2009 V.K. was informed that the forcible payment of the fine would be executed on 13 March 2009. On 12 March 2009 V.K.'s father paid the fine imposed.

30. On 17 March 2009 the Court of First Instance issued another enforcement order requesting that the children be surrendered to the applicant within three days, failing which V.K. would be fined EUR 1,000.

31. On 10 September 2009, after the application had already been communicated to the respondent Government, the Court of First Instance issued a decision specifying that the order would be enforced on 8 October 2009, if need be, by means of a forcible transfer of custody.

32. On 8 October 2009 V.K. refused to surrender the children, who, apparently, also resisted the transfer. The BSCC representative proposed that a forcible transfer of custody be postponed and the judge accepted to do so.

33. On 23 October 2009, when the enforcement was to be attempted again, V.K. proposed that it be adjourned until the court had decided on his request for custody (see paragraphs 36-38 below), or that an interim period be allowed, with the participation of a family psychologist, to help the children to adapt to the new situation. The BSCC representative also suggested that a transitional period be allowed before the enforcement. The applicant insisted on the enforcement. The house was searched, but the children were not found. The applicant was invited to submit a proposal as to how the judgment could be further enforced as well as to inform the court on her possibility to provide the necessary labour force for the enforcement ("*eventualnog obezbjeđenja potrebne radne snage*"). At the same time, the police were invited to establish the whereabouts of the children.

34. On 30 November 2009, during another attempt at enforcement, the children refused to go with the applicant, claiming that she had not treated them properly. After V.K.'s parents, who had resisted the enforcement, were removed, the judgment was enforced and the children were finally surrendered to the applicant.

35. The applicant maintained that as of 5 January 2005 until 30 November 2009 she had only had sporadic and brief contact with her children, mostly in-between school classes and, even then, in the presence of V.K. or his father.

D. The second set of civil proceedings

36. On an unspecified date V.K. instituted a new civil complaint, seeking sole custody of the children.

37. On 1 June 2009 the Court of First Instance ruled in his favour and ordered the applicant to pay monthly child maintenance. In so deciding, the court took account of an informal conversation that an expert psychiatrist had had with the children. The psychiatrist's conclusion was that A and B wanted to live with their father, that it would be stressful for them to be taken away from their present home, but that their mother needed to be allowed regular access. When specifically asked whether the children had

been negatively directed towards their mother by their father, the expert responded by saying that "it [was] obvious that the children had been negatively directed towards their mother by an adult person". The court noted that the children had been living with their father, contrary to the final judgment rendered in 2006, but that they had adapted to it and liked it. Finally, the court concluded that "the factual situation [had] lasted for far too long" and that it was in the children's interest to verify the situation.

38. On 15 September 2009 the High Court in Podgorica quashed this judgment and remitted the case to the Court of First Instance.

E. Criminal proceedings against V.K.

39. On 16 February 2007 V.K. was found guilty of domestic violence, the victim being the applicant, and was sentenced to three months in prison, suspended for a period of two years. On 28 June 2007 the High Court in Podgorica overturned that judgment and dismissed the charges as the criminal prosecution had become time-barred.

40. On 7 December 2007 the Court of First Instance in Kotor acquitted V.K. of charges of child abduction (*oduzimanje maloljetnog lica*) concluding that "[...] although the said acts of the accused contained all the elements of the criminal offence he had been charged with, the said offence represented an act of minor significance". On 28 May 2008 the High Court in Podgorica upheld that judgment and it thereby became final.

II. RELEVANT DOMESTIC LAW

A. Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

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

Article 149

"The Constitutional Court shall ...

(3) ... [rule on a] ... constitutional appeal ... [filed in respect of an alleged] ... violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted ..."

42. This Constitution entered into force on 22 October 2007.

B. Constitutional Court Act of Montenegro (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

43. The relevant provision of the Constitutional Court Act read as follows:

Article 48

"Constitutional appeal can be filed against an individual decision of a state body [...] for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted."

44. Articles 49-59 provide additional details as regards the processing of constitutional appeals.

45. This Act entered into force on 4 November 2008.

C. Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in OGM no. 11/07)

46. Relevant provisions of this Act read as follows:

Article 2 § 1

"The party and the intervener in civil matters [...] shall have the right to judicial protection in the event of violation of the right to trial within a reasonable time [...]."

Article 3

"Legal remedies for the protection of right to trial within a reasonable time shall be:

(1) Request to accelerate the proceedings (hereinafter referred to as the request for review);

(2) Action for fair redress."

Article 17

"If the judge notifies the president of the court that certain procedural measures will be undertaken ... no later than four months after the receipt of the request for review, the president of the court shall notify the party thereof and thus finalise the procedure upon the request for review."

Article 23 § 1

"If the president of the court acted pursuant to Article 17 [...], the party cannot file another request for review in the same case before the expiry of the period specified in the notification [...]."

Article 24 § 1

Article 31

"Fair redress for the violation of the right to trial within a reasonable time may be realised by:

(1) payment of monetary compensation for the damage caused by the violation of the right to trial within a reasonable time, and/or

(2) by publishing the judgment that the right of the party to a trial within a reasonable time has been violated."

Article 33 § 3

"The action [for fair redress] ... shall be filed with the Supreme Court no later than six months after the date of receipt of the final and legally binding decision on the request for review within the procedure of enforcement of the decision."

Article 40

"The Supreme Court shall be obliged to make a decision on the action no later than four months after the date of receipt of the action."

Article 44

"This Act shall apply also to judicial proceedings instituted before the entry into force of this Act but after 3 March 2004.

In cases referred to in paragraph 1 above, in the determination of a legal remedy for violations of the right to trial within a reasonable time, the violations of the right which occurred after 3 March 2004 shall be established.

When establishing the violation of the right referred to in paragraph 2 above, the Court shall also take into consideration the length of the judicial proceedings prior to 3 March 2004."

47. This Act entered into force on 21 December 2007, but contained no reference to the applications involving procedural delay already lodged with the Court.

D. The relevant domestic court's case-law

48. Between 1 January 2008 and 30 September 2009 the courts in Montenegro considered one hundred and two requests for review. Two requests were withdrawn and eight were being examined. In the same period, twenty-two actions for fair redress were submitted, out of which

sixteen actions were dealt with and six were still being examined. In one case the courts awarded the plaintiff non-pecuniary damages for the length of civil proceedings.

49. Four of the requests for review, among the copies provided by the Government, concerned the length of enforcement proceedings. In two cases the plaintiffs were informed that the proceedings would be terminated within the next four months. There is no information in the provided documents as to whether these time-limits were complied with. In one case it is unclear whether the enforcement was not undertaken due to some prior obligations of the parties, and in another case the judge notified the plaintiff that the enforcement had since taken place.

50. In no case have the plaintiffs attempted to file an appeal following notifications rendered in accordance with Article 17 of the Act.

51. With regard to the case-law, following the action for fair redress, there were two such actions, among the provided copies, in which the plaintiffs had sought redress due to the length of enforcement proceedings. One was declared inadmissible because the plaintiff had not previously made use of a request for review, and the other was rejected as premature as the plaintiff had filed his action before the expiration of the time-limit set in the notification.

E. Family Law Act 1989 (Porodični zakon; published in the Official Gazette of the Socialist Federal Republic of Montenegro no. 07/89)

52. Article 68 of this Act provides that, after obtaining the opinion of the SCC, the court shall decide who will be granted custody of the children, if there is no agreement between the parents in that respect. Exceptionally, the court can also decide on the child's contact with a parent who has not been granted custody if the other parent prevents him/her from seeing the child. The court shall change these decisions if the circumstances so require.

53. Article 333 provides that in proceedings relating to the custody of children, the court shall *ex officio* decide on interim measures for the protection and living arrangements of the children.

54. Article 343 provides for urgency in forcible enforcements and the need to protect children as much as possible. If the enforcement cannot be achieved through fines, children shall be taken and given to the parent who was granted custody.

F. Family Law Act 2007 (Porodični zakon; published in OGM no. 01/07)

55. This Act entered into force on 1 September 2007, thereby repealing the Family Law Act 1989. Article 375, however, provides for an identical provision with regard to forcible enforcement, as per the previous Act.

G. Enforcement Procedure Act 2004 (*Zakon o izvršnom postupku*; published in the Official Gazette of the Republic of Montenegro – OG RM - no. 23/04)

56. Article 4 § 1 provides that the enforcement court is obliged to proceed urgently.

57. Under Article 47, if needed, the bailiff may request police assistance; should the police fail to provide such assistance, the enforcement court shall inform the Minister of Internal Affairs, the Government, or the competent parliamentary body.

58. Articles 224-227 contain, *inter alia*, provisions relating to the enforcement of final child custody judgments.

59. Article 225, while placing special emphasis on the best interests of the child, provides, in particular, that there shall be an initial period of three days for voluntary compliance with a child custody order. Beyond that, however, fines should be imposed and, ultimately, if necessary, the child should be taken forcibly by the court, in co-operation with the Social Care Centre.

H. Police Act (Zakon o policiji; published in OG RM no. 28/05)

60. Pursuant to Article 7 § 1 the police are obliged to assist other State bodies in the enforcement of their decisions if there is physical resistance or such resistance may reasonably be expected.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

61. The applicant complained under Article 8 of the Convention that due to the belated enforcement of the final custody judgment of 5 May 2006, as well as the respondent State's prior failure to enforce the NSCC's order of 8 March 2005, she had been prevented from exercising her parental rights in

accordance with the relevant domestic legislation. Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Compatibility ratione temporis

62. The Government submitted that the Committee of Ministers of the Council of Europe had decided that Montenegro was a party to the Convention as of 6 June 2006.

63. The applicant made belated comments, which, on that account, were not admitted to the file.

64. The Court has already held that the Convention should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004 (see *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 69, 28 April 2009). It sees no reason to depart from this finding in the present case. The Government's objection must, therefore, be dismissed.

2. Exhaustion of domestic remedies

(a) Arguments of the parties

65. The Government submitted that the applicant had not exhausted all effective domestic remedies available to her. In particular, she had failed to lodge an appeal, following the request for review, and an action for fair redress provided by the Right to a Trial within a Reasonable Time Act (see paragraph 46 above). Lastly, she had not made use of the constitutional appeal (see paragraph 43 above).

66. The applicant did not file comments within the time-limit set (see paragraph 63 above).

(b) Relevant principles

67. The Court recalls that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the alleged violations before they are submitted to the Court.

68. However, the only remedies which the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999 V). The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I). Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from that requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

69. Finally, the Court reiterates that the decisive question in assessing the effectiveness of a remedy concerning a complaint about the length of proceedings is whether or not there is a possibility for the applicant to be provided with direct and speedy redress, rather than an indirect protection of the rights guaranteed under Article 6 (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 195, ECHR 2006, and *Sürmeli v. Germany* [GC], no. 75529/01, § 101, 8 June 2006). In particular, a remedy of this sort shall be "effective" if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays which have already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157-159, ECHR 2000-XI; *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII; and *Sürmeli v. Germany* [GC], cited above, § 99).

(c) Court's assessment

(i) As regards the appeal following the request for review

70. The Court notes that, pursuant to Article 17 of the Right to a Trial within a Reasonable Time Act, notification is provided as one of the means of dealing with a request for review (see paragraph 46 above). The Court further notes that in the present case the domestic court apparently did resort to such a notification, informing the applicant that V.K. would be fined "without delay" but that it was "impossible to say when and how the enforcement proceedings at issue shall be concluded" (see paragraph 27 above). In accordance with Article 17, with this notification the applicant's request for review was considered to be dealt with.

71. Article 24, however, provides for the right of appeal, *inter alia*, in cases where the court fails to deliver the notification to the applicant within the specified time. Since the notification was duly delivered to the applicant,

she had no statutory right to lodge an appeal. The domestic courts' case-law in this regard, submitted by the Government itself, confirms this (see paragraph 50 above). Therefore, the said appeal cannot be considered an available remedy in the applicant's case and the Government's objection in this regard must be dismissed.

(ii) As regards the action for fair redress

72. Article 31 of the Right to a Trial within a Reasonable Time Act (see paragraph 46 above) provides for redress in the form of monetary compensation and/or publishing the judgment that the right to a trial within reasonable time has been violated. Even assuming that the applicant could have obtained compensation for the past delay and/or have had the judgment on the violation of her right to trial within reasonable time published, the said action was clearly not capable of expediting the enforcement at issue while it was still pending, which was clearly the applicant's main concern (see, *mutatis mutandis, V.A.M. v. Serbia*, no. 39177/05, § 86, 13 March 2007). Therefore, the applicant had had no obligation to make use of this avenue of redress. In any event, it would appear that the ultimate enforcement of the judgment in question was primarily, if not exclusively, the consequence of the present case having been communicated to the Government rather than the result of any domestic remedy.

(iii) As regards the constitutional appeal

73. Pursuant to Article 48 of the Constitutional Court Act of Montenegro, a constitutional appeal can be filed against an individual decision concerning one's human rights and freedoms (see paragraph 43 above). As the Court understands the said provision, the applicant is supposed to have a final decision, which by its contents and substance violates his/her human rights. The applicant is allowed to file a constitutional appeal against such a decision.

74**.** The Court notes that in this case the applicant complains about the respondent State's continued failure to enforce the final court's decision. Taking into account that the Government have presented no case-law to the contrary, the Court considers that the constitutional appeal cannot be considered an available remedy in cases of non-enforcement due to there being no “individual decision” against which such an appeal could be filed.

(iv) Conclusion

75. The Court also considers that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and finds no other ground to declare them inadmissible. They must therefore be declared admissible.

B. Merits

1. Arguments of the parties

76. The Government submitted that, pursuant to Article 68 of the Family Act in force at the time, ruling on the custody of children was exclusively in the courts' competence (see paragraph 52 above) from the moment when the action for divorce was brought. In that context, the Government submitted that, if the applicant had wanted an interim decision with regard to the custody of children before the judgment was rendered, she should have submitted a request to the court to that effect. The Social Care Centre, according to the Government, had no competence in that respect, except to provide its opinion on the matter.

77. The Government further noted that the Court of First Instance in Kotor primarily had the interests of the children in mind, who, "from the beginning of the dispute" had refused to live with the applicant, and for whom the forcible transfer would have been an irremediable trauma, as stated by the BSCC expert. Such conditions, as submitted by the Government, had required sensitivity on the part of all involved so that the necessary conditions could be created with a view to reducing the trauma for the children as much as possible.

78. The applicant's belated submissions were not admitted to the file (see paragraph 63 above).

2. Relevant principles

79. The Court notes that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, among other authorities, *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

80. Even though the primary object of Article 8 is to protect the individual against arbitrary action by the public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290). In this context, the Court has repeatedly held that Article 8 includes a right for parents to have measures taken that will permit them to be reunited with their children and an obligation on the national authorities to take such action (see, among other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I; *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII; and *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 58, 24 April 2003).

81. However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take

place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned are always an important element (see *Ignaccolo-Zenide*, cited above, § 94).

82. The Court, therefore, has to ascertain whether the national authorities took all such necessary steps to facilitate reunion as could reasonably be demanded in the special circumstances of the case (see *Ignaccolo-Zenide*, cited above, § 96, *Nuutinen v. Finland*, cited above, § 128, *Hokkanen v. Finland*, 23 September 1994, § 58, Series A no. 299-A, and *Šobota-Gajić v. Bosnia and Herzegovina*, no. 27966/06, § 53, 6 November 2007).

83. In this connection, the Court states that, in a case such as the present one, the adequacy of a measure is to be judged by the swiftness of its implementation as the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them (see *Ignaccolo-Zenide*, cited above, § 102).

3. The Court's assessment

84. The Court considers that, while the applicant could have theoretically requested the domestic court to render an interim measure on custody during the proceedings, she was not required to do so pursuant to Article 333 of the Family Act in force at the time, which provided for the court to decide on such measures *ex officio* (see paragraph 53 above). In addition, had the NSCC considered that it lacked competence to decide on the matter it would have declared so and rejected the applicant's requests. Therefore, the first decision aimed at reuniting the applicant with her children was rendered by the NSCC on 8 March 2005.

85. Between April and June 2005, at the applicant's requests, the NSCC issued three additional decisions to the same effect. The Court notes, however, that there has been only one unsuccessful attempt to enforce the first NSCC decision, which was on 14 March 2005.

86. The NSCC decisions became irrelevant on 5 May 2006, when the court's judgment, granting the custody of A and B to the applicant, became final. On 12 June 2006 the applicant sought the enforcement of the judgment. In this context, the Court notes that the first attempt to fine V.K. for failing to surrender the children took place only on 9 March 2009, and the first attempt to actually enforce the judgment by forcible transfer took place on 8 October 2009, which is after the application had been communicated. On 30 November 2009, on the third attempt, the applicant was reunited with her children.

87. Therefore, the impugned situation lasted nearly four years and nine months after the NSCC's decision was rendered, that is three years and seven months after the court judgment to the same effect became final. During this time the competent national authorities had: (a) attempted only

once to enforce the NSCC decision, (b) fined V.K. only once, two years and nine months after the applicant had sought the enforcement of the judgment, (c) attempted the forcible transfer only after the case had been communicated to the respondent Government, and (d) enforced the judgment within less than three months from the communication of the case.

88. Whilst the Government maintained that the children had refused "from the beginning of the dispute" to be transferred to the applicant, the information provided by the Government showed that there had been no attempt aimed at such a transfer for two years and nine months. The Government provided no explanation in this regard. At the same time, there is no indication that this delay can be attributed to the applicant.

89. As noted above, the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and without the necessary preparation, particularly in the circumstances of A and B's case. However, there is no evidence that any such preparatory work explained the above-mentioned delays by the authorities.

90. Having regard to the facts of the case, including the passage of time, the best interests of A and B, the criteria laid down in its own case-law and the Government's submissions, notwithstanding the State's margin of appreciation as well as the fact that A and B were eventually surrendered to the applicant, the Court concludes that the Montenegrin authorities have failed to make adequate and effective efforts to execute the NSCC decision and the final court judgment in a timely manner.

91. There has accordingly been a violation of Article 8 of the Convention.

II. OTHER COMPLAINTS

92. To the extent that the applicant implicitly complained of the non-enforcement of the judgment, in that V.K. had not paid the child-maintenance as specified, the Court notes that the beneficiaries of such maintenance are, by default, the children. As the children, although contrary to the judgment, lived with V.K. as of 5 January 2005 until 30 November 2009, the applicant cannot claim child maintenance for that period having had no expenses herself in that respect. Therefore, even assuming that the applicant's complaint is compatible *ratione personae*, it must be declared inadmissible as manifestly ill-founded. As for the period after 30 November 2009, due to the short time which elapsed after the children had been surrendered, the applicant's complaint is manifestly ill-founded and must be dismissed pursuant to Article 35 §§ 3 and 4 of the Convention. It is also open to the applicant to obtain a further order from the domestic courts requiring her former spouse to comply with his maintenance obligations.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

94. The applicant claimed damages of EUR 50,000 after the expiry of the time-limit for submitting Article 41 claims.

95. However, the Government, with reference to the same amount claimed in the application form filed by the applicant, nevertheless stated in their observations on the admissibility and merits that the claim was excessive and contrary to the case-law of the Court.

96. The Court is of the view that it has not been duly substantiated that the applicant sustained pecuniary damage as a result of the violation of Article 8. However, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be sufficiently compensated by the sole finding of a violation. Making its assessment on an equitable basis and having regard to the particular circumstances of the case, the Court awards the applicant EUR 10,000 under this head.

B. Costs and expenses

97. The Court notes that the applicant's claim for costs was submitted after the expiry of the original deadline and, unlike the claim for damages, was never the subject of submissions by the Government. The applicant has therefore failed to comply with Rule 60 §§ 2 and 3 of the Rules of Court, and her claim must therefore be dismissed.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the respondent State's belated enforcement of the final custody judgment and its prior failure to enforce the interim custody order admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President

FOURTH SECTION

CASE OF MIJUŠKOVIĆ v. MONTENEGRO

(Application no. 49337/07)

JUDGMENT

STRASBOURG

21 September 2010

FINAL

21/12/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mijušković v. Montenegro,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Mihai Poalelungi,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 31 August 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 49337/07) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Ms Svetlana Mijušković ("the applicant"), on 2 November 2007.

2. The applicant was represented by Mr D. Kovačević, a lawyer practising in Nikšić. The Montenegrin Government ("the Government") were represented by their Agent, Mr. Z. Pažin.

3. The applicant primarily complained, under Article 8 of the Convention, of the belated enforcement of a final custody judgment, as well as the respondent State's prior failure to enforce an interim custody order.

4. On 2 September 2009 the President of the Fourth Section decided to give notice of the application to the Government. Under Article 29 § 3 of the Convention, it was also decided to examine the merits of the application at the same time as its admissibility and to give priority to the application in accordance with Rule 41 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Introduction

5. The applicant was born in 1971 and currently lives in Budva.

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

7. On 26 April 1998 the applicant and V.K. married and on 12 October 1998 their twins, A and B, were born.

8. On 5 June 2003, due to marital problems, the applicant moved back to her parents' house in Nikšić, together with the children.

9. On 22 July 2004 the Social Care Centre in Nikšić ("the NSCC") issued a decision regulating V.K.'s access to A and B.

10. It would appear that during this period V.K. had been seeing the children in accordance with this decision.

11. On 5 January 2005 V.K. took the children for the winter holiday and subsequently refused to return them to the applicant.

12. On 8 March 2005 the NSCC ordered that the children be returned to the applicant and entrusted the enforcement of that order to the Social Care Centre in Budva ("the BSCC").

13. On 14 March 2005 the BSCC, with police assistance, attempted to enforce the order in question, but it appears that V.K.'s parents physically prevented that from happening.

14. Between April and June 2005, at the applicant's requests, the NSCC issued three additional decisions, urging V.K. to surrender the children. They provided that should V.K. fail to comply with the applicant's custody rights he would be fined, and that, ultimately, forcible enforcement might be called for.

15. On one occasion thereafter V.K. brought the children to the BSCC but refused to surrender them to the applicant, claiming that the children did not want to live with her.

16. There is no evidence in the case file indicating that V.K. had been fined or, indeed, that a forcible transfer of custody had been attempted again.

B. The first set of civil proceedings

17. On 23 June 2003 V.K. lodged a claim with the Court of First Instance in Kotor, seeking the dissolution of his marriage to the applicant as well as custody of the children.

18. On 1 September 2003 the applicant lodged a counter-claim to the same effect.

19. On 9 March 2004 the presiding judge joined the two claims into a single set of proceedings.

20. On 5 January 2006 the Court of First Instance: (i) dissolved the marriage, (ii) granted custody of the children to the applicant, and (iii) ordered V.K. to pay monthly child maintenance.

21. On 5 May 2006 the High Court upheld that judgment and it thereby became final.

22. On 12 September 2006 the Supreme Court dismissed V.K.'s appeal on points of law (*revizija*).

C. The enforcement proceedings

23. On 12 June 2006 the applicant submitted a request for the enforcement of the final judgment.

24. On 22 June 2006 the Court of First Instance in Kotor issued an enforcement order whereby V.K. was given three days to surrender the children to the applicant. He was also warned that if he failed to comply he could be fined or even subjected to a forcible transfer of custody.

25. On 21 July 2006 the High Court upheld this order.

26. On 26 February 2009 the applicant submitted a request for a review (*kontrolni zahtjev*; see paragraph 46 below) with the Court of First Instance, seeking execution of the enforcement order.

27. On 5 March 2009 the execution judge (*izvršni sudija*) informed the President of the court that as it was "impossible to reach an agreement [...] by which the children would be surrendered" to the applicant, the bailiff was ordered to enforce "without delay" the fine of EUR 500 in respect of V.K. He finished his report by stating "that it [was] impossible to say when and how the enforcement proceedings at issue shall be concluded".

28. On 7 March 2009 the bailiff made an attempt to enforce the fine, but it was to no avail due to the verbal and physical resistance of V.K.'s parents. Subsequently, the bailiff requested the President of the court to release her of the duty to enforce the fine.

29. On 9 March 2009 V.K. was informed that the forcible payment of the fine would be executed on 13 March 2009. On 12 March 2009 V.K.'s father paid the fine imposed.

30. On 17 March 2009 the Court of First Instance issued another enforcement order requesting that the children be surrendered to the applicant within three days, failing which V.K. would be fined EUR 1,000.

31. On 10 September 2009, after the application had already been communicated to the respondent Government, the Court of First Instance issued a decision specifying that the order would be enforced on 8 October 2009, if need be, by means of a forcible transfer of custody.

32. On 8 October 2009 V.K. refused to surrender the children, who, apparently, also resisted the transfer. The BSCC representative proposed that a forcible transfer of custody be postponed and the judge accepted to do so.

33. On 23 October 2009, when the enforcement was to be attempted again, V.K. proposed that it be adjourned until the court had decided on his request for custody (see paragraphs 36-38 below), or that an interim period be allowed, with the participation of a family psychologist, to help the children to adapt to the new situation. The BSCC representative also suggested that a transitional period be allowed before the enforcement. The applicant insisted on the enforcement. The house was searched, but the children were not found. The applicant was invited to submit a proposal as to how the judgment could be further enforced as well as to inform the court on her possibility to provide the necessary labour force for the enforcement ("*eventualnog obezbjeđenja potrebne radne snage*"). At the same time, the police were invited to establish the whereabouts of the children.

34. On 30 November 2009, during another attempt at enforcement, the children refused to go with the applicant, claiming that she had not treated them properly. After V.K.'s parents, who had resisted the enforcement, were removed, the judgment was enforced and the children were finally surrendered to the applicant.

35. The applicant maintained that as of 5 January 2005 until 30 November 2009 she had only had sporadic and brief contact with her children, mostly in-between school classes and, even then, in the presence of V.K. or his father.

D. The second set of civil proceedings

36. On an unspecified date V.K. instituted a new civil complaint, seeking sole custody of the children.

37. On 1 June 2009 the Court of First Instance ruled in his favour and ordered the applicant to pay monthly child maintenance. In so deciding, the court took account of an informal conversation that an expert psychiatrist had had with the children. The psychiatrist's conclusion was that A and B wanted to live with their father, that it would be stressful for them to be taken away from their present home, but that their mother needed to be allowed regular access. When specifically asked whether the children had

been negatively directed towards their mother by their father, the expert responded by saying that "it [was] obvious that the children had been negatively directed towards their mother by an adult person". The court noted that the children had been living with their father, contrary to the final judgment rendered in 2006, but that they had adapted to it and liked it. Finally, the court concluded that "the factual situation [had] lasted for far too long" and that it was in the children's interest to verify the situation.

38. On 15 September 2009 the High Court in Podgorica quashed this judgment and remitted the case to the Court of First Instance.

E. Criminal proceedings against V.K.

39. On 16 February 2007 V.K. was found guilty of domestic violence, the victim being the applicant, and was sentenced to three months in prison, suspended for a period of two years. On 28 June 2007 the High Court in Podgorica overturned that judgment and dismissed the charges as the criminal prosecution had become time-barred.

40. On 7 December 2007 the Court of First Instance in Kotor acquitted V.K. of charges of child abduction (*oduzimanje maloljetnog lica*) concluding that "[...] although the said acts of the accused contained all the elements of the criminal offence he had been charged with, the said offence represented an act of minor significance". On 28 May 2008 the High Court in Podgorica upheld that judgment and it thereby became final.

II. RELEVANT DOMESTIC LAW

A. Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

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

Article 149

"The Constitutional Court shall ...

(3) ... [rule on a] ... constitutional appeal ... [filed in respect of an alleged] ... violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted ..."

42. This Constitution entered into force on 22 October 2007.

B. Constitutional Court Act of Montenegro (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

43. The relevant provision of the Constitutional Court Act read as follows:

Article 48

"Constitutional appeal can be filed against an individual decision of a state body [...] for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted."

44. Articles 49-59 provide additional details as regards the processing of constitutional appeals.

45. This Act entered into force on 4 November 2008.

C. Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in OGM no. 11/07)

46. Relevant provisions of this Act read as follows:

Article 2 § 1

"The party and the intervener in civil matters [...] shall have the right to judicial protection in the event of violation of the right to trial within a reasonable time [...]."

Article 3

"Legal remedies for the protection of right to trial within a reasonable time shall be:

(1) Request to accelerate the proceedings (hereinafter referred to as the request for review);

(2) Action for fair redress."

Article 17

"If the judge notifies the president of the court that certain procedural measures will be undertaken ... no later than four months after the receipt of the request for review, the president of the court shall notify the party thereof and thus finalise the procedure upon the request for review."

Article 23 § 1

"If the president of the court acted pursuant to Article 17 [...], the party cannot file another request for review in the same case before the expiry of the period specified in the notification [...]."

Article 24 § 1

"If the president of the court [...] does not deliver [...] notification on the request for review to the party [...] pursuant to Article 17 the party may lodge an appeal [...]."

Article 31

"Fair redress for the violation of the right to trial within a reasonable time may be realised by:

(1) payment of monetary compensation for the damage caused by the violation of the right to trial within a reasonable time, and/or

(2) by publishing the judgment that the right of the party to a trial within a reasonable time has been violated."

Article 33 § 3

"The action [for fair redress] ... shall be filed with the Supreme Court no later than six months after the date of receipt of the final and legally binding decision on the request for review within the procedure of enforcement of the decision."

Article 40

"The Supreme Court shall be obliged to make a decision on the action no later than four months after the date of receipt of the action."

Article 44

"This Act shall apply also to judicial proceedings instituted before the entry into force of this Act but after 3 March 2004.

In cases referred to in paragraph 1 above, in the determination of a legal remedy for violations of the right to trial within a reasonable time, the violations of the right which occurred after 3 March 2004 shall be established.

When establishing the violation of the right referred to in paragraph 2 above, the Court shall also take into consideration the length of the judicial proceedings prior to 3 March 2004."

47. This Act entered into force on 21 December 2007, but contained no reference to the applications involving procedural delay already lodged with the Court.

D. The relevant domestic court's case-law

48. Between 1 January 2008 and 30 September 2009 the courts in Montenegro considered one hundred and two requests for review. Two requests were withdrawn and eight were being examined. In the same period, twenty-two actions for fair redress were submitted, out of which

sixteen actions were dealt with and six were still being examined. In one case the courts awarded the plaintiff non-pecuniary damages for the length of civil proceedings.

49. Four of the requests for review, among the copies provided by the Government, concerned the length of enforcement proceedings. In two cases the plaintiffs were informed that the proceedings would be terminated within the next four months. There is no information in the provided documents as to whether these time-limits were complied with. In one case it is unclear whether the enforcement was not undertaken due to some prior obligations of the parties, and in another case the judge notified the plaintiff that the enforcement had since taken place.

50. In no case have the plaintiffs attempted to file an appeal following notifications rendered in accordance with Article 17 of the Act.

51. With regard to the case-law, following the action for fair redress, there were two such actions, among the provided copies, in which the plaintiffs had sought redress due to the length of enforcement proceedings. One was declared inadmissible because the plaintiff had not previously made use of a request for review, and the other was rejected as premature as the plaintiff had filed his action before the expiration of the time-limit set in the notification.

E. Family Law Act 1989 (Porodični zakon; published in the Official Gazette of the Socialist Federal Republic of Montenegro no. 07/89)

52. Article 68 of this Act provides that, after obtaining the opinion of the SCC, the court shall decide who will be granted custody of the children, if there is no agreement between the parents in that respect. Exceptionally, the court can also decide on the child's contact with a parent who has not been granted custody if the other parent prevents him/her from seeing the child. The court shall change these decisions if the circumstances so require.

53. Article 333 provides that in proceedings relating to the custody of children, the court shall *ex officio* decide on interim measures for the protection and living arrangements of the children.

54. Article 343 provides for urgency in forcible enforcements and the need to protect children as much as possible. If the enforcement cannot be achieved through fines, children shall be taken and given to the parent who was granted custody.

F. Family Law Act 2007 (Porodični zakon; published in OGM no. 01/07)

55. This Act entered into force on 1 September 2007, thereby repealing the Family Law Act 1989. Article 375, however, provides for an identical provision with regard to forcible enforcement, as per the previous Act.

G. Enforcement Procedure Act 2004 (*Zakon o izvršnom postupku*; published in the Official Gazette of the Republic of Montenegro – OG RM - no. 23/04)

56. Article 4 § 1 provides that the enforcement court is obliged to proceed urgently.

57. Under Article 47, if needed, the bailiff may request police assistance; should the police fail to provide such assistance, the enforcement court shall inform the Minister of Internal Affairs, the Government, or the competent parliamentary body.

58. Articles 224-227 contain, *inter alia*, provisions relating to the enforcement of final child custody judgments.

59. Article 225, while placing special emphasis on the best interests of the child, provides, in particular, that there shall be an initial period of three days for voluntary compliance with a child custody order. Beyond that, however, fines should be imposed and, ultimately, if necessary, the child should be taken forcibly by the court, in co-operation with the Social Care Centre.

H. Police Act (Zakon o policiji; published in OG RM no. 28/05)

60. Pursuant to Article 7 § 1 the police are obliged to assist other State bodies in the enforcement of their decisions if there is physical resistance or such resistance may reasonably be expected.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

61. The applicant complained under Article 8 of the Convention that due to the belated enforcement of the final custody judgment of 5 May 2006, as well as the respondent State's prior failure to enforce the NSCC's order of 8 March 2005, she had been prevented from exercising her parental rights in

accordance with the relevant domestic legislation. Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Compatibility ratione temporis

62. The Government submitted that the Committee of Ministers of the Council of Europe had decided that Montenegro was a party to the Convention as of 6 June 2006.

63. The applicant made belated comments, which, on that account, were not admitted to the file.

64. The Court has already held that the Convention should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004 (see *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 69, 28 April 2009). It sees no reason to depart from this finding in the present case. The Government's objection must, therefore, be dismissed.

2. Exhaustion of domestic remedies

(a) Arguments of the parties

65. The Government submitted that the applicant had not exhausted all effective domestic remedies available to her. In particular, she had failed to lodge an appeal, following the request for review, and an action for fair redress provided by the Right to a Trial within a Reasonable Time Act (see paragraph 46 above). Lastly, she had not made use of the constitutional appeal (see paragraph 43 above).

66. The applicant did not file comments within the time-limit set (see paragraph 63 above).

(b) Relevant principles

67. The Court recalls that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the alleged violations before they are submitted to the Court.

68. However, the only remedies which the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999 V). The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I). Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from that requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

69. Finally, the Court reiterates that the decisive question in assessing the effectiveness of a remedy concerning a complaint about the length of proceedings is whether or not there is a possibility for the applicant to be provided with direct and speedy redress, rather than an indirect protection of the rights guaranteed under Article 6 (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 195, ECHR 2006, and *Sürmeli v. Germany* [GC], no. 75529/01, § 101, 8 June 2006). In particular, a remedy of this sort shall be "effective" if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays which have already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157-159, ECHR 2000-XI; *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII; and *Sürmeli v. Germany* [GC], cited above, § 99).

(c) Court's assessment

(i) As regards the appeal following the request for review

70. The Court notes that, pursuant to Article 17 of the Right to a Trial within a Reasonable Time Act, notification is provided as one of the means of dealing with a request for review (see paragraph 46 above). The Court further notes that in the present case the domestic court apparently did resort to such a notification, informing the applicant that V.K. would be fined "without delay" but that it was "impossible to say when and how the enforcement proceedings at issue shall be concluded" (see paragraph 27 above). In accordance with Article 17, with this notification the applicant's request for review was considered to be dealt with.

71. Article 24, however, provides for the right of appeal, *inter alia*, in cases where the court fails to deliver the notification to the applicant within the specified time. Since the notification was duly delivered to the applicant,

she had no statutory right to lodge an appeal. The domestic courts' case-law in this regard, submitted by the Government itself, confirms this (see paragraph 50 above). Therefore, the said appeal cannot be considered an available remedy in the applicant's case and the Government's objection in this regard must be dismissed.

(ii) As regards the action for fair redress

72. Article 31 of the Right to a Trial within a Reasonable Time Act (see paragraph 46 above) provides for redress in the form of monetary compensation and/or publishing the judgment that the right to a trial within reasonable time has been violated. Even assuming that the applicant could have obtained compensation for the past delay and/or have had the judgment on the violation of her right to trial within reasonable time published, the said action was clearly not capable of expediting the enforcement at issue while it was still pending, which was clearly the applicant's main concern (see, *mutatis mutandis, V.A.M. v. Serbia*, no. 39177/05, § 86, 13 March 2007). Therefore, the applicant had had no obligation to make use of this avenue of redress. In any event, it would appear that the ultimate enforcement of the judgment in question was primarily, if not exclusively, the consequence of the present case having been communicated to the Government rather than the result of any domestic remedy.

(iii) As regards the constitutional appeal

73. Pursuant to Article 48 of the Constitutional Court Act of Montenegro, a constitutional appeal can be filed against an individual decision concerning one's human rights and freedoms (see paragraph 43 above). As the Court understands the said provision, the applicant is supposed to have a final decision, which by its contents and substance violates his/her human rights. The applicant is allowed to file a constitutional appeal against such a decision.

74**.** The Court notes that in this case the applicant complains about the respondent State's continued failure to enforce the final court's decision. Taking into account that the Government have presented no case-law to the contrary, the Court considers that the constitutional appeal cannot be considered an available remedy in cases of non-enforcement due to there being no "individual decision" against which such an appeal could be filed.

(iv) Conclusion

75. The Court also considers that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and finds no other ground to declare them inadmissible. They must therefore be declared admissible.

B. Merits

1. Arguments of the parties

76. The Government submitted that, pursuant to Article 68 of the Family Act in force at the time, ruling on the custody of children was exclusively in the courts' competence (see paragraph 52 above) from the moment when the action for divorce was brought. In that context, the Government submitted that, if the applicant had wanted an interim decision with regard to the custody of children before the judgment was rendered, she should have submitted a request to the court to that effect. The Social Care Centre, according to the Government, had no competence in that respect, except to provide its opinion on the matter.

77. The Government further noted that the Court of First Instance in Kotor primarily had the interests of the children in mind, who, "from the beginning of the dispute" had refused to live with the applicant, and for whom the forcible transfer would have been an irremediable trauma, as stated by the BSCC expert. Such conditions, as submitted by the Government, had required sensitivity on the part of all involved so that the necessary conditions could be created with a view to reducing the trauma for the children as much as possible.

78. The applicant's belated submissions were not admitted to the file (see paragraph 63 above).

2. Relevant principles

79. The Court notes that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, among other authorities, *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

80. Even though the primary object of Article 8 is to protect the individual against arbitrary action by the public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290). In this context, the Court has repeatedly held that Article 8 includes a right for parents to have measures taken that will permit them to be reunited with their children and an obligation on the national authorities to take such action (see, among other authorities, *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, ECHR 2000-I; *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII; and *Sylvester v. Austria*, nos. 36812/97 and 40104/98, § 58, 24 April 2003).

81. However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take

place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned are always an important element (see *Ignaccolo-Zenide*, cited above, § 94).

82. The Court, therefore, has to ascertain whether the national authorities took all such necessary steps to facilitate reunion as could reasonably be demanded in the special circumstances of the case (see *Ignaccolo-Zenide*, cited above, § 96, *Nuutinen v. Finland*, cited above, § 128, *Hokkanen v. Finland*, 23 September 1994, § 58, Series A no. 299-A, and *Šobota-Gajić v. Bosnia and Herzegovina*, no. 27966/06, § 53, 6 November 2007).

83. In this connection, the Court states that, in a case such as the present one, the adequacy of a measure is to be judged by the swiftness of its implementation as the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them (see *Ignaccolo-Zenide*, cited above, § 102).

3. The Court's assessment

84. The Court considers that, while the applicant could have theoretically requested the domestic court to render an interim measure on custody during the proceedings, she was not required to do so pursuant to Article 333 of the Family Act in force at the time, which provided for the court to decide on such measures *ex officio* (see paragraph 53 above). In addition, had the NSCC considered that it lacked competence to decide on the matter it would have declared so and rejected the applicant's requests. Therefore, the first decision aimed at reuniting the applicant with her children was rendered by the NSCC on 8 March 2005.

85. Between April and June 2005, at the applicant's requests, the NSCC issued three additional decisions to the same effect. The Court notes, however, that there has been only one unsuccessful attempt to enforce the first NSCC decision, which was on 14 March 2005.

86. The NSCC decisions became irrelevant on 5 May 2006, when the court's judgment, granting the custody of A and B to the applicant, became final. On 12 June 2006 the applicant sought the enforcement of the judgment. In this context, the Court notes that the first attempt to fine V.K. for failing to surrender the children took place only on 9 March 2009, and the first attempt to actually enforce the judgment by forcible transfer took place on 8 October 2009, which is after the application had been communicated. On 30 November 2009, on the third attempt, the applicant was reunited with her children.

87. Therefore, the impugned situation lasted nearly four years and nine months after the NSCC's decision was rendered, that is three years and seven months after the court judgment to the same effect became final. During this time the competent national authorities had: (a) attempted only

once to enforce the NSCC decision, (b) fined V.K. only once, two years and nine months after the applicant had sought the enforcement of the judgment, (c) attempted the forcible transfer only after the case had been communicated to the respondent Government, and (d) enforced the judgment within less than three months from the communication of the case.

88. Whilst the Government maintained that the children had refused "from the beginning of the dispute" to be transferred to the applicant, the information provided by the Government showed that there had been no attempt aimed at such a transfer for two years and nine months. The Government provided no explanation in this regard. At the same time, there is no indication that this delay can be attributed to the applicant.

89. As noted above, the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and without the necessary preparation, particularly in the circumstances of A and B's case. However, there is no evidence that any such preparatory work explained the above-mentioned delays by the authorities.

90. Having regard to the facts of the case, including the passage of time, the best interests of A and B, the criteria laid down in its own case-law and the Government's submissions, notwithstanding the State's margin of appreciation as well as the fact that A and B were eventually surrendered to the applicant, the Court concludes that the Montenegrin authorities have failed to make adequate and effective efforts to execute the NSCC decision and the final court judgment in a timely manner.

91. There has accordingly been a violation of Article 8 of the Convention.

II. OTHER COMPLAINTS

92. To the extent that the applicant implicitly complained of the non-enforcement of the judgment, in that V.K. had not paid the child-maintenance as specified, the Court notes that the beneficiaries of such maintenance are, by default, the children. As the children, although contrary to the judgment, lived with V.K. as of 5 January 2005 until 30 November 2009, the applicant cannot claim child maintenance for that period having had no expenses herself in that respect. Therefore, even assuming that the applicant's complaint is compatible *ratione personae*, it must be declared inadmissible as manifestly ill-founded. As for the period after 30 November 2009, due to the short time which elapsed after the children had been surrendered, the applicant's complaint is manifestly ill-founded and must be dismissed pursuant to Article 35 §§ 3 and 4 of the Convention. It is also open to the applicant to obtain a further order from the domestic courts requiring her former spouse to comply with his maintenance obligations.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

94. The applicant claimed damages of EUR 50,000 after the expiry of the time-limit for submitting Article 41 claims.

95. However, the Government, with reference to the same amount claimed in the application form filed by the applicant, nevertheless stated in their observations on the admissibility and merits that the claim was excessive and contrary to the case-law of the Court.

96. The Court is of the view that it has not been duly substantiated that the applicant sustained pecuniary damage as a result of the violation of Article 8. However, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be sufficiently compensated by the sole finding of a violation. Making its assessment on an equitable basis and having regard to the particular circumstances of the case, the Court awards the applicant EUR 10,000 under this head.

B. Costs and expenses

97. The Court notes that the applicant's claim for costs was submitted after the expiry of the original deadline and, unlike the claim for damages, was never the subject of submissions by the Government. The applicant has therefore failed to comply with Rule 60 §§ 2 and 3 of the Rules of Court, and her claim must therefore be dismissed.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the respondent State's belated enforcement of the final custody judgment and its prior failure to enforce the interim custody order admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President

FOURTH SECTION

CASE OF ŠABANOVIĆ v. MONTENEGRO AND SERBIA

(Application no. 5995/06)

JUDGMENT

STRASBOURG

31 May 2011

FINAL

31/08/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Šabanović v. Montenegro and Serbia**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 10 May 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 5995/06) against Montenegro and Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Mr Zoran Šabanović ("the applicant"), on 19 January 2006.

2. The applicant was represented by Mr J. Pejović, a lawyer practising in Herceg Novi. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicant complained under Article 10 of the Convention of a breach of his right to freedom of expression stemming from his criminal conviction.

4. On 19 April 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 and lives in Herceg Novi.

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

1. The newspaper article and the subsequent press conference

7. On 6 February 2003 a Montenegrin daily newspaper published an article about the quality of the water in the Herceg-Novi area, entitled "Taps full of bacteria" (*Slavine pune bakterija*). The article stated that all of the current water sources contained various bacteria. These assertions were based on a report produced by the Institute for Health (*Institut za zdravlje Crne Gore*), which had been requested by the Chief State Water Inspector (*Glavni republički vodoprivredni inspektor*, hereinafter "the Chief Inspector"), apparently with a view to exploring the possibility of connecting additional sources to the water-supply grid. The same article also included a statement by the applicant, at that time the Director of a public corporation called "The Water Supply and Sewage Systems" (*JP Vodovod i Kanalizacija*, hereinafter "the Water Supply Company") and a member of the Socialist People's Party (SNP)[1], that he was not familiar with the analysis at issue, but that the water was regularly tested and always filtered before being pumped into the system.

8. On the same day the applicant held a press conference in response to the above-mentioned article. The applicant stated that, firstly, all tap water was filtered before being pumped into the water-supply system and was thus safe for use by the public. Secondly, the Chief Inspector had been promoting the interests of the two private companies which had already been granted licences to develop additional water sources and, lastly, the Chief Inspector had been directed to do so by the Democratic Party of Socialists (DPS)[2] and the companies in question had themselves obtained their licences unlawfully. The statement was published in several daily newspapers.

2. The criminal proceedings

9. On 7 April 2003 the Chief Inspector lodged a private criminal action (*privatna krivična tužba*) against the applicant for defamation (*kleveta*), claiming that the latter's statements were untrue and, therefore, harmful to his honour and reputation.

10. On 4 September 2003 the Court of First Instance (*Osnovni sud*) in Podgorica held the main hearing, during which the applicant said that his statement was not defamatory, but that "it was a value judgment, which he could prove". He stated that he had been informed about the results of the water analysis three days after the press conference, and the analysis clearly stated that the water from the water-supply system was of the necessary quality and was not a danger to health. He explained that there were

[1] The SNP was an opposition party at the State level.
[2] The DPS was the major partner in the ruling coalition Government at the State level.

obviously two reports, one concerning the water sources and one concerning the filtered water. He did not dispute the right of the Chief Inspector to ask for a water analysis, as it was his duty to do so, but the applicant did not think that the analysis of unfiltered water should have been published, but rather the analysis of the filtered water. Finally, he proposed that the court should read the article "Taps full of bacteria" to understand the context in which the impugned statement had been made, and that it should obtain the files concerning other proceedings ongoing at the time between the Water Supply Company and the two private companies in question.

11. At the same hearing the court also heard the Chief Inspector. He stated that he had always worked professionally and that he did not work under anybody's orders, he himself having filed a criminal complaint against one of the two companies. He stated that he had ordered the analysis at issue after consulting his Minister, who had "supported" him ("*koji [me] je podržao u tome"*). He emphasised that the title of the newspaper article had had nothing to do with him, as newspapers wrote what they deemed appropriate ("*novine pišu [...] po sopstvenom nahođenju*"), although they were contacting him to obtain data. However, he was not interested in what the newspapers had written on this particular issue or why they had not published the analysis of the filtered water ("*nije me interesovalo zašto nijesu objavljivali o analizi tretirane vode*..."), his main concern being to prove that a particular water source was of adequate quality and that it could be used.

12. On the same day the court found the applicant guilty and sentenced him to three months' imprisonment. This sentence, however, was suspended and was not to be enforced unless the applicant committed another crime within a period of two years.

13. In the operative part of the judgment only the following statement was found to amount to defamation, that is, to be "untrue" and "harmful to the honour and reputation of the private prosecutor":

> "The Inspector [...] works in the interest and at the request of [the two companies], as directed by the DPS".

14. In its reasoning the court stated that the statement made by the applicant was not supported by facts and rejected the applicant's defence that it was merely a value judgment. In the court's view the applicant had been aware that he might harm the honour and reputation of the private prosecutor and thus had had a defamatory intention (*klevetnička namjera*). The court refused to read the newspaper article or to request the files of the proceedings referred to by the applicant as that would only have delayed the proceedings and, in any event, neither was relevant for the proceedings at issue.

15. On an unspecified date thereafter the applicant lodged an appeal. He stated that, firstly, the Chief Inspector had sought the said analysis in order

to examine the possibility of connecting water sources administered by the two private companies to the water-supply grid. Secondly, there were two water analyses, before and after it had been filtered, but the Chief Inspector had provided the newspapers only with the analysis of the unfiltered water. Thirdly, the Chief Inspector himself had not responded to the misleading title of the article stating that the taps were full of bacteria, because he was "not interested" in it. Fourthly, the court had refused to read the newspaper article, without which it was impossible to conclude that his intention had been to defame the private prosecutor. Finally, he did not think it was defamatory to say that a "government official worked as directed by the ruling party", or that his response to such an article could be considered to amount to defamation of the private prosecutor.

16. On 1 November 2005 the judgment of 4 September 2003 was upheld by the High Court (*Viši sud*) in Podgorica, which fully endorsed the reasons given by the Court of First Instance. No effective appeal lay against this judgment to the Court of Serbia and Montenegro (see paragraphs 17-18 and 29 below).

II. RELEVANT DOMESTIC LAW

A. Constitutional Charter of the State Union of Serbia and Montenegro (Ustavna povelja državne zajednice Srbija i Crna Gora, published in the Official Gazette of Serbia and Montenegro no. 1/03)

17. Article 9 § 1 of the Constitutional Charter provided that both member States shall regulate, safeguard and protect human rights in its territory.

18. The relevant part of Article 46 provided that the Court of Serbia and Montenegro shall examine complaints lodged by citizens in cases where an institution of Serbia and Montenegro has infringed their rights and freedoms as guaranteed by the Constitutional Charter, if no other legal redress has been provided.

B. Constitution of the Republic of Montenegro (Ustav Republike Crne Gore; published in the Official Gazette of the Republic of Montenegro – OG RM – no. 48/92)

19. Section 34 § 2 provided for the freedom to publicly express one's opinion.

20. Section 35 § 2 stipulated that citizens have the right to express and publish their opinions via the mass media.

C. Criminal Code of the Republic of Montenegro (Krivični zakon Republike Crne Gore; published in OG RM nos. 42/93, 14/94, 27/94, 30/02, 56/03)

21. The relevant provisions of this Act read as follows:

Section 76 §§ 1, 2 and 4

"Whoever, in relation to another, asserts or disseminates a falsehood which can damage his honour and reputation shall be fined or punished by imprisonment not exceeding six months.

Whoever commits one of the acts described in [the above] paragraph ... through the press, via radio or television ... [, in another manner through the mass media,] ... or at a public meeting shall be punished by imprisonment not exceeding one year.

...

If the defendant proves his claims to be true or if he proves that he had reasonable grounds to believe in the veracity of the claims which he made or disseminated, he shall not be punished for defamation, but may be punished for the offence of insult ..."

Section 80 § 1

"The defendant shall not be punished for insulting another person if he does so in ... a serious critique, in the performance of his official duties, [...] in defence of a right or of a justified interest, or if from the manner of his expression it transpires that there was no intent to disparage."

D. General Criminal Code (Osnovni krivični zakon; published in Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90, and the Official Gazette of the Federal Republic of Yugoslavia nos. 35/92, 37/93, 24/94)

22. The relevant provisions of this Act read as follows:

Section 51

"... [T]he purpose of a suspended sentence ... is that punishment ... for socially less dangerous acts should not be imposed ... when ... it can be expected that an admonition with a threat of punishment (suspended sentence) ... will ... [be sufficient to deter the offender] ... from committing any [other] criminal acts."

Section 52 § 1

"In handing down a suspended sentence, the court shall impose a punishment on a person who has committed a criminal act and at the same time order that this punishment shall not be enforced if the convicted person does not commit another criminal act for a [specified] period of time, which cannot be less than one or more than five years in all (period of suspension)."

Section 53 § 4

"In deciding whether or not to impose a suspended sentence, the court shall take into account the purpose of [this] sentence, the personality of the offender, his conduct prior to and following the commission of the criminal act, the degree of his criminal liability, as well as all the other circumstances under which the act was committed."

Section 54 §§ 1 and 2

"The court shall revoke the suspended sentence [and order its execution] if, during the period of suspension, the convicted person commits one or more [additional] criminal acts for which he is sentenced to imprisonment for a term of or exceeding two years.

If, during the period of suspension, the convicted person commits one or more [additional] criminal acts and is sentenced to imprisonment for a term not exceeding two years or to a fine, the court shall, upon consideration of all the circumstances ... including the similarity of the crimes committed ... decide whether or not to revoke the suspended sentence ... ".

III. INTERNATIONAL DOCUMENT REFERRED TO BY THE GOVERNMENT

23. The Government referred, *inter alia*, to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted by the UNECE – United Nations Economic Commission for Europe – on 25 June 1998).

24. Section 5 § 1(c) of that convention provides that in the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

IV. OTHER RELEVANT DOCUMENTS

25. On 4 October 2007 the Parliamentary Assembly of the Council of Europe adopted Resolution 1577 (2007), *Towards decriminalisation of defamation*, in which it urged those member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complained under Article 10 of the Convention of a breach of his right to freedom of expression stemming from his criminal conviction. Article 10 reads as follows:

> "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. ...
>
> 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 ... for the protection of the reputation or rights of others ..."

A. Admissibility

1. Compatibility ratione personae

27. The applicant complained against both Montenegro and Serbia.

28. The Court notes that both member States of the then State Union of Serbia and Montenegro were responsible for the protection of human rights in its territory (see paragraph 17 above). Given the fact that the entire criminal proceedings have been conducted solely within the competence of the Montenegrin courts, the Court finds the applicant's complaint in respect of Montenegro compatible *ratione personae* with the provisions of the Convention. For the same reason, however, his complaint in respect of Serbia is incompatible *ratione personae*, within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.

2. Conclusion

29. The Court has already held that an appeal to the Court of Serbia and Montenegro was an ineffective domestic remedy (see *Matijašević v. Serbia*, no. 23037/04, § 37, ECHR 2006-X). It notes that the Montenegrin Government did not raise any objection with regard to the admissibility of the application within the meaning of Article 35 § 1 of the Convention. The Court considers that the applicant's complaint in respect of Montenegro is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

30. The Government maintained that the applicant's claim was a statement of fact rather than a value judgment, since the applicant himself stated he could prove it, whereas value judgments were not susceptible to proof (see paragraph 10 above). Furthermore, even where a statement amounted to a value judgment, there must exist a sufficient factual basis to support it.

31. The Government reiterated that there had been no need for the applicant to respond to the article at a press conference since he had already responded in the article itself (see paragraph 7 above). The applicant had misused his freedom of expression by directing the public debate towards the Chief Inspector, aiming primarily to discredit him and present him as corrupt.

32. The Government further relied on various international documents, in particular the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which provides, *inter alia*, that all information with regard to how harm arising from a possible imminent threat to human health may be prevented or mitigated must be disseminated without delay to the public which may be affected thereby (see paragraphs 23 and 24 above).

33. The Government reiterated that freedom of expression entailed the right to receive information, but that it was in the public interest that such information should be true, in particular when it related to a matter such as the quality of drinking water.

34. Lastly, the Government concluded that the restriction on freedom of expression in such a case was necessary in a democratic society, that the criminal sanction was proportionate to the legitimate aim pursued and that, therefore, there was no violation of Article 10 of the Convention.

35. The applicant made belated comments, which, on that account, were not admitted to the file.

2. The Court's assessment

36. As the Court has often observed, the freedom of expression enshrined in Article 10 constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of that Article, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb (see, among many other authorities, *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236, and *Vogt v. Germany*, 26 September 1995, § 52, Series A no. 323).

37. The Court has also already upheld the right to impart, in good faith, information on matters of public interest even where the statements in question involved untrue and damaging statements about private individuals (see, *mutatis mutandis*, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III) and has emphasised that it has to be taken into account whether the expressions at issue concern a person's private life or their behaviour and attitudes in the capacity of an official (see *Dalban v. Romania* [GC], no. 28114/95, § 50, ECHR 1999-VI). The Court recalls in this connection that senior civil servants acting in an official capacity are subject to wider limits of acceptable criticism than private individuals (see *Thoma v. Luxembourg*, no. 38432/97, § 47, ECHR 2001-III; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 80, ECHR 2004-XI; *Mamère v. France*, no. 12697/03, § 27, ECHR 2006-XIII; and *Dyundin v. Russia*, no. 37406/03, § 26, 14 October 2008).

38. In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. Where a statement amounts to a value judgment the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (see, among many authorities, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87 *in fine*, ECHR 2005-II).

39. Finally, the Court notes that the nature and severity of the penalty imposed, as well as the "relevance" and "sufficiency" of the national courts' reasoning, are matters of particular significance when it comes to assessing the proportionality of an interference under Article 10 § 2 (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004, and *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII), and reiterates that Governments should always display restraint in resorting to criminal sanctions, particularly where there are other means of redress available (see *Castells v. Spain*, cited above, § 46).

40. Turning to the present case, the Court notes that the final criminal judgment at issue obviously amounts to an interference with the applicant's right to freedom of expression. Since the conviction was based on the Criminal Code, however, this interference must be deemed as "prescribed by law" within the meaning of Article 10 § 2 (see paragraph 21 above). Further, the judgment at issue was adopted in pursuit of a legitimate aim, that is, "for the protection of the reputation of others". The parties have not contested these findings. What remains to be resolved, therefore, is whether the interference was "necessary in a democratic society" or, in other words, whether the criminal conviction was proportionate to the legitimate aim pursued.

41. In this regard, the Court firstly notes that the applicant was responding to a newspaper article the title of which implied that the drinking

water was contaminated with various bacteria. The fact that the applicant considered it his duty as the Director of the Water Supply Company to respond to such an article is understandable. Secondly, the main aim when organising the press conference was to inform the public that the water pumped into the system had been filtered and was thus safe for use. Thirdly, even though he also criticised the Chief Inspector, this criticism concerned his behaviour and attitudes in his capacity as an official, rather than his private life. As noted above, senior civil servants acting in an official capacity are subject to wider limits of acceptable criticism than private individuals (see paragraph 37 above). For the Court, the applicant's remarks, even if it is accepted that they were a statement of fact rather than a value judgment, were not a gratuitous attack on the Chief Inspector but rather, from the applicant's perspective, a robust clarification of a matter under discussion which was of great public interest.

42. Further, the Court notes that the domestic courts, notwithstanding the applicant's encouragement to do so, failed to situate his remarks in a broader context, namely the debate generated by the quality of the drinking water in the area concerned. In view of this rather restricted approach to the matter, it can scarcely be said that the reasons given by the domestic courts can be considered relevant and sufficient.

43. Lastly, the Court recalls that while the use of criminal-law sanctions in defamation cases is not in itself disproportionate (see *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 59, ECHR 2007-XI; *Długołęcki v. Poland*, no. 23806/03, § 47, 24 February 2009; and *Saaristo and Others v. Finland*, no. 184/06, § 69 *in limine*, 12 October 2010), the nature and severity of the penalties imposed are factors to be taken into account (see, *mutatis mutandis*, *Cumpănă and Mazăre*, cited above, § 111). In this regard, the Court also recalls the Resolution of the Council of Europe, which was adopted in the meantime, calling on the member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay (see paragraph 25 above). In the present case, the Court notes with concern that the applicant was given a suspended sentence, which could, under certain circumstances, have been transformed into a prison sentence (see paragraphs 12 and 22, in particular section 54 quoted therein).

44. In view of the above, especially bearing in mind the seriousness of the criminal sanction involved, and reaffirming its long-standing practice that there is little scope under Article 10 § 2 of the Convention for restrictions on the debate of questions of public interest (see *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 46, ECHR 1999-VIII), the Court finds that the interference in question was not necessary in a democratic society. Accordingly, there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

46. The applicant claimed damages and costs and expenses in the total amount of 100,000 euros (EUR) after the expiry of the time-limit for submitting Article 41 claims.

47. The Government contested the applicant's claim as belated, unsubstantiated, inappropriately high and not in line with the Court's case-law.

48. The Court notes that the applicant's just satisfaction claim was submitted on 8 December 2010, a month after the expiry of the original deadline on 8 November 2010. The Court further notes that the applicant has advanced no justified reasons for having failed to comply with the requirements of Rule 60 § 2 of the Rules of the Court. In these circumstances the Court considers that his claim should be dismissed.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application in respect of Montenegro admissible, and the application in respect of Serbia inadmissible;

2. *Holds* that there has been a violation of Article 10 of the Convention by Montenegro;

3. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

FOURTH SECTION

CASE OF KOPRIVICA v. MONTENEGRO

(Application no. 41158/09)

JUDGMENT
(Merits)

STRASBOURG

22 November 2011

FINAL

22/02/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Koprivica v. Montenegro,

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

Nicolas Bratza, *President,*
Lech Garlicki,
David Thór Björgvinsson,
Päivi Hirvelä,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 3 November 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 41158/09) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Mr Veseljko Koprivica ("the applicant"), on 31 July 2009.

2. The applicant was represented by Mr R. Prelević, a lawyer practising in Podgorica. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicant complained under Article 10 of the Convention that the final civil court judgment rendered against him breached his right to freedom of expression.

4. On 10 May 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Podgorica.

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

A. The article and ensuing civil proceedings

7. On 24 September 1994 an article, entitled "16", was published in a Montenegrin weekly magazine, the *Liberal,* in circulation at the time, which was opposed to the Government. The article, which appeared to have been written by a special correspondent from The Hague, reported that many journalists from the former Yugoslavia were going to be tried for incitement to war before the International Criminal Tribunal for the former Yugoslavia ("the ICTY"), including sixteen journalists from Montenegro. The article named the two ICTY officials who had allegedly prepared the file and then went on to list the names of the sixteen journalists in question. The applicant in the present case was the editor-in-chief of the *Liberal* and its founder was a prominent opposition party at the time.

8. On 27 October 1995 one of the sixteen journalists whose name had appeared in the article ("the plaintiff"), and who had himself been an editor of a major State-owned media outlet, filed a compensation claim against the applicant and the magazine's founder. The plaintiff claimed that the assertions contained in the article, which were later repeated through other media both within the country and abroad, were untrue and that they were harmful to his honour and reputation. He enclosed a copy of a Serbian daily newspaper, the *Politika*, published on 27 September 1994, in support of his claim that the assertions had been transmitted by other media.

9. On 29 May 2002 the ICTY informed the Court of First Instance (*Osnovni sud*) in Podgorica that it had no information whatsoever concerning the plaintiff.

10. In the course of the civil proceedings, the applicant maintained that he had relied on the information provided by the magazine's special correspondent. Commenting on the ICTY's statement, however, the applicant said:

> "I'm not interested in there being no proceedings against [the plaintiff], the contents of the ICTY ... letter, or whether [the plaintiff] is on that list. I have personally witnessed [his] work as the editor-in-chief of the [media outlet in question] during the reporting on the Dubrovnik operation ....".

11. On 17 May 2004 the Court of First Instance ruled partly in favour of the plaintiff, ordering the applicant and the magazine's founder, jointly, to pay him the sum of 5,000 euros ("EUR") for the non-pecuniary damage suffered. On the basis of the ICTY's statement, the court found that the published assertions had not been true and, in particular, that the applicant had not been interested in their veracity. The court refused to hear the author of the article, considering it unnecessary in the light of the information provided by the ICTY. It considered that the applicant's proposal that the author be heard was also aimed at delaying the proceedings as the applicant did not know his exact address. In any event, the author had not mentioned in his text the number of the case file, dates or any other data which would

in a convincing manner support the veracity of the information. The court held that the applicant should not have allowed the publishing of untrue information, as it represented a misuse of freedom of expression, and that he should have attempted to check its accuracy first instead of trusting his correspondent unreservedly. The court further held that personal beliefs and convictions could not justify the publishing of such information and concluded that the assertions in question had harmed the honour and the reputation of the plaintiff.

12. Both the plaintiff and the applicant appealed against the judgment. The plaintiff, in particular, complained that the compensation awarded was too low. The applicant, for his part, disputed that he, as the editor-in-chief, should be held responsible for the publishing of information of dubious veracity. He submitted that the information was of particular importance to the public and proposed additional evidence, namely that the court hear a colleague of his as an additional witness, as he was present when the fax with the impugned information was received and whom he consulted on whether to publish the information or not, as well as to see a documentary film broadcast in 2004 by the same media outlet whose editor-in-chief in the early 1990s had been the plaintiff himself, and which allegedly contained an unfavourable reference to the plaintiff and his work at the time. The applicant concluded that, in any event, the damages awarded were too high.

13. On 14 March 2008 the High Court (*Viši sud*) in Podgorica increased the amount of damages to EUR 10,000 and assessed the litigation costs at EUR 5,505. In so doing, it endorsed the reasoning of the Court of First Instance, adding that the applicant should have focused on the accuracy of the information in question rather than having it published as soon as possible. The court took the view that the veracity of the assertions could not be established by the applicant consulting the article's author or another colleague but only by reliable evidence, which was lacking in this case. It further held that, according to the legislation in force at the time the article was published, the editor-in-chief, *inter alia*, could also be held responsible for publishing untrue information (see paragraph 32 below). The court made no reference to the documentary film referred to by the applicant.

14. On 6 November 2008 the Supreme Court (*Vrhovni sud*) in Podgorica amended the High Court's judgment, reducing the damages and costs awarded to EUR 5,000 and EUR 2,677.50, respectively.

B. Enforcement proceedings

15. On 5 June 2009 the Court of First Instance ordered the payment of the amounts awarded by the High Court.

16. On 17 November 2009 the Court of First Instance issued a further order, specifying that payment should be made by regular transfers of one

half of the applicant's salary (*zarada*) which he was earning in another magazine.

17. On 17 November 2010, following a request by the applicant, the Court of First Instance terminated (*obustavio*) the enforcement of the High Court's judgment. At the same time, it confirmed that the amount owed was the one awarded by the Supreme Court, to be paid by regular transfers of one half of the applicant's salary to the plaintiff.

18. By 14 October 2011 the applicant had paid to the plaintiff EUR 852.99 in total.

C. Other relevant facts

19. It would appear that as of March 2005 the founder of the magazine ceased to exist, leaving the applicant as the only remaining debtor.

20. The applicant's pension between 2004 and 2008 ranged between EUR 170 and EUR 300 per month.

21. The average monthly income in Montenegro when the relevant domestic decisions were rendered was EUR 195 in 2004 and EUR 416 in 2008. Financial brokers had the highest incomes, these being on average EUR 345 in 2004 and EUR 854 in 2008.[1]

22. There are no copies of any articles relating to the impugned information published by other media in the case file except for a copy of part of the article published in the *Politika* (see paragraph 8 above).

23. On an unspecified date after the impugned article had been published another journalist from the list of the sixteen lodged a private criminal action (*privatna krivična tužba*) against the applicant for defamation (*kleveta*). On 20 September 1995 the Court of First Instance found the applicant guilty and ordered him to pay a fine of 800 dinars (YUD) and costs in the amount of YUD 100. On 23 November 1999 the High Court rejected the criminal action as the prosecution had become time-barred in the meantime. There is no information in the case file whether other journalists whose names appeared in the article instituted proceedings, either civil or criminal, against the applicant.

[1] The data are taken from the website of the Statistics Agency of Montenegro on 21 July 2011 http://www.monstat.org/cg/page.php?id=24&pageid=24 .

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Montenegro 2007 (*Ustav Crne Gore*; published in the Official Gazette of Montenegro - OGM - no. 1/07)

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

Article 47

"Everyone is entitled to freedom of expression ....

Freedom of expression can be limited only by the right of others to dignity, reputation and honour ...."

Article 147 §§ 1 and 2

An Act ... cannot have a retroactive effect.

Exceptionally, certain provisions of an Act can have retroactive effect, if required by the public interest ....

Article 149

"The Constitutional Court shall ...

(3) ... [rule on a] ... constitutional appeal ... [lodged in respect of an alleged] ... violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted ..."

25. The Constitution entered into force on 22 October 2007.

B. Constitutional Court Act of Montenegro (*Zakon o Ustavnom sudu Crne Gore*; published in OGM no. 64/08)

26. Section 34 provides, *inter alia*, that while decisions upon a constitutional appeal may be published in the Official Gazette, they must be published on the website of the Constitutional Court.

27. Sections 48 to 59 provide additional details as regards the processing of constitutional appeals. In particular, section 56 provides that when the Constitutional Court finds a violation of a human right or freedom, it shall quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body which rendered the quashed decision.

28. This Act entered into force in November 2008.

C. Rules of the Constitutional Court of Montenegro (*Poslovnik Ustavnog suda Crne Gore*; published in OGM no. 33/09)

29. Rule 93(2) provides that public access to the work of the court is to be ensured, *inter alia*, by publishing its decisions in the Official Gazette of Montenegro and on the website of the court.

D. Obligations Act (*Zakon o obligacionim odnosima*; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia - OG SFRY - nos. 29/78, 39/85, 45/89, 57/89 and the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - no. 31/93)

30. Section 198 regulated responsibility for pecuniary damage caused by an individual's harming another person's reputation or asserting or disseminating untrue allegations where that individual knew or should have known that these allegations were untrue.

31. Under sections 199 and 200, *inter alia*, anyone who had suffered mental anguish as a consequence of damage to his honour or reputation could, depending on its duration and intensity, sue for financial compensation before the civil courts and, in addition, request other forms of redress "which might be capable" of affording adequate non-pecuniary compensation.

E. Public Information Act (*Zakon o javnom informisanju*; published in the Official Gazette of the Republic of Montenegro no. 56/93)

32. Section 62 provided that if untrue information, which harmed another's honour or reputation, was published in the media (*javno glasilo*), an interested person would be entitled to sue the relevant author, editor-in-chief, founder and publisher for financial compensation.

F. Media Act (*Zakon o medijima*; published in OGRM nos. 51/02 and 62/02 and OGM no. 46/10)

33. Section 20 of the Act provides that if a person's honour or integrity is harmed by information published in the media, that person may file a compensation claim against the author and the founder of the particular medium in question.

34. This Act entered into force in 2002.

G. The relevant domestic case-law[1]

35. As of 21 July 2011 a total of 705 constitutional appeals would appear to have been examined by the Constitutional Court: 351 of them were rejected on procedural grounds (*odbačene*), 333 were rejected on the merits (*odbijene*), in three cases the proceedings were terminated (*obustava postupka*), and in four cases examination was adjourned. By the same date, fourteen constitutional appeals had been accepted, the first one having been accepted on 8 July 2010; this decision was published in the Official Gazette on 26 November 2010.

36. A single document containing 77 decisions rendered in 2009 was posted on the website of the Constitutional Court on an unspecified date in 2010. Another single document containing 205 decisions, out of 337 rendered in 2010, was posted on the website on an unspecified date after 17 May 2011. By 21 July 2011 none of 291 decisions rendered in 2011 has been made public on the Constitutional Court's website.

37. By the same date thirteen decisions had been published in the Official Gazettes and in these thirteen constitutional appeals were accepted.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. The applicant complained, under Article 10 of the Convention, that his right to freedom of expression had been breached as a result of the final civil court judgment rendered against him.

39. Article 10 reads as follows:

> "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...
>
> 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 ... for the protection of the reputation or rights of others...."

[1] The data are based on the Bulletins and Statements (*Saopštenja*) published by the Constitutional Court on its website by 21 July 2011 (http://www.ustavnisudcg.co.me/aktuelnosti.htm) and the Official Gazettes.

A. Admissibility

1. The parties' submissions

40. The Government maintained that the applicant had failed to exhaust all effective domestic remedies. In particular, he had failed to lodge a constitutional appeal.

41. The applicant asserted that a constitutional appeal was not an effective domestic remedy. He maintained that proceedings following a constitutional appeal lasted too long, two years on average. He further contended that even if such an appeal were to be upheld, the Constitutional Court could only quash the impugned decision and order that the case be re-examined, while he would have to institute another set of proceedings in order to obtain just satisfaction for any damage caused by the decision held to run counter to constitutional provisions.

2. Relevant principles

42. The Court reiterates that, according to its established case-law, the purpose of the domestic remedies rule contained in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court. However, the only remedies to be exhausted are those which are effective.

43. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV).

44. The Court notes that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see *Akdivar and Others*, cited above, § 69).

3. The Court's assessment

45. The Court notes that following their introduction in October 2007, constitutional appeals had been systematically rejected or dismissed until July 2010, when the first decision upholding such an appeal was rendered, which decision was published more than four months later.

46. The Court further notes that by 31 July 2009, the date on which the applicant lodged his complaint with this Court, no constitutional appeal had been upheld, nor had any decision rendered thereupon been made available to the public, even though the constitutional appeal had already existed for roughly one year and nine months. Such a situation continued until an unspecified date in 2010, with the majority of decisions not having been made public even afterwards. As the applicant had filed his application with the Court before any decision of the Constitutional Court was published and because the issue of whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged, the Court considers that the applicant was not obliged to exhaust this particular avenue of redress before turning to Strasbourg (see, *mutatis mutandis*, *Vinčić and Others v. Serbia*, no. 44698/06 et seq. § 51, 1 December 2009, as well as *Cvetković v. Serbia*, no. 17271/04, § 41, 10 June 2008). Therefore, the Government's objection in this regard must be dismissed. The Court might in future cases reconsider its view if the Government demonstrate, with reference to concrete published decisions, the efficacy of the remedy, with the consequence that applicants may be required first to exhaust that remedy before making an application to the Court (see, *mutatis mutandis*, *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 43-44, 29 April 2008).

47. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant's submissions

48. The applicant maintained that the domestic courts' judgments were not in accordance with the law, as the courts should have applied the Media Act of 2002, which did not provide for the responsibility of the editor-in-chief, as well as sections 198 and 199 of the Obligations Act, which provided other forms of redress (see paragraphs 30, 31, 33 and 34 above).

49. The applicant reiterated that the domestic courts had rejected all the evidence proposed by him in order to establish whether he had acted in good faith, and whether any public interest had been served in publishing the article in question. In particular, they had refused to hear the witnesses he had proposed or to view the documentary film (see paragraph 13 above).

50. He further submitted that, at the time, there had been no official contacts between the ICTY and the then Federal Republic of Yugoslavia (FRY), of which Montenegro had been a part; nor had there been any Internet connection available in Montenegro. In view of this, he had entirely depended on the special correspondent and his own sound judgment of his opponent's editorial policy. Furthermore, the plaintiff himself had made no attempt whatsoever to deny the information in issue.

51. He maintained that his statement as cited in the judgment of the Court of First Instance (see paragraph 10 above) was rather the domestic judge's interpretation of what he had said at a hearing when he had not been represented by a professional lawyer. What he had meant was that anyone who had observed the plaintiff's editorial policy at the relevant time could have easily believed that the ICTY was investigating his role.

52. Finally, the applicant submitted that the compensation awarded was disproportionate, having regard to his modest income at the time (see paragraph 20 above).

(b) The Government's submissions

53. The Government submitted that the domestic decisions were in accordance with the law, as the Constitution prohibited retroactive implementation of legislation, and there was no legal ground for the implementation of the legislation passed in 2002 (see paragraph 24 above).

54. They reiterated that freedom of expression was not an absolute right but was limited to a significant extent, including in the interest of the protection of the honour and reputation of others.

55. The Government maintained that Article 10 provided not only for the freedom of the media to inform the public but also for the right of the public to be properly informed, this being particularly important with regard to the ICTY and war crimes proceedings, being issues of the broadest public interest. They agreed that while a public debate about issues important for society, including editorial policy, in particular during the war, was fully legitimate in a democratic society, it was nevertheless unacceptable to misinform the public by publishing assertions that international criminal proceedings were pending against someone when that was not the case.

56. They maintained that the information in question was clearly a statement of fact, which had proved to be absolutely inaccurate (see paragraph 9 above), and that its aim was to discredit the plaintiff. The domestic courts had reliably established that the applicant had not been acting in good faith, as the information was nothing more than an undated typed list of names containing no explanation which might lead to the conclusion that the ICTY was in any way interested in the listed journalists.

57. They pointed to the unprofessional attitude of the applicant in his failure to check the veracity of the information, in particular his lack of interest in its accuracy (see paragraph 10 above). The domestic courts had

legitimately refused to hear the witnesses proposed by him, and had duly explained why. In the Government's opinion, the applicant had not proved in the domestic proceedings that the correspondent had indeed had such a status in the *Liberal* or that he was the author of the article.

58. They contested the assertion that the applicant's statement had not been quoted correctly, as he had never before made any objections to the court's record, even though he had been legally represented.

59. Lastly, they doubted that a pension was the applicant's only income.

60. The Government concluded that the interference of the domestic courts with the applicant's right to freedom of expression in this particular case had pursued a legitimate aim and that the compensation awarded was proportionate to this aim, in particular in view of the fact that the information in question had been further transmitted by news agencies throughout the former Yugoslavia, as well as Radio Free Europe, and thus made available to a large number of people.

2. The relevant principles

61. The Court emphasises the essential function fulfilled by the press in a democratic society. Although the press must not overstep certain bounds, particularly in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Dalban v. Romania* [GC], no. 28114/95, § 49, ECHR 1999-VI).

62. It is in the first place for the national authorities to assess whether there is a "pressing social need" for a restriction on freedom of expression and, in making that assessment, they enjoy a certain margin of appreciation (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-...). In cases concerning the press, the State's margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press. The Court's task in exercising its supervisory function is to look at the interference complained of in the light of the case as a whole and to determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether the measure taken was proportionate to the legitimate aim pursued (see *Vogt v. Germany*, 26 September 1995, § 52, Series A no. 323; and *Jerusalem v. Austria*, no. 26958/95, § 33, ECHR 2001-II).

63. A careful distinction needs also to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 98, ECHR 2004-XI, and *Kasabova v. Bulgaria*, no. 22385/03, § 58 *in limine*, 19 April 2011).

64. Article 10 of the Convention does not, however, guarantee wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. These "duties and responsibilities" are liable to assume significance when there is a question, as in the instant case, of attacking the reputation of named individuals and undermining the "rights of others". By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, *mutatis mutandis*, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III; as well as *Rumyana Ivanova v. Bulgaria*, no. 36207/03, § 61, 14 February 2008, and *Kasabova v. Bulgaria*, cited above, § 63).

65. Finally, the amount of compensation awarded must "bear a reasonable relationship of proportionality to the ... [moral] ... injury ... suffered" by the plaintiff in question (see *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 49 Series A no. 316-B; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 96, ECHR 2005 - II, where the Court held that the damages "awarded ... although relatively moderate by contemporary standards ... [were] ... very substantial when compared to the modest incomes and resources of the ... applicants ..." and, as such, in breach of the Convention; see also *Lepojić v. Serbia*, no. 13909/05, § 77 *in fine*, 6 November 2007, where the reasoning of the domestic courts was found to be insufficient given, *inter alia*, the amount of compensation and costs awarded equivalent to approximately eight average monthly salaries).

3. The Court's assessment

66. Turning to the present case, the Court considers that the final civil court judgment undoubtedly constituted an interference with the applicant's right to freedom of expression. In view of the relevant provisions of the Obligations Act and the prohibition on retroactive implementation of Acts under the Montenegrin Constitution, the Court is satisfied that the interference was "prescribed by law" within the meaning of Article 10 § 2 of the Convention (see paragraphs 24, 30 and 31 above). The Court does not consider that section 198 of the Obligations Act, invoked by the applicant (see paragraph 30 above), was applicable in the present case, as it concerned compensation for pecuniary damage. The Court further accepts that the impugned judgment was adopted in pursuit of a legitimate aim, namely "for the protection of the reputation" of another. What remains to be resolved, therefore, is whether the interference was "necessary in a democratic society".

67. In this latter connection, the Court considers that the impugned article was clearly based on an allegation of fact and as such susceptible to proof. It must therefore be examined whether there were any special grounds in the particular circumstances of the present case for requiring the applicant as the editor-in-chief of the magazine to verify whether the information, which was allegedly defamatory of the plaintiff, had a basis in fact. The Court notes in this connection that the information amounted to a serious accusation against the plaintiff, the more so given the sensitivity of the regional context at the material time. On that account, the Court considers that particular diligence was required before transmitting the information to the public. Furthermore, the situation must be examined as it presented itself to the applicant at the material time, rather than with the benefit of hindsight on the basis of the information contained in the ICTY letter obtained in the course of the domestic proceedings a long time thereafter (see paragraph 9 above, see also *Bladet Tromsø and Stensaas v. Norway*, cited above, § 66 *in fine*).

68. The Court observes that the inaccuracy of the information published was, in substance, the main reason why the domestic courts awarded damages. The applicant, for his part, submitted that it was impossible for him to check the accuracy of the special correspondent's dispatch, as there was no Internet connection or official contacts between the FRY and the ICTY at the relevant time. The domestic courts themselves established only in 2002 that the information was untrue, namely six years and seven months after the domestic proceedings had been instituted. However, it is unclear whether this was due to the domestic courts' inactivity in this regard or because it had been impossible to establish the veracity of the information earlier.

69. The Court considers that, in the absence of official contacts and Internet, there was no reason for the applicant not to try at least to contact the ICTY himself by other means (telephone, fax, mail) in order to double-check the existence of a factual basis for the allegation. The Court is aware that news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see, *inter alia*, *Bozhkov v. Bulgaria*, no. 3316/04, § 48, 19 April 2011, and the authorities cited therein). However, in the present case, the article was not published in a daily newspaper, but in a weekly magazine, which gave the applicant more time for double-checking. In addition, the applicant's statement made during the domestic proceedings clearly implies that he was not concerned with verifying the truth or reliability of the information before publishing it (see paragraph 10 above).

70. While the Government expressed a doubt that the correspondent was the author of the article, the Court observes that the applicant proposed in the course of the domestic proceedings that the courts hear both the correspondent as well as another journalist who was present on the

magazine's premises when the impugned information was received by fax (see paragraphs 57, 11, 12 and 13 above, in that order). However, the courts refused to hear the witnesses proposed.

71. Even though it can be argued that in the particular circumstances of the instant case the applicant should have personally taken steps to verify the accuracy of the impugned information, the Court considers that the person best placed to check the accuracy was the special correspondent. It is significant that at all times the applicant maintained that he had confidence in the professionalism of the magazine's special correspondent and, on that account, requested the domestic courts to hear the special correspondent. The courts refused to do so (see paragraphs 11 and 49 above). The applicant was thus denied an opportunity to attempt to clarify the situation. The Court recalls that it is not, in principle, incompatible with Article 10 to place on the defendant in libel proceedings the burden of proving to the civil standard the truth of defamatory statements. However, this is subject to the proviso that the defendant must be allowed a realistic opportunity to do so (see *Kasabova v. Bulgaria*, cited above, § 58 *in limine*, and the relevant autorities cited therein).

72. While noting the above considerations, the Court is prepared to accept that the applicant failed to take adequate steps to verify the impugned information, while also acknowledging that the domestic courts, for their part, took a rather restricted approach to the matter by refusing the applicant's proposals to hear relevant witnesses. However, the Court does not consider it necessary to take a firm stance on these matters, because it is in any event of the view that the damages awarded against the applicant were disproportionate (see, *mutatis mutandis, Kasabova v. Bulgaria*, cited above, § 68).

73. In particular, the Court finds that the damages and costs awarded were very substantial when compared to the applicant's income at the time, being roughly twenty-five times greater than the applicant's pension (see paragraphs 14 and 20 above; see also *Tolstoy Miloslavsky v. the United Kingdom,* cited above; and *Lepojić v. Serbia*, cited above, § 77 *in fine*). While the Government contested that the applicant's pension was his only income, they failed to submit any evidence to the contrary (see paragraph 59 above). The Court notes that the enforcement order of 17 November 2009 implies that the applicant at that time worked for another magazine (see paragraph 16 above). However, there is no information in the case file that he was also working at the time when the domestic judgments were rendered. In any event, the Court considers that the damages and costs he was ordered to pay to the plaintiff were very substantial even when compared to the highest incomes in the respondent State in general (see paragraph 21 above, see also, *mutatis mutandis*, *Sorguç v. Turkey*, no. 17089/03, § 37, ECHR 2009-... (extracts)).

74. In conclusion, the Court finds that the award of damages and costs in the present case were disproportionate to the legitimate aim served (see, *mutatis mutandis*, *Steel and Morris v. the United Kingdom*, cited above, § 97). It follows that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society".

75. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. The relevant provision of this Article reads as follows:

Article 41

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

77. The applicant claimed EUR 7,667.50 in respect of pecuniary damage, this amount corresponding to damages and legal costs awarded against him in the domestic proceedings, and EUR 5,000 in respect of non-pecuniary damage. He also claimed EUR 593 for the costs and expenses incurred before the Court.

78. The Government contested the claim in respect of pecuniary and non-pecuniary damage. In particular, they maintained that there was no causal link between the damage and the possible violation of Article 10. Finally, the domestic judgment had not been enforced yet and the applicant had not paid the amounts awarded. The Government left the applicant's claim in respect of the costs and expenses to the assessment of the Court.

79. The Court considers that this question is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the parties (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision and accordingly
   (i) *reserves* the said question in whole;

(ii) *invites* the parties to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(iii) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 22 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Nicolas Bratza
Deputy Registrar	President

FOURTH SECTION

CASE OF LAKIĆEVIĆ AND OTHERS v. MONTENEGRO AND SERBIA

(Applications nos. 27458/06, 37205/06, 37207/06 and 33604/07)

JUDGMENT

STRASBOURG

13 December 2011

FINAL

13/03/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lakićević and others v. Montenegro and Serbia**,**

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 22 November 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in four separate applications (nos. 27458/06, 37205/06, 37207/06 and 33604/07) lodged with the Court against both Montenegro and Serbia (the first and the third applicants) and against Montenegro alone (the second and the fourth applicants) under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Montenegrin nationals, Ms Nevenka Lakićević (the first applicant), Mr Borislav Vukašinović (the second applicant), Mr Veselin Budeč (the third applicant) and Mr Vlado Rajković (the fourth applicant) on 5 June 2006, 2 August 2006, 24 July 2006 and 24 July 2007 respectively.

2. The first, third and fourth applicants were, exceptionally, granted leave to represent themselves (Rule 36 § 2 of the Rules of Court). The second applicant was represented by Mr V. Đurišić, a lawyer practising in Podgorica. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicants complained under Article 6 of the Convention and Article 1 of Protocol No.1 about the suspension of their pensions.

4. On 19 April 2010 the President of the Fourth Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants - Ms Nevenka Lakićević (the first applicant), Mr Borislav Vukašinović (the second applicant), Mr Veselin Budeč (the third applicant), and Mr Vlado Rajković (the fourth applicant) - are all Montenegrin nationals who were born in 1947, 1937, 1924, and 1944 respectively. They live in Herceg-Novi (the first and third applicants) and Podgorica (the second and fourth applicants).

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

A. Suspension of pensions

7. Between November 1989 and June 2002 the applicants closed their private law firms and submitted papers to begin their retirements.

8. Between August 1990 and September 2002 their old-age and disability pension entitlements, as well as the exact amount of their pensions (*starosna i invalidska penzija*), were established by decisions of the Pension and Disability Insurance Fund (*Republički fond penzijskog i invalidskog osiguranja*; hereinafter "the Pension Fund"). The decisions, as submitted by the second and fourth applicants, allowed the applicants to resume working on a part-time basis.

9. Between April 1996 and June 2002 the applicants reopened their own legal practices on a part-time basis.

10. On 1 April 2004, 20 July 2005, 3 June 2005 and 24 November 2005 the Pension Fund suspended (*obustavlja*) payment of the applicants' pensions respectively, until such time as they ceased professional activity. These decisions were all "deemed to be applicable as of 1 January 2004", which was when section 112 of the Pension and Disability Insurance Act 2003 (hereinafter "the Pension Act 2003") entered into force (see paragraphs 23 and 25 below).

11. The Pension Fund's rulings were subsequently upheld by the Ministry of Labour and Social Welfare (*Ministarstvo rada i socijalnog staranja*), as well as, ultimately, by the Administrative Court (*Upravni sud*) on 6 December 2005, 4 April 2006, 18 April 2006 and 7 February 2007 in respect of the first, second, third and fourth applicants respectively. The Administrative Court explained, *inter alia*, that the applicants had not been deprived of their pension entitlements as such, but that the payment of their pensions had instead been suspended on the basis of the relevant domestic legislation.

12. Finally, on 13 June 2006, 27 June 2006 and 28 May 2007 respectively, the Supreme Court (*Vrhovni sud*) in Podgorica dismissed the

second, third and fourth applicants' requests for judicial review of their cases (*zahtjev za vanredno preispitivanje sudske odluke*). In so doing, the Supreme Court essentially endorsed the reasons given by the Administrative Court.

13. The first applicant did not attempt to make use of the judicial review avenue, in view of the fact that the other applicants' identical requests had already been rejected by the Supreme Court.

14. Payment of the second applicant's pension was resumed with effect from 1 December 2007, which is when he ceased his professional activity. The payment of the second, third and fourth applicants' pensions was resumed with effect from 1 January 2009, which is when the Amendments to the Pension Act entered into force, repealing section 112 of the Pension Act 2003 (see paragraph 26 below).

B. Civil proceedings against the applicants

1. The first applicant

15. On 30 June 2004 the Pension Fund lodged a compensation claim against the first applicant, seeking repayment of the pension payments she had received for January and February 2004 in the total amount of 425.74 euros (EUR). In response, the first applicant lodged a counterclaim seeking payment of the pension which had not been paid to her between March 2004 and December 2008 due to the suspension of her pension rights, amounting in total to EUR 15,332.45.

16. On 4 November 2009 the Court of First Instance (*Osnovni sud*) in Herceg Novi, after joining the two proceedings, ruled in favour of the first applicant, referring, in particular, to section 6 of the Amendments to the Pension and Disability Insurance Act 2003 (hereinafter "the Amendments to the Pension Act"), section 193 of the Pension Act 2003 as well as a decision of the Constitutional Court of Montenegro (see paragraphs 26, 24 and 28 below). On 19 January 2010 the High Court (*Viši sud*) in Podgorica overturned this judgment and ruled against the first applicant, relying on sections 112 and 222 of the Pension Act 2003 and considering that their application was not retroactive. This judgment was upheld by the Supreme Court on 3 June 2010, which court mainly endorsed the reasons of the High Court. In doing so, the Supreme Court in particular referred to section 112 of the Pension Act 2003.

17. On 29 July 2010 the Court of First Instance issued an enforcement order providing that the Pension Fund would retain half the first applicant's pension until the entire sum owed had been paid. On 4 November 2010 this decision was upheld by the High Court.

2. The second and third applicants

18. On 17 January 2007 and an unspecified date the Pension Fund lodged compensation claims against the second and third applicants respectively, seeking repayment of the pension they had received from 1 January 2004 onwards.

19. On 20 June 2007 the Court of First Instance in Podgorica ruled against the second applicant, which judgment was upheld by the High Court in Podgorica on 13 February 2009. It would appear from the case file that this decision has been enforced.

20. On 25 February 2010 the Court of First Instance in Herceg Novi ruled in favour of the third applicant. On 16 April 2010 the High Court in Podgorica overturned this decision and ruled against him. In doing so, it referred to the above decisions of the Administrative Court and the Supreme Court (see paragraphs 11 and 12 above). It would appear from the case file that this decision has been enforced in subsequent enforcement proceedings.

4. The fourth applicant

21. There is no information in the case file as to whether the Pension Fund instituted civil proceedings against the fourth applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional Charter of the State Union of Serbia and Montenegro (Ustavna povelja državne zajednice Srbija i Crna Gora, published in the Official Gazette of Serbia and Montenegro no. 1/03)

22. Article 9 § 1 of the Constitutional Charter provided that both member States shall regulate, safeguard and protect human rights in its territory.

B. Pension and Disability Insurance Act 2003 (Zakon o penzijskom i invalidskom osiguranju, published in the Official Gazette of the Republic of Montenegro - OG RM - no. 54/03)

23. Section 112 paragraph 1 provided that a person's pension shall be suspended should he or she resume working or establish a private practice, for as long as this activity continues.

24. Section 193 paragraph 1 provided that beneficiaries of, *inter alia*, old-age pension (*starosna penzija*) and disability pension (*invalidska penzija*), who obtained these rights in accordance with the relevant legislation in force before this Act entered into force, shall preserve these

rights afterwards at the same level (*u istom obimu*) with appropriate adjustments [on the basis of living expenses and average salaries].

25. Section 222 provided that this Act would enter into force on 1 January 2004.

C. Amendments to the Pension and Disability Insurance Act 2003 (Zakon o izmjenama i dopunama zakona o penzijskom i invalidskom osiguranju, published in the Official Gazette of Montenegro - OGM - no. 79/08)

26. Section 6 repealed section 112 paragraph 1 of the Pension Act 2003. These Amendments entered into force on 1 January 2009.

D. Decision of the Federal Constitutional Court published in the Official Gazette of the Federal Republic of Yugoslavia no. 39/2002

27. On 12 July 2002 the Federal Constitutional Court of Yugoslavia, Yugoslavia being comprised of Montenegro and Serbia at the time, held that section 32 of the Federal Pension and Disability Insurance Act, which essentially corresponded to section 112 paragraph 1 of the Pension Act 2003, was in breach of the Constitution of the Federal Republic of Yugoslavia. In particular, once pension entitlements had been acquired they could not be repealed or restricted by subsequent measures. Further, there was a lack of proportionality between the public interest, protection of which was allegedly the intention of the provisions in question on the one hand and the interests of individuals in respect of their property rights on the other. Lastly, the court held that the section in question was indeed retroactive in nature, since it had also been applied to pensioners who had resumed professional activities before its entry into force.

E. Decision of the Constitutional Court of the Republic of Montenegro U br. 7/04, 11/04, 30/04, 60/04 and 101/04

28. On 10 November 2004 the Constitutional Court of the Republic of Montenegro rejected an initiative to assess the constitutionality of section 112 paragraph 1 of the Pension Act 2003. In so doing, it held, *inter alia*, that it was a matter of legislative judgment whether or not to allow a person to simultaneously receive pension and resume working, and that therefore this matter fell outside the jurisdiction of the Constitutional Court. It further held:

> "According to the ...Constitutional Court, Article 112 § 1 of the 2003 Act does not have retroactive effect, as it does not apply to situations which came into existence before its entry into force, but only as regards those ... which have arisen ... [thereafter] ...".

F. Administrative Dispute Act (Zakon o upravnom sporu, published in OG RM no. 60/03 and OGM no. 32/11)

29. Articles 40-46 provide details concerning a request for judicial review (*zahtjev za vanredno preispitivanje sudske odluke*).

30. In particular, Articles 40-42 provide that parties may file a request for judicial review with the Supreme Court. They may do so within a period of 30 days following receipt of a final decision rendered by the Administrative Court, and only if the relevant legislation, procedural or substantive, has been breached by the lower court.

31. In accordance with Article 46, the Supreme Court shall, should it accept a request for judicial review lodged by one of the parties concerned, have the power to overturn the impugned judgment or quash it and order a re-trial before the Administrative Court.

THE LAW

I. JOINDER OF THE APPLICATIONS

32. The Court notes that the applications under examination concern the same issue. It is therefore appropriate to join them, in accordance with Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

33. The applicants complained about the suspension of their pensions.

34. The Court considers that their complaints naturally fall to be examined under Article 1 of Protocol No. 1 only (see, *mutatis mutandis*, *Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000-X; *Skórkiewicz v. Poland* (dec.), no 39860/98, 1 June 1999; and *Domalewski v. Poland* (dec.), no. 34610/97, 15 June 1999), which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. Compatibility ratione personae

(a) As regards the applicants

35. The Government maintained that the applicants had lost their victim status when the Amendments to the Pension Act entered into force on 1 January 2009, as of that moment payment of their pensions was resumed (see paragraphs 26 and 14 above).

36. The first, second and third applicants contested this claim. The fourth applicant made no comment in this respect. In particular, the first applicant maintained that her victim status persisted, as she had never obtained any compensation for the pension she had not received for the period between 1 March 2004 and 31 December 2008, and was thus still deprived of her property.

37. The Court reiterates that an individual can no longer claim to be a victim of a violation of the Convention when the national authorities have acknowledged, either expressly or in substance, a breach of the Convention and have provided redress (see *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51). Accordingly, in principle, where domestic proceedings are settled and include an admission of the breach by the national authorities and the payment of a sum of money amounting to redress, the dual requirements established in *Eckle* are satisfied, and the applicant can no longer claim to be a victim of a violation of the Convention.

38. The Court notes that in the present case the national authorities have never acknowledged, either expressly or in substance, a breach of the Convention, nor did they provide any redress for the suspension of pensions which the applicants allege constituted a violation of the Convention. On the contrary, the Government explicitly stated that the suspension of the pensions was not in breach of the Convention, and the domestic courts refused to award any compensation in this respect (see paragraph 57 below and paragraphs 15-17 above).

39. In view of the above, without prejudging the merits of the case, the Court considers that the applicants' status as "victims" within the meaning of Article 34 of the Convention is unaffected. Accordingly, the Government's objection in this regard must be dismissed.

(b) As regards the respondent States

40. The first and third applicants made complaints against both Montenegro and Serbia.

41. The Court notes that each member State of the then State Union of Serbia and Montenegro was responsible for the protection of human rights in its own territory (see paragraph 22 above). Given the fact that the entire proceedings have been conducted solely within the competence of the

Montenegrin authorities, which also had the exclusive competence to deal with the subject matter, the Court, without prejudging the merits of the case, finds the applicants' complaints in respect of Montenegro compatible *ratione personae* with the provisions of the Convention and Protocol No. 1 thereto. For the same reason, however, the first and third applicants' complaint in respect of Serbia is incompatible *ratione personae* within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention (see *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 70, 28 April 2009, and *Šabanović v. Montenegro and Serbia*, no. 5995/06, § 28, 31 May 2011).

2. Compatibility ratione temporis

42. Even though the Government did not raise any objection in this regard, the Court has to satisfy itself that it has jurisdiction in any case brought before it (see, *mutatis mutandis, Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III, as well as *Kavaja and Miljanić v. Montenegro* (dec.), nos. 43562/02 and 37454/08, § 30, 23 November 2010).

43. The Court notes that the relevant domestic legislation providing for the suspension of the applicants' pensions had entered into force on 1 January 2004, which was before the respondent State's ratification of Protocol No. 1 to the Convention on 3 March 2004. However, the Court also observes that the applicants continued to receive their pensions until well after 3 March 2004. The suspension, therefore, did not automatically take place on the basis of the legislation alone, but only after the Pension Fund had rendered specific decisions to that effect, all of which were issued after the respondent State's ratification of the Convention and Protocol No. 1 thereto.

44. In view of this, the Court considers that the impugned interference falls within this Court's competence *ratione temporis* (see*, mutatis mutandis, Blečić,* cited above, § 83-84; as well as *Zana v. Turkey*, 25 November 1997, § 42, *Reports of Judgments and Decisions* 1997-VII).

3. Exhaustion of domestic remedies

(a) As regards the first applicant

45. The Government maintained that the first applicant had not exhausted all effective domestic remedies. In particular, she did not seek a Supreme Court judicial review.

46. The first applicant contested the effectiveness of this remedy, especially in view of the decisions given in respect of the other three applicants, and in view of the fact that the Supreme Court had, in any case, ruled against her in the civil proceedings (see paragraphs 12, 15 and 16 above).

47. The Court reiterates that, according to its established case-law, the purpose of the domestic remedies rule contained in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court. However, the only remedies to be exhausted are those which are effective.

48. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and which offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV).

49. The application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see *Akdivar and Others*, cited above, § 69).

50. The Court recalls that it has already established that an appeal on points of law in civil proceedings (*revizija*) and an appeal on points of law in criminal proceedings (*zahtjev za ispitivanje zakonitosti pravosnažne presude*), are, in principle, effective domestic remedies within the meaning of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Rakić and Others v. Serbia*, nos. 47460/07 et seq., §§ 37 and 27, 5 October 2010, and the authorities cited therein; *Debelić v. Croatia*, no. 2448/03, §§ 20 and 21, 26 May 2005; and *Mamudovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 49619/06, 10 March 2009). As the request for judicial review in the administrative dispute, even if described as "extraordinary" in the Administrative Dispute Act (*zahtjev za vanredno preispitivanje sudske odluke*) corresponds to the said remedies in civil and criminal proceedings, the Court considers that, given its nature, it must also, in principle and whenever available in accordance with the relevant rules on procedure, be considered an effective domestic remedy within the meaning of Article 35 § 1 of the Convention (compare and contrast the analysis in *Kolu v. Finland* (dec.), no. 56463/10, ECHR 3 May 2011).

51. Turning to the present case, the Court notes that the first applicant indeed failed to submit a request for judicial review with the Supreme Court. It also notes that the Supreme Court ruled against the other three applicants upon their requests for judicial review, whose claims were identical to the claim of the first applicant, and, in doing so, it essentially endorsed the reasons given previously by the Administrative Court (see

paragraph 12 above). In addition, the Supreme Court had indeed had a chance to rule in respect of the first applicant, albeit in civil proceedings, and it ruled against her (see paragraph 16 above). As there is nothing in the case file to suggest that the Supreme Court would have ruled any differently in respect of the first applicant, the Court considers that requiring her to use this remedy in such circumstances, would amount to excessive formalism and that therefore she did not have to exhaust this particular avenue of redress (see, *mutatis mutandis*, *Uljar and Others v. Croatia*, no. 32668/02, § 32 *in fine*, 8 March 2007). The Government's objection in this regard must therefore be dismissed.

(b) As regards the other applicants

52. The Government maintained that the applicants had not exhausted all effective domestic remedies. In particular, they had not instituted civil proceedings in order to obtain compensation.

53. The first applicant submitted that she had instituted civil proceedings, but to no avail, as the domestic courts had ruled against her. The second and third applicants contested the effectiveness of civil proceedings, claiming that the domestic courts had never awarded any damages in such cases, and inviting the Government to submit any domestic case-law to the contrary. The fourth applicant made no comment in this respect.

54. The Court notes that the first applicant did institute civil proceedings for compensation, but that the domestic courts ruled against her (see paragraphs 15-17 above). The Court also observes that the Government failed to submit any other domestic case-law in support of their claim that the applicants could have obtained compensation in civil proceedings.

55. In view of the above, the Court is of the opinion that the civil proceedings cannot be considered as an effective domestic remedy in the particular circumstances of the case, thus absolving the second, third and fourth applicants of the requirement to make use of this remedy. The Government's objection in this regard must therefore also be dismissed.

4. Conclusion

56. The Court notes that the applicants' complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

57. The Government maintained that there was no general obligation on the State to allow pensioners to work, and that thus it was within the State's discretion as to how to regulate it. In particular, it was not in the public interest for people to enjoy the benefits of both a pension and work at the same time. In this respect the Government noted that the domestic authorities were better placed to assess what was in the public interest, and had a wide margin of appreciation in that regard. Therefore, the impugned provision of the Pension Act 2003 was a legitimate measure in the public interest, proportionate to the legitimate aim of preserving the budgetary stability of the State and improving social policy. As everybody could choose which right they preferred to use, a fair balance was achieved between the private interests of the applicants on the one hand and the public interest on the other. Therefore, there was no violation of Article 1 of Protocol No. 1.

58. The first, second and third applicants contested these claims. In particular, the first applicant referred to section 193 of the Pension Act 2003 (see paragraph 24 above), arguing that it confirmed that this Act did not have retroactive effect but that it should have been applied only to pensioners who re-established their private practice after this Act had entered into force. She held that this was further confirmed by the Constitutional Court of Montenegro (see paragraph 28 above), as well as, eventually, by the State itself when it abolished the relevant part of the relevant section (see paragraph 26 above). The second applicant, in particular, maintained that the State had proved the unlawfulness of the relevant part of the provision concerned by abolishing it by means of the Amendments to the Pension Act. The fourth applicant made no comment in this respect.

2. The Court's assessment

59. The principles which apply generally in cases under Article 1 of Protocol No. 1 are equally relevant when it comes to pensions (see *Andrejeva v. Latvia* [GC], no. 55707/00, § 77, 18 February 2009, and, more recently, *Stummer v. Austria* [GC], no. 37452/02, § 82, 7 July 2011). Thus, that provision does not guarantee the right to acquire property (see, among other authorities, *Van der Mussele v. Belgium*, 23 November 1983, § 48, Series A no. 70; *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II; and *Kopecký v. Slovakia* [GC], no. 44912/98, § 35 (b), ECHR 2004-IX). Nor does it guarantee, as such, any right to a pension of a particular amount (see, among other authorities, *Müller v. Austria*, no. 5849/72, Commission's report of 1 October 1975, Decisions and

Reports (DR) 3, p. 25; *T. v. Sweden*, no. 10671/83, Commission decision of 4 March 1985, DR 42, p. 229; *Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000-X; *Kuna v. Germany* (dec.), no. 52449/99, ECHR 2001-V (extracts); *Lenz v. Germany* (dec.), no. 40862/98, ECHR 2001-X; *Kjartan Ásmundsson v. Iceland*, no. 60669/00, § 39, ECHR 2004-IX; *Apostolakis v. Greece*, no. 39574/07, § 36, 22 October 2009; *Wieczorek v. Poland*, no. 18176/05, § 57, 8 December 2009; *Poulain v. France* (dec.), no. 52273/08, 8 February 2011; and *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, § 55, 31 May 2011). However, where a Contracting State has in force legislation providing for the payment as of right of a pension – whether or not conditional on the prior payment of contributions – that legislation has to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 64, ECHR 2010-...). The reduction or the discontinuance of a pension may therefore constitute interference with possessions that needs to be justified (see *Kjartan Ásmundsson*, cited above, § 40; *Rasmussen v. Poland*, no. 38886/05, § 71, 28 April 2009; and *Wieczorek*, cited above, § 57).

60. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see *The Former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 79 and 82, ECHR 2000-XII) and that it should pursue a legitimate aim "in the public interest".

61. According to the Court's case-law, the national authorities, because of their direct knowledge of their society and its needs, are in principle better placed than the international judge to decide what is "in the public interest". Under the Convention system, it is thus for those authorities to make the initial assessment as to the existence of a problem of public concern warranting measures interfering with the peaceful enjoyment of possessions. Moreover, the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws concerning pensions or welfare benefits involves consideration of various economic and social issues. The Court accepts that in the area of social legislation including in the area of pensions States enjoy a wide margin of appreciation, which in the interests of social justice and economic well-being may legitimately lead them to adjust, cap or even reduce the amount of pensions normally payable to the qualifying population including, like in the instant case, by means of rules on incompatibility between the receipt of a pension and paid employment. However, any such measures must be implemented in a non-discriminatory manner and comply with the requirements of proportionality. Therefore, the margin of appreciation available to the legislature in implementing such policies should be a wide one, and its judgment as to what is "in the public interest" should be respected unless that judgment is

manifestly without reasonable foundation (see, for example, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, 16 March 2010; *Andrejeva v. Latvia* [GC], no. 55707/00, § 83, 18 February 2009; as well as *Moskal v. Poland*, no. 10373/05, § 61, 15 September 2009).

62. Any interference must also be reasonably proportionate to the aim sought to be realised. In other words, a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden (see *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98; and *Wieczorek*, cited above, §§ 59-60, with further references).

63. While it must not be overlooked that Article 1 of Protocol No. 1 does not restrict a State's freedom to choose the type or amount of benefits that it provides under a social security scheme (see *Stec and Others*, cited above § 54; *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 53, ECHR 2006-VI; and *Wieczorek*, cited above, § 66 *in limine*), it is also important to verify whether an applicant's right to derive benefits from the social security scheme in question has been infringed in a manner resulting in the impairment of the essence of his pension rights (see *Domalewski*, cited above; *Kjartan Ásmundsson*, cited above, § 39 *in fine*; and *Wieczorek*, cited above, § 57 *in fine*).

64. Turning to the present case, the Court considers that the applicants' pension entitlements constituted a possession within the meaning of Article 1 of Protocol No. 1 to the Convention. Further, the Pension Fund's suspension of payment of the applicants' pensions clearly amounted to an interference with the peaceful enjoyment of their possessions (see paragraph 59 above).

65. As regards the requirement of lawfulness, the Court notes that the payment of pensions was suspended on the basis of section 112 of the Pension Act 2003, which seems to imply that it was in accordance with the law. Certainly, the interpretation of this provision given by the domestic courts favours such a conclusion (see paragraph 16 above).

66. The Court considers that such an interpretation of the domestic courts raises some doubts in view of Section 193 of the Pension Act 2003, as well as in view of the decision of the Constitutional Court of Montenegro, and the ruling of the Federal Constitutional Court in respect of an essentially identical provision of the Federal Pension and Disability Insurance Act, both Montenegro and Serbia being part of one legal system at the time (see paragraphs 24, 28 and 27 above).

67. In any event, even assuming that it was in accordance with law, it remains to be resolved whether the said interference pursued a legitimate aim and if there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

68. Even though the Government submitted no supporting documents as to the benefits of this measure, the Court may accept that the aims pursued were social justice and the State's economic well-being, both of which are legitimate.

69. As regard the issue of proportionality the Court notes that the initial decisions issued by the Pension Fund conferred on the applicants the entitlement to receive their respective pensions. In doing so, the Pension Fund agreed that the applicants had satisfied all the statutory conditions and qualified for the pensions. Under the rules in force at the time, gainful employment was not incompatible with a Fund member's receipt of a full pension, as long as the employment was on a part-time basis (see paragraph 8 above). After meeting the legal criteria for retirement, and encouraged by the pension system to which they had contributed over a number of years, the applicants reopened their private practices on a part-time basis whilst at the same time receiving their pensions (see, *mutatis mutandis*, *Kjartan Ásmundsson,* cited above, § 44, ECHR 2004-IX).

70. The Court further notes that, when the applicants' pensions were suspended by the relevant Pension Fund decisions in 2004 and 2005, this was not due to any changes in their own circumstances, but to changes in the law. This particularly affected the applicants, as it entirely suspended the payment of the pensions they had been receiving for a number of years, taking no account of the amount of revenue generated by their part-time work (see, *mutatis mutandis*, *Kjartan Ásmundsson,* cited above, § 44, as well as, in contrast, among many authorities, *Domalewski* and *Skórkiewicz,* both cited above, where the applicants were deprived only of their special privileged status, while retaining all the rights attaching to their ordinary pension under the general social insurance system). Even though the applicants have submitted no data as to how much exactly they earned in their private practice, and as the Government have offered no evidence to the contrary, in view of the fact that they worked on a part-time basis only the Court considers that the pension still constituted a considerable part of their gross monthly income (see *Kjartan Ásmundsson,* cited above, § 44).

71. In this context, the Court also observes that the Pension Act 2003 affected not only the applicants' right to receive their pension in the future but partly also the payments received hitherto, as the first, second and third applicants were obliged to pay back the amounts they had received after 1 January 2004 (see paragraphs 17, 19 and 20 above, as well as, in contrast, *mutatis mutandis*, *Wieczorek v. Poland*, cited above, § 72, and *Hasani v. Croatia* (dec.), no. 20844/09, 30 September 2010).

72. Against this background, the Court finds that, as individuals, the applicants were made to bear an excessive and disproportionate burden. Even having regard to the wide margin of appreciation enjoyed by the State in the area of social legislation, the impact of the impugned measure on the applicants' rights, even assuming its lawfulness (see paragraph 66 above),

cannot be justified by the legitimate public interest relied on by the Government. It could have been otherwise had the applicants been obliged to endure a reasonable and commensurate reduction rather than the total suspension of their entitlements (see, among many authorities, *Kjartan Ásmundsson,* cited above, § 45; *Wieczorek v. Poland*, cited above, § 67, *Maggio and Others v. Italy*, cited above, § 62, *Banfield v. the United Kingdom* (dec.), no. 6223/04, 18 October 2005) or if the legislature had afforded them a transitional period within which to adjust themselves to the new scheme. Furthermore, they were required to pay back the pensions they had received as of 1 January 2004 onwards, which must also be considered a relevant factor to be weighed in the balance.

73. In view of the above, the Court considers that there has been a violation of Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

75. The first applicant claimed EUR 15,769.07 in respect of pecuniary damage (EUR 15,332.45 on account of suspended pensions and EUR 436.62 on account of pensions reimbursed to the Pension Fund) and EUR 9.000 in respect of non-pecuniary damage.

76. The second applicant claimed EUR 12,377.3 in respect of pecuniary damage (EUR 8,532.86 on account of suspended pensions and EUR 3,844.44 on account of pensions reimbursed to the Pension Fund).

77. The third applicant claimed a total amount of EUR 18,448.8 in respect of pecuniary damage and EUR 5,000 in respect of non-pecuniary damage.

78. The fourth applicant claimed EUR 10,618.49 in respect of pecuniary damage. He enclosed a calculation made by the Pension Fund stating that the unpaid pensions amounted to EUR 8,038.53, as he had been regularly receiving the pension until 1 May 2005.

79. The Government maintained that the amounts sought by the applicants were inappropriately high and not in line with the relevant case-law of the Court.

80. The Court is satisfied that the applicants have suffered pecuniary damage as a result of the violation found and considers that they should be awarded compensation in an amount reasonably related to any prejudice

suffered. It cannot award them the full amounts claimed, precisely because a reasonable and commensurate reduction in their entitlement could have been compatible with their Convention rights (see paragraph 72 above). Deciding in the light of the figures available in the case file, the Court awards the first and third applicants EUR 8,000 each, the second applicant EUR 6,000 and the fourth applicant EUR 4,000, plus any tax that may be chargeable on those amounts (see, *mutatis mutandis*, *Kjartan Ásmundsson,* cited above, § 51).

81. Even if not the subject of a specific claim by the second and fourth applicants, the Court accepts that all the applicants in the present case have certainly suffered some non-pecuniary damage which cannot be sufficiently compensated by the sole finding of a violation (see, *mutatis mutandis*, *Garzičić v. Montenegro*, no. 17931/07, § 42, 21 September 2010; as well as *Staroszczyk v. Poland*, no. 59519/00, §§ 141-143, 22 March 2007). Making its assessment on an equitable basis, the Court awards each of them the sum of EUR 4,000.

B. Costs and expenses

82. The first applicant claimed EUR 679.8 in total for the costs and expenses incurred both before the domestic courts and this Court. The third applicant claimed a lump sum of EUR 400 for the costs of "translation and correspondence". The second and the fourth applicants made no claims in this respect.

83. The Government left the decision in this respect to the Court's discretion.

84. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the entire sum claimed by the first applicant. As the third applicant failed to submit evidence, such as itemised bills and invoices, that the expenses sought had actually been incurred, the Court accordingly rejects that claim. Lastly, the Court considers that there is no call to award the second and fourth applicants any sum on this account, as they made no claims in this respect.

C. Default interest

85. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the complaints in respect of Montenegro admissible, and the complaints in respect of Serbia inadmissible;

3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts plus any tax that may be chargeable:
      (i) the first and third applicants EUR 8,000 (eight thousand euros) each, the second applicant EUR 6,000 (six thousand euros) and the fourth applicant EUR 4,000 (four thousand euros), in respect of pecuniary damage,
      (ii) EUR 4,000 (four thousand euros) each for non-pecuniary damage, and
      (iii) EUR 679.8 (six hundred and seventy-nine euros and eighty cents) to the first applicant for costs and expenses.
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President

FOURTH SECTION

CASE OF BARAĆ AND OTHERS v. MONTENEGRO

(Application no. 47974/06)

JUDGMENT

STRASBOURG

13 December 2011

FINAL

13/03/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Barać and Others v. Montenegro,

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 22 November 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 47974/06) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by thirteen Montenegrin nationals, Mr Blagota Barać, Mr Milan Terzić, Mr Zoran Stanišić, Mr Stanko Burić, Ms Stanica Marković, Mr Radovan Kadović, Mr Ranko Tomašević, Mr Novo Stanišić, Mr Branko Radulović, Mr Novak Nikolić, Mr Mihailo Popović, Mr Milan Golubović, and Mr Ranko Kovačević ("the applicants"), on 9 November 2006.

2. The applicants were represented by Mr M. Vojinović, a lawyer practising in Nikšić. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicants complained under Article 6 § 1 of the Convention that the domestic civil proceedings had been unfair since the final judgment rendered against them had been based on an Act which was no longer in force at the relevant time.

4. On 28 June 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants - Mr Blagota Barać, Mr Milan Terzić, Mr Zoran Stanišić, Mr Stanko Burić, Ms Stanica Marković, Mr Radovan Kadović, Mr Ranko Tomašević, Mr Novo Stanišić, Mr Branko Radulović, Mr Novak Nikolić, Mr Mihailo Popović, Mr Milan Golubović, and Mr Ranko Kovačević - are all Montenegrin nationals who were born in 1968, 1953, 1961, 1950, 1956, 1951, 1952, 1963, 1951, 1966, 1955, 1953, and 1955 respectively and live in Danilovgrad.

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

A. The civil proceedings

7. On 14 January 2005 the applicants filed a claim for compensation (*isplata zimnice*) against their employer.

8. On 13 February 2006 the Court of First Instance (*Osnovni sud*) in Danilovgrad ruled in their favour, awarding them 150 euros (EUR) each, plus legal costs totalling EUR 1,875.

9. On 26 April 2006 the High Court (*Viši sud*) in Podgorica overturned the previous judgment and rejected the applicants' claim, relying solely on the Act on Changes and Amendments to the Labour Act 2004 (*Zakon o izmjenama i dopunama Zakona o radu*, hereinafter "the Labour Amendments Act 2004"). At the same time, the applicants were ordered to pay jointly to their employer EUR 900 for legal costs. The applicants received this judgment on 23 May 2006 at earliest.

10. On 12 September 2006 the Supreme Court (*Vrhovni sud*) in Podgorica rejected the applicants' appeal on points of law on procedural grounds (*revizija se odbacuje*).

B. Other relevant information

11. On 28 February 2006 the Constitutional Court of Montenegro (*Ustavni sud*) declared the Labour Amendments Act 2004 unconstitutional (see paragraph 14 below).

12. On 18 April 2006 that decision was published in Official Gazette no. 24/06 (*Službeni list br. 24/06*), and thereby the said Act ceased to be in force (see paragraph 13, in particular Article 62 therein, and paragraph 16 below).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional Court Act of the Republic of Montenegro (*Zakon o Ustavnom Sudu Republike Crne Gore*; published in the Official Gazette of the Republic of Montenegro – OG RM - no. 21/93, hereinafter "the Constitutional Court Act 1993")

13. The relevant provisions of the Act provided as follows:

Article 62

"When it is established that an Act [...] is not in accordance with the Constitution [...] that Act [...] ceases to be in force on the day when the Constitutional Court's decision is published in the Official Gazette of the Republic of Montenegro."

Article 69 § 1

"[Such an] Act [...] cannot be applied to matters (*odnosi*) which arose before the day when the decision of the Constitutional Court was published unless a final decision in the particular matter was rendered before that day."

Article 70

"Those whose rights have been violated by final decisions rendered on the basis of an Act ... which the Constitutional Court established was not in accordance with the Constitution ... have the right to request the body in charge to change the final decision [in question].

A request to have [such a] decision changed shall be submitted within six months of the day when the decision of the Constitutional Court was published in the Official Gazette of the Republic of Montenegro."

Article 71

"If the consequences of the implementation of the [unconstitutional] Act ... cannot be removed by having the impugned decision changed, the Constitutional Court can determine that the consequences be removed by *restitutio in integrum*, compensation, or in some other way."

B. Decision of the Constitutional Court of the Republic of Montenegro (*Odluka Ustavnog Suda Republike Crne Gore,* published in the OG RM no. 24/06)

14. The relevant part of the Decision reads as follows:

"It has been established that the Labour Amendments Act 2004 (Official Gazette of the Republic of Montenegro, no. 79/04) is not in accordance with the Constitution of the Republic of Montenegro and it shall cease to exist on the day when this decision is published.

15. The Decision specified that the reason for declaring the above Act unconstitutional was that it had not been adopted in Parliament by an absolute majority of MPs, as required by the Constitution.

16. The Decision was published on 18 April 2006.

C. Relevant case-law of the Constitutional Court

17. The Government submitted three decisions of the Constitutional Court of Montenegro, rendered in September 2003, December 2005 and July 2006, respectively, on the basis of Articles 70 and 71 of the Constitutional Court Act 1993. In all three decisions the Constitutional Court, in rejecting other claimants' requests, had held that Article 70 actually provided for an individual the right to request the reopening of proceedings in which an impugned decision had been rendered.

18. In particular, in its decision of September 2003 the Constitutional Court had rejected an initiative to assess the constitutionality of Article 70 of the Constitutional Court Act 1993.

19. In December 2005 the Constitutional Court rejected a claimant's request to amend a decision rendered by the Court of First Instance in November 2004, which first-instance decision had been based on a provision which was later, in April 2005, declared unconstitutional.

20. In July 2006 the Constitutional Court rejected a claimant's request to remove the consequences he had allegedly suffered before November 2005 on account of the implementation of a decision of the Water Supply Company of 2002, the decision having been declared unconstitutional in November 2005.

21. In the latter two decisions, the claimants' requests were rejected as they had failed to previously request the reopening of the proceedings in which the impugned decisions had been rendered.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

22. The applicants complained under Article 6 § 1 of the Convention that the domestic civil proceedings had not been fair since the final judgment rendered against them had been based on an Act which had no longer been in force at the time.

23. The relevant part of Article 6 § 1 of the Convention reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...".

A. Admissibility

24. The Government maintained that the applicants had not exhausted all effective domestic remedies. In particular, they had failed to request that the impugned decision be changed, in accordance with Articles 70 and 71 of the Constitutional Court Act 1993, and the Government referred to the case-law of the Montenegrin Constitutional Court in this respect (see paragraphs 13 and 17-21 above).

25. The applicants contested that claim. In particular, they reiterated that at the time when the High Court ruled in their case the Labour Amendments Act 2004 had already ceased to be in force.

26. The Court reiterates that, according to Article 35 § 1 of the Convention, it may only deal with a complaint after all domestic remedies have been exhausted, and recalls that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 75, 28 April 2009).

27. Turning to the present case, the Court notes that the wording of Article 70 of the Constitutional Court Act 1993 (see paragraph 13 above, in particular Article 70 § 2 therein) implies that the remedy provided for therein referred to those cases where a certain provision was declared unconstitutional after the impugned decision had already been rendered, rather than to those where a relevant provision had been declared unconstitutional before a decision was adopted. The case-law submitted by the Government certainly appears to support this conclusion (see paragraphs 17-21 above). That being so, the Court considers that the remedy referred to by the Government was not available to the applicants.

28. In any event, the Court notes that the remedy in question was in practice a request to have impugned proceedings reopened (see paragraph 17 above). In this connection, it is recalled that a request for the reopening of proceedings which have already been concluded on the basis of a final court decision cannot usually be considered an effective remedy within the meaning of Article 35 § 1 of the Convention (see, among many others, *Josseline Riedl-Riedenstein and Others v. Germany* (dec.), no. 48662/99, 22 January 2002). The situation may be different if it can be established that under domestic law such a request can genuinely be deemed an effective remedy (see *K.S. and K.S. AG v. Switzerland*, no. 19117/91, Commission decision of 12 January 1994, Decisions and Reports (DR) 76-A, p. 70). However, the Government has submitted no case-law to that effect. Therefore, their objection in this regard must be dismissed even assuming that the remedy in question was available.

29. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

30. Relying on Article 6 § 1 of the Convention, the applicants complained about the arbitrariness of the final decision rendered against them, it being based on legislation no longer in force.

31. The Government noted that the impugned Act had been declared unconstitutional for formal reasons rather than substantial ones (see paragraph 15 above).

32. The Court has already held that no fair trial could be considered to have been held where the reason given in the relevant domestic decision was not envisaged by the domestic legislation and, therefore, was not a legally valid one (see, *mutatis mutandis*, *De Moor v. Belgium*, 23 June 1994, § 55 *in fine*, Series A no. 292-A, where the competent domestic body refused to enrol the applicant on the list of "pupil advocates", relying on a ground which was not provided in the relevant legislation at all; see also *Dulaurans v. France*, no. 34553/97, § 33-39, 21 March 2000).

33. Turning to the present case, the Court observes that the final decision rendered by the High Court against the applicants relied solely on an Act which had previously been declared unconstitutional and a relevant decision to that effect already published in the Official Gazette. Thus, the Labour Amendments Act 2004 had ceased to be in force and, as such, was not applicable in the applicants' case, as provided by Article 69 § 1 of the Constitution in force at the time (see paragraph 13 above). Therefore, the only legal basis for the High Court's decision was not valid at the relevant time. It is irrelevant in this connection whether the impugned piece of legislation was declared unconstitutional for formal or substantial reasons (see paragraphs 15 and 31 above).

34. In view of the above, the Court considers that the contested proceedings did not satisfy the requirements of fairness of Article 6 § 1 and there has accordingly been a breach of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

36. The applicants each claimed damages of EUR 202.34.

37. The Government contested this claim.

38. The Court cannot speculate as to what the outcome of the impugned proceedings would have been if the Convention had not been violated. However, it considers that the applicants undeniably sustained non-pecuniary damage as a result of the unfairness of the court proceedings. Having regard to the circumstances of the case, the Court considers it reasonable to award each applicant the entire sum claimed.

B. Costs and expenses

39. The applicants also claimed EUR 2,775 for the costs and expenses incurred before the domestic courts and EUR 2,000 for those incurred before the Court.

40. The Government contested this claim.

41. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

42. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants jointly EUR 2,725 for the costs and expenses incurred domestically. As to the legal costs incurred before the Court, it notes that the applicants' representative submitted an initial application in his native language and, at the request of the Court, written pleadings in English. Having regard to the tariff fixed by the local Bar Association, which the Court considers reasonable in the circumstances of this case, the Court considers that the applicants are jointly entitled to EUR 1,680 under this head (see, *mutatis mutandis*, *Šobota-Gajić v. Bosnia and Herzegovina*, no. 27966/06, § 70, 6 November 2007).

43. The applicants should therefore receive EUR 4,405 in all, plus any tax that may be chargeable under this head.

C. Default interest

44. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by five votes to two that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by five votes to two
   (a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 202.34 each (two hundred and two euros and thirty-four cents), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,405 (four thousand four hundred and five euros) jointly, plus any tax that may be chargeable, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 December 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judges Kalaydjieva and De Gaetano is annexed to this judgment.

L.G.
F.A.

JOINT DISSENTING OPINION OF JUDGES KALAYDJIEVA AND DE GAETANO

1. Although we voted in favour of declaring the application admissible – the line of demarcation between inadmissibility on the facts and non-violation often being a very thin one – we regret that we cannot share the view of the majority on the merits in this case.

2. The applicants are not complaining that their right of access to a court has been breached; their complaint under Article 6 § 1 is limited to the fact that the final judgment rendered (by the High Court) was based on a law which was no longer in force on the date of the delivery of that judgment (it was still in force at the time of their dismissal).

3. What, from the case file, appears to have happened is that the High Court in Podgorica, when it convened on 26 April 2006 to discuss the employer's appeal, was not aware that eight days previously the Official Gazette had carried the Constitutional Court's decision of 28 February 2006 which had declared the Labour Amendments Act 2004 unconstitutional (because that act had not been adopted by Parliament with the required majority of votes). The Supreme Court could not entertain the applicants' appeal on points of law since the value of their separate claims did not exceed EUR 5,000, each being only EUR 150.

4. The Court has repeatedly stated that Article 6 provides only a procedural, and not a substantive, guarantee; a mere claim that a national court has made an error of fact or of law will not suffice for a violation of Article 6, since this article is not meant to guarantee that the outcome of the proceedings is fair, but only that the procedure leading to that outcome is such. Thousands of applications are declared inadmissible *ratione materiae* each year – at single judge, committee or Chamber level – by application of this basic principle. The classic formulation of this principle remains that enunciated in *García Ruiz v. Spain* (21 January 1991), §28: "...it is not [the function of the Court] to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention."

5. It is true that some cases suggest that there may be a violation of Article 6 if a decision is arbitrary or manifestly unreasonable (see, for instance, *Camilleri v. Malta* dec. 16 March 2000; *Blücher c. République Tchèque* 11 janvier 2005 § 56-57). All these cases are very fact-specific and do not easily lend themselves to the formulation of a general principle or

rule which can be said to have made any serious inroad into the doctrine of *quatrième instance*. This is even more so with regard to the two cases cited in the majority judgment at § 32. In *De Moor* the Court, in §§ 55 and 56, vacillates between the domestic tribunal's reasoning not being a "legally valid one" and the proceedings not having been held in public. Indeed, the majority decision in the instant case relies on part of § 55 by the exegetic formula of *mutatis mutandis*. Likewise in *Dulaurans*, although one senses that the bottom line is that the French domestic courts did not provide adequate reasons for their judgments, there is also a wavering between lack of proper reasoning and conflicting conclusions of fact.

6. In the instant case the facts are simple – the High Court in Podgorica was unaware of the publication mentioned in § 1, supra. This appears to have been simply an oversight, an error. Furthermore, we are not convinced that a decision of the Constitutional Court declaring a provision unconstitutional necessarily and automatically makes this provision inapplicable to the circumstances of the case before the national courts. This would normally depend on the procedural or substantive nature of the said provision as well as on the period to which its applicability must be assessed. However this assessment falls within the competence of the national courts. In our view the present case file discloses no arbitrariness or manifest unreasonableness, such as flying in the face of established case-law or absurd conclusions of law or fact (which would fall to be regarded as violating the implicit requirement of Article 6 § 1 to give reasons for decisions). We see no difference between the wrong application of a law and what happened in this case.

FOURTH SECTION

CASE OF BOUCKE v. MONTENEGRO

(Application no. 26945/06)

JUDGMENT

STRASBOURG

21 February 2012

FINAL

21/05/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Boucke v. Montenegro**,**

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 31 January 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 26945/06) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Ms Snežana Boucke and Ms Kristina Boucke, both of whom have dual Serbian and German nationality, on 23 June 2006.

2. The applicants were represented by Mr S. Mrdaković, a lawyer practising in Kragujevac (Serbia). The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicants essentially complained, under Article 6 of the Convention, about the non-enforcement of two final judgments concerning child maintenance.

4. On 16 December 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1) and to give priority to the application in accordance with Rule 41 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants, Ms Snežana Boucke ("the first applicant") and Ms Kristina Boucke ("the second applicant"), were born in 1951 and 1988 respectively and live in Kruševac, Serbia.

A. Background information

6. On 21 May 1988 the first applicant gave birth to the second applicant, born out of wedlock.

7. On 18 August 1992 the District Court in Düsseldorf ruled that M.J., from Montenegro, was the father of the second applicant and ordered him to pay child maintenance.

8. On 29 October 1999 the District Court (*Okružni sud*) in Kruševac (*Serbia*) confirmed (*priznao*) the decision of the Düsseldorf District Court. It would appear that enforcement of this judgment has never been sought.

B. The first set of civil proceedings

9. On an unspecified date the second applicant instituted proceedings against M.J. seeking child maintenance. As she was a minor at the time she was represented by the first applicant as her legal guardian.

10. On 23 December 1997 the Municipal Court (*Opštinski sud*) in Kruševac issued a judgment ordering M.J. (hereinafter "the debtor") to pay 62,500 Yugoslav dinars (YUD) for the maintenance accrued between 1 July 1988 and 30 June 1997, with statutory interest, plus YUD 960 for the costs of proceedings. This judgment became final on 10 February 1998.

11. On 13 April 1998 the Court of First Instance (*Osnovni sud*) in Herceg Novi (Montenegro) issued an enforcement order (*rješenje o izvršenju*) providing that the amount due would be paid by the sale of the debtor's movable assets. On 22 October 1998 the debtor's objection (*prigovor*) in this regard was rejected.

12. On 29 October 1998 the court bailiff established that the debtor had no movable assets of his own, as he lived at his father-in-law's house. The debtor, for his part, submitted in addition that he was paying 70% of his salary for the maintenance of two other children.

13. On 12 November 1998 the Court of First Instance informed the second applicant that the debtor was insolvent, as he had no movable assets which could be sold to allow the judgment in question to be enforced.

14. On an unspecified date in 1998 the debtor paid YUD 600 towards his debt.

15. On 14 January 1999 the second applicant sought enforcement of the remainder of the decision by attachment of the debtor's salary, which request was repeated on 7 August 2000, 19 February 2001, and 7 May, 1 July and 3 September 2004.

16. It would appear that on 1 July 2004 the second applicant complained to the Montenegrin Ministry of Justice about the work of the relevant Court of First Instance. On 12 July 2004 the judge who was in charge of the enforcement as of May 2004, in reply to this complaint, informed the

president of the Court of First Instance that he "considered the complaint justified (*osnovana*)."

17. On 12 July 2004 the said judge informed the second applicant that the enforcement proceedings in her case had been resumed.

18. On 24 September 2004 an expert witness submitted to the Herceg Novi court a recalculation of the amount owed in euros, the amount due being 6,352.42 euros (EUR).

19. On 8 November 2004 the Court of First Instance in Herceg Novi requested the second applicant's lawyer to provide the necessary bank details so that a corresponding enforcement order could be issued.

20. Between 13 December 2004 and 28 December 2004 the said court attempted to contact the second applicant and also sought assistance from the relevant Internal Affairs Secretariat as well as a Social Care Centre in Serbia.

21. On 27 January 2005 the first applicant provided the court with the requested bank details.

22. On 4 March 2005 the Herceg-Novi court issued another enforcement order, providing that one third of the debtor's monthly income was to be transferred to the first applicant as the second applicant's legal guardian.

23. On 17 March 2005 the debtor lodged an objection, stating, *inter alia*, that he was supporting a family of four, two of whom were minor children, as well as paying 50% of his salary for the maintenance of another child. He proposed to pay one-sixth of his income for the enforcement in question.

24. On 16 May 2007 the Court of First Instance rejected the debtor's objection and upheld its enforcement order of 4 March 2005, without considering the debtor's arguments in respect of his financial commitments.

25. On 20 October 2010 the same court forwarded the enforcement order of 4 March 2004 to the Power Supply Company (*Elektroprivreda – Filijala Herceg Novi*), the debtor's employer, a State-owned company.

26. On an unspecified date thereafter the second applicant would appear to have informed the Court of First Instance that the said enforcement order had not been complied with, apparently because the debtor was paying off several loans.

27. On 19 November 2010 the Court of First Instance approached the debtor's employer, reminding them that the child maintenance, in accordance with the relevant provisions of the Family Act and the Enforcement Act, had priority over all the other pecuniary obligations of the debtor and that the employer was therefore obliged to comply with the enforcement order.

28. On 14 December 2010 the Court of First Instance ordered the debtor's employer to transfer to the second applicant the amount that was otherwise retained by the employer on a monthly basis on account of a loan owed by the debtor to the employer (see paragraph 37 below).

29. This decision would appear not to have been enforced to date.

C. The second set of civil proceedings

30. On an unspecified date the second applicant instituted another set of civil proceedings against M.J. seeking child maintenance. She was represented by the first applicant as her legal guardian.

31. On 30 June 2004, after two remittals, the Municipal Court in Kruševac gave a judgment ordering M.J. to pay 8% of his monthly income from 18 February 1998, plus YUD 48,600 for the costs of proceedings. This judgment became enforceable on 23 May 2005.

32. The applicants maintain that they sought enforcement of this judgment, but have submitted no evidence in that regard, even though they have been requested by the Court to do so on at least three occasions.

33. This judgment would appear not to have been enforced to date.

D. The third set of civil proceedings

34. On an unspecified date the second applicant instituted another set of civil proceedings against the debtor, seeking an increase of the child maintenance established by the decision of 30 June 2004 (see paragraph 31 above). On 17 September 2009 the Municipal Court in Kruševac gave a decision stating that the second applicant's claim had been withdrawn. On 2 October 2009 the second applicant appealed against this decision. These proceedings appear to be still pending.

E. Other relevant facts

35. On 3 February 1997 the debtor and his spouse at the time lodged with the Court of First Instance in Herceg Novi a plea for dissolution of their marriage, proposing to the court, *inter alia*, that the debtor's spouse be given custody of their two minor children, born in 1990 and 1995 respectively, and that the debtor pay in respect of child maintenance 50% of his monthly income. There is no decision of a domestic court in this regard in the case file.

36. On 17 July 2009, in criminal proceedings, the debtor was found guilty of not paying child maintenance to the second applicant between 23 May 2005 and 30 January 2006, and was sentenced to three months' imprisonment, suspended for a period of one year. It would appear that the decision is still pending on appeal.

37. The debtor's payslip of October 2010 specified that he earned EUR 559.89 per month, 62% of which he was paying towards two loans. The payslip indicates that the debtor had taken one of those loans from his employer in a total amount of EUR 5,500 ten months earlier, to be repaid over ten years, and that the other loan had been taken from a bank that very month in a total amount of EUR 54,295.75, to be repaid over fifteen years.

It also transpires that over an unspecified ten-year period before October 2010 the debtor had been paying off a third loan, the monthly payment of which amounted to approximately 20% of his monthly income.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

38. Article 149 of the Constitution provides that the Constitutional Court shall rule on a constitutional appeal lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

39. This Constitution entered into force on 22 October 2007.

B. Montenegro Constitutional Court Act (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

40. Section 48 provides that a constitutional appeal may be lodged against an individual decision of a state body, an administrative body, a local self-government body or a legal person exercising public authority, for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted.

41. Sections 49-59 provide additional details as regards the processing of constitutional appeals. In particular, section 56 provides that when the Constitutional Court finds a violation of a human right or freedom, it shall quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body which rendered the quashed decision.

42. This Act entered into force in November 2008.

C. Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in OGM no. 11/07)

43. This Act provides, under certain circumstances, the possibility to have lengthy proceedings expedited by means of a request for review (*kontrolni zahtjev*), as well as an opportunity for claimants to be awarded compensation by means of an action for fair redress (*tužba za pravično zadovoljenje*).

44. Section 44, in particular, provides that this Act shall be applied retroactively to all proceedings from 3 March 2004, but that the duration of proceedings before that date shall also be taken into account.

45. This Act entered into force on 21 December 2007, but contained no reference to applications involving procedural delay already lodged with the Court.

D. Relevant domestic case-law

46. Between 1 January 2008 and 30 September 2009 the courts in Montenegro considered 102 requests for review pursuant to the Right to a Trial within a Reasonable Time Act. A further two requests were withdrawn, and eight were still being examined. Of the 102 requests that had been considered, in eighty-four cases the applicants were notified that certain procedural measures would be taken within a specified period. There is no information in the documents provided as to whether these time-limits were complied with or not. Eighteen requests were rejected as ill-founded.

47. Between 1 January 2010 and 30 April 2011 an additional ninety-six requests for review were considered. A further two requests were still being examined and one request had been withdrawn. Of the ninety-six requests that had been considered two were rejected on procedural grounds (*odbačeni*), and twenty-six were rejected as ill-founded (*odbijeni*). Ten requests were considered justified (*usvojeni*): in five cases the proceedings were indeed expedited, in three they were not, and in two cases it is unclear if the proceedings advanced. In thirty-eight requests the applicants were notified that certain procedural measures would be taken within a specified period: in twenty-six cases the indicated measure would appear to have been taken, in eight cases "compliance with notifications was controlled" without any further details having been provided, in two cases the proceedings were not expedited, in one case it is unclear what the outcome of the notification was and in one case the impugned proceedings ended at about the same time as the applicant lodged the request. As regards the remaining twenty requests for review, decisions and/or notifications were issued without details as to their specific content.[1]

48. Between 1 January 2008 and 30 September 2009 twenty-two actions for fair redress were submitted, of which sixteen were dealt with and six were still being examined. In one case the courts awarded the plaintiff compensation for non-pecuniary damage in respect of the length of civil proceedings. Between 1 January 2010 and 30 April 2011 an additional fifteen actions for fair redress were examined, in three of which the courts awarded damages.

1. Five cases examined by the Commercial Court, eleven cases examined by the High Court in Podgorica and four cases examined by the Administrative Court.

E. Enforcement Procedure Act 2000 (Zakon o izvršnom postupku; published in the Official Gazette of the Federal Republic of Yugoslavia no. 28/00, 73/00 and 71/01)

49. Section 2 provides that enforcement proceedings are to be instituted at the request of the creditor, except when this Act specifically provides that the proceedings are to be instituted *ex officio*.

50. Section 4 § 1 provides that the enforcing court is obliged to proceed as a matter of urgency.

51. Sections 63-84 contain, *inter alia*, provisions relating to enforcement in respect of the debtor's movable assets.

52. Section 87 provides that enforcement in respect of the debtor's salary can reach a maximum of half his/her salary.

53. Sections 112-120 contain, *inter alia*, provisions relating to enforcement in respect of the debtor's income. Section 115 § 1, in particular, provides that when there are several people entitled to legal maintenance (*zakonsko izdržavanje*) from the same debtor and the total amount sought by them exceeds the proportion of the debtor's income in respect of which their claims can be enforced, the enforcement shall be carried out in favour of each creditor in proportion to their claim (*izvršenje se određuje i sprovodi u korist svakog od takvih poverilaca srazmerno visini njihovih potraživanja*).

54. This Act entered into force on 8 July 2000. In accordance with section 262 of the Act, however, all enforcement proceedings instituted prior to 8 July 2000 are to be concluded pursuant to this Act.

F. Enforcement Procedure Act 2004 (Zakon o izvršnom postupku; published in the Official Gazette of the Republic of Montenegro - OG RM - no. 23/04)

55. The Enforcement Procedure Act 2004 entered into force on 13 July 2004, thereby repealing the Enforcement Procedure Act 2000. In accordance with section 286 of this Act, however, all enforcement proceedings instituted prior to 13 July 2004 are to be concluded pursuant to the Enforcement Procedure Act 2000.

G. Family Act 1989 (Porodični zakon, published in OG RM nos. 07/89 and 13/89)

56. Section 273 provided, *inter alia*, that following a debtor's request to that effect, a court could increase, reduce, terminate (*ukine*) or alter the maintenance established by a previous court decision if the circumstances on which the said decision was based have changed.

57. Section 277 further provided that in a case where a parent who has been ordered by a court decision to pay child maintenance does not comply with that obligation on a regular basis, the Social Care Centre (*organ starateljstva*) shall, either at the request of the other parent or of its own motion, take measures to ensure that the child is provided with temporary maintenance in accordance with the regulations on social and child protection, until the said parent starts fulfilling his obligation.

H. Family Act 2007 (Porodični zakon, published in the Official Gazette of the Socialist Republic of Montenegro no. 1/07)

58. The Family Act 2007 entered into force on 1 September 2007, thereby repealing the Family Act 1989. By virtue of section 380 however, if the first-instance decision was given before this Act entered into force, the procedure shall be continued under the Family Act 1989.

I. Civil Proceedings Act 2004 (Zakon o parničnom postupku, published in OG RM nos. 22/04, 28/05 and 76/06)

59. Pursuant to section 44, the court competent to deal with disputes arising from enforcement proceedings is the court in the region of jurisdiction of the court in charge of the enforcement proceedings.

60. This Act entered into force on 10 July 2004.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

61. The applicants complained, under Article 6 § 1 of the Convention, about the non-enforcement of the judgments, which became final on 10 February 1998 and 23 May 2005 respectively, ordering the second applicant's father to pay child maintenance.

62. The relevant part of this Article reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...".

A. Admissibility

1. As regards the first applicant (compatibility ratione personae)

63. In the Court's view, although the Montenegrin Government have not raised an objection as to the Court's competence *ratione personae* in this respect, the first applicant's victim status nevertheless calls for its consideration (see, *mutatis mutandis, Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III, and *Bijelić v. Montenegro and Serbia, no. 11890/05,* § 71, 28 April 2009). The Court observes that in the present case the party to the domestic proceedings at issue was the second applicant only, in whose favour both judgments were rendered, the first applicant having merely been her legal guardian and representative. It follows, therefore, that the first applicant's complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

2. As regards the second applicant (non-exhaustion)

(a) The first judgment issued in 1998

(i) Arguments of the parties

64. The Government submitted that the applicants had not exhausted all effective domestic remedies available to them. In particular, they had failed to lodge a request for review and an action for fair redress, which were provided by the Right to a Trial within a Reasonable Time Act (see paragraph 43 above). Lastly, after using these remedies the applicants could have made use of a constitutional appeal. In this respect the Government referred to *Buj v. Croatia* (dec.), no. 24661/02, 1 June 2006; *Slaviček v. Croatia* (dec.), no. 20862/02, 4 July 2002; and *Nogolica v. Croatia* (dec.), no. 77784/01, 5 September 2002.

65. The second applicant submitted belated comments, which, on that account, were not admitted to the file.

(ii) Relevant principles

66. The Court reiterates that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the alleged violations before they are submitted to the Court.

67. However, the only remedies which the Convention requires to be exhausted are those which relate to the breaches alleged and at the same time are available and sufficient (see *Selmouni v. France* [GC],

no. 25803/94, § 75, ECHR 1999-V; and *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010).

68. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; and *Dalia v. France*, 19 February 1998, § 38, *Reports of Judgments and Decisions* 1998-I).

69. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her of that requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

70. The Court reiterates that the effectiveness of a particular remedy is normally assessed with reference to the date on which the application was lodged (see, for example, *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)), this rule, however, being subject to exceptions which may be justified by the specific circumstances of each case (see *Nogolica,* cited above).

71. Finally, the Court has already held that it would be unreasonable to require an applicant to try a request for review on the basis of the Right to a Trial within a Reasonable Time Act in a case where the domestic proceedings had been pending for a number of years before the introduction of this piece of legislation and had still not been decided, and where no conclusions could be drawn from the Government's submissions about its effectiveness (see *Živaljević v. Montenegro*, no. 17229/04, §§ 60-65, 8 March 2011; *Bijelić,* cited above*,* § 76; and *Parizov v. "the former Yugoslav Republic of Macedonia",* no. 14258/03, §§ 45-46, 7 February 2008). The Court, however, reserved its right to reconsider its view if the Government demonstrate, with reference to specific cases, the efficacy of the remedy (see *Živaljević,* cited above, § 66).

(iii) The Court's assessment

(α) As regards the request for review

72. The Court notes that the respondent State's case-law on the basis of the request for review would appear to have evolved to a certain extent in comparison to the statistics available earlier, as in thirty-one cases the impugned proceedings would appear to have been expedited after a request for review had been submitted (see paragraph 47 above and *Živaljević,* cited above, § 40). It also observes, however, that to date in a considerable number of cases, notably thirty-six, the domestic courts either have not acted in accordance with their own decisions to expedite the proceedings or

the outcome of the request for review is rather unclear (see paragraph 47 above).

73. It is further noted that while the second applicant has indeed never lodged a request for review as such, she has urged the relevant domestic courts on numerous occasions to expedite the proceedings, but to no avail (see paragraph 15 above). Even though the domestic judge in charge of the enforcement considered the second applicant's complaint justified as early as 2004 (see paragraph 16 above), more than seven years later the proceedings are still ongoing.

74. In view of the above, as well as in view of the fact that the proceedings here at issue had been pending for more than nine years and eight months before the Right to a Trial within a Reasonable Time Act entered into force, out of which more than three years and nine months elapsed after the Convention had entered into force in respect of the respondent State, the Court considers that it would be unreasonable to require the second applicant to try this avenue of redress (see *Živaljević,* cited above, §§ 60-65; *Bijelić*, cited above, § 76; and *Parizov,* cited above, §§ 45-46). Therefore, the Government's objection in this regard must be dismissed.

(β) As regards the action for fair redress

75. The Court has already held that the action for fair redress is not capable of expediting proceedings while they are still pending, which is clearly the second applicant's main concern (see *Mijušković v. Montenegro,* no. 49337/07, §72, 21 September 2010). It sees no reason to hold otherwise in the present case.

(γ) As regards the constitutional appeal

76. The Court reiterates that the decisive question in assessing the effectiveness of a remedy concerning a complaint about the length of proceedings is whether or not it was possible for the applicant to be provided with direct and speedy redress, rather than with indirect protection of the rights guaranteed under Article 6 (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 195, ECHR 2006-V; and *Sürmeli v. Germany* [GC], no. 75529/01, § 101, ECHR 2006-VII). In particular, a remedy of this sort shall be "effective" if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays which have already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157-159, ECHR 2000-XI; *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII; and *Sürmeli*, cited above, § 99).

77. The Court observes that the Constitutional Court could, at best, quash the decision rendered upon the remedies provided by the Trial within a Reasonable Time Act, and order that the applicant's request for review or an action for fair redress be re-examined by the same body which had

rendered the impugned decision in the first place (see paragraph 41 above). The Constitutional Court itself could neither expedite the proceedings nor award any redress, thereby offering indirect protection rather than a direct and speedy redress.

78. The Court further observes that the reasoning applied in the said cases against Croatia, referred to by the Montenegrin Government, cannot be applied in respect of Montenegro, as the relevant legislation in Croatia explicitly provides that the Constitutional Court must examine a constitutional complaint even before all legal remedies have been exhausted in cases where a competent court has not decided within a reasonable time a claim concerning the applicant's rights and obligations, or a criminal charge against him. The Montenegrin legislation, on the contrary, provides that a constitutional appeal can be lodged against an individual decision only after all other effective domestic remedies have been exhausted (see paragraphs 38 and 40 above), and contains no reference whatsoever to possible complaints in respect of the length of proceedings.

79. In view of the above considerations, the Court considers that a constitutional appeal cannot be considered an effective domestic remedy in respect of length of proceedings. Therefore, the Government's objection in this regard must be dismissed.

(δ) Conclusion

80. The Court notes that the second applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) The second judgment issued in 2004

81. The second applicant complained also about non-enforcement of the judgment rendered by the Municipal Court in Kruševac on 30 June 2004 (see paragraph 31 above). She maintained that she had requested that an enforcement order be issued, but submitted no evidence in that regard.

82. The Government, for their part, submitted that there was no evidence whatsoever that the second applicant had ever initiated enforcement proceedings in this respect.

83. In the absence of any evidence that the second applicant had indeed requested the enforcement of this judgment, which evidence had been sought from the second applicant on at least three occasions, the Court cannot but conclude that the respondent State has not been made aware of the existence of the said judgment, given that it was issued by a competent court in Serbia, and thus afforded an opportunity of preventing or putting right the alleged violation before it is submitted to the Court. It follows that

this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Merits

1. Arguments of the parties

84. The Government submitted that the second applicant's lawyer contributed significantly to the length of the proceedings, as he had failed to provide in due time the bank account details necessary for the enforcement of the judgment issued in 1998. These details were provided by the first applicant only on 27 January 2005, after the Montenegrin courts had sought legal assistance from the relevant Serbian bodies, which ensured that the first applicant was served with the Montenegrin courts' request (see paragraphs 19-21 above). The respondent State afterwards duly issued another enforcement order, which stipulated that one-third of the debtor's salary was to be transferred to the second applicant, as it had been previously established that the debtor had no movable assets or property which could be sold to pay off the outstanding debt. Lastly, it was impossible to enforce the judgment at issue due to the insolvency of the debtor, as he was paying off several loans as well as paying maintenance for two other children, born in 1990 and 1995, respectively, one of whom had turned eighteen in the meantime.

85. The second applicant did not submit comments within the time-limit set by the Court (see paragraph 65 above).

2. Relevant principles

86. The Court reiterates its settled case-law to the effect that Article 6 § 1 of the Convention, *inter alia*, protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. Accordingly, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed (see, among other authorities, *Hornsby v. Greece*, judgment of 19 March 1997, Reports 1997-II, pp. 510-11, § 40; *Burdov v. Russia*, no. 59498/00, § 34, ECHR 2002-III; and *Jasiūnienė v. Lithuania*, no. 41510/98, § 27, 6 March 2003). The State has an obligation to organise a system of enforcement of judgments that is effective both in law and in practice (see *Fuklev v. Ukraine*, no. 71186/01, § 84, 7 June 2005).

87. Further, the Court notes that, irrespective of whether enforcement is to be carried out against a private or State actor, it is up to the State to take all necessary steps, within its competence, to execute a final court judgment and, in so doing, to ensure the effective participation of its entire apparatus, failing which it will fall short of the requirements contained in Article 6 § 1

(see, albeit in the context of child custody, *Felbab v. Serbia*, no. 14011/07, § 62, 14 April 2009). However, a failure to enforce a judgment because of the debtor's indigence cannot be held against the State unless and to the extent that it is imputable to the domestic authorities, for example, to their errors or delay in proceeding with the enforcement (see, *mutatis mutandis*, *Omasta v. Slovakia* (dec.), no. 40221/98, 10 December 2002).

88. Lastly, the Court reiterates that enforcement proceedings by their very nature need to be dealt with expeditiously (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 23, ECHR 2000-IV).

3. The Court's assessment

89. The period to be taken into account began on 3 March 2004, which is when the Convention entered into force in respect of Montenegro (see *Bijelić,* cited above*,* § 69). The enforcement proceedings initiated upon the judgment which became final in February 1998 have thus been within the Court's competence *ratione temporis* for a period of more than seven years and nine months and they are still pending. The Court further notes that, in order to determine the reasonableness of the length of proceedings, regard must also be had to the state of the case on 3 March 2004 (see, among other authorities, *Mikulić v. Croatia*, no. 53176/99, § 37, ECHR 2002-I, *Styranowski v. Poland*, 30 October 1998, § 46, *Reports of Judgments and Decisions* 1998-VIII). In this connection it is noted that the enforcement in question had already been ongoing for nearly six years before that date (see paragraph 11 above). The Court considers that the length of the enforcement proceedings here at issue could be justified only under exceptional circumstances.

90. The Court notes at the outset that the impugned proceedings concern child maintenance. While it can be accepted that some such cases may be more complex than others, the Court does not consider the present one to be of such complexity as to justify enforcement proceedings of this length. The issue involved in these proceedings was clearly of great importance to the second applicant, the Convention itself requiring exceptional diligence in all child-related matters (see, among many authorities, *Veljkov v. Serbia*, no. 23087/07, § 87, 19 April 2011).

91. While a period of less than three months can be attributed to the second applicant's lawyer (see paragraphs 19-21 above), the overall delay was caused by several substantial periods of inactivity which have to be attributed to the domestic authorities: after the enforcement proceedings had resumed on 12 July 2004, it took more than seven months for the relevant domestic court to issue another enforcement order attaching the debtor's salary, more than a further two years and two months for the same court to reject the debtor's objection in this regard, and another three years and five months to deliver this decision to the debtor's employer (see paragraphs 22-25 above).

92. As regards the debtor's alleged insolvency, the Government provided only the debtor's payslip of October 2010. They did not provide any domestic court decision which would have established in a clear and precise way how much exactly the debtor was obliged to pay for the maintenance of his other children or, for that matter, how many children he actually had to support. The debtor, for his part, provided in the domestic proceedings inconsistent data in this respect (see paragraphs 12, 23 and 36 above). In any case, the Court notes that a maintenance claim for one child does not exclude a maintenance claim for another child. These claims have to be met proportionally pursuant to section 115 of the Enforcement Procedure Act 2000 (see paragraph 53 above).

93. The Court further notes that the said salary slip reveals that the debtor is burdened by his obligations to pay off various loans rather than to pay the maintenance owed to his other children. The Montenegrin banks and the debtor's employer authorised two loans for him, one in January 2010 and another one in October 2010 (see paragraph 37 above), clearly indicating that the debtor, at least in this period, was not insolvent. This leads to the conclusion that had the enforcement order been delivered to the debtor's employer before the debtor took out the last two loans, he would have been able to pay off the outstanding debt in respect of the second applicant. In any event, even in those circumstances the claim of the second applicant has priority over the debtor's debts based on the loans (see paragraph 27 above).

94. In view of the above, in particular of what was at stake for the second applicant and the failure of the domestic authorities to display adequate diligence, the Court considers that the non-enforcement at issue amounts to a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

95. The applicants also complained, under Article 14 of the Convention, about being discriminated against by the Montenegrin authorities on the bases of their Serbian nationality.

96. The Court considers that the first applicant's complaint in this respect is incompatible *ratione personae,* for the reasons already stated in paragraph 63 above.

97. Quite apart from the fact that the second applicant does not seem to have raised this issue before the domestic courts, the Court, in any event, notes that there is no evidence in the case file that there has been any discrimination against the second applicant on any grounds. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

98. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

99. In its letter of 25 February 2011 the applicants were invited to submit any claims for just satisfaction and reminded that failure to do so entailed the consequence that the Chamber would either make no award of just satisfaction or else reject the claim in part. They were also informed that this applied even if the applicants had indicated their wishes in this respect at an earlier stage of the proceedings. Even though they were legally represented the applicants did not submit a claim for just satisfaction. The Court, therefore, makes no award in this regard.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the second applicant's complaint concerning non-enforcement of the judgment issued in 1998 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in this regard.

Done in English, and notified in writing on 21 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Lech Garlicki President

FOURTH SECTION

CASE OF TOMIĆ AND OTHERS v. MONTENEGRO

(Applications nos. 18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09 and 7316/10)

JUDGMENT

STRASBOURG

17 April 2012

FINAL

22/10/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tomić and Others v. Montenegro**,**

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 27 March 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in ten separate applications against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by twelve Montenegrin nationals whose personal details are set out in the annex to this judgment.

2. The applicants were represented by Mr V. Bjeković, a lawyer practising in Podgorica. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicants alleged an inconsistent practice on the part of the domestic courts. In particular, they complained that their claims had been rejected by the domestic courts whereas the same courts had at the same time allowed identical claims filed by their colleagues.

4. On 7 October 2010 the applications were communicated to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. Background information and the proceedings before the domestic courts

6. The first, second, third, fourth, eighth, ninth, tenth, eleventh and twelfth applicants, and legal predecessor of the fifth, sixth and seventh applicants, were all employees of the Aluminium Plant in Podgorica (*Kombinat aluminijuma Podgorica*).

7. On various dates they were all certified as totally unfit for work (*potpuni gubitak radne sposobnosti*). Their disability (*invalidnost*) was partly the result of a work-related illness.

8. Between 10 and 16 November 2005 they were made redundant and received a severance payment.

9. On various dates thereafter the Pension Fund (*Republički fond penzijskog i invalidskog osiguranja*) in Podgorica recognised their right to a disability pension (*pravo na invalidsku penziju*), effective from the date on which they had respectively been certified disabled.

10. On various subsequent dates the first, second, third, fourth, eighth, ninth, tenth, eleventh and twelfth applicants, and legal predecessor of the fifth, sixth and seventh applicants, filed claims against their former employer, seeking damages consisting of the difference between the disability pension they were receiving and the salary which they would have received had they not been made redundant. The amounts claimed varied between 581 euros (EUR) (for the third applicant) and EUR 9,273.64 (for the fourth applicant). They expressly stated, either in their claims or further submissions made in the context of appeals, appeals on points of law and/or replies to the defendant's submissions, that these were labour-related claims exempted from court fees. The fifth, sixth and seventh applicants continued the proceedings in their legal predecessor's stead as he had passed away in the meantime.

11. Some of the applicants were successful before the Court of First Instance (*Osnovni sud*) in Podgorica, while others were not. However, all the applicants were unsuccessful in the second-instance proceedings before the High Court (*Viši sud*) in Podgorica, which rendered its decisions between 7 November 2008 and 9 October 2009. The first, third, fourth, eighth, tenth, eleventh, and twelfth applicants lodged an appeal on points of law (*revizija*) with the Supreme Court (*Vrhovni sud*) in Podgorica. Between 18 February and 3 December 2009 the Supreme Court upheld the High Court's judgments and, in substance, endorsed its reasoning. The second, fifth, sixth, seventh and ninth applicants did not lodge an appeal on points of law.

12. In its reasoning in the applicants' cases, the High Court and the Supreme Court held, *inter alia*, that the applicants' employment had been terminated because they had been made redundant, not because their right to a disability pension had been recognised. In particular, when their right to a

pension was subsequently recognised they were no longer employed and thus had no salary in any event; accordingly, no damage had been sustained and their claims were unfounded.

13. In six other judgments, submitted by the applicants, rendered between 7 December 2006 (by the Supreme Court) and 2 February 2009 (by the High Court) the same courts had ruled in favour of the applicants' colleagues, notwithstanding the fact that their claims were based on the same facts and concerned identical legal issues. In their reasoning in those other cases, the courts explained, *inter alia*, that the claim for damages was justified on grounds of their disability and that the employer had to compensate them according to the extent to which the work-related illness had caused the disability. At the same time, the courts found that the claimants' redundancy and the accompanying payment, which the claimants had received, had nothing to do with the legal grounds for seeking damages for their disability. These judgments became final and enforceable (*pravosnažne i izvršne*).

B. Other relevant facts

14. All the applicants lodged constitutional appeals. On 24 March 2011 the Constitutional Court (*Ustavni sud*) rejected (*odbacio*) the constitutional appeal lodged by the ninth applicant on the grounds that he had not exhausted all effective domestic remedies; in particular, he had not lodged an appeal on points of law with the Supreme Court. Between 24 December 2009 and 10 March 2011 the Constitutional Court dismissed (*odbio*) the constitutional appeals lodged by all the other applicants on the grounds that the impugned judgments did not depart from established case-law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution of the Republic of Montenegro 1992 (*Ustav Republike Crne Gore*; published in the Official Gazette of the Republic of Montenegro - OG RM - no. 48/92)

15. Article 17 of the 1992 Constitution provided that "everyone shall be entitled to the equal protection of his or her freedoms and rights in legal proceedings".

16. This Constitution was repealed in October 2007, when the new Constitution, published in OG RM no. 01/07, entered into force.

B. The Constitution of Montenegro 2007 (*Ustav Crne Gore*; published in the Official Gazette of Montenegro - OGM - 01/07)

17. Article 19 of the 2007 Constitution provides that everyone has the right to equal protection of his or her rights and freedoms.

18. Article 32 provides that "everyone shall have the right to a fair ... trial ... before a ... tribunal."

19. Article 124 § 2 provides that the Supreme Court shall ensure that the courts apply the laws consistently.

20. Article 149 § 1 provides, *inter alia*, that the Constitutional Court shall rule on constitutional appeals lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

C. Montenegro Constitutional Court Act (*Zakon o Ustavnom sudu Crne Gore*; published in OGM no. 64/08)

21. Sections 48 to 59 contain additional provisions as regards the processing of constitutional appeals.

22. This Act entered into force in November 2008.

D. Courts Act 2002 (*Zakon o sudovima*; published in OG RM nos. 05/02, 49/04, 22/08 and 39/11)

23. Section 5 § 2 provides that everyone shall be equal before the courts.

24. Section 27 provides that the Supreme Court shall establish general legal principles and opinions in order to ensure consistent application of the Constitution, laws and other acts.

E. Civil Procedure Act 2004 (*Zakon o parničnom postupku*; published in OG RM no. 24/04)

25. Section 2 § 1 provides that the court shall decide the case within the limits of the claims submitted in the proceedings (*u granicama zahtjeva koji su stavljeni u postupku*).

26. Section 397 § 2 provides that an appeal on points of law is "not admissible" in pecuniary disputes where the "value of the part of the final judgment being challenged does not exceed EUR 5,000". However, as provided for in section 397 § 4(2), an appeal on points of law is always admissible in disputes concerning loss of earnings or other labour-related income where the relevant damages have been awarded or revoked for the first time.

27. Section 438 provides that an appeal on points of law is admissible in disputes relating to the establishment, existence or termination of employment.

28. Section 401 provides, *inter alia*, that, when deciding on an appeal on points of law, the competent court shall confine its examination to that part of the judgment which has been challenged by the appeal on points of law and to the stated grounds of appeal.

29. Section 352 § 1 provides that a judgment becomes final (*pravosnažna*) when it can no longer be challenged by an appeal.

F. Amendments to the Civil Procedure Act 2004 (*Zakon o izmjenama i dopunama zakona o parničnom postupku*; published in OG RM no. 76/06)

30. Section 24 of this Act amended section 397 § 2 of the Civil Procedure Act 2004 by providing that an appeal on points of law is "not admissible" in pecuniary disputes where the "value of the part of the final judgment being challenged does not exceed EUR 10,000".

31. Section 26 of this Act amended section 438 of the Civil Procedure Act 2004 by providing, under the "labour disputes" heading, that an appeal on points of law is allowed "only" in disputes relating to the establishment, existence or termination of employment.

32. This Act entered into force on 20 December 2006.

33. However, it contained no transitional provisions specifying which of these two Acts should be applied in pending proceedings.

G. Court Fees Act (*Zakon o sudskim taksama*; published in OG RM nos. 76/05 and 39/07 and OGM no. 40/10)

34. Section 8 provides, *inter alia*, that parties to proceedings concerning labour rights and employment shall be exempted from paying court fees.

H. Relevant domestic case-law

35. Between 20 February 2007 and 21 December 2010 the domestic courts ruled in eighty-nine other cases lodged by the applicants' colleagues. In one of the cases in which the claimant was successful before the Court of First Instance, neither of the parties appealed and the relevant judgment thus became final and enforceable.

36. The High Court examined eighty-eight appeals, in which four of the claimants were successful and the others were not. In two of those four cases neither of the parties lodged an appeal on points of law and those two judgments thus became final and enforceable.

37. Between 20 November 2008 and 21 December 2010 the Supreme Court decided eighty-six appeals on points of law. Two of them were rejected on procedural grounds: one had been lodged out of time and in the other one the value of the claim was considered to be below the statutory threshold allowing for this remedy. Eighty-four appeals on points of law were examined on the merits regardless of the value of the claim, including two cases in which the claimants had been successful before the High Court. In all cases the Supreme Court ruled against the claimants.

38. In December 2006 another colleague of the applicants was successful before the domestic courts, including before the Supreme Court. It is clear from the case file that the claimant in question had never been made redundant and that he had retired after being certified totally unfit for work.

THE LAW

I. JOINDER OF THE APPLICATIONS

39. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

40. The applicants complained under Articles 6, 13 and 14 of the Convention, Article 1 of Protocol No. 1 and Article 1 of Protocol No. 12 that the domestic courts had rejected their claims while at the same time allowing identical claims filed by their colleagues.

41. The Court considers that the applicants' complaints naturally fall to be examined under Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. Exhaustion of domestic remedies and six-month rule

(a) The parties' submissions

42. The Government submitted that both a constitutional appeal and an appeal on points of law were effective domestic remedies which had not

been used by all the applicants. In support of their submission that a constitutional appeal was an effective remedy, they submitted two decisions of the Constitutional Court delivered in 2010, allowing the relevant constitutional appeals, both of which concerned the right of access to the Supreme Court. The claims at issue were unrelated to the claims of the applicants in the present case. They also submitted statistical data on how many constitutional appeals had been rejected or decided on the merits between 1 January and 1 April 2011.

43. The Government asserted, further, that the applicants' claims were labour-related, so an appeal on points of law was always admissible regardless of the value of the claim. The applicants had been exempted from paying the court fees in the domestic proceedings, which would not have been possible if these had not been labour disputes. In this regard they referred to section 397 § 4(2) of the Civil Procedure Act and Article 8 § 1 of the Court Fees Act (see paragraphs 26 and 34 above). Lastly, they contended that the applicants' rights did not fall within the ambit of social legislation, as, if that had been the case, their claims would have been dealt with in administrative proceedings and not by the civil courts.

44. The applicants maintained that an appeal on points of law was not allowed in cases where the amount in dispute did not exceed the statutory threshold of EUR 10,000 unless it was a labour-related claim, which was not the case here. Their claims were property-related, based on pension and disability insurance, falling within the ambit of social rather than labour legislation. They further submitted copies of their constitutional appeals and the relevant decisions, maintaining, however, that this was not an effective domestic remedy.

(b) The Court's assessment

(i) As regards the constitutional appeal and the related six-month time-limit

45. The Court notes that all of the applicants lodged a constitutional appeal (see paragraph 14 above). The Government's objection in this regard must therefore be dismissed. The Court sees no reason to reconsider the effectiveness of the constitutional appeal in this particular case (see *Koprivica v. Montenegro*, no. 41158/09, § 46, 22 November 2011) as all the applications were, in any event, submitted within six months of the date when the High Court gave its decisions in respect of the second, fifth, sixth, seventh and ninth applicants, and of the date when the Supreme Court gave its decisions in respect of the first, third, fourth, eighth, tenth, eleventh and twelfth applicants (see the Annex appended to the judgment).

(ii) As regards the appeal on points of law

46. The Court has already held that, given its nature, an appeal on points of law must, in principle and whenever available in accordance with the

relevant civil procedure rules, be considered an effective domestic remedy within the meaning of Article 35 § 1 of the Convention (see *Jevremović v. Serbia*, no. 3150/05, § 41, 17 July 2007; *Ilić v. Serbia*, no. 30132/04, §§ 20 and 21, 9 October 2007; and, *mutatis mutandis*, *Debelić v. Croatia*, no. 2448/03, §§ 20 and 21, 26 May 2005).

47. In the specific circumstances of the present case, however, the Court is of the opinion that the exhaustion issue raised by the Government is closely linked to the merits of the complaints. In particular, it involves the question of whether an appeal on points of law to the Supreme Court, if available (see paragraphs 26-27 and 30-33 above) and made use of, could have secured consistency in the adjudication of the claims at issue. Consequently, the Court joins its examination of this question to its assessment of the merits of the applicants' complaints (see, *mutatis mutandis*, *Rakić and Others v. Serbia*, nos. 47460/07 et seq., § 38, 5 October 2010).

2. Conclusion

48. The Court concludes that the applicants' complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring them inadmissible has been established.

B. Merits

1. The parties' submissions

49. The applicants complained that the domestic courts had rejected their claims while at the same time allowing identical claims filed by their colleagues. In support of their allegations, they submitted copies of the domestic courts' rulings in six other cases: a final and enforceable judgment of the Court of First Instance, four High Court judgments in which the claimants were successful, and a decision of the Supreme Court rendered in 2006 (see paragraphs 35, 36 and 38 above).

50. The Government contested the applicants' allegations. In particular, unlike in *Vinčić and Others v. Serbia*, cited above, the last-instance court in the present case was not the High Court but the Supreme Court, which, by ruling consistently in other cases based on the same grounds, had removed any uncertainties as to possible contradictory interpretations by the lower courts. They submitted all the domestic case-law in this regard (see paragraphs 35-38 above).

51. The Government further maintained that in three of the six cases referred to by the applicants the respondent had not exercised its right to appeal or to lodge an appeal on points of law, so the Supreme Court was unable to rule on the claims and bring those judgments into line with the

domestic case-law on this issue, as it had done in other cases. Further, the ruling of the Supreme Court of 2006 was irrelevant in the present context, as in that particular case the respondent had not replied to the claimant's appeal on points of law and the Supreme Court had a statutory obligation to confine its examination to the grounds of appeal as submitted, that is, to the part of the lower court's judgment being challenged (see paragraphs 25 and 28 above). The Government did not comment on the remaining two decisions of the High Court rendered in favour of the claimants, but submitted copies of the Supreme Court's decisions overturning these decisions and ruling against the claimants in question (see paragraph 37 above).

52. The applicants reaffirmed their complaints and referred, in particular, to *Rakić and Others v. Serbia*, cited above, § 43. They further maintained that the domestic courts' decisions submitted by the Government were not yet final (*nisu pravosnažne*).

2. The Court's assessment

53. The Court reiterates that it is not its role to question the interpretation of the domestic law by the national courts. Similarly, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 49-50, 20 October 2011, and the other authorities cited therein). It has also been considered that certain divergences in interpretation could be accepted as an inherent trait of any judicial system which, like the Montenegrin one, is based on a network of trial and appeal courts with authority over a certain territory (see, *mutatis mutandis*, *Tudor Tudor v. Romania*, no. 21911/03, § 29, 24 March 2009). However, profound and long-standing differences in the practice of the highest domestic court may in itself be contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law (see *Beian v. Romania (no. 1)*, no. 30658/05, §§ 37-39, ECHR 2007-V (extracts)).

54. The criteria in assessing whether conflicting decisions of domestic supreme courts are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], cited above, § 53).

55. Lastly, it has been accepted that giving two disputes different treatment cannot be considered to give rise to conflicting case-law when this

is justified by a difference in the factual situations at issue (see, *mutatis mutandis*, *Erol Uçar v. Turkey* (dec.), no. 12960/05, 29 September 2009).

56. Turning to the present cases, the Court notes that of the six judgments referred to by the applicants only one was delivered by the Supreme Court. It is also noted that this judgment was delivered much earlier than the others and in a case in which the claimant was clearly in a different situation from that of the applicants, as he had never been made redundant but instead had retired when he was declared unfit for work (see paragraphs 8 and 37-38 above). Therefore, the said judgment cannot be considered relevant in the present case (see paragraph 55 above). It is further observed that two of the four decisions made by the High Court in favour of the claimants were later overturned by the Supreme Court (see paragraphs 37 and 51 above). Therefore, only three decisions were rendered in favour of claimants who were in an identical situation to the applicants. These decisions, one rendered by the Court of First Instance and two by the High Court, were never examined by the Supreme Court as the respondent in question had failed to lodge an appeal or an appeal on points of law (see paragraphs 35-36 above).

57. The Court further observes that the High Court examined eighty-eight appeals in total, of which eighty-four decisions were against the claimants and only four in their favour. It would appear that these four favourable decisions could be considered an exception and inconsistent in comparison with the other eighty-four, rather than the other way round. The Supreme Court, for its part, examined on the merits eighty-four appeals on points of law and, in so doing, ruled consistently without a single exception in that respect (see paragraph 37 above; compare and contrast with *Rakić and Others v. Serbia*, cited above). In the light of section 352 § 1 of the Civil Procedure Act, and contrary to the applicants' submissions, it is clear that the High Court and Supreme Court judgments referred to are final (see paragraph 29 above).

58. In view of the foregoing, the Court considers that the Supreme Court ensured consistency of the case-law at issue (see paragraphs 36, 37 and 57 above) and that there are no "profound and long-standing differences" in its case-law in the present case (see paragraph 54 above). It follows, therefore, that there has been no violation of Article 6 § 1 of the Convention.

59. The Court further finds that in the light of this conclusion it is not necessary to rule on the Government's objection as to the exhaustion of domestic remedies in so far as it concerns an appeal on points of law (see *Juhas Đurić v. Serbia*, no. 48155/06, § 67, 7 June 2011; see, also, *mutatis mutandis*, *Palić v. Bosnia and Herzegovina*, no. 4704/04, § 81, as well as the relevant operative provisions, 15 February 2011).

III. OTHER COMPLAINTS

60. The applicants also complained about the outcome of the proceedings.

61. The Government maintained that these complaints were of a fourth-instance nature and, as such, inadmissible as manifestly ill-founded.

62. The Court reiterates that, in accordance with Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

63. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Decides* to join to the merits the Government's objection as to the non-exhaustion of domestic remedies in so far as it concerns an appeal on points of law;

3. *Declares* the complaints concerning the alleged inconsistent practice of the domestic courts admissible and the remainder of the application inadmissible;

4. *Holds* that there has been no violation of Article 6 § 1 of the Convention and that it is not necessary in consequence to rule on the Government's above-mentioned objection.

Done in English, and notified in writing on 17 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President

Annex

Application no.	Date of lodging the application	Applicant's name and date of birth	Date of the Court of First Instance decisions	Date of the High Court decisions	Date of the Supreme Court decisions	Date of the Constitutional Court decisions
18650/09	26 March 2009	Miodrag Tomić ("the first applicant"), born in 1956	30 August 2007	7 November 2008	18 December 2009	11 March 2010
18676/09	23 March 2009	Čedomir Čabarkapa ("the second applicant"), born in 1958	1 June 2008	10 February 2009	/	10 March 2011
18679/09	24 March 2009	Aleksandar Đukanović ("the third applicant") born in 1948	8 November 2007	9 December 2008	3 March 2009	11 March 2010
38855/09	30 May 2009	Miraš Furtula ("the fourth applicant") born in 1950	22 October 2008	26 December 2008	14 April 2009	11 February 2010
38859/09	30 May 2009	Dragica Piper ("the fifth applicant"), born in 1954; Srđan Piper ("the sixth applicant"), born in 1987; Mirela Piper ("the seventh applicant") born in 1993	7 April 2008	17 March 2009	/	11 February 2010
38883/09	30 May 2009	Nenad Zindović ("the eighth applicant") born in 1962	13 October 2007	5 December 2008	14 March 2009	11 February 2010
39589/09	15 July 2009	Zoran Ulićević ("the ninth applicant") born in 1954	25 May 2007	27 February 2009	/	24 March 2011
39592/09	15 July 2009	Dragoljub Milačić ("the tenth applicant") born in 1956	28 December 2007	13 March 2009	14 May 2009	11 February 2010
65365/09	25 November 2009	Vaso Jovanović ("the eleventh applicant") born in 1962	9 January 2009	8 July 2009	7 October 2009	24 December 2009
7316/10	22 January 2010	Mr Zoran Raković ("the twelfth applicant") born in 1966	29 December 2008	9 October 2009	3 December 2009	30 September 2010

FOURTH SECTION

CASE OF STAKIĆ v. MONTENEGRO

(Application no. 49320/07)

JUDGMENT

STRASBOURG

2 October 2012

FINAL

02/01/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Stakić v. Montenegro,

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 11 September 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 49320/07) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Mr Momir Stakić ("the applicant"), on 5 November 2007.

2. The applicant was represented by Mr Z. Đukanović, a lawyer practising in Zemun, Serbia. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicant complained about the length of civil proceedings as well as the lack of an effective domestic remedy in that regard.

4. On 6 January 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1953 and lives in Zemun (Serbia).

A. Civil proceedings

6. On 21 February 1977 the District Court (*Okružni sud*) in Podgorica found X, Y and Z guilty of participating in a fight (*učestvovanje u tuči*) on 14 July 1973.

7. On 18 December 1978 the applicant instituted civil proceedings against X, Y and Z seeking compensation for an eye injury he had suffered in the fight and the subsequent loss of the sight in his right eye, and for loss of income caused by his reduced working capacity.

8. On 18 March 1980 the Municipal Court (*Opštinski sud*) in Podgorica ruled partly in favour of the applicant on the basis of his school certificates, his employment record, documents concerning his injury and medical treatment as well as two expert witnesses' statements. This judgment was partly upheld by the District Court (*Okružni sud*) in Podgorica on 30 December 1980. On 10 May 1983 the Supreme Court (*Vrhovni sud*) in Podgorica quashed the previous judgments and ordered a re-trial. There is no information in the case file as to how many hearings had been held and/or adjourned before the Supreme Court issued its ruling.

9. Between 10 May 1983 and 21 June 1990 five hearings were adjourned and one hearing was held. Between 23 September 1985 and 6 January 1986 the impugned proceedings had been stayed due to the applicant's absence from a prior hearing.

10. On 21 June 1990 the Court of First Instance (*Osnovni sud*) in Podgorica ruled partly in favour of the applicant. The judgment was based on the evidence previously adduced as well as on further documents relating to the applicant's health and employment, and another three expert witnesses' opinions. On 14 May 1991 the High Court (*Viši sud*) in Podgorica quashed the first-instance judgment and ordered another re-trial.

11. Between 14 May 1991 and 16 October 2008 seven more hearings were adjourned and one hearing was held.

12. On 16 October 2008 the Court of First Instance (*Osnovni sud*) in Podgorica ruled partly in favour of the applicant. The judgment relied on: the opinions of four experts given by November 1986, documents obtained by May 1993, the statements of four witnesses provided between March 1997 and April 2002, and the statements of the applicant, X and another expert witness made between 6 November 2005 and 19 November 2007.

13. On 18 September 2009, the High Court in Podgorica quashed this judgment and ordered another re-trial.

14. On 13 September 2010 the Court of First Instance decided that the case should be examined afresh given that it had been assigned to a new judge. The court requested another opinion of a financial expert. As for the remaining evidence, the parties agreed that the minutes from previous hearings could be read.

15. The next hearing was scheduled for 2 November 2010. There is no information in the case file as to whether this hearing took place or if there were any further developments in the case.

B. Other relevant information

16. By 3 March 2004, which is when the Convention entered into force in respect of the respondent State, the applicant had amended the amount of compensation he had sought on seven occasions, and nine hearings had been adjourned due to his absence or upon his request.

17. After the Convention had entered into force in respect of Montenegro the applicant amended the amount he sought on two further occasions.

18. On 19 January 2006 the applicant requested an additional financial expertise.

19. There is no information in the case file as to how many hearings in total were held and/or adjourned.

20. Y and Z died on 19 May 2007 and 14 May 1988, respectively.

II. RELEVANT DOMESTIC LAW

A. Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

21. Article 32 provides, *inter alia*, that everybody has the right to a fair and public trial within a reasonable time.

22. Article 149 of the Constitution provides that the Constitutional Court shall rule on a constitutional appeal lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

23. This Constitution entered into force on 22 October 2007.

B. Montenegro Constitutional Court Act (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

24. Section 48 provides that a constitutional appeal may be lodged against an individual decision of a state body, an administrative body, a local self-government body or a legal person exercising public authority, for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted.

25. Sections 49-59 provide additional details as regards the processing of constitutional appeals. In particular, section 56 provides that when the Constitutional Court finds a violation of a human right or freedom, it shall

quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body which rendered the quashed decision.

26. This Act entered into force in November 2008.

C. Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in OGM no. 11/07)

27. This Act provides, under certain circumstances, the possibility to have lengthy proceedings expedited by means of a request for review (*kontrolni zahtjev*), as well as an opportunity for claimants to be awarded compensation by means of an action for fair redress (*tužba za pravično zadovoljenje*).

28. Section 44, in particular, provides that this Act shall be applied retroactively to all proceedings from 3 March 2004, but that the duration of proceedings before that date shall also be taken into account.

29. This Act entered into force on 21 December 2007, but contained no reference to applications involving procedural delay already lodged with the Court.

D. Courts Act (Zakon o sudovima; published in the Official Gazette of the Republic of Montenegro - OG RM - nos. 05/02, 49/04, 22/08 and 39/11)

30. Section 7 provides that everyone is entitled to an impartial trial within a reasonable time.

E. Civil Procedure Act (Zakon o parničnom postupku, published in the OG RM nos. 22/04, 28/05 and 76/06)

31. Section 11 paragraph 1 provides, *inter alia*, for the obligation of the domestic courts to ensure that the proceedings are conducted without delays, and within a reasonable time.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

32. The applicant complained, under Article 6 of the Convention, about the length of the above proceedings.

33. The relevant part of this Article reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...".

A. Admissibility

1. Arguments of the parties

34. The Government submitted that the applicant had not exhausted all effective domestic remedies available to him. In particular, he had failed to lodge a request for review and an action for fair redress, which were provided by the Right to a Trial within a Reasonable Time Act (see paragraphs 27-29 above). He had also failed to make use of a constitutional appeal.

35. The second applicant contested these submissions.

2. Relevant principles

36. The Court recalls that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the alleged violations before they are submitted to the Court.

37. However, the only remedies which the Convention requires to be exhausted are those which relate to the breaches alleged and at the same time are available and sufficient (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999 V, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, ECHR 2010-...). The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198, and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I).

38. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from that requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

3. The Court's assessment

39. The Court has already held that it would be unreasonable to require an applicant to attempt to file a request for review on the basis of the Right to a Trial within a Reasonable Time Act in a case where the domestic proceedings had been pending for a number of years before the introduction of this legislation and had still not been decided, and where no conclusions could be drawn from the Government's submissions about its effectiveness

(see *Boucke v. Montenegro*, no. 26945/06, §§ 72-74, 21 February 2012). The Court, however, has reserved its right to reconsider its view if the Government demonstrate, with reference to specific cases, the efficacy of this remedy (see *Živaljević v. Montenegro*, no. 17229/04, § 66, 8 March 2011).

40. In view of the fact that the proceedings at issue had been pending for more than twenty eight years before the Right to a Trial within a Reasonable Time Act entered into force, of which more than three years and nine months elapsed after the Convention entered into force in respect of the respondent State, and that no recent case-law with regard to the efficacy of this particular remedy has been submitted, the Court sees no reason to depart from its previous finding and concludes, therefore, that the Government's objection must be dismissed.

41. The Court has also already held that an action for fair redress is not capable of expediting proceedings while they are still pending, and that a constitutional appeal cannot be considered an effective domestic remedy in respect of length of proceedings (see *Boucke v. Montenegro*, cited above, §§ 75-79). It sees no reason to depart from its finding in the present case. The Government's objection in this regard must, therefore, also be dismissed.

42. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

43. The applicant reaffirmed his complaint. He also submitted that he had had to ask that some hearings be adjourned on account of his health.

44. The Government maintained that the impugned proceedings were both factually and legally complex, requiring a number of witnesses and expert witnesses to be heard. In particular, five expert opinions had been given during the period of the Court's competence *ratione temporis*, all of them upon the applicant's proposal. Secondly, the applicant himself had been mainly responsible for the length of the proceedings. In particular, he had amended and further particularised his claim on a number of occasions, two of which after the Convention had entered into force in respect of Montenegro; several hearings scheduled between 1983 and 2002 had been adjourned because of him; and the impugned proceedings had been stayed between 23 September 1985 and 6 January 1986 due to his absence (see paragraphs 9, and 16-17 above). Thirdly, Y and Z had passed away in the meantime (see paragraph 20 above), which required that their legal

successors be identified, which added to the overall length of the proceedings. Lastly, the impugned proceedings were of no vital importance to the applicant and, as such, did not require priority or any urgent action on the part of the courts. The courts issued seven decisions in total, two of which were rendered at two instances after the ratification of the Convention. It could not therefore be said that they were not active. The Government concluded that there was no violation of Article 6 of the Convention.

2. Relevant principles

45. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

46. In order to determine the reasonableness of the delay at issue, regard must be had to the state of the case on the date of ratification (see, *mutatis mutandis*, *Styranowski v. Poland*, judgment of 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII).

3. The Court's assessment

47. The period to be taken into account began on 3 March 2004, which is when the Convention entered into force in respect of Montenegro (see *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 69, 28 April 2009). The impugned proceedings have thus been within the Court's competence *ratione temporis* for a period of more than eight years and six months and they are still pending at first instance, another twenty-four years having already elapsed before that date.

48. The Court observes that the present case concerns compensation for the injuries the applicant had suffered in a fight. The Court notes that four witnesses and five expert witnesses had been heard. However, contrary to the Government's submissions, it is clear from the case file that most of this evidence had been obtained before the Convention entered into force in respect of the respondent State (see paragraph 12 above). While it can be accepted that some compensation claims may be more complex than others, the Court does not consider the present one to be of such complexity as to justify proceedings of this length. Nor does the fact that the impugned proceedings do not require priority or urgent action justify a procedural delay of such length, which length may even be considered a *de facto* denial of justice.

49. It is noted that the applicant indeed amended the exact amount of compensation he sought on two occasions after the ratification of the

Convention by Montenegro. The Court, however, does not consider that this could have significantly contributed to the length of the proceedings as the claim was not amended in its substance. While some of the hearings scheduled before 3 March 2004 had been postponed at the request of the applicant, there is nothing in the case file to suggest that the procedural delay after the date of ratification resulted from his conduct but rather was caused by the failure of the authorities to act diligently.

50. The Court notes that the first decision after the respondent State's ratification of the Convention was given on 16 October 2008, which is more than four years and seven months later. After this decision had been quashed on 18 September 2009, the case has been pending before the first-instance court for almost three years, with only one hearing having taken place in the meantime (see paragraphs 12-15 above).

51. In view of the criteria laid down in its jurisprudence and the relevant facts of the present case, the Court is of the opinion that the length of the proceedings complained of has failed to satisfy the reasonable time requirement. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

52. The applicant also complained, under Article 13, that he had no effective domestic remedy at his disposal to expedite the impugned proceedings.

53. Article 13 provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

54. The Court notes that the applicant's complaint raises issues of fact and law under the Convention, the determination of which requires an examination of the merits. It also considers that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it cannot be rejected on any other ground. The complaint must therefore be declared admissible.

B. Merits

55. The Court notes that Article 13 guarantees an effective remedy before a national authority for an alleged breach of all rights and freedoms guaranteed by the Convention, including the right to a hearing within a

reasonable time under Articles 6 § 1 (see, *inter alia*, *Kudła v. Poland* [GC], no. 30210/96, § 156, ECHR 2000-XI).

56. It recalls, further, that a remedy concerning length is "effective" if it can be used either to expedite the proceedings before the courts dealing with the case, or to provide the litigant with adequate redress for delays which have already occurred (see *Sürmeli v. Germany* [GC], no. 75529/01, § 99, ECHR 2006-VII).

57. Finally, the Court emphasises that the best solution in absolute terms is indisputably, as in many spheres, prevention. Where the judicial system is deficient with regard to the reasonable-time requirement in Article 6 § 1 of the Convention, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy. Some States have fully understood the situation by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 183 and 186, ECHR 2006-V; and *Sürmeli v. Germany* [GC], cited above, §100).

58. However, as noted above, the existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see paragraph 37 above).

59. Turning to the present case, the Court notes that the Government averred in their preliminary objections that there were remedies available for the applicant's complaint about the length of the proceedings under Article 6 § 1, which objections were rejected on the grounds described at paragraphs 39-41 above.

60. The Court concludes, for the same reasons, that there has been a violation of Article 13 taken together with Article 6 § 1 of the Convention on account of the lack of an effective remedy under domestic law for the applicant's complaints concerning the length of civil proceedings (see *Stevanović v. Serbia*, no. 26642/05, §§ 67-68, 9 October 2007; see, also, *mutatis mutandis*, *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, §§ 84-85, 27 May 2008).

61. The Court would again observe that it might reconsider its view in this regard if the Government are able to demonstrate in future such applications, with reference to specific cases, the efficacy of the said remedies (see paragraphs 39-40 above).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

63. The applicant claimed in the application form EUR 120,000 for non-pecuniary damage. He made no claim in this regard in his observations.

64. The Government maintained that the claimed amount was unsubstantiated, inappropriately high and contrary to the case-law of the Court.

65. Even if not the subject of a specific claim in his observations, the Court accepts that the applicant in the present case has certainly suffered some non-pecuniary damage which cannot be sufficiently compensated by the sole finding of a violation (see, *mutatis mutandis*, *Garzičić v. Montenegro*, no. 17931/07, § 42, 21 September 2010; as well as *Staroszczyk v. Poland*, no. 59519/00, §§ 141-143, 22 March 2007; see, also, *mutatis mutandis*, *Mijušković v. Montenegro*, no. 49337/07, §§ 94-96, 21 September 2010). Furthermore, the Government have commented on the applicant's claim as set out in the application form. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 under this head.

B. Costs and expenses

66. The applicant claimed that he had incurred considerable costs before the domestic courts, but that he had not saved the relevant invoices as he had not known that he might need them. He made no claim with regard to the costs incurred before the Court.

67. The Government contested this claim.

68. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses for lack of substantiation.

C. Default interest

69. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 2 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President

FOURTH SECTION

CASE OF VELIMIROVIĆ v. MONTENEGRO

(Application no. 20979/07)

JUDGMENT

STRASBOURG

2 October 2012

FINAL

02/01/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Velimirović v. Montenegro,

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 11 September 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 20979/07) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Mr Milutin Velimirović ("the applicant"), on 10 May 2007.

2. The applicant was represented by Mr N. Batrićević, a lawyer practising in Podgorica. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicant complained, under Article 6 of the Convention, about the non-enforcement of a final domestic judgment concerning flat-allocation.

4. On 12 July 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1940 and lives in Danilovgrad.

A. The enforcement proceedings

6. On 25 March 1988 the applicant's employer published a competition for an allocation of certain number of flats to its employees. The applicant was among those who applied. However, he was not provided with housing.

7. On 20 February 1991, upon the applicant's claim, the Labour Court of First Instance (*Osnovni sud udruženog rada*) in Podgorica ordered that the employer, which was a respondent party in the domestic proceedings ("the debtor"), and which, at that time, would appear to have been a socially-owned company (*društveno preduzeće*), re-allocate a certain number of flats. On 28 April 1992 the High Court upheld this judgment, which thereby became final.

8. On 27 October 1992, at the applicant's request, the Court of First Instance (*Osnovni sud*) issued an enforcement order (*rješenje o izvršenju*). By 16 April 1993 the debtor's objection (*prigovor*) and an appeal (*žalba*) in this regard were rejected.

9. On 1 February 2000 the debtor's Flat-Allocation Commission ("the Commission") issued another decision. On 15 March 2000, pursuant to Article 31 of the debtor's Statute, the debtor's Steering Committee (*Upravni odbor*) annulled this decision and ordered the Commission to conduct a new flat-allocation procedure.

10. On 6 February 2001 the Court of First Instance ordered the debtor to pay a fine and to comply with the enforcement order within 30 days. On 12 May 2001 the debtor's objection was rejected.

11. On 1 March 2001 the Commission issued another decision on flat allocation. However, the applicant was not among the persons to be provided with housing. The decision specified that an objection could be lodged against it with the debtor's Steering Committee.

12. On 2 October 2001 the Court of First Instance ordered the debtor to pay another fine and to comply with the enforcement order within 15 days.

13. On 23 October 2001 the Court of First Instance quashed the previous decision and all the enforcement activities which had been carried out on the grounds that the debtor had rendered a decision on flat-allocation and thus had enforced the 1992 judgment. On 3 November 2001 the applicant's objection in this regard was rejected.

14. On 25 January 2002 the applicant and one of his colleagues filed an objection against the Commission's decision on the flat-allocation (see paragraph 11 above).

15. On 9 April 2002, having received no response in respect of their objection, the applicant and his colleague filed a separate claim with the Court of First Instance seeking annulment of the debtor's decision of 1 March 2001.

16. On 3 June 2004 the Court of First Instance stayed the proceedings (*postupak se prekida*) until the debtor had decided on the said objection.

17. On 15 October 2004 the High Court (*Viši sud*) in Podgorica quashed the previous decision and ordered a re-trial.

18. On 15 April 2005 the Court of First Instance rejected the claim (*odbacuje se tužba*) on the grounds that it could be filed only against a final decision, and "there was no doubt that a final decision had not been rendered on the flat-allocation at issue" (*u postupku predmetne raspodjele stanova nesumnjivo nije donijeta konačna odluka*). The applicant and his colleague were also ordered to pay 1,450 euros (EUR) to the debtor and the interveners for legal costs.

19. On 9 June 2006 the High Court upheld this decision.

20. On 13 November 2006 the Supreme Court (*Vrhovni sud*) dismissed the applicant's appeal on points of law (*revizija*).

21. It would appear from the case file that the debtor has never ruled on the applicant's objection and thus no final decision on flat allocation has ever been rendered.

B. Other relevant facts

22. It transpires from the case file that as from 10 January 1997, which is when the insolvency proceedings in respect of the debtor were terminated (*obustavljen*), the debtor was organised as a joint-stock company (*akcionarsko društvo*). It is unclear who owned the controlling share of stocks at the time. On 27 January 2011 the applicant submitted that the debtor had been liquidated in the meantime, and that its legal successors were the Assembly of Municipality of Podgorica, and the respondent State.

II. RELEVANT DOMESTIC LAW

A. Enforcement Procedure Act 2000 (Zakon o izvršnom postupku; published in the Official Gazette of the Federal Republic of Yugoslavia nos. 28/00, 73/00 and 71/01)

23. Section 4 § 1 provided that enforcement proceedings were urgent.

24. Section 204 set out details with regard to enforcement in situations where the debtor's positive action was required.

25. Section 262 provided that this Act would be applied to all the enforcement proceedings initiated before the Act entered into force.

B. Enforcement Procedure Act 2004 (Zakon o izvršnom postupku; published in the Official Gazette of the Republic of Montenegro no. 23/04)

26. Section 286 provided that all the enforcement proceedings, which had been initiated before this Act entered into force, would be terminated in accordance with the Enforcement Procedure Act 2000.

C. Enforcement Act 2011 (Zakon o izvršenju i obezbjeđenju; published in the Official Gazette of Montenegro no. 36/11)

27. Sections 6 § 1 and 230 of this Act correspond, in substance, to sections 4 § 1 and 204 of the Enforcement Procedure Act 2000.

28. Section 292 § 1 provides that all the enforcements (*postupci izvršenja*) would be terminated in accordance with this Act.

29. This Act entered into force on 25 September 2011 and thereby repealed the Enforcement Procedure Act 2004.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

30. The applicant complained, under Article 6 § 1 of the Convention, about the non-enforcement of the judgment which became final in 1992, ordering the debtor in the domestic proceedings to issue a decision on flat allocation.

31. The relevant part of this Article reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...".

A. Admissibility

32. The Government submitted that the applicant's complaint was incompatible *ratione temporis* given that the enforcement proceedings had been terminated on 23 October 2001 (see paragraph 13 above), which was before the Convention entered into force in respect of Montenegro.

33. The applicant contested this claim.

34. The Court recalls that, in accordance with the general rules of international law, the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party (see, for example, *Kadiķis v. Latvia*

(dec.), no. 47634/99, 29 June 2000). In order to establish the Court's temporal jurisdiction it is, therefore, essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated (see *Blečić v. Croatia* [GC], no. 59532/00, § 82, ECHR 2006-III).

35. Turning to the present case, the Court notes that the judgment at issue had become final by 28 April 1992, and that it had to be enforced by 16 April 1993 (see paragraphs 7 and 8 above). It is further observed that the enforcement proceedings had officially ended in 2001, which was before the Convention entered into force in respect of the respondent State on 3 March 2004. The said proceedings were terminated on the grounds that the debtor had issued a decision on flat allocation on 1 March 2001. However, the Court notes that this decision was not yet final at the time when the Convention entered into force in respect of Montenegro, as the debtor clearly had not decided on the applicant's objection in that regard. Such a situation continued well after the ratification, as observed by the domestic courts themselves, which pronounced on this issue between 15 April 2005 and 13 November 2006, clearly stating that the debtor had not rendered a final decision on flat allocation by then (see paragraphs 18-20 above).

36. In view of the above, the Court considers, without prejudging the merits of the case, that the impugned non-enforcement is within the Court's competence *ratione temporis* within the meaning of Article 35 § 3 (a) of the Convention. A different conclusion would lead to a situation in which a State could avoid its responsibility for enforcements simply by officially terminating the enforcement proceedings without having enforced an impugned decision beforehand, thus allowing a final, enforceable judicial decision to remain inoperative to the detriment of one party (see, *mutatis mutandis*, *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). The Government's objection in this regard must, therefore, be dismissed.

37. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds (see, *mutatis mutandis*, *Nesevski v. "the former Yugoslav Republic of Macedonia"*, no. 14438/03, § 18, 24 April 2008). It must therefore be declared admissible.

B. Merits

38. The applicant re-affirmed his complaint. He also submitted that the debtor had been liquidated in the meantime, its legal successors being the Assembly of Municipality of Podgorica, and the respondent State.

39. The Government made no comments in this regard.

40. The Court notes that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, enforceable judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (see *Hornsby v. Greece*, cited above, § 40).

41. Turning to the present case, the Court notes that the judgment at issue had not been enforced by 13 November 2006 and would appear to remain unenforced to date, as the debtor has apparently never rendered a final decision on the flat allocation and thus has never complied with the 1992 judgment (see paragraphs 20 and 21 above). The Government neither contested this nor provided any evidence to the contrary (see paragraph 39 above).

42. While the period to be taken into account began on 3 March 2004, which is when the Convention entered into force in respect of Montenegro, in order to determine the reasonableness of the length of proceedings regard must also be had to the state of the case on 3 March 2004 (see, among other authorities, *Mikulić v. Croatia*, no. 53176/99, § 37, ECHR 2002-I, *Styranowski v. Poland*, 30 October 1998, § 46, *Reports of Judgments and Decisions* 1998-VIII). The impugned non-enforcement has thus been within the Court's competence *ratione temporis* for a period of eight years and two months, another eleven years having already elapsed before that date. The Court considers that there has accordingly been a violation of Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Nesevski v. "the former Yugoslav Republic of Macedonia"*, cited above, §§ 22-25).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

44. The applicant claimed EUR 144,000 in respect of pecuniary damage (EUR 78,000 on account of the flat he expected to get from the debtor, and EUR 66,000 on account of the rent he had to pay instead) and EUR 5,000 in respect of non-pecuniary damage.

45. The Government contested this claim.

46. The Court is of the view that it has not been duly substantiated that the applicant sustained pecuniary damage as a result of the violation of Article 6 § 1 on account of the length of the non-enforcement at issue. However, the Court accepts that the applicant has suffered some non-pecuniary damage which cannot be sufficiently compensated by the sole finding of a violation. Making its assessment on an equitable basis, the Court therefore awards the applicant EUR 3,600 under this head.

B. Costs and expenses

47. The applicant also claimed EUR 725 for the costs and expenses incurred before the domestic courts. It would appear that he did not claim anything in respect of the costs and expenses before the Court.

48. The Government contested this claim as unsubstantiated and contrary to the case-law of the Court.

49. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession, in particular the ruling of the domestic courts on legal costs (see paragraph 18 above), the Court considers it reasonable to award the applicant the entire sum claimed.

C. Default interest

50. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 725 (seven hundred and twenty five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 2 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President

FOURTH SECTION

CASE OF NOVOVIĆ v. MONTENEGRO

(Application no. 13210/05)

JUDGMENT

STRASBOURG

23 October 2012

FINAL

23/01/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Novović v. Montenegro,

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 2 October 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 13210/05) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Mr Miladin Novović ("the applicant"), on 2 April 2005.

2. The applicant was represented by Mr M. Mirović, a lawyer practising in Bar. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicant complained, in particular, about the length of reinstatement proceedings.

4. On 28 June 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1939 and lives in Sutomore.

6. On 25 June 1991 the applicant was made redundant.

7. On 29 June 1991 and on 2 December 1993 the applicant filed two claims seeking reinstatement and compensation, one against his former employer, and one against the institution which, in the meantime, had taken

over the functions from his former employer (*Republički zavod za geodetske i imovinskopravne poslove*; hereinafter "the Institution").

8. On 28 February 1994 the Court of First Instance (*Osnovni sud*) in Bar ruled against the applicant upon his claim against the Institution.

9. On 27 May 1994 the High Court (*Viši sud*) in Podgorica overturned this judgment and ruled in favour of the applicant.

10. On 9 November 1994 the two sets of proceedings were joined into a single lawsuit. On the same day the Court of First Instance in Bar ruled in respect of the claim against the former employer, awarding the applicant damages. This judgment became final (*pravosnažna*) in January 1995. The proceedings against the Institution continued.

11. On 30 May 1995 the Supreme Court (*Vrhovni sud*) in Podgorica quashed the two judgments rendered in respect of the Institution (see paragraphs 8 and 9 above) and ordered a re-trial.

12. It would appear that on 8 December 1999 the Court of First Instance in Bar rendered a decision that the applicant's claim had been withdrawn (*tužba povučena*), which decision was apparently quashed by the High Court in Podgorica on 16 May 2000.

13. On 27 February 2006 the Court of First Instance in Bar ruled against the applicant.

14. On 4 November 2008 the High Court in Podgorica upheld this judgment.

15. On 16 June 2009 the Supreme Court in Podgorica dismissed the applicant's appeal on points of law (*revizija*).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

16. Article 149 of the Constitution provides that the Constitutional Court shall rule on a constitutional appeal lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

17. This Constitution entered into force on 22 October 2007.

B. The Montenegro Constitutional Court Act (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

18. Section 48 provides that a constitutional appeal may be lodged against an individual decision of a state body, an administrative body, a local self-government body or a legal person exercising public authority, for

violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted.

19. Sections 49-59 provide additional details as regards the processing of constitutional appeals. In particular, section 56 provides that when the Constitutional Court finds a violation of a human right or freedom, it shall quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body which rendered the quashed decision.

20. This Act entered into force on 4 November 2008.

C. Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in OGM no. 11/07)

21. This Act provides, under certain circumstances, the possibility to have lengthy proceedings expedited by means of a request for review (*kontrolni zahtjev*), as well as an opportunity for claimants to be awarded compensation by means of an action for fair redress (*tužba za pravično zadovoljenje*).

22. Section 33 § 3 provides, *inter alia*, that an action for fair redress shall be filed with the Supreme Court no later than six months after the date of receipt of the final decision rendered in the impugned proceedings.

23. Section 44, in particular, provides that this Act shall be applied retroactively to all proceedings from 3 March 2004, but that the duration of proceedings before that date shall also be taken into account.

24. This Act entered into force on 21 December 2007, but contained no reference to applications involving procedural delay already lodged with the Court.

D. Civil Procedure Act 1977 (Zakon o parničnom postupku; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 4/77, 36/77, 6/80, 36/80, 43/82, 72/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, and the Official Gazette of the Federal Republic of Yugoslavia nos. 27/92, 31/93, 24/94, 12/98, 15/98 and 3/02)

25. Section 434 provided that labour disputes were to be dealt with by the courts urgently.

E. Civil Procedure Act 2004 (Zakon o parničnom postupku; published in the Official Gazette of the Republic of Montenegro nos. 22/04, 28/05 and 76/06)

26. This Act entered into force on 10 July 2004 and thereby repealed the Civil Procedure Act 1977.

27. The text of section 434 of the Civil Procedure Act 2004 corresponds to section 434 of the Civil Procedure Act 1977.

F. Relevant domestic case-law

28. Between 1 January 2008 and 30 September 2009 twenty-two actions for fair redress were submitted, of which sixteen were dealt with and six were still being examined. In one case the courts awarded the plaintiff compensation for non-pecuniary damage in respect of the length of civil proceedings. Between 1 January 2010 and 30 April 2011 an additional fifteen actions for fair redress were examined, in three of which the courts awarded damages.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. As regards the length of proceedings

29. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by a ... tribunal..."

1. Admissibility

(a) Arguments of the parties

30. The Government submitted that the applicant had not exhausted all effective domestic remedies available to him. In particular, he had failed to lodge a request for review and an action for fair redress provided by the Right to a Trial within a Reasonable Time Act (see paragraph 21 above). He had also failed to make use of a constitutional appeal (see paragraphs 16-20 above).

31. The applicant submitted belated comments, which, on that account, were not admitted to the file.

(b) Relevant principles

32. The Court reiterates that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is

to afford the Contracting States the opportunity of preventing or putting right the alleged violations before they are submitted to the Court.

33. However, the only remedies which the Convention requires to be exhausted are those which relate to the breaches alleged and at the same time are available and sufficient (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999-V; and *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010).

34. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; and *Dalia v. France*, 19 February 1998, § 38, *Reports of Judgments and Decisions* 1998-I).

35. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her of that requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

36. The decisive question in assessing the effectiveness of a remedy concerning a complaint about the length of proceedings is whether or not it was possible for the applicant to be provided with direct and speedy redress, rather than with indirect protection of the rights guaranteed under Article 6 (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 195, ECHR 2006, and *Sürmeli v. Germany* [GC], no. 75529/01, § 101, 8 June 2006). In particular, a remedy of this sort shall be "effective" if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays which have already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157-159, ECHR 2000-XI; *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII; and *Sürmeli v. Germany* [GC], cited above, § 99).

37. The Court reiterates that the effectiveness of a particular remedy is normally assessed with reference to the date on which the application was lodged (see, for example, *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)), this rule, however, being subject to exceptions which may be justified by the specific circumstances of each case (see *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII).

(c) The Court's assessment

(i) As regards the request for review

38. The Court has already held that it would be unreasonable to require an applicant to try a request for review on the basis of the Right to a Trial within a Reasonable Time Act in a case where the domestic proceedings had

been pending for a number of years before the introduction of this piece of legislation and where no conclusions could be drawn from the Government's submissions about its effectiveness (see, *mutatis mutandis*, *Boucke v. Montenegro*, no. 26945/06, §§ 72-74, 21 February 2012, as well as *Živaljević v Montenegro*, no. 17229/04, §§ 60-65, 8 March 2011). The Court, however, reserved its right to reconsider its view if the Government demonstrated, with reference to specific cases, the efficacy of this remedy (see *Boucke,* cited above, § 71, and *Živaljević,* cited above, § 66).

39. In view of the fact that the proceedings here at issue had been pending for more than 16 years and 5 months before the Right to a Trial within a Reasonable Time Act entered into force, out of which more than three years and nine months had elapsed after the Convention had entered into force in respect of the respondent State, and that no recent case-law concerning the efficacy of this particular remedy has been submitted, the Court sees no reason to depart from its previous finding and considers that it would have been unreasonable to have required the applicant to try this avenue of redress (see *Boucke,* cited above, § 74; see, also, *Živaljević,* cited above, §§ 60-65). The Government's objection in this regard must, therefore, be dismissed.

(ii) As regards the action for fair redress

40. The Court notes that the applicant lodged his application on 2 April 2005, which was more than 2 years and 8 months before an action for fair redress was introduced by the Right to a Trial within a Reasonable Time Act (see paragraphs 1 and 24 above). Therefore, at the time when the applicant lodged his application with this Court, there was no available domestic remedy which would have enabled him to obtain redress for the past delay, the effectiveness of a particular remedy being assessed with reference to the date on which the application was lodged (see *Baumann v. France*, cited above, § 47).

41. While the Court has allowed for an exception to this rule, this was usually in cases where specific national legislation as regards the length of proceedings had been passed in response to a great number of applications already pending before the Court indicating a systemic problem in these States. These laws also contained transitional provisions bringing within the jurisdiction of domestic courts the cases already pending before this Court (see *Grzinčič v. Slovenia*, no. 26867/02, § 48, 3 May 2007; *Charzyński v. Poland* (dec.), no. 15212/03, § 20, ECHR 2005-V; and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). Having regard to those considerations, the Court was of the opinion that these States should be afforded an opportunity to prevent or put right the alleged violation themselves and therefore allowed for an exception to the above rule.

42. Unlike in the above mentioned cases, the relevant legislation in Montenegro had not been passed in response to numerous applications

pending before this Court, nor does it contain any transitional provision whatsoever with regard to applications already pending before this Court (see paragraph 24 above). Therefore, it is unclear whether the domestic courts would have ruled at all on the merits of the applicant's action for fair redress had he lodged one.

43. The Court also notes that the applicant cannot be required to avail himself of this avenue of redress at this stage, as its use had long become time-barred in his case (see paragraphs 15 and 22 above).

44. Having regard to the particular circumstances of the instant case as set out above, the Court considers that the applicant was not obliged to exhaust this particular avenue of redress (see, *mutatis mutandis*, *Vinčić and Others v. Serbia*, no. 44698/06 et seq. § 51, 1 December 2009, as well as *Cvetković v. Serbia*, no. 17271/04, § 41, 10 June 2008). The Government's objection must, therefore, be dismissed.

(iii) As regards the constitutional appeal

45. The Court has already held that a constitutional appeal cannot be considered an effective domestic remedy in respect of length of proceedings (see, *mutatis mutandis, Boucke,* cited above, § 79; see, also, *Mijušković v. Montenegro*, no. 49337/07, § 73-74, 21 September 2010). It sees no reason to hold otherwise in the present case. The Government's objection must, therefore, be dismissed.

(iv) Conclusion

46. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds**.** It must therefore be declared admissible.

2. Merits

47. The Government made no comment.

48. The applicant did not submit comments within the time-limit set by the Court (see paragraph 31 above).

49. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case, the conduct of the parties and of the relevant authorities, and the importance of what is at stake for the applicant (see, among other authorities, *Mikulić v. Croatia*, no. 53176/99, § 38, ECHR 2002-I).

50. In assessing the reasonableness of the delay at issue, regard must also be had to the state of the employment dispute on the date of ratification

(see, *mutatis mutandis*, *Styranowski v. Poland*, 30 October 1998, § 46, *Reports of Judgments and Decisions* 1998-VIII).

51. The Court recalls that reinstatement proceedings are of "crucial importance" to plaintiffs and that, as such, they must be dealt with "expeditiously" (see *Guzicka v. Poland*, no. 55383/00, § 30, 13 July 2004, and *Georgi Georgiev v. Bulgaria*, no. 22381/05, § 18 *in fine*, 27 May 2010). Indeed, this requirement is reinforced additionally in respect of States where domestic law provides that such cases must be resolved with particular urgency (see, *mutatis mutandis*, *Borgese v. Italy*, 26 February 1992, § 18, Series A no. 228-B; see also paragraphs 25-27 above). The Court has already found a period of four years and one month for three levels of jurisdiction in proceedings concerning reinstatement excessive and in breach of Article 6 § 1 of the Convention (see *Simić v. Serbia*, no. 29908/05, §§ 16 and 21, 24 November 2009).

52. Turning to the present case, the Court notes that the impugned proceedings were within this Court's competence *ratione temporis* for a period of five years and three months after the respondent State's ratification of the Convention on 3 March 2004, another twelve years and eight months having already elapsed before that date.

53. The Court further observes that the nature of the applicant's action was not particularly complex and there was nothing in the case file which would indicate that he contributed to the length of the impugned proceedings.

54. Having regard to the criteria laid down in its jurisprudence and the domestic law (see, in particular, paragraphs 49-51 and 25-27 above, in that order), as well as the circumstances of the present case, the Court considers that the overall length of the impugned proceedings has failed to satisfy the reasonable time requirement (see, *mutatis mutandis, Stanković v. Serbia*, no. 29907/05, § 35, 16 December 2008, and *Simić v. Serbia*, cited above, §§ 18 - 21).

55. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

B. As regards the outcome of the proceedings

56. Under Article 6 § 1 of the Convention the applicant implicitly also complained about the outcome of the above proceedings.

57. The Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I), nor is it its task to act as a court of appeal in respect of the decisions taken by domestic courts (see *Melnychuk v. Ukraine* (dec), no. 28743/03, ECHR 2005-IX).

58. It follows that 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. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

60. In his belated observations the applicant referred to the just satisfaction claim he had made in his application form: EUR 27,195 for damages and EUR 7,500 for costs and expenses incurred before the domestic courts.

61. The Government contested this claim.

62. In the Court's letter of 4 November 2010 the applicant was invited to submit any claims for just satisfaction within the time-limit fixed for the submission of his observations on the merits, and was reminded that failure to do so entailed the consequence that the Chamber would either make no award of just satisfaction or else reject the claim in part. He was also informed that this applied even if the applicant had indicated his wishes in this respect at an earlier stage of the proceedings. Even though he was legally represented the applicant submitted a just satisfaction claim after the expiration of the envisaged time-limit. The Court, therefore, makes no award (see, *mutatis mutandis*, *Boucke v. Montenegro*, cited above, § 99).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the length of the proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 23 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President

SECOND SECTION

CASE OF MILIĆ v. MONTENEGRO AND SERBIA

(Application no. 28359/05)

JUDGMENT

STRASBOURG

11 December 2012

FINAL

11/03/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Milić v. Montenegro and Serbia,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 20 November 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 28359/05) against Montenegro and Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Ivan Milić ("the applicant"), on 19 July 2005.

2. The applicant, who had been granted legal aid, was represented by Ms G. Ćušić, a lawyer practising in Belgrade. The Montenegrin Government were represented by their Agent, Mr Z. Pažin. The Serbian Government were represented by their Agent, Mr. S. Carić.

3. The applicant complained about non-enforcement of a final judgment ordering his reinstatement and a lack of an effective domestic remedy in that regard.

4. On 15 March 2010 the application was communicated to the Governments of Montenegro and Serbia. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Ivan Milić, was born in 1966 and lives in Belgrade, Serbia.

A. The first set of civil proceedings and the ensuing enforcement proceedings

6. On 20 June 2002 the Court of First Instance (*Osnovni sud*) in Podgorica ordered that the applicant be reinstated by the Clinical Centre of Montenegro (*Kliničko bolnički Centar Crne Gore*), a State-run medical institution.

7. On 4 February 2003 this judgment became final, and on 16 December 2003 it was confirmed by the Supreme Court (*Vrhovni sud*) in Podgorica at third instance.

8. On 23 April 2003 the Clinical Centre of Montenegro informed the applicant that it could not comply with the judgment in question, but would rather seek an alternative solution.

9. On 22 May 2003 the Court of First Instance issued an enforcement order, which decision was confirmed on 26 June 2003.

10. On 19 August 2003 the Clinical Centre of Montenegro concluded an agreement with the Special Hospital in Risan, also a State-run medical institution, whereby the latter accepted the applicant as its employee.

11. On 30 September 2003 the applicant informed the State Prosecutor that he did not approve of this arrangement.

12. On 17 October 2003 the Special Hospital in Risan issued a decision to the effect that the applicant would become its employee as of 30 October 2003.

13. On 20 October 2003 the applicant received this decision.

14. On 21 October 2009, as submitted by the Montenegrin Government, the applicant concluded an Agreement on Termination of Employment with the Clinical Centre of Montenegro whereby his employment had been terminated as from 3 February 2003 and both parties waived any further claims in this regard.

15. On 26 October 2009 the applicant withdrew his enforcement request.

16. On 5 November 2009 the Court of First Instance terminated the enforcement proceedings and all the enforcement activities which had been carried out in that regard. On 17 November 2009 this decision became final.

B. Other relevant facts

17. On 6 May 2004, upon the applicant's separate claim, the Court of First Instance in Podgorica ordered the Clinical Centre of Montenegro to pay the applicant 4,456 euros ("EUR") for salary arrears for the period between September 2001 and 3 February 2003. This judgment was upheld by the High Court on 5 October 2004. It would appear from the case file that this judgment was enforced on an unspecified date thereafter.

18. On 3 February 2003 the applicant started to work in the Clinical Centre of Serbia for a period of nine months. It would appear from the case

file that on an unspecified date thereafter his temporary employment was transformed into a permanent one.

II. RELEVANT DOMESTIC LAW

A. Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

19. Article 149 of the Constitution provides that the Constitutional Court shall rule on a constitutional appeal lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

20. The Constitution entered into force on 22 October 2007.

B. Montenegro Constitutional Court Act (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

21. Section 48 provides that a constitutional appeal may be lodged against an individual decision of a state body, an administrative body, a local self-government body or a legal person exercising public authority, for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted.

22. Sections 49-59 provide additional details as regards the processing of constitutional appeals. In particular, section 56 provides that when the Constitutional Court finds a violation of a human right or freedom, it shall quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body which rendered the quashed decision.

23. The Act entered into force in November 2008.

C. Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in OGM no. 11/07)

24. This Act provides, under certain circumstances, the possibility to have lengthy proceedings expedited by means of a request for review (*kontrolni zahtjev*), as well as an opportunity for claimants to be awarded compensation by means of an action for fair redress (*tužba za pravično zadovoljenje*).

25. Section 9 § 2 provides that a request for review can be filed with the court which is dealing with the case at the relevant time.

26. Section 33 § 3 provides that an action for fair redress shall be filed with the Supreme Court no later than six months after the date of receipt of the final decision rendered in the impugned proceedings or, within the

enforcement procedure, no later than six months after the date of receipt of the final decision issued upon the request for review.

27. Section 44 further provides that this Act shall be applied retroactively to all proceedings from 3 March 2004, but that the duration of proceedings before that date shall also be taken into account.

28. The Act entered into force on 21 December 2007, but contained no reference to applications involving procedural delay already lodged with the Court.

D. Enforcement Procedure Act 2000 (Zakon o izvršnom postupku; published in the Official Gazette of the Federal Republic of Yugoslavia nos. 28/00, 73/00 and 71/01)

29. Section 4 § 1 provided that enforcement proceedings were urgent.

30. Sections 211-214 set out details as regards enforcement in cases of reinstatement.

E. Enforcement Procedure Act 2004 (Zakon o izvršnom postupku; published in the Official Gazette of the Republic of Montenegro - OG RM - no. 23/04)

31. The Act entered into force on 13 July 2004, thereby repealing the Enforcement Procedure Act 2000. In accordance with section 286 of this Act, however, all enforcement proceedings instituted prior to 13 July 2004 were to be concluded pursuant to the Enforcement Procedure Act 2000.

F. Labour Act 2003 (Zakon o radu; published in OG RM nos. 43/03, 79/04, 24/06 and 25/06; and in the Official Gazette of Montenegro no. 16/07)

32. Section 33 required an employee's consent in order for him to be transferred to another employer.

G. Labour Act 2008 (Zakon o radu; published in OGM nos. 49/08, 26/09 and 88/09)

33. The Labour Act 2008 entered into force on 19 August 2008 thereby repealing the Labour Act 2003. Section 42 § 2 of the former, however, also requires the employee's consent for his transfer to another employer.

H. Relevant domestic case-law

34. Between 1 January 2008 and 30 September 2009 twenty-two actions for fair redress were submitted, of which sixteen were dealt with and six were still being examined. In one case the courts awarded the plaintiff compensation for non-pecuniary damage in respect of the length of civil proceedings. Between 1 January 2010 and 30 April 2011 an additional fifteen actions for fair redress were examined, in three of which the courts awarded damages.

THE LAW

35. The applicant complained under various Articles of the Convention against both Montenegro and Serbia about the non-enforcement of the judgment issued by the Court of First Instance in Podgorica ordering his reinstatement, which became final on 4 February 2003, as well as about the lack of an effective domestic remedy in that respect.

36. The Court considers that these complaints all fall to be examined under Articles 6 § 1 and 13 of the Convention (see *Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005), which, in their relevant parts, read as follows:

Article 6 § 1

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

Article 13

"Everyone whose rights and freedoms...are violated shall have an effective remedy before a national authority..."

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. Admissibility

1. Compatibility ratione personae

(a) As regards the respondent States

37. The Montenegrin Government made no comment in this regard.

38. The Serbian Government submitted that the application was incompatible *ratione personae* with regard to Serbia. They referred, in particular, to *Bijelić v. Montenegro and Serbia*, no. 11890/05, §§ 67-70, 28 April 2009.

39. The applicant complained against both Montenegro and Serbia.

40. Given the fact that the entire enforcement proceedings have been conducted solely by the Montenegrin authorities, which also had the exclusive competence to deal with the subject matter, the Court, without prejudging the merits of the case, finds the applicant's complaints in respect of Montenegro compatible *ratione personae* with the provisions of the Convention. For the same reason, however, the applicant's complaints in respect of Serbia are incompatible *ratione personae* within the meaning of Article 35 § 3(a), and must be rejected pursuant to Article 35 § 4 of the Convention (see, also, *Lakićević and Others v. Montenegro and Serbia*, nos. 27458/06, 37205/06, 37207/06 and 33604/07, § 41, 13 December 2011).

(b) As regards the applicant

41. The Montenegrin Government submitted that the applicant could no longer claim to be a "victim" as he had concluded the Agreement on Termination of Employment on 21 October 2009, waived any further claims in this regard and had withdrawn his enforcement request. The Agreement had effect as from 3 February 2003, which was before the Convention entered into force in respect of Montenegro and before the applicant lodged his application with the Court. They also maintained that the applicant's submission that he had been forced to conclude the said Agreement was unsubstantiated.

42. The applicant contested these submissions. In particular, he maintained that by the time he had concluded the Agreement the enforcement proceedings had been already ongoing for more than five years but to no avail. He had been forced to conclude the said Agreement and to withdraw the enforcement request as he needed to verify his employment in another institution. His withdrawal of the enforcement request was therefore irrelevant and his rights had been breached.

43. The Court reiterates that, in order to be able to lodge a petition by virtue of Article 34, a person, non-governmental organisation or a group of individuals must be able to claim to be the victim of a violation of the rights set forth in the Convention.

44. Turning to the present case, the Court notes that the domestic proceedings were settled in that the applicant concluded the Agreement on Termination of Employment and thus consented to discontinue to insist that the relevant court judgment be enforced. He withdrew his enforcement request on 26 October 2009, after which the enforcement proceedings were terminated.

45. The Court also notes, however, that the said agreement did not address the issue of the length of the said non-enforcement, which the applicant alleges constituted a violation of the Convention. In view of that, and without prejudice to the merits of the case, the Court considers that the

applicant's Convention complaint still persists and that the applicant's status as a "victim" within the meaning of Article 34 of the Convention remained unaffected by the agreement. The Government's objection in this regard must, therefore, be dismissed.

2. Exhaustion of domestic remedies

(a) Arguments of the parties

46. The Montenegrin Government submitted that the applicant had not exhausted all effective domestic remedies available to him. In particular, he had failed to lodge a request for review and an action for fair redress provided by the Right to a Trial within a Reasonable Time Act (see paragraph 24 above). He had also failed to make use of a constitutional appeal (see paragraphs 19-23 above).

47. The applicant contested these submissions. In particular, he maintained that the remedies referred to by the Government had not existed at the time when he had lodged his application with the Court and that therefore he had not been obliged to make use of them later. He also submitted that in any event these remedies were not effective.

(b) Relevant principles

48. The Court recalls that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the alleged violations before they are submitted to the Court.

49. However, the only remedies which the Convention requires to be exhausted are those which relate to the breaches alleged and at the same time are available and sufficient (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999 V, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, ECHR 2010-...). The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I).

50. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from that requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

51. The Court reiterates that the effectiveness of a particular remedy is normally assessed with reference to the date on which the application was lodged (see, for example, *Baumann v. France*, no. 33592/96, § 47, ECHR

2001-V (extracts)), this rule, however, being subject to exceptions which may be justified by the specific circumstances of each case (see *Nogolica v. Croatia* (dec.), no. 77784/01, 5 September 2002).

(c) The Court's assessment

(i) As regards the request for review

52. The Court has already held that it would be unreasonable to require an applicant to try a request for review on the basis of the Right to a Trial within a Reasonable Time Act in a case where the domestic proceedings had been pending for a number of years before the introduction of this legislation and where no conclusions could be drawn from the Government's submissions about its effectiveness (see, *mutatis mutandis*, *Boucke v. Montenegro*, no. 26945/06, §§ 72-74, 21 February 2012; as well as *Živaljević v Montenegro*, no. 17229/04, §§ 60-65, 8 March 2011). The Court, however, reserved its right to reconsider its view if the Government demonstrated, with reference to specific cases, the efficacy of this remedy (see *Boucke,* cited above § 71, and *Živaljević,* cited above, § 66).

53. In view of the fact that the enforcement proceedings here at issue had been pending for more than four years and six months before the Right to a Trial within a Reasonable Time Act entered into force, of which more than three years and nine months had elapsed after the Convention entered into force in respect of the respondent State, and that no recent case-law concerning the efficacy of this particular remedy has been submitted, the Court sees no reason to depart from its previous finding and concludes, therefore, that the Government's objection must be dismissed.

(ii) As regards the action for fair redress

54. The Court notes that the applicant lodged his application on 19 July 2005, which was more than two years and five months before an action for fair redress was introduced by the Right to a Trial within a Reasonable Time Act (see paragraphs 1 and 28 above). Therefore, at the time when the applicant lodged his application with this Court, there was no available domestic remedy which would have enabled him to obtain redress for the past delay, the effectiveness of a particular remedy being assessed with reference to the date on which the application was lodged (see *Baumann v. France*, cited above, § 47).

55. While the Court has allowed for an exception to this rule, this was usually in cases where specific national legislation as regards the length of proceedings had been passed in response to a great number of applications already pending before the Court indicating a systemic problem in these States. These laws also contained transitional provisions bringing within the jurisdiction of domestic courts the cases already pending before this Court (see *Grzinčič v. Slovenia*, no. 26867/02, § 48, 3 May 2007; *Charzyński*

v. Poland (dec.), no. 15212/03, § 20, ECHR 2005-V; and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). Having regard to those considerations, the Court was of the opinion that these States should be afforded an opportunity to prevent or put right the alleged violation themselves and therefore allowed for an exception to the above rule.

56. Unlike in the above mentioned cases, the relevant legislation in Montenegro had not been passed in response to numerous applications pending before this Court, nor does it contain any transitional provision whatsoever with regard to applications already pending before this Court (see paragraph 28 above). Therefore, it is unclear whether the domestic courts would have ruled at all on the merits of the applicant's action for fair redress had he lodged one.

57. The Court also notes that the applicant cannot be required to avail himself of this avenue of redress at this stage, as its use had long become time-barred in his case (see paragraphs 26, 25 and 16 above, in that order).

58. Having regard to the particular circumstances of the instant case as set out above, the Court considers that the applicant was not obliged to exhaust this particular avenue of redress (see, *mutatis mutandis*, *Novović v. Montenegro*, 13210/05, §§ 40-44, 23 October 2012 (not yet final); *Vinčić and Others v. Serbia*, no. 44698/06 et seq. § 51, 1 December 2009, as well as *Cvetković v. Serbia*, no. 17271/04, § 41, 10 June 2008). The Government's objection must, therefore, be dismissed.

(iii) As regards the constitutional appeal

59. The Court has also already found that a constitutional appeal cannot be considered an effective domestic remedy in respect of length of proceedings (see *Boucke,* cited above, § 79; see, also, *Mijušković v. Montenegro*, cited above, §§ 73-74). It sees no reason to hold otherwise in the present case. The Government's objection in this regard must, therefore, be dismissed.

3. Conclusion

60. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds**.** It must therefore be declared admissible.

B. Merits

61. The Montenegrin Government made no comment in this regard.

62. The applicant reaffirmed his complaint.

63. The Court recalls that Article 6 § 1 of the Convention, *inter alia*, protects the implementation of final, binding judicial decisions, which, in

States that accept the rule of law, cannot remain inoperative to the detriment of one party. Accordingly, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed (see, among other authorities, *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). The State has an obligation to organise a system of enforcement of judgments that is effective both in law and in practice (see *Fuklev v. Ukraine*, no. 71186/01, § 84, 7 June 2005).

64. Lastly, the Court reiterates that enforcement proceedings by their very nature need to be dealt with expeditiously (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 23, ECHR 2000-IV).

65. Turning to the present case, the Court notes that the period to be taken into account began on 3 March 2004, which is when the Convention entered into force in respect of Montenegro (see *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 69, 28 April 2009) and ended on 26 October 2009, when the applicant withdrew the enforcement request. The impugned enforcement proceedings had thus been within the Court's competence *ratione temporis* for a period of more than five years and seven months, more than another nine months having already elapsed before that date (see *Mikulić v. Croatia*, no. 53176/99, § 37, ECHR 2002-I, *Styranowski v. Poland*, 30 October 1998, § 46, *Reports of Judgments and Decisions* 1998-VIII).

66. The impugned enforcement proceedings concerned the applicant's reinstatement. While it can be accepted that some such cases may be more complex than others, the Court does not consider the present one to be of such complexity as to justify enforcement proceedings of this length. The issue was clearly of great importance to the applicant, the Convention itself requiring exceptional diligence in employment disputes (see, *mutatis mutandis*, *Guzicka v. Poland*, no. 55383/00, § 30, 13 July 2004, *Borgese v. Italy*, 26 February 1992, § 18, Series A no. 228-B, and *Georgi Georgiev v. Bulgaria*, no. 22381/05, § 18 *in fine*, 27 May 2010).

67. As to the conduct of the parties, the Court observes that after the Convention had entered into force in respect of the respondent State and prior to 26 October 2009 the authorities failed to make any attempt whatsoever in order to enforce the judgment in question. The Montenegrin Government did not provide any explanation in that regard. It is further noted that even before the ratification of the Convention the Clinical Centre of Montenegro had merely informed the applicant that the impugned decision could not be enforced, but that they would rather seek an alternative solution. To that end it was agreed with the Special Hospital in Risan to take over the applicant, an option explicitly requiring the applicant's consent, which was clearly lacking in the present case (see paragraphs 32-33 and 10-11 above). The applicant, for his part, would not appear to have contributed in any way to the delay complained of.

68. Having regard to its case-law on the subject (see, *mutatis mutandis*, *Boucke,* cited above, § 89-94), what was at stake for the applicant and the failure of the domestic authorities to display adequate diligence, the Court considers that the non-enforcement at issue amounts to a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

A. Admissibility

69. The Court considers that the applicant's complaint in respect of Serbia is incompatible *ratione personae*, for the reasons already stated in paragraph 40 above.

70. The Court notes that the complaint in respect of Montenegro raises issues of fact and law under the Convention, the determination of which requires an examination of the merits. It also considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention and that it cannot be rejected on any other grounds. The complaint must therefore be declared admissible.

B. Merits

71. The Court notes that Article 13 guarantees an effective remedy before a national authority for an alleged breach of all rights and freedoms guaranteed by the Convention, including the right to a hearing within a reasonable time under Articles 6 § 1 (see, *inter alia*, *Kudła v. Poland* [GC], no. 30210/96, § 156, ECHR 2000 XI).

72. It recalls, further, that a remedy concerning length is "effective" if it can be used either to expedite the proceedings before the courts dealing with the case, or to provide the litigant with adequate redress for delays which have already occurred (see *Sürmeli v. Germany* [GC], no. 75529/01, § 99, ECHR 2006 VII).

73. Finally, the Court emphasises that the best solution in absolute terms is indisputably, as in many spheres, prevention. Where the judicial system is deficient with regard to the reasonable-time requirement in Article 6 § 1 of the Convention, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy.

74. However, as noted above, the existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they

will lack the requisite accessibility and effectiveness (see paragraph 49 above).

75. Turning to the present case, the Court notes that the Montenegrin Government averred in their preliminary observations that there were remedies available for the applicant's complaint about the length of the enforcement proceedings made under Article 6 § 1, which objections were rejected on the grounds described at paragraphs 52-59 above.

76. The Court concludes, for the same reasons, that there has been a violation of Article 13 taken together with Article 6 § 1 of the Convention on account of the lack of an effective remedy under domestic law for the applicant's complaint concerning the length of non-enforcement at issue (see *Stakić v. Montenegro*, no. 49320/07, §§ 55-60, 2 October 2012 (not yet final); see, also, *Stevanović v. Serbia*, no. 26642/05, §§ 67-68, 9 October 2007; and, *mutatis mutandis*, *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, §§ 84-85, 27 May 2008).

77. The Court would again observe that it might reconsider its view in this regard if the Government are able to demonstrate in future such applications, with reference to specific cases, the efficacy of the said remedies (see paragraph 52 above, *in fine*).

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

78. The applicant also complained: (a) under Article 1 of Protocol No. 1 to the Convention, that his right to peacefully enjoy his property had been violated in that he had been forced to change the place of residence to search for another job and thus had to leave his property in Montenegro; and (b) under Article 14 of the Convention and Article 1 of Protocol No. 12 thereto, about having been discriminated against.

79. The Court considers that the applicant's complaints in respect of Serbia are incompatible *ratione personae* for the reasons already stated in paragraph 40 above.

80. In the light of all the material in its possession, in particular in view of the fact that the applicant submitted no evidence that Montenegro deprived him of his property in its territory or interfered with it in any way, the Court finds that the complaint in this respect is unsubstantiated and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

81. Quite apart from the fact that the applicant does not seem to have raised this issue before the domestic courts, the Court, in any event, notes that there is no evidence in the case file that there has been any discrimination against the applicant on any grounds. It follows that this complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

83. The applicant claimed the damages but maintained that the exact amount was difficult to specify as it was "an enormous figure". He did not submit a properly itemised claim or any documentary evidence in that regard.

84. The Montenegrin Government made no comment in this regard.

85. Pursuant to Rule 60 §§ 2 and 3 of the Rules of Court, the Court requires specific claims supported by appropriate documentary evidence, failing which it may make no award (see the Rules of Court as well as paragraph 5 of the Practice Direction on Just Satisfaction Claims). As regards pecuniary damage, in particular, it is for the applicant to show that pecuniary damage has resulted from the violation alleged. The applicant should submit relevant documents to prove, as far as possible, not only the existence but also the amount or value of the damage (see paragraph 11 of the said Practice Direction). Given that the applicant did not submit a properly itemised claim in respect of the pecuniary damage nor any documentary evidence in that regard and thus failed to comply with Rule 60 §§ 2 and 3 of the Rules of Court, the Court makes no award under this head.

86. On the other hand, it is clear that the applicant sustained some non-pecuniary damage arising from the breaches of his rights under Articles 6 § 1 and 13 of the Convention, for which he should be compensated. Making its assessment on an equitable basis, the Court awards the applicant EUR 7,000 in this regard.

B. Costs and expenses

87. The applicant maintained that he had incurred "significant" costs and expenses, but he had submitted no invoice.

88. The Montenegrin Government did not make any comment in this respect.

89. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

90. In the present case, regard being had to the above criteria, as well as to the EUR 850 already granted to the applicant under the Council of Europe's legal aid scheme, the Court rejects the applicant's claim in this regard for lack of substantiation.

C. Default interest

91. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* admissible the applicant's complaints under Articles 6 § 1 and 13 of the Convention in respect of Montenegro;

2. *Declares* the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds* that there has been a violation of Article 13 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, 7,000 EUR (seven thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* remainder of the applicant's just satisfaction claim.

Done in English, and notified in writing on 11 December 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President

SECOND SECTION

CASE OF A. AND B. v. MONTENEGRO

(Application no. 37571/05)

JUDGMENT

STRASBOURG

5 March 2013

FINAL

05/06/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of A. and B. v. Montenegro,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 5 February 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37571/05) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the applicants' mother, a Montenegrin national, on 19 October 2005. In July 2006 she passed away and her two sons, Mr A and Mr B, elected to pursue the application before the Court. For reasons of convenience, the present judgment will refer to Mr A and Mr B as the applicants. The President of the Fourth Section, to which the case had been assigned at the time, acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants, who had been granted legal aid, were represented by Mr P. Radulović, a lawyer practising in Banja Luka, Bosnia and Herzegovina. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicants complained, primarily, about the continued non-enforcement of the final civil judgments concerning the re-payment of the old foreign-currency savings deposited by their late mother and inherited by them. In the alternative, they complained about the failure of the *Podgorička banka* and/or the Central Bank of Montenegro to register the savings at issue and thus have them converted into the respondent State's public debt, in accordance with the relevant domestic legislation.

4. On 6 July 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. BACKGROUND INFORMATION

5. Following the financial crisis in the former Socialist Federal Republic of Yugoslavia, as well as the subsequent collapse of the banking system in the 1990s, in 1998, 2002, and 2003 the Federal Republic of Yugoslavia, as well as the respondent State itself adopted specific legislation accepting the conversion of foreign currency deposits in certain banks, including the *Podgorička banka*, into a public debt. The legislation set the time-frame (2017) and the amounts, including interest, to be paid back to the banks' former clients (see paragraphs 27-41 below).

II. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1949 and 1950, respectively, and both live in Montenegro.

A. The civil proceedings

7. On 20 September 1993 the Court of First Instance (*Osnovni sud*) in Podgorica rendered the first judgment in favour of the applicants' mother ordering the *Podgorička banka* to pay to her: (i) 179,650.84 US dollars (USD), 59,539.97 German marks (DEM), 254,906.52 Italian liras (LIT) and 4,364.70 Swiss francs (CHF) on account of her foreign-currency savings; (ii) the applicable domicile sight deposit interest for the period between 1 January 1993 and 3 July 1993, plus 6% annual interest as of 3 July 1993; and (iii) 193,768,312 Yugoslav dinars (YUD) for legal costs.

8. On 23 May 1994 the Court of First Instance in Podgorica rendered a second judgment in favour of the applicants' mother ordering the *Podgorička banka* to pay to her: (i) USD 9,770 and DEM 25,700 on account of her foreign-currency savings; (ii) the accrued sight deposit interest, and (iii) YUD 1,584 for legal costs.

9. On 27 June 1996 the same court rendered a third judgment in favour of the applicants' mother, ordering the *Podgorička banka* to pay to her: (i) USD 147,620.64, DEM 126,661.39 and LIT 1,602.16 on account of an erroneous calculation of the applicable interest; (ii) the stipulated interest of 12.5%; and (iii) YUD 900 for legal costs.

10. On various dates thereafter these judgments became final and enforceable.

B. The enforcement proceedings

11. By 5 November 1998 enforcement orders in respect of the first and third judgments were issued. By 19 November 1999 the Court of First Instance terminated the enforcement of these two judgments relying on the Act on the Settlement of Obligations Arising from the Citizens' Foreign Currency Savings (see paragraph 29 below). The applicants' mother did not seek an enforcement order in respect of the second judgment at the time.

12. Between December 2003 and February 2004 the applicants' mother requested the enforcement of all three judgments against the *Podgorička banka*. On 30 March 2005 the Court of First Instance rejected these requests, on the basis that the *Podgorička banka* was no longer the debtor (*nije pasivno legitimisana*). The decision further explained that by virtue of the Act on the Citizens' Foreign-Currency Savings 2003 the respondent State had taken over the debt from this bank, and that the Central Bank of Montenegro (*Centralna banka Crne Gore*) was responsible for the accuracy of the data taken from the records of the authorised banks (see paragraph 34 below).

13. On 18 April 2005 and 19 April 2005 the Court of First Instance upheld the impugned decisions, endorsing the reasons contained therein.

C. Other relevant facts

14. On 26 May 2004 the applicants requested the Real Estate Office (*Direkcija za nekretnine*) in Podgorica to register the enforcement orders against the *Podgorička banka* property (*tražili zabilježbu u evidenciji rješenja o izvršenju na nepokretnostima*). On 1 June 2004 the Real Estate Office rejected their request. On 23 November 2004 the Real Estate Administration (*Uprava za nekretnine*) upheld the previous decision and directed them to enforce their rights through the Central Bank and the Ministry of Finance. On 3 April 2007 the applicants' request was rejected by the Administrative Court (*Upravni sud*).

15. On 21 December 2004 the applicants' mother requested the Central Bank to ensure the payment of the outstanding debt. On 7 April 2005 the Central Bank informed her that it lacked competence to deal with her case (*nema ingerencije u [ovom] slučaju)*. In particular, it could not be held responsible for the accuracy of the relevant data as that was the responsibility of the authorised banks. In this regard the Central Bank referred to Article 7 § 5 of the Act on the Citizens' Foreign-Currency Savings 2003 (see paragraph 36 below). In February and March 2006 the applicants, on behalf of their mother, requested again that the Central Bank pay the savings in question. On an unspecified date thereafter the Central Bank replied by referring to its previous letter of 7 April 2005, notably that it could not comply with their request. On 18 December 2007, upon yet

another request from the applicants, this bank confirmed that there were no foreign-currency savings registered in respect of their mother.

16. On 4 October 2005 the applicants' mother was informed, upon her enquiry, by the Ministry of Finance that the authorised banks were responsible for the accuracy of the transferred data.

17. After the applicants' mother passed away in July 2006, the Court of First Instance rendered a decision on 5 May 2007 declaring the applicants her sole legal heirs and specifying that the inheritance consisted of the deposits (*novčana sredstva*) as established by the final courts' judgments referred to above (see paragraphs 7-9 above).

18. On 21 December 2007 the *Podgorička banka* informed the applicants that there was no evidence that the debt established by the domestic judgments had been paid. At the same time, they were informed that the Central Bank was responsible for the accuracy of the transferred data and that the applicants could obtain the official data concerning the transfer from the Central Bank.

19. On several occasions the applicants' mother and/or the applicants contacted the Ombudsman (*Zaštitnik ljudskih prava i sloboda*), and the Ministry of Justice (*Ministarstvo pravde*), but to no avail.

20. It would appear that the debt established by the domestic courts' judgments has never been registered by the *Podgorička banka* and transferred to the Central Bank.

D. The additional foreign currency account

21. The applicants' mother had another foreign-currency account with EUR 17,697.79, which amount was registered as public debt with the Central Bank and later converted into bonds. On an unspecified date in 2006 the applicants would appear to have sold the bonds for half of their value.

II. RELEVANT DOMESTIC LAW

A. The Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

22. Article 149 of the Constitution provides that the Constitutional Court shall rule on a constitutional appeal lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

23. The Constitution entered into force on 22 October 2007.

B. The Constitutional Court Act (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

24. Section 48 provides that a constitutional appeal may be lodged against an individual decision of a state body, an administrative body, a local self-government body or a legal person exercising public authority, for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted.

25. Sections 49-59 provide additional details as regards the processing of constitutional appeals. In particular, section 56 provides that when the Constitutional Court finds a violation of a human right or freedom, it shall quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body which rendered the quashed decision.

26. The Act entered into force in November 2008.

C. The Act on the Settlement of Obligations Arising from the Citizens' Foreign Currency Savings (Zakon o izmirenju obaveza po osnovu devizne štednje građana; published in the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - nos. 59/98, 44/99 and 53/01)

27. Sections 1, 2, 3 and 4 provided that all foreign currency savings deposited with the "authorised banks", including the *Podgorička banka*, before 18 March 1995 were to become public debts.

28. Under section 10 the State's responsibility in that respect was to be fully honoured by 2012 through the payment of specified amounts, plus interest, and according to a certain time-frame.

29. Section 22 provided that, as of the date of this Act's entry into force (12 December 1998), "all pending lawsuits, including judicial enforcement proceedings, aimed at the collection of the foreign currency covered by this Act shall be discontinued".

D. The Act on the Settlement of the Public Debt of the Federal Republic of Yugoslavia Arising from the Citizens' Foreign Currency Savings (Zakon o regulisanju javnog duga Savezne Republike Jugoslavije po osnovu devizne štednje građana; published in OG FRY no. 36/02)

30. This Act repealed the Act described above. In doing so, however, it explicitly acknowledged as part of public debt all deposits previously recognised as such. It modified the time-frame for honouring the debt in question (from 2012 to 2016) and specified amended amounts, plus interest, to be paid annually.

31. Section 36 reaffirmed that "all lawsuits aimed at the collection of the foreign currency savings covered by this Act, including judicial enforcement proceedings, shall be discontinued".

32. This Act entered into force on 4 July 2002. It was subsequently amended on two occasions, but these amendments concerned peripheral issues unrelated to the savers' above-described status.

E. The Citizens' Foreign-Currency Savings Act 2003 (Zakon o regulisanju obaveza i potraživanja po osnovu ino duga i devizne štednje građana; published in the Official Gazette of the Republic of Montenegro - OG RM - nos. 55/03 and 11/04)

33. Section 3, *inter alia*, defines "foreign currency savings" as all foreign currency deposited by natural persons with one of the "authorised banks based in the territory of the Republic of Montenegro" as recognised as a public debt of the Federal Republic of Yugoslavia (see paragraphs 27 and 30 above). The same section further provides that the foreign-currency savings shall be increased for an annual interest rate of 2% as of 1 January 2003. The same interest rate shall be applied on annual basis to all the remaining unpaid sums at the end of each payment period until the foreign-currency savings are entirely paid off.

34. Section 4 provides that the Central Bank of Montenegro shall provide all the records (*evidenciju*) and necessary documentation in respect of the foreign-currency savings, and that the same bank shall be responsible for the accuracy of the data taken from the records of the banks in question.

35. Pursuant to section 5 § 1 as of the date of this Act's entry into force Montenegro shall assume the obligations of the authorised banks towards natural persons in respect of their foreign-currency savings.

36. Section 7 § 1 provides that after the transfer of debts to the Central Bank (*nakon isknjižavanja potraživanja i obaveza*), the authorised banks are obliged to provide the Central Bank with detailed analytical records of debts (*detaljnu analitiku obaveza*) on the basis of foreign currency savings. Article 7 § 5 provides that the authorised banks are responsible for the accuracy of these data.

37. Sections 14 and 15 provide that Montenegro shall honour this debt by 2017 and specify the amounts, and interest, to be paid annually in Euros.

38. Pursuant to section 18, the banks' clients may, in advance of the said time-frame and under certain conditions, make use of their deposits converted into Government bonds in order to pay taxes, buy State property or take part in the privatisation of State-owned businesses.

39. Under sections 16 and 17 former clients of the banks in question can also sell the said bonds to other natural or legal persons. Such trading is exempt from taxation.

40. Sections 16 § 5 and 18 § 2 provide that the Government of Montenegro shall adopt additional technical regulations concerning the bonds in question.

41. This Act entered into force on 9 October 2003, and its amendments on 28 February 2004.

F. The Obligations Act 1978 (Zakon o obligacionim odnosima; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 29/78, 39/85, 57/89 and 31/93)

42. Section 172 paragraph 1 provides, *inter alia*, that a legal person is responsible for the damage caused by its body to another person in the course of performing its functions or related thereto.

G. The Obligations Act 2008 (Zakon o obligacionim odnosima; published in the OGM nos. 47/08 and 04/11)

43. Section 148 provides that one who causes damage to another person is obliged to compensate for it, unless he/she proves that the damage was not his/her fault.

44. Section 166 provides, *inter alia*, that a legal person is responsible for the damage caused by its body to another person in the course of performing its functions or related thereto.

45. Section 192 provides that the responsible person will provide *restitutio in integrum* as before the damage occurred. If the damage cannot be removed entirely in this way, the remainder of the damage will be compensated in money.

H. The Civil Procedure Act (Zakon o parnicnom postupku; published in the OG RM nos. 22/04, 28/05, and 76/06, and OGM no. 73/10)

46. Section 188 provides that, by a civil claim, a plaintiff can seek the courts only to establish the existence or non-existence of a certain right or legal relation, or the accuracy of a document (*neistinitost neke isprave*).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

47. Under Article 1 of Protocol No. 1 to the Convention the applicants complained about the failure of the *Podgorička banka* and/or the Central Bank to register the foreign-currency savings deposited by their late mother and thus have them converted into the respondent State's public debt, in accordance with the relevant domestic legislation.

48. The relevant provision reads as follows:

Article 1 of Protocol No. 1.

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. The parties' submissions

49. The Government submitted that the applicants had not exhausted all effective domestic remedies available to them.

50. In particular, they had failed to institute civil proceedings against the *Podgorička banka*, on the basis of which database the transfer had been done, and which omitted to submit the relevant data concerning the savings in question to the Central Bank. They also could have filed a civil claim against the State, had they considered the State responsible. In the proceedings against the *Podgorička banka* and/or the State the applicants could have sought both compensation as well as the establishment of their right and/or the accuracy (*istinitost*) of the debt-related records (see paragraphs 42-46 above).

51. The Government further maintained that the applicants had also failed to initiate administrative proceedings against the Central Bank or any other body they considered responsible for the said legal matter, which decision could have been further challenged before the courts.

52. Lastly, after having exhausted these remedies the applicants could have made use of a constitutional appeal (see paragraphs 22-26 above). In any event, the letters addressed to various institutions could not be considered adequate legal proceedings.

53. The applicants contested these submissions and referred, in particular, to the civil court decisions rendered against the *Podgorička banka* in 1993, 1994 and 1996 (see paragraphs 7-10 above). While addressing various institutions was not an appropriate legal procedure itself, this was done only after the civil proceedings had been concluded and as an additional attempt to have the said judgments enforced.

54. They also maintained that a constitutional appeal had been introduced in the Montenegrin legal system much after the relevant civil proceedings had been concluded and it was thus not available to them at the relevant time.

2. The relevant principles

55. The Court reiterates that, according to its established case-law, the purpose of the domestic remedies rule contained in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court. However, the only remedies to be exhausted are those which are effective.

56. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and which offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV).

57. The application of this rule must make due allowance for the context. Accordingly, the Court has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see *Akdivar and Others*, cited above, § 69). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Van Oosterwijck v. Belgium*, 6 November 1980, Series A no. 40, § 35). This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant (see *Akdivar and Others v. Turkey*, cited above, § 69). It must examine whether, in all the circumstances of the case, the applicant did everything that could

reasonably be expected in order to exhaust domestic remedies (see *EVT Company v. Serbia*, no. 3102/05, § 37 *in fine*, 21 June 2007).

3. The Court's assessment

58. The Court observes the contradiction in the domestic legislation as to who exactly was responsible for providing the records on the old foreign-currency savings and the accuracy of the relevant data (see paragraphs 34 and 36 above). This contradiction was further affirmed by various domestic bodies when dealing with the requests of the applicants and their late mother (see paragraphs 12 *in fine*, 13, 14 *in fine*, 15-16, and 18 above). The Government, for their part, did not provide a clarification in this respect (see paragraphs 50-51 above).

59. The Court notes that the applicants' late mother had obtained the civil court judgments against the *Podgorička banka*, which had already established the existence of the debt and its exact amount (see paragraphs 7-10 above), but which could not be enforced by virtue of the domestic legislation (see paragraphs 29, 31 and 11 above, in that order). In addition, the domestic courts themselves specified that, after the adoption of the relevant legislation, the said bank was no longer the debtor (see paragraph 12 *in limine* above). As there is nothing in the case file to suggest that the domestic courts would have ruled any differently at a later stage, the Court considers that requiring the applicants to initiate yet another set of civil proceedings against the bank at issue, after they had already obtained a final judgment in their favour, would place an excessive burden on them and that therefore they did not have to exhaust this particular avenue of redress (see, *mutatis mutandis*, *Metaxas v. Greece*, no. 8415/02, § 19, 27 May 2004; and *Đukić v. Bosnia and Herzegovina*, no. 4543/09, § 33, 19 June 2012).

60. The Court further observes that the applicants' late mother as well as the applicants themselves requested the Central Bank on several occasions to ensure the payment of the outstanding debt. However, the Central Bank merely informed them by letters that it lacked competence to deal with their case (see paragraph 15 above).

61. While administrative proceedings before the Central Bank as well as a civil claim against the respondent State were theoretically possible, the Court notes that the savings in question had never actually been registered, as confirmed by the Central Bank (see paragraph 15 *in fine* above), and thus converted into the State's public debt. The Court considers that, in such circumstances, and in view of the said Central Bank's rejection of its competence in the applicants' case neither administrative proceedings before the Central Bank nor civil proceedings against the State could offer the applicants reasonable prospects of success, thus absolving them from the obligation to make use of these remedies.

62. Lastly, it should be reiterated that, although there may be exceptions justified by particular circumstances of a case, the assessment of whether

domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). The Court observes in this regard that the application in the present case had been lodged on 19 October 2005, while the constitutional appeal was introduced as of 22 October 2007, which is two years later, and was thus unavailable to the applicants at the relevant time (see paragraphs 1 and 22-23 above).

63. In view of the above, in particular given the contradiction in the relevant legislation, varying interpretations thereof, numerous futile attempts by both the applicants as well as their late mother to re-obtain the savings at issue at the domestic level after having had obtained judgments against the debtor bank, the Court considers that the applicants did not have to exhaust in addition the avenues of redress suggested by the Government. The Government's objection in this regard must therefore be dismissed.

64. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

65. The applicants reaffirmed their complaints. In particular, they submitted that the State was obliged to pay for their old-foreign currency savings, pursuant to the relevant legislation, and that the Government had never denied it.

66. The Government made no comments in this regard.

2. The Court's assessment

67. The Court recalls that foreign currency savings constitute a possession within the meaning of Article 1 of Protocol No. 1 to the Convention (see *Kovačić and Others v. Slovenia* (dec.), no. 44574-98 et al., 9 October 2003, as well as *Trajkovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 53320/99, ECHR 2002 IV). It is also reiterated that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see *The Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 79, ECHR 2000-XII) and that it should pursue a legitimate aim "in the public interest". According to the Court's established case-law, the expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law, and it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see

Kurić and Others v. Slovenia [GC], no. 26828/06, § 341, ECHR 2012 (extracts); see also *Amann v. Switzerland* [GC], no. 27798/95, § 50, ECHR 2000-II; *Slivenko v. Latvia* [GC], no. 48321/99, § 100, ECHR 2003-X).

68. Turning to the present case, the Court notes that the foreign-currency savings deposited by the applicants' late mother constituted a possession, which possession was inherited by the applicants by virtue of the decision of the Court of First Instance of 5 May 2007 (see paragraph 17 above). As the relevant domestic legislation clearly provided that the State would take these savings over as a public debt and pay them back gradually by 2017 (see paragraphs 33, 35 and 37 above), the Court considers that the applicants' mother and later the applicants themselves had a legitimate expectation that they would re-obtain the savings in question.

69. However, due to, apparently, an administrative error, and contrary to the said legislation, the savings at issue have never been registered and converted into the public debt and the applicants have never received a single instalment. This has been confirmed by the Central Bank and the *Podgorička banka*, as well as, indirectly, even by the Government themselves (see paragraphs 15 *in fine*, 18 *in limine*, and 50 *in limine* above).

70. The Court notes a lack of precision and foreseeability of the domestic legislation as to who is responsible for the transfer, the Central Bank or the debtor bank, given the contradiction of the relevant provisions (see paragraphs 34 and 36 above). It is clear, however, that it could not be imputed to the applicants.

71. In view of the above, the Court considers that there has been an evident interference by the respondent State with the applicants' possessions and their legitimate expectation to gradually re-obtain the savings at issue, which interference was clearly contrary to the law. This conclusion makes it unnecessary for the Court to ascertain whether a fair balance has been struck between the demands of the general interest of the community on the one hand, and the requirements of the protection of the individual's fundamental rights on the other (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II).

72. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

73. Relying on Article 6 of the Convention the applicants made the same complaint as the one already examined under Article 1 of Protocol No. 1.

74. The relevant provision reads as follows:

Article 6

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...".

75. Having regard to its findings in relation to Article 1 Protocol No. 1, the Court considers that it is not necessary to examine separately the admissibility or the merits of the applicant's identical complaint made under Article 6 of the Convention (see, *mutatis mutandis*, *Milanović v. Serbia*, no. 44614/07, § 103, 14 December 2010; *Mladenović v. Serbia*, no. 1099/08, § 59, 22 May 2012; as well as *Jovanović v. Serbia*, no. 32299/08, § 53, 2 October 2012).

III. OTHER COMPLAINTS

76. Under Article 6 of the Convention and Article 1 of Protocol No. 1 thereto the applicants also complained about: (a) their inability to enforce the final civil judgments rendered in the 1990s and be paid back the savings in question instantaneously, as well as (b) having had to sell the bonds issued in respect of another foreign-currency savings account for half of their nominal value (see paragraph 21 above).

77. The Court has already held in similar cases that the applicants did not have a continuing right to the enforcement, as it had been barred by the relevant legislation before the respondent State's ratification of the Convention and Protocol No. 1 on 3 March 2004 (see *Ajdarpašić and Kadić v. Montenegro* (dec.), nos. 40759/06 and 56888/09, §§30-33, 23 November 2010; *Molnar Gabor v. Serbia*, no. 22762/05, §§ 48-51, 8 December 2009; see also paragraphs 29, 31 and 11 above, in that order). It follows that the applicants' complaint in this respect is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

78. The Court notes that the relevant domestic legislation envisaged a possibility for the bonds to be sold (see paragraph 39 above), but it did not limit the value of these bonds in the market in any way whatsoever. In such circumstances, the Court considers that the State cannot be held responsible for the applicants' own choice to sell the bonds for half of their nominal value. It follows that this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

80. The applicants claimed the old foreign-currency savings and interest, as awarded by the domestic courts (see paragraphs 7-9 above), in respect of pecuniary damage, as well as 10,000 euros (EUR) each in respect of non-pecuniary damage.

81. The Government contested this claim.

82. The Court accepts that the applicants have suffered some non-pecuniary damage which cannot be sufficiently compensated by the sole finding of a violation. Making its assessment on an equitable basis, the Court awards the applicants jointly EUR 3,000 under this head.

83. In addition, the respondent Government must pay the applicants, on account of pecuniary damage, all the instalments, including the relevant interest (see paragraph 33 above), due to them as of the moment when the old foreign-currency savings became public debt by virtue of the relevant domestic legislation until the date when this Court's judgment becomes final, less any amounts that may have been paid in the meantime on this basis. The respondent Government must also take all appropriate measures to ensure that the competent authorities implement the relevant legislation in respect of the applicants and thus secure the payment of all future instalments under the same conditions and in the same manner as is done in respect of all other beneficiaries of the said legislation.

B. Costs and expenses

84. The applicants also claimed EUR 10,000 for the costs and expenses incurred before the domestic courts and referred to the relevant decisions issued in the course of these proceedings (see paragraphs 7-9 above). They also submitted an expert's calculation of these costs, including the statutory interest, given that, in the meantime, the official currency in the respondent State changed from Yugoslav dinars to euros. From the submitted analysis it transpired that the costs incurred in the domestic proceedings amounted to EUR 8,016.35 in total (EUR 3,785.22 for the first set of proceedings, EUR 2,243 for the second set of proceedings and EUR 1,988.13 for the third set of proceedings).

85. The Government contested this claim.

86. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

87. In the present case, regard being had to the documents in its possession, in particular the domestic judgments specifying the awarded costs and the expert's opinion on the matter, and the above criteria, as well as to the EUR 850 already granted to the applicants under the Council of Europe's legal aid scheme, the Court considers it reasonable to award the sum of EUR 6,500 for the costs and expenses in the domestic proceedings.

C. Default interest

88. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 1 of Protocol No. 1 concerning the failure to register the savings in question and have them converted into the respondent State's public debt admissible;

2. *Declares* the complaints under Article 6 of the Convention and Article 1 of Protocol No. 1 thereto concerning the non-enforcement of the judgments issued in the 1990s and the sale of the bonds for half of their value inadmissible;

3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention on account of the failure to register the savings in question and have them converted into the respondent State's public debt;

4. *Holds* that it is not necessary to examine separately the admissibility or the merits of the complaint concerning the registration and conversion of the savings in question into the public debt under Article 6 § 1 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in

accordance with Article 44 § 2 of the Convention, the following amounts at the rate applicable at the date of settlement:

(i) all the instalments, including the relevant interest, due to them as of the moment when the old foreign-currency savings became public debt by virtue of the relevant domestic legislation until the date when this judgment becomes final, less any amounts that may have been paid in the meantime on this basis, plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) the respondent Government must also take all appropriate measures to ensure that the competent authorities implement the relevant legislation in respect of the applicants and thus secure the payment of all future instalments under the same conditions and in the same manner as it is done in respect of all other beneficiaries of the said legislation;

(iii) EUR 3,000 (three thousand euros) jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iv) EUR 6,500 (six thousand five hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 5 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President

SECOND SECTION

CASE OF VUKELIĆ v. MONTENEGRO

(Application no. 58258/09)

JUDGMENT

STRASBOURG

4 June 2013

FINAL

04/09/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Vukelić v. Montenegro,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Françoise Elens-Passos, *Acting Section Registrar,*

Having deliberated in private on 7 May 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 58258/09) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Zvonimir Vukelić ("the applicant"), on 27 October 2009.

2. The applicant was represented by Mr D. Todorovski, a lawyer practising in Skopje, "the former Yugoslav Republic of Macedonia". The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicant complained, under Article 6 of the Convention, about the non-enforcement of a final judgment rendered in his favour in 1997.

4. On 6 January 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On 27 April 2010 the Government submitted their observations and on 25 June 2010 the applicant responded. On 29 September 2010 the Government submitted their final comments.

6. Further to the notification under Article 36 § 1 of the Convention and Rule 44 § 1 (a), the Croatian Government did not wish to exercise their right to intervene in the present case.

7. On 30 May 2012 the President of the Fourth Section, to which the case had been assigned at the time, decided to re-communicate the application and ask the Government for a factual up-date, in particular the relevant domestic case-law adopted on the basis of the Right to a Trial within a Reasonable Time Act. The applicant replied in writing to the Government's submissions in this regard.

8. The application was transferred to the Second Section of the Court, following the re-composition of the Court's sections on 1 November 2012.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1963 and lives in Skopje, "the former Yugoslav Republic of Macedonia".

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

A. The civil proceedings

11. On an unspecified date the applicant, represented by a lawyer, filed a compensation claim against another private person ("the debtor").

12. On 17 October 1996 the Real Estate Office in Bar (*Služba za katastar i imovinsko-pravne poslove Bar*) issued a decision to register a mortgage (*založno pravo*) on the debtor's flat in favour of the applicant.

13. On 7 November 1996 the Court of First Instance (*Osnovni sud*) in Bar ruled in favour of the applicant, ordering the debtor to pay 36,000 German Marks, statutory interest and specified legal costs. This judgment became final on 7 January 1997.

14. On 18 March 1997 the High Court (*Viši sud*) in Podgorica rejected the debtor's appeal as having been lodged out of time.

B. The enforcement proceedings

15. On 16 April 1997 the Court of First Instance issued an enforcement order (*rješenje o izvršenju*) ordering the sale of the debtor's flat by means of a public auction.

16. On 5 May 2000 the same court established the value of the flat at issue.

17. The public auction, scheduled for 1 September 2000, was cancelled on account of the judge's absence. No further auctions have been scheduled thereafter.

18. On 31 October 2006 the Court of First Instance stayed the enforcement proceedings (*prekida se postupak izvršenja*) due to the debtor's death. On 8 November 2006 this decision was posted on the applicant's door, after a prior written notice (*poslije pismenog obaviještenja rješenje pribijeno na vrata*).

19. On 9 September 2009 the applicant wrote to the President of the Court of First Instance, urging that the decision at issue be enforced and asking that any relevant information in that regard be sent to him at his address in Skopje, "the former Yugoslav Republic of Macedonia".

20. On 15 September 2009 the applicant was informed that the enforcement proceedings had been stayed on 31 October 2006.

21. On 25 September 2009 the applicant wrote again to the President of the Court of First Instance seeking that the enforcement proceedings be expedited.

22. On 28 September 2009 the applicant proposed that the enforcement proceedings be continued in respect of the debtor's heirs.

23. On 13 October 2009 the Court of First Instance in Bar invited the applicant to provide the names and the addresses of the debtor's heirs within three days, in default of which his request would be considered withdrawn. It was further specified that no appeal was allowed against this decision.

24. On 9 December 2009 the applicant appealed. He submitted that he did not know the names and the addresses of the debtor's heirs, and that it was impossible for him to find this out, especially within three days. He further maintained that the court should have acted pursuant to section 32 of the Enforcement Act and should have found the debtor's heirs, or, alternatively, should have appointed a temporary representative for them without delay (see paragraph 45 below).

25. On 18 December 2009 the Court of First Instance requested the Real Estate Office in Bar (*Uprava za nekretnine, područna jedinica Bar*) to provide a property certificate (*list nepokretnosti*) for the flat at issue.

26. On 28 December 2009 the Real Estate Office provided the requested certificate, which indicated that the new owners of the flat were B.N. and A.N., the registered address of the former being in Serbia.

27. On 21 January 2010 the Court of First Instance rendered a decision to continue the enforcement proceedings, designating B.N. and A.N. as the new debtors. On 3 February 2010 this decision was served on A.N. The delivery to B.N. failed as he appeared not to live at the provided address in Serbia.

28. On 15 April 2010 the Court of First Instance requested the relevant Police Directorate in Serbia to inform it if B.N. had residence there and, if so, at which address.

29. On 16 February 2011 the Ministry of Justice of Serbia informed the Ministry of Justice of Montenegro that B.N. had a permanent residence in Serbia, but that he actually lived in Montenegro. On 8 March 2011 this information was forwarded to the court in Bar.

30. On 13 June 2012 the court in Bar invited the applicant to pay 233.88 EUR "for publishing a notice (*oglas*) in the media, pursuant to section 94 paragraph 6 of the Enforcement Act" (see paragraph 50 below), in default of which the enforcement would be terminated (*obustaviti*).

31. On 4 July 2012 the applicant's objection against the previous decision was rejected as inadmissible. It was specified that, pursuant to section 169 of the Enforcement Act 2011, a notice on sale was to be published in the newspapers (see paragraph 51 below). At the same time, the applicant was informed that on 11 October 2011 another interim measure prohibiting the sale of the flat at issue had been deleted from the register of the Real Estate Office, thus creating the conditions for these enforcement proceedings to be concluded (see paragraph 34 below).

32. There is no information in the case file that the notice on sale was published in the newspapers or that B.N. was served with the enforcement decision of 21 January 2010. The enforcement proceedings would appear to be still pending.

C. Other relevant facts

33. On 26 February 2004 the debtor passed away.

34. On an unspecified date in 1997 a private person X instituted civil proceedings against the debtor and another private person. On 7 April 1998 the court in Bar issued an interim measure prohibiting the debtor from selling the flat at issue and ordered that this measure be registered by the Real Estate Office in Bar until these proceedings were concluded. On 10 September 1999 the proceedings ended. On 11 October 2011 the interim measure was deleted, following a relevant order of the court in Bar to that effect.

35. On an unspecified date in 2008 a private person Y filed a compensation claim against A.N. and three other private persons. On 11 March 2009 these proceedings were registered in respect of the flat at issue by the Real Estate Office (*zabilježba spora*). On 23 October 2009 these proceedings ended by a court settlement of the parties. On 12 October 2011 the court in Bar ordered that the note on the proceedings be deleted from the register of the Real Estate Office.

36. On 24 November 2010 the court in Bar requested the Central Bank to calculate the interest rate applicable to the amounts of 34,891.30 EUR and EUR 104.85 starting from 25 March 2004. On 30 November 2010 the Central Bank informed the court in Bar that the requested amounts were EUR 52,411.59 and EUR 157.49, respectively.

37. There is no information in the case file as to when the applicant's lawyer ceased to represent him save for the letter of 9 September 2009 in which the applicant asked the courts that all the relevant information be sent to him (see paragraph 19 above).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

38. Article 149 of the Constitution provides that the Constitutional Court shall rule on a constitutional appeal lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

39. The Constitution entered into force on 22 October 2007.

B. Montenegro Constitutional Court Act (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

40. Section 48 provides that a constitutional appeal may be lodged against an individual decision of a State body, an administrative body, a local self-government body or a legal person exercising public authority, for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted.

41. Sections 49-59 provide additional details as regards the processing of constitutional appeals. In particular, section 56 provides that when the Constitutional Court finds a violation of a human right or freedom, it shall quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body which rendered the quashed decision.

42. The Act entered into force in November 2008.

C. Enforcement Procedure Act 2000 (Zakon o izvršnom postupku; published in the Official Gazette of the Federal Republic of Yugoslavia nos. 28/00, 73/00 and 71/00)

43. Section 4 § 1 provided that enforcement proceedings were urgent.

44. Section 14 provided that the Civil Procedure Act would apply accordingly to the enforcement proceedings unless provided otherwise by this or another federal Act.

45. Section 32 provided that in cases where the enforcement proceedings were stayed due to the death of one of the parties the relevant court would inform thereof the heirs of that party, if their names and addresses were known, as well as the opposite party. If the names or addresses of the heirs were not known the court would, without a delay, appoint a temporary representative for them.

46. Sections 134-176, *inter alia*, set out details as regards enforcement by means of a public auction.

D. Enforcement Procedure Act 2004 (Zakon o izvršnom postupku; published in the Official Gazette of the Republic of Montenegro - OG RM - no. 23/04)

47. The Enforcement Procedure Act 2004 entered into force on 13 July 2004, thereby repealing the Enforcement Procedure Act 2000. In accordance with section 286, however, all enforcement proceedings instituted prior to 13 July 2004 were to be concluded pursuant to the Enforcement Procedure Act 2000.

E. Enforcement Act 2011 (Zakon o izvršenju i obezbjeđenju; published in the OGM no. 36/11)

48. This Act entered into force on 25 September 2011 and thereby repealed the Enforcement Procedure Act 2004. Section 292 § 1, in particular, provides that all enforcements (*postupci izvršenja*) would be terminated in accordance with this Act.

49. Sections 6 § 1 and 14 of this Act correspond, in substance, to sections 4 § 1 and 14 of the Enforcement Procedure Act 2000.

50. Section 94 sets out details as regards the sale of the debtor's movable property.

51. Sections 154-184 set out details as regards the sale of real estate as well as regards enforcement by means of a public auction. In particular, section 169 provides, *inter alia*, that a notice on sale of a real estate shall be published in the media.

F. Civil Procedure Act (Zakon o parničnom postupku; published in the OG RM nos. 22/04, 28/05 and 76/06)

52. Section 211 provides that the proceedings shall be stayed (*postupak se prekida*) when one of the parties passes away.

53. Section 214 provides, *inter alia*, that proceedings which were stayed due to the death of one of the parties shall be continued when the heirs or an administrator of the estate (*staralac zaostavštine*) take over the proceedings or when the court invites them to do so upon a proposal of the other party to that effect.

54. Section 133 § 1 provides, *inter alia*, that when a party has a representative (*punomoćnika*), all court documents will be served on the representative.

55. Section 136 provides, *inter alia*, that a decision against which a separate appeal may be filed shall be delivered in person to a party or his/her representative. If a person who is to be served does not happen to be at the place where the delivery is to be performed, the bailiff shall find out when and where that person can be found and shall leave a written notice

with one of the persons mentioned in section 137, requesting that he/she be present on a certain day and hour in his flat or office. If the bailiff does not find the person to be served even after this, he/she shall proceed in accordance with the provisions of section 137 of this Act and the delivery shall thus be considered as having been carried out.

56. Section 137 provides that if the person to whom a court document is to be delivered does not happen to be at home, the delivery shall be accomplished by serving the court documents on an adult member of his/her household, who must receive them. If such persons also happen not to be at home, the court documents shall be served on a neighbour, if he/she agrees.

57. Section 138 provides that if the person to be served, an adult member of the household, an authorised person or an employee of a State body or a legal entity refuses to receive the court documents without legal reason, the bailiff shall leave the said documents in the flat or at the office of that person or post it on the door of the flat or the office in question. The bailiff shall make a note on the delivery slip concerning the day, hour and reason for refusal of reception, as well as the place where he or she left the court documents, and thus the delivery shall be considered accomplished.

58. Section 142 § 1 provides that when a party to the proceedings or his/her representative changes his/her address during the proceedings they shall immediately inform the court thereof.

59. This Act entered into force on 10 July 2004.

G. Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in the OGM no. 11/07)

60. This Act provides, under certain circumstances, the possibility to have lengthy proceedings expedited by means of a request for review (*kontrolni zahtjev*), as well as an opportunity for claimants to be awarded compensation by means of an action for fair redress (*tužba za pravično zadovoljenje*).

61. Section 10, in particular, provides that the president of the relevant court shall decide upon the request for review, which, pursuant to section 9, is to be submitted to the court before which the case is pending and must contain the name and the address of the party, the registration number of the case or other data on the basis of which it can be established to which case it refers, the data and circumstances indicating that the court is unjustifiably prolonging the proceedings, and the signature of the party.

62. Section 17 provides that if the judge notifies the president of the court that certain procedural measures will be undertaken no later than four months after the receipt of the request for review, the president of the court shall notify the party thereof and thus finalise the procedure upon the request for review.

63. Section 23 § 1 provides that if the president of the court acted pursuant to section 17 the party cannot file another request for review in the same case before the expiry of the period specified in the notification.

64. Pursuant to section 24 § 1 if the president of the court does not deliver a notification on the request for review to the party pursuant to section 17 the party may lodge an appeal.

65. Section 44 provides that this Act shall apply also to judicial proceedings initiated before the entry into force of this Act but after 3 March 2004. In the determination of a legal remedy for violations of the right to trial within a reasonable time, the violations of the right which occurred after 3 March 2004 shall be established. When establishing the violation of this right, the Court shall also take into consideration the length of the judicial proceedings prior to 3 March 2004.

66. This Act entered into force on 21 December 2007.

H. Relevant domestic case-law

67. Between 21 December 2007, which is when the Right to a Trial within a Reasonable Time Act entered into force, and 3 September 2012, the courts in Montenegro considered more than 121 requests for review. The Court of First Instance in Cetinje submitted the data only for the period between 1 May 2011 and 15 May 2012, and the Court of First Instance in Žabljak for the period between January 2011 and June 2012. Also, the Court of First Instance in Danilovgrad and the Court of First Instance in Kolašin did not provide the exact number of the requests for review that had been dealt with by these two courts. All the other courts dealt with 121 requests for review in total.

68. In forty-six cases the courts issued notifications specifying the concrete actions that would be undertaken in each case within four months with a view of expediting the proceedings (see paragraph 62 above). In thirty cases of these forty-six the relevant actions were undertaken within the set time-limit (a main hearing concluded, a decision or a judgment rendered etc.). In fourteen cases the relevant actions were undertaken within periods ranging between 4 months and 12 months. In two cases the relevant action specified in the notification would not appear to have been undertaken even after a period of 12 months.

69. In thirty-three cases the requests for review were dismissed as unfounded. In twenty-one cases of these thirty-three the relevant domestic proceedings would appear to have been pending before the first-instance courts between 5 months, and 1 year and nine months at most. In one case the relevant civil proceedings in respect of which the request for review was dismissed as unfounded had already been pending for at least 4 years and 5 months before a first-instance court. In eleven cases it is unclear how long the relevant domestic proceedings had lasted.

70. It is unclear how the additional thirty-three requests for review had been dealt with. However, it would appear that in eighteen cases out of these thirty-three the relevant domestic proceedings ended soon thereafter. The status of the remaining fifteen proceedings is not known.

71. Lastly, in five cases the appellants were informed that the relevant decisions had been rendered in the meantime and in four cases the requests for review were withdrawn.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

72. The applicant complained, under Article 6 of the Convention, about the non-enforcement of the final court judgment rendered in his favour, which became final in 1997.

73. The relevant part of this Article reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...".

A. Admissibility

1. Abuse of the right to petition

74. The Government submitted that the applicant had made comments in his observations amounting to an abuse of the right of petition, within the meaning of Article 35 § 3 of the Convention. In particular, the applicant had submitted that he had been discriminated against on the grounds of his Croatian nationality, that his lawyer had had to cancel his power of attorney in order not to have professional problems, and that the domestic bodies had worked unlawfully using threats, blackmails as well as family and political connections. The Government therefore invited the Court to declare the application inadmissible.

75. The Court recalls that, whilst the use of offensive language in proceedings before it is undoubtedly inappropriate, an application may only be rejected as abusive in extraordinary circumstances (see, for example, *Akdivar and Others v. Turkey*, 16 September 1996, §§ 53-54, *Reports of Judgments and Decisions* 1996-IV; and *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X). It is also true that in certain exceptional cases the persistent use of insulting or provocative language by an applicant against the respondent Government may be considered an abuse of the right of petition (see *Duringer and Grunge v. France* (dec.), nos. 61164/00 and 18589/02, ECHR 2003-II, as well as *Stamoulakatos v. the United Kingdom*,

no. 27567/95, Commission decision of 9 April 1997; *X. v. Germany*, no. 2724/66, Commission decision of 10 February 1967; *X. and Y. v. Germany*, no. 2625/65, Commission decision of 30 September 1968, Reports 28, pp. 26-42). In the present case, however, the Court considers that the statements made by the applicant are unsubstantiated, but that they do not amount to circumstances of the kind that would justify a decision to declare the application inadmissible as an abuse of the right of petition (see, *mutatis mutandis*, *Chernitsyn v. Russia* (dec.), no. 5964/02, 8 July 2004).

76. It follows that the Government's preliminary objection must be dismissed.

2. Exhaustion of domestic remedies

a. Arguments of the parties

77. The Government submitted that the applicant had not exhausted all effective domestic remedies available to him. In particular, he had failed to lodge a request for review and an action for fair redress, which were provided by the Right to a Trail within a Reasonable Time Act (see paragraph 60 above). The applicant's not living in Montenegro and his ignorance about these remedies did not absolve him from the obligation to use them. Lastly, after having used these remedies the applicant could have made use of a constitutional appeal.

78. The applicant contested the Government's submissions. In particular, he did not live in Montenegro and therefore did not know about the said remedies until he received the Government's observations in the present case. In any event, the decision at issue remained unenforced as of 1997, and the Right to a Trial within a Reasonable Time Act had entered into force only in 2007. He also submitted that the domestic case-law provided by the Government (see paragraphs 67-71 above) was irrelevant to his case.

b. The relevant principles

79. The Court reiterates that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court.

80. However, the only remedies which the Convention requires to be exhausted are those which relate to the breaches alleged and at the same time are available and sufficient (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999 V, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010). The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see

Vernillo v. France, 20 February 1991, § 27, Series A no. 198; and *Dalia v. France*, 19 February 1998, § 38, Reports 1998-I).

81. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others*, cited above, § 65).

82. The application of this rule must make due allowance for the context. Accordingly, the Court has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see *Akdivar and Others*, cited above, § 69). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Van Oosterwijck v. Belgium*, 6 November 1980, § 35, Series A no. 40). This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant (see *Akdivar and Others*, cited above, § 69). It must examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected in order to exhaust domestic remedies (see *EVT Company v. Serbia*, no. 3102/05, § 37 *in fine*, 21 June 2007).

83. Finally, the Court has already held that it would be unreasonable to require an applicant to try a request for review on the basis of the Right to a Trial within a Reasonable Time Act in a case where the domestic proceedings had been pending for a number of years before the introduction of this legislation and where no conclusions could be drawn from the Government's submissions about its effectiveness (see *Boucke v. Montenegro*, no. 26945/06, §§ 72-74, 21 February 2012; as well as, *mutatis mutandis*, *Živaljević v Montenegro*, no. 17229/04, §§ 60-65, 8 March 2011). The Court, however, reserved its right to reconsider its view if the Government demonstrated, with reference to specific cases, the effectiveness of this remedy (see *Živaljević*, cited above, § 66).

c. The Court's assessment

84. The Court observes that the respondent State's case-law on the basis of the request for review has considerably evolved in the meantime (see paragraphs 67-71 above; see also *Boucke*, cited above, §§ 46-47). In particular, in nearly all the cases in which the relevant domestic courts specified a time-limit for undertaking certain procedural activities these activities were indeed undertaken and in most cases in a timely manner (see paragraph 68 above). It also appears that most of the requests for review that

were dismissed as unfounded were correctly dismissed as such (see paragraph 69 above).

85. While there are some cases in which the outcome of the request for review is rather unclear (see paragraph 70 above), the Court considers that, in view of the considerable development of the relevant domestic case-law on this issue, a request for review must, in principle and whenever available in accordance with the relevant legislation, be considered an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced against Montenegro after the date when this judgment becomes final.

86. Turning to the present case, the Court notes that while the applicant has indeed never lodged a request for review as such, he has urged at least twice the relevant domestic courts to expedite the enforcement proceedings, substantially complying with the requirements provided by a request for review (see paragraphs 61, 19 and 21, in that order), but to no avail. More than three years and five months after such attempts the enforcement proceedings are still ongoing.

87. In view of the above, the Court considers that requiring the applicant to use this remedy formally in such circumstances would amount to excessive formalism and that therefore he did not have to exhaust this particular avenue of redress (see, *mutatis mutandis*, *Boucke,* cited above, §§ 73-74). The Government's objection in this regard must therefore be dismissed.

88. The Court has already held that an action for fair redress is not capable of expediting proceedings while they are still pending, which is clearly the applicant's main concern, and that a constitutional appeal cannot be considered an effective domestic remedy in respect of length of proceedings (see *Boucke,* cited above, §§ 75-79; see also *Stakić v. Montenegro*, no. 49320/07, § 41, 2 October 2012). It sees no reason to depart from its finding in the present case. The Government's objection in this regard must, therefore, also be dismissed.

3. Conclusion

89. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

90. The applicant reaffirmed his complaint. In particular, he submitted that there were several long periods of inactivity by the respondent State

(see paragraphs 17-18, 29-30, and 34 above), and a failure of the relevant authorities to act in accordance with the relevant legislation, in particular section 32 of the Enforcement Act (see paragraph 45 above). He also submitted that it was unclear how the judge responsible for the enforcement got the amounts of EUR 34.891.30 and EUR 104.85 given that there was no expert's calculation in that regard, or why the interest rate was calculated only as of 25 March 2004 (see paragraph 36 above).

91. The Government submitted that the applicant had contributed to the length of the enforcement proceedings at issue. In particular, he had made a proposal that the enforcement proceedings be continued only on 28 September 2009, which proposal was necessary for the courts to invite the heirs to take over the proceedings (see paragraphs 22, 53, 44 and 49 above, in that order). He had also failed to provide the courts with the names of the debtor's heirs which is why they could not have a temporary representative appointed pursuant to section 32 of the Enforcement Act. As regards the applicant's argument that he did not know who they were (see paragraph 24 above), the data registered in the Real Estate Office were public and accessible to every interested person, including the applicant. He could have thus obtained this information as easily as the Court of First Instance did.

92. The Government further submitted that the length of the enforcement proceedings at issue was also influenced by an international legal assistance, as one of the new debtors had a permanent residence in Serbia. Due to the failure to serve him with the new enforcement order in Serbia, for which the respondent State could not be held responsible, the said enforcement order could not become final, this being a precondition for proceeding with the enforcement at issue.

93. Lastly, the present case was complex due to there being several other property-related claims in respect of the flat at issue (see paragraphs 34-35 above). Once one of these proceedings had been concluded the enforcement could continue in respect of the applicant (see paragraph 31 *in fine* above).

94. In view of the above the Government concluded that the Montenegrin authorities had proceeded in a timely and efficient manner.

2. The relevant principles

95. The Court recalls that Article 6 § 1 of the Convention, *inter alia*, protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. Accordingly, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed (see, among other authorities, *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). The State has an obligation to organise a system of enforcement of judgments that is effective both in law and in practice (see *Fuklev v. Ukraine*, no. 71186/01, § 84, 7 June 2005).

96. Further, the Court notes that, irrespective of whether enforcement is to be carried out against a private or State actor, it is up to the State to take all necessary steps, within its competence, to execute a final court judgment and, in so doing, to ensure the effective participation of its entire apparatus, failing which it will fall short of the requirements contained in Article 6 § 1 (see, albeit in the context of child custody, *Felbab v. Serbia*, no. 14011/07, § 62, 14 April 2009). However, a failure to enforce a judgment because of the debtor's indigence cannot be held against the State unless and to the extent that it is imputable to the domestic authorities, for example, to their errors or delay in proceeding with the enforcement (see, *mutatis mutandis*, *Omasta v. Slovakia* (dec.), no. 40221/98, 10 December 2002).

97. Lastly, the Court reiterates that enforcement proceedings by their very nature need to be dealt with expeditiously (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 23, ECHR 2000-IV).

3. The Court's assessment

98. Turning to the present case, the Court notes that the judgment at issue had not been enforced as of April 1997 and remains unenforced to date (see paragraphs 15 and 32 above). While the period to be taken into account began on 3 March 2004, which is when the Convention entered into force in respect of Montenegro (see *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 69, 28 April 2009), in order to determine the reasonableness of the length of proceedings regard must also be had to the state of the case on 3 March 2004 (see, among other authorities, *Mikulić v. Croatia*, no. 53176/99, § 37, ECHR 2002-I; *Styranowski v. Poland*, 30 October 1998, § 46, *Reports of Judgments and Decisions* 1998-VIII). The impugned enforcement proceedings have thus been within the Court's competence *ratione temporis* for a period of more than nine years, another six years and ten months having already elapsed before that date. The length of the enforcement proceedings here at issue could be justified only under exceptional circumstances.

99. The Court notes that between 3 March 2004 and 31 October 2006, which is two years, seven months and twenty-nine days, the relevant authorities made no attempt whatsoever to enforce the judgment at issue (see paragraphs 17-18 above). Once they were informed in February 2011 that one of the new debtors actually lived in Montenegro they would not appear to have made any effort to date to establish his whereabouts in order to serve him with the new decision, which is more than another two years and one month, and which, as the Government submitted, is a precondition for the new enforcement decision to become final (see paragraph 92 *in fine* above). No explanation was provided in this regard. The Court considers that these substantial periods of inactivity can only be attributed to the domestic authorities.

100. The applicant, for his part, would not appear to have contributed in any way to the delay complained of. In this regard, the Court observes that an attempt was made to serve the decision to stay the enforcement proceedings on the applicant in person, contrary to the relevant domestic provisions given that he would appear to have been duly represented by a lawyer at the time, as it was only in September 2009 that the applicant asked the domestic court to communicate directly with him (see paragraphs 11, 18 *in fine*, 19 and 37 above). Once the applicant learned that the enforcement proceedings had been stayed he immediately sought that they be continued (see paragraphs 20 and 22 above). Therefore, the Court considers that the period between 31 October 2006 and 9 September 2009 cannot be attributed to the applicant either.

101. Lastly, it is noted that the present case concerns the enforcement of a judgment against another private person. While it can be accepted that some such cases may be more complex than others, the Court does not consider the present one to be of such complexity as to justify the enforcement proceedings of this length. While it is true that there were other property-related claims in respect of the flat at issue, it is observed that the first such proceedings had already ended in 1999, which is long before the Convention entered into force in respect of the respondent State, and the second such proceedings lasted between 2008 and October 2009, that is when the enforcement proceedings here at issue had been stayed anyhow and therefore could not be considered to have had any influence over it.

102. Having regard to its case-law on the subject (see, *mutatis mutandis, Boucke*, cited above, § 89-94) and the failure of the domestic authorities to display adequate diligence, the Court considers that the non-enforcement at issue amounts to a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

103. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

104. The applicant claimed EUR 208,333.88 in respect of pecuniary damage, this apparently being the amount of the debt as established by the domestic judgment at issue including the accompanying interest. He also claimed EUR 50,000 for non-pecuniary damage on account of "mental anguish of his three-member family and himself".

105. The Government made no comment in this regard.

106. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim (see, *mutatis mutandis*, *Šoštarić v. Croatia*, no. 39659/04, §§ 39-41, 12 April 2007). On the other hand, it awards the applicant EUR 3,600 in respect of non-pecuniary damage.

107. Having regard to the violation found, the Court also considers that the respondent State must secure, by appropriate means, the enforcement of the judgment rendered in favour of the applicant (see, *mutatis mutandis*, *Gülizar Çevik v. Turkey*, no. 34450/08, § 35, 31 May 2012).

B. Costs and expenses

108. The applicant claimed EUR 10,000 for the costs and expenses in general, but he submitted no invoice.

109. The Government made no comment in this respect.

110. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the applicant's claim for costs and expenses for lack of substantiation.

C. Default interest

111. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State must secure, by appropriate means, the enforcement of the judgment rendered in favour of the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention;

(b) that the respondent State is to pay the applicant within three months from the date on which the judgment becomes final in accordance with

Article 44 § 2 of the Convention, EUR 3,600 euros (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 4 June 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Guido Raimondi
Acting Registrar	President

SECOND SECTION

CASE OF MIJANOVIĆ v. MONTENEGRO

(Application no. 19580/06)

JUDGMENT

STRASBOURG

17 September 2013

FINAL

17/12/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mijanović v. Montenegro,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, President,
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, judges,

and Stanley Naismith, Section Registrar,

Having deliberated in private on 27 August 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 19580/06) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Mr Borislav Mijanović ("the applicant"), on 4 May 2006.

2. The applicant was represented by Mr N. Pavličić, a lawyer practising in Podgorica. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicant complained about the non-enforcement of the judgment rendered in his favour and a violation of his property rights thereby.

4. On 18 January 2010 the President of the Fourth Section, to which the case had been assigned at the time, decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The application was transferred to the Second Section of the Court, following the re-composition of the Court's sections on 1 November 2012.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was a Montenegrin national, born in 1930, who lived in Podgorica.

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

A. Civil proceedings

8. On an unspecified date the applicant filed a compensation claim against "Radoje Dakić", a joint-stock company mostly consisting of State-owned capital (hereinafter "the debtor"; see paragraphs 27-28 below).

9. On 24 September 2003, following a remittal, the Court of First Instance (*Osnovni sud*) in Podgorica ruled in favour of the applicant, ordering the debtor to pay 159,879.33 euros ("EUR") plus statutory interest, as well as EUR 6,216.26 for legal costs.

10. On 6 July 2004 the High Court (*Viši sud*) in Podgorica upheld this judgment, and on 27 December 2005 the Supreme Court (*Vrhovni sud*) dismissed the debtor's appeal on points of law (*revizija*).

B. Enforcement proceedings

11. On 24 September 2004, upon the applicant's request to that effect, the Court of First Instance issued an enforcement order (*rješenje o izvršenju*) by means of a bank account transfer.

12. On 31 October 2005 the Central Bank (*Centralna banka Crne Gore*) informed the Court of First Instance that the judgment had not been enforced due to a lack of funds in the debtor's bank account.

13. On an unspecified date in February 2006, and in response to a prior request, the applicant was informed by the Minister of Justice that the judgment could not be enforced due to the lack of funds in the debtor's account. At the same time, the applicant was invited to provide the courts with any other accounts used by the debtor.

14. On 9 March 2006 the applicant provided details of several such accounts.

15. On 16 March 2006 the Court of First Instance issued a decision (*zaključak*) ordering the Central Bank to block all the debtor's bank accounts and provide data on the funds available therein (*dostave podatke o stanju sredstava na tim računima*). The Central Bank was to order the payment to the applicant, primarily from the designated bank account. If there were no sufficient funds in the said account, the Central Bank was to order the payment from another bank account in which there were funds. At the same time the court forwarded to the Central Bank the information obtained from the applicant on the debtor's other bank accounts.

16. On 24 March 2006 the Central Bank informed the court that the debt at issue had been attached to one of the debtor's bank accounts pursuant to section 194 of the Enforcement Act 2004 (see paragraph 35 below).

17. On 3 April 2006 and 13 April 2006 the applicant complained about the delay to the Court of First Instance. In particular, he submitted that the Central Bank had attached the debt to the account in which there were no funds available thus making the enforcement impossible.

18. On 26 April 2006 the Court of First Instance reaffirmed its decision of 16 March 2006, insisting on full compliance with the relevant legal provisions which defined the role of the Central Bank in enforcement proceedings (see paragraph 35 below).

19. On 28 April 2006 the Central Bank informed the court that the enforcement at issue had been attached to the debtor's account specified in the letter of 24 March 2006, as well as that the debtor's other accounts had been blocked.

20. It would appear that on 31 August 2006 the Court of First Instance requested once again the enforcement of the judgment at issue.

21. On 13 September 2006 the Central Bank informed the court that the enforcement was awaiting the inflow of funds in the particular account of the debtor. According to the information provided by the Central Bank there were fifteen other claims against the debtor, which had priority over the applicant's claim.

22. On 27 March 2007 the applicant would appear to have requested a change of the means of enforcement.

23. On 29 March 2007 the Court of First Instance asked the applicant to specify his enforcement request within 8 days, in default of which it would be considered withdrawn. The applicant's representative received this request on 2 April 2007.

24. On 24 April 2007 the bailiff requested that the case-file be archived as the applicant's representative had failed to amend the enforcement request which was thus considered withdrawn. At the same time it was stated that there was no reason for any further action by the court at the time as the enforcement order issued in favour of the applicant was registered (*rješenje o izvršenju unijeto u program prinudne naplate*) and was awaiting the inflow of funds in the debtor's account.

25. On 4 May 2009 the applicant filed a new enforcement request, pursuant to section 30 of the Enforcement Act (see paragraph 34 below), proposing that the judgment at issue be enforced by sale of the debtor's immovable assets. On 15 July 2009 an enforcement order to that effect was issued. There is no evidence in the case file that the domestic bodies made any attempt whatsoever to enforce this order.

26. The enforcement proceedings are still ongoing.

C. Status of the debtor

27. The Government submitted that between 3 March 2004, which is when the Convention entered into force in respect of Montenegro, and the

end of 2005, 52.196% of the debtor's stocks were owned by the State, either directly or through some of its bodies (the Government, the Employment Agency, the Pension and Disability Insurance Fund, and the Development Fund).

28. As of 2006 onwards the State and the said bodies owned 50.579% of the debtor's stocks.

D. Other relevant facts

29. The applicant maintained that: (a) the Government's Privatisation Council (*Savjet za privatizaciju*) had sold several plots of the debtor's land to a private company X and the Municipality of Podgorica for EUR 7,618,000 and EUR 1,400,000, respectively; (b) the debtor had received a grant of EUR 1,200,000 from the Government, and (c) it had made a profit of approximately EUR 2,000,000 in two and a half years, which made a total of EUR 12,218,000. He also submitted that the debtor had avoided doing business through its official bank account specified in the enforcement order, having instead opened accounts in other banks.

30. Since 7 December 2005 the applicant complained about the non-enforcement to the President of the debtor's Board of Directors, the President and the Prime Minister of Montenegro, the President of the Supreme Court, the Ombudsman, and the Central Bank's General Director.

31. On 21 April 2010 the applicant passed away. On 21 October 2010 the Court of First Instance declared Mrs Marina Mijanović Markuš, one of the applicant's daughters, his sole heir in respect of the amount owed by the debtor as established by the final judgment issued on 24 September 2003.

II. RELEVANT DOMESTIC LAW

A. Enforcement Procedure Act 2004 (Zakon o izvršnom postupku; published in the Official Gazette of the Republic of Montenegro - OG RM - no. 23/04)

32. Section 4 § 1 provided that the enforcement court was obliged to proceed urgently.

33. Section 14 provided that the Civil Procedure Act would apply accordingly to the enforcement proceedings unless provided otherwise by this or another Act.

34. Section 30 provided, *inter alia*, that the court would order the enforcement in a manner proposed by the creditor. If the enforcement order could not be enforced thereby the creditor could propose another means of enforcement, on which proposal the court would rule by a decision.

35. Sections 190-198 set out details as regards enforcement by means of a bank account transfer. Section 194, in particular, provided that the court would forward an enforcement order to the Central Bank, which would immediately order other banks to block all the debtor's accounts and provide data on the funds available therein. Upon receipt of these data the Central Bank would order the payment primarily from the bank account specified in the enforcement order. If there were several bank accounts specified in the enforcement order the payment would be made in the same order as specified. If there were no sufficient funds in the account specified in the enforcement order the Central Bank would order the payment from other accounts in which the debtor had funds.

36. Sections 143-187 set out details relating to enforcement in respect of the debtor's immovable assets.

B. Enforcement Act 2011 (Zakon o izvršenju i obezbjeđenju; published in the Official Gazette of Montenegro - OGM - no. 36/11)

37. This Act entered into force on 25 September 2011 and thereby repealed the Enforcement Procedure Act 2004. Section 292 § 1, in particular, provides that all enforcements (*postupci izvršenja*) will be terminated in accordance with this Act.

38. Sections 6 § 1 and 14 of this Act correspond, in substance, to sections 4 § 1 and 14 of the Enforcement Procedure Act 2004.

39. Sections 154-201 set out details relating to enforcement in respect of the debtor's immovable assets.

C. Civil Procedure Act (Zakon o parničnom postupku; published in the OG RM nos. 22/04, 28/05 and 76/06 and in the OGM no. 73/10)

40. Section 106 provides, *inter alia*, that if a request (*podnesak*) is incomprehensible or incomplete the court shall ask that it be amended or rectified within a specified time-limit which cannot be longer than eight days. If the request is not amended/rectified within the specified time it shall be considered withdrawn.

D. Inheritance Act 2008 (Zakon o nasljeđivanju; published in the OGM no. 74/08)

41. Section 130 provides that the deceased's estate (*zaostavština*) shall be transferred *ex lege* to the legal heirs at the moment of death.

E. Property Act (Zakon o svojinsko-pravnim odnosima; published in the OGM no. 19/09)

42. Section 28 provides that property can be acquired *ex lege*, through a legal transaction, by means of inheritance, or on the basis of a decision issued by the State in accordance with the law.

43. Section 91 provides that the deceased's property will be transferred *ex lege* to the legal heirs at the moment of death.

F. Corporations Privatisation Act (Zakon o privatizaciji privrede; published in the OG RM no. 23/96, 6/99, 59/00, 42/04)

44. Section 2a provided, *inter alia*, that the Government of Montenegro would establish a Privatisation Council to manage, control and supervise the process of privatisation. The Privatisation Council was responsible to the Government and was financed from the State's budget. The privatisation was to be conducted in accordance with annual plans adopted by the Government upon proposals of the Privatisation Council.

45. These provisions entered into force on 3 March 1999.

G. The Government's Privatisation Plans

46. As of 2000 the Government adopted annual Privatisation Plans setting out details about the privatisation of various companies.

47. The Privatisation Plan 2003 (*Odluka o planu privatizacije za 2003. godinu*), which entered into force on 14 March 2003, explicitly provided, *inter alia*, that the privatisation of the debtor would be run by the Privatisation Council.

48. The Privatisation Plan 2004, which entered into force on 16 April 2004, provided that the Government would adopt privatisation plans and strategies and would issue relevant decisions in that regard. The Privatisation Council was, *inter alia*, to: (a) decide on the distribution of the income obtained by the privatisation; (b) coordinate the activities of the subjects involved; (c) establish various Commissions, one of which would also examine the effects of privatisation on the social status of workers and would propose adequate measures. In cases where a privatisation contract was annulled, further privatisation was to be conducted by the Pension and Disability Insurance Fund, the Development Fund and the Employment Agency in accordance with their stake (*vlasničko učešće)*. In particular, this Plan reaffirmed that the privatisation of the debtor was one of the priorities and that a decision on the most effective privatisation method would be rendered by the Privatisation Council or the Government.

49. The Privatisation Plan 2005 (*Odluka o planu privatizacije za 2005. godinu*), which entered into force on 24 February 2005, envisaged the preparation of a concrete privatisation plan for the debtor.

H. Other relevant provisions

50. For other relevant domestic law see *Boucke v. Montenegro*, no. 26945/06, §§ 38-48, 21 February 2012.

THE LAW

I. THE APPLICANT'S DEATH

51. On 21 April 2010 the applicant died.

52. On 2 July 2010 the applicant's wife and two daughters informed the Court that they wished to maintain the proceedings lodged by their late husband/father.

53. The Government contested this request.

54. On 21 October 2010 the Court of First Instance in Podgorica declared the applicant's wife and his two daughters the applicant's legal heirs. In particular, Mrs Marina Mijanović Markuš, one of the two daughters, was declared the applicant's sole heir in respect of the amount owed by the debtor as established by the final court judgment issued on 24 September 2003.

55. Given the relevant domestic legislation (see paragraphs 41-43 above), as well as the fact that Mrs Mijanović Markuš has a "definite pecuniary interest" in the proceedings at issue (see, *mutatis mutandis*, *Ahmet Sadık v. Greece*, 15 November 1996, § 26, *Reports of Judgments and Decisions* 1996-V; see, also, *Marčić and Others v. Serbia*, no. 17556/05, §§ 35-39, 30 October 2007), the Court finds, without prejudice to the Government's other preliminary objections, that she has standing to proceed in her father's stead.

56. Mrs Mijanović Markuš shall, therefore, herself be referred to as "the applicant" hereinafter.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 THERETO

57. The applicant's father complained, in substance, about the non-enforcement of the final judgment issued in his favour on 24 September 2003, and a violation of his property rights caused thereby. The applicant submitted that she wished to pursue these complaints.

58. The Court being the "master of the characterisation" to be given in law to the facts of any case before it (see *Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005), it considers that these complaints fall to be examined under Article 6 of the Convention and Article 1 of Protocol No. 1 of the Convention.

59. Article 6, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

60. Article 1 of Protocol No. 1 provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. Compatibility ratione personae (as regards the State)

61. In the Court's view, although the Montenegrin Government have not raised an objection as to the Court's competence *ratione personae* in this respect, this issue nevertheless calls for its consideration (see, *mutatis mutandis*, *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III, and *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 71, 28 April 2009).

62. It transpires from the evidence submitted by the Government, and relating to the period as of 3 March 2004 onwards, that the majority stock-holder of the debtor has been indeed the State, either directly or through one of its bodies. In the course of 2006 the State and its bodies sold less than 1.62% of their stocks in the debtor (see paragraphs 27-28 above), thus still remaining the majority stock-holder.

63. The applicant and her late father, for their part, maintained that the debtor was at all times owned and managed by the respondent State as well as occasionally financed thereby (see paragraph 29 above). The Government did not dispute this or offer any evidence to the contrary.

64. The Court firstly notes that the Government did not dispute that the debtor was owned and managed by the respondent State, and did not raise an objection as to the Court's competence *ratione personae* as regards the respondent State.

65. It is further noted that the decision to privatise the debtor was made by the Government. The privatisation itself was run by the Privatisation Council, a State-body liable to the Government, which, *inter alia*, also

disposed of the income obtained through the privatisation as it saw fit (see paragraphs 44 and 48 above; see also, *mutatis mutandis*, *Lisyanskiy v. Ukraine*, no. 17899/02, § 19, 4 April 2006).

66. The Court also recalls that even when a State has sold a large part of its share in a company it owned to a private person, this could not release the State from its obligation to honour a judgment debt which had arisen before the shares were sold (see *Solovyev v. Ukraine*, no. 4878/04, § 21 *in limine*, 14 December 2006).

67. In view of the above, and without prejudice to the other objections raised by the Government or to the merits of the case, the Court considers that the debtor, despite the fact that it was a separate legal entity, did not enjoy sufficient institutional and operational independence from the State to absolve the latter from responsibility under the Convention (see, *mutatis mutandis*, *R. Kačapor and Others v. Serbia*, nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, §§ 96-99, 15 January 2008; see also *Mykhaylenky and Others v. Ukraine*, nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02, § 44, ECHR 2004-XII).

68. Accordingly, the Court finds the applicant's complaints are compatible *ratione personae* with the provisions of the Convention.

2. Exhaustion of domestic remedies

69. The Government submitted that the applicant's father had not exhausted all effective domestic remedies available to him. In particular, he had failed to lodge a request for review and an action for fair redress, which were provided by the Right to a Trial within a Reasonable Time Act (see paragraph 50 above). Lastly, after using these remedies the applicant's father could have made use of a constitutional appeal.

70. The applicant contested these submissions. In particular, she maintained that the remedies referred to by the Government had not existed at the time when the application had been lodged with the Court and that therefore there was no obligation to make use of them later.

71. The Court recently held in *Vukelić v. Montenegro* (no. 58258/09, § 85, 4 June 2013 (not yet final)) that a request for review must, in principle and whenever available in accordance with the relevant legislation, be considered an effective domestic remedy within the meaning of Article 35 § 1 of the Convention in respect of applications introduced against Montenegro after the date when the *Vukelić* judgment becomes final.

72. As the application here at issue had been lodged with the Court on 4 May 2006, that is long before the *Vukelić* judgment was rendered, and in view of the Court's earlier findings in this regard, the Court considers that the applicant in the present case did not have to exhaust this particular avenue of redress (see *Boucke v. Montenegro*, no. 26945/06, § 74,

21 February 2012). The Government's objection in this regard must, therefore, be dismissed.

73. The Court has already held that an action for fair redress is not capable of expediting proceedings while they are still pending, and that a constitutional appeal cannot be considered an effective domestic remedy in respect of length of proceedings (see *Boucke v. Montenegro*, cited above, §§ 75-79). It sees no reason to depart from its findings in the present case. The Government's objection in this regard must, therefore, also be dismissed.

3. The conclusion

74. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Article 6 of the Convention

(a) The parties' submissions

75. The Government submitted that the enforcement proceedings at issue were complex and that, in any event, they did not require priority or any urgent action by the domestic courts. There were no significant periods of inactivity on the part of the domestic courts and the applicant's father had contributed to the length of the enforcement proceedings.

76. In particular, the domestic court had requested on several occasions that the Central Bank act urgently in the matter. The Central Bank, in response, had attached the enforcement of the judgment at issue to a specific debtor's account, which then awaited an inflow of funds to the account.

77. Furthermore, a delay of two years and one month was attributable to the applicant's father given that he had not complied in a timely manner with the court's instruction to amend the enforcement request (see paragraphs 22-24 above). The domestic courts could not change the means of the enforcement of their own motion but were bound by a creditor's proposal in that regard.

78. Lastly, the Government submitted that there were a number of other judgments issued against the same debtor, in favour of former employees of other debtors on account of their salary arrears. Several auctions were scheduled aimed at selling the debtor's immovable assets and honouring the obligations arising from these judgments. However, all the auctions failed due to there being no investors who would buy the said assets, this being an

additional reason justifying the delay in the enforcement proceedings here at issue.

79. In view of the above, the Government concluded that there was no violation of Article 6 § 1 of the Convention.

80. The applicant contested these submissions and reaffirmed her complaint. She submitted, in particular, that the debtor had had a considerable income in the past period (see paragraph 29 above) and that it was unacceptable that the debtor could dispose of such an amount in a situation when its bank account was blocked or that the State, owning the majority of the debtor's stocks, had not known or could not have known the origin of these funds or the purpose for which they were used. She maintained that the Government should have rather submitted evidence of the transactions from and to the debtor's bank account which would clarify who had prevented the enforcement of the judgment here at issue, and how and why.

(b) The Court's assessment

81. The Court recalls that Article 6 § 1 of the Convention, *inter alia*, protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. Accordingly, the execution of a judicial decision cannot be prevented, invalidated or unduly delayed (see, among other authorities, *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II). While a delay in the execution of a judgment may be justified in particular circumstances, it may not, however, be such as to impair the essence of the right protected under Article 6 § 1 of the Convention (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 74, ECHR 1999-V).

82. The State has an obligation to organise a system of enforcement of judgments that is effective both in law and in practice (see *Fuklev v. Ukraine*, no. 71186/01, § 84, 7 June 2005). Irrespective of whether a debtor is a private or a State-controlled actor, it is up to the State to take all necessary steps to enforce a final court judgment, as well as to, in so doing, ensure the effective participation of its entire apparatus (see, *mutatis mutandis*, *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 174-189, ECHR 2004-V (extracts)).

83. Turning to the present case, the Court notes that, contrary to the Government's submission, the enforcement proceedings by their very nature need to be dealt with expeditiously (see paragraphs 32 and 38; see also *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 23, ECHR 2000-IV). While it can be accepted that some enforcement proceedings may be more complex than others, the Court does not consider the present case to be of such complexity as to justify the length thereof.

84. It is further observed that even though the applicant's father indeed failed to amend in a timely manner his enforcement request of 27 March 2007, his previous enforcement order remained registered and awaited the inflow of funds to the debtor's account (see paragraph 24 above). In any event, even had he done so earlier it is unclear how it would have expedited the enforcement at issue given that several other auctions aimed at selling the debtor's immovable assets had anyhow failed, as submitted by the Government (see paragraph 78 above). Therefore, the Court considers that the period between 24 April 2007 and 4 May 2009 cannot be attributed to the applicant either, in particular given that the earlier enforcement order remained continuously in force and attached to the debtor's bank account.

85. The Court also notes that the Central Bank never attempted to attach the debt in question to any of the debtor's other bank accounts in spite of the efforts of the applicant's father to that end (see paragraphs 13-14 and 17 above). In addition, as of 24 April 2007 onwards the domestic courts only issued another enforcement order (see paragraph 25 above), which they apparently never attempted to enforce and which remains unenforced to date.

86. Lastly, given the finding of State liability for the debt owed to the applicant in the present case, it is noted that the State cannot cite either the lack of its own funds or the indigence of the debtor as an excuse for the non-enforcement in question (see, *mutatis mutandis*, *R. Kačapor and Others v. Serbia*, cited above, § 114).

87. In view of the above, the Court finds that the Montenegrin authorities have failed to take the necessary measures in order to enforce the judgment in question. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

2. Article 1 of Protocol No. 1 to the Convention

88. The applicant's father also complained that by the non-enforcement of the judgment at issue his property rights were violated. The applicant submitted that she wished to pursue this complaint.

89. The Government contested this claim.

90. The Court reiterates that the failure of the State to enforce the final judgment rendered in favour of the applicant's father and subsequently inherited by the applicant constitutes an interference with her right to the peaceful enjoyment of possessions, as provided in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see, among many other authorities, *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III).

91. For the reasons set out above in respect of Article 6, the Court considers that the said interference was not justified in the present case. There has, accordingly, been a separate violation of Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

93. The applicant sought the payment of the judgment debt.

94. The Government contested the applicant's claim.

95. The Court reiterates that the most appropriate form of redress in respect of a violation of Article 6 is to ensure that applicants as far as possible are put in the position in which they would have been had the requirements of Article 6 not been disregarded. The Court finds that in the present case this principle applies as well, having regard to the violation found. It therefore considers that the Government should pay the applicant, in respect of pecuniary damage, the award made by the domestic courts including the statutory interest and the legal costs referred to therein (see, *mutatis mutandis*, *Pejaković and Others v. Bosnia and Herzegovina*, nos. 337/04, 36022/04 and 45219/04, §§ 31-32, 18 December 2007).

96. As the applicant made no claim in respect of non-pecuniary damage, no award is made in that regard.

B. Costs and expenses

97. Since the applicant made no claim in this respect the Court considers that there is no call to award her any sum on that account.

C. Default interest

98. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the award made by the domestic courts, including the statutory interest and the legal costs referred to therein, in respect of pecuniary damage;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 17 September 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President

SECOND SECTION

CASE OF BULATOVIĆ v. MONTENEGRO

(Application no. 67320/10)

JUDGMENT

STRASBOURG

22 July 2014

FINAL

22/10/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bulatović v. Montenegro,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Işıl Karakaş,
András Sajó,
Nebojša Vučinić,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Abel Campos, *Deputy Section Registrar,*

Having deliberated in private on 1 July 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 67320/10) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Mr Željko Bulatović ("the applicant"), on 15 November 2010.

2. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicant complained, in particular, about the conditions and length of his detention on remand. He also complained of a lack of medical care while in detention on remand.

4. On 5 November 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Podgorica.

A. The criminal proceedings

6. On 8 May 2001 the applicant murdered X and immediately thereafter left the country.

7. On 6 March 2002 the applicant, in his absence, was found guilty of murder and sentenced to twenty years in prison.

8. On 27 June 2002 the applicant was arrested in Spain pursuant to an international arrest warrant (*potjernica*), and placed in custody.

9. On 14 May 2003 he was extradited to Montenegro.

10. On 3 February 2004 the criminal proceedings against the applicant were re-opened (*ponavljanje krivičnog postupka*).

11. On 10 April 2009 the High Court (*Viši sud*) in Podgorica found the applicant guilty, sentenced him to fourteen years' imprisonment and ordered him to pay the costs of the proceedings as well as court fees (*na osnovu sudskog paušala*).

12. On 29 January 2010 the Court of Appeal (*Apelacioni sud*) in Podgorica quashed the judgment and ordered a retrial.

13. On 4 October 2010 the High Court found the applicant guilty, sentenced him to fourteen years' imprisonment, and ordered him to pay the costs of the proceedings and court fees.

14. On 21 March 2011 the Court of Appeal upheld that decision. It would appear that on 26 April 2011 the decision was served on the applicant and he was transferred to prison.

15. On 19 September 2011 the Supreme Court (*Vrhovni sud*) in Podgorica dismissed an appeal on points of law (*zahtjev za ispitivanje zakonitosti pravosnažne presude*) lodged by the applicant.

16. On 25 November 2011 the applicant lodged a constitutional appeal complaining, in substance, about the reasoning of the courts, their assessment of the evidence and their interpretation of the law. He also complained of various irregularities in dealing with his request for review and his action for fair redress (see paragraphs 17-22 below). On 2 November 2012 the applicant withdrew his constitutional appeal and the Constitutional Court terminated the proceedings (*obustavio je postupak*) on 27 November 2012.

B. The applicant's attempts to have the criminal proceedings expedited

17. On 10 November 2009 the applicant lodged a request for review (*kontrolni zahtjev*), complaining that the Court of Appeal had not ruled on his appeal within three months (see paragraph 75 below).

18. On 11 January 2010, having received no reply to the previous request, the applicant appealed to the Supreme Court.

19. On 7 July 2010, having still received no reply, the applicant lodged an action for fair redress (*tužba za pravično zadovoljenje*).

20. On 29 September 2010 the Supreme Court rejected the action on the grounds that the applicant had not lodged a request for review.

21. On 10 May 2011 the applicant lodged another action for fair redress.

22. On 17 June 2011 the Supreme Court ruled that the criminal proceedings had been unreasonably long. Considering that the applicant's detention required urgent proceedings, but also that it had been a complex case and that the applicant had contributed to the overall length of the proceedings, the court awarded him 2,000 euros (EUR). The applicant's proposal that that decision be published was refused as the court did not consider it to be a "serious breach" of the right to a trial within a reasonable time. It was also noted that the applicant had indeed submitted a request for review beforehand, which had not been considered, and that his appeal in that regard had never been forwarded by the Court of Appeal to the Supreme Court.

23. On 25 July 2011 the applicant lodged a constitutional appeal against that decision, complaining, in particular, about the Supreme Court's rejection of his first action for fair redress, the conclusion that he had contributed to the overall length of the criminal proceedings, and the amount awarded. He also requested that the Supreme Court's decision be published. In March 2013, when the Government submitted their observations, the constitutional appeal was still pending.

C. The applicant's detention

24. On 6 March 2002 the High Court issued a detention order against the applicant in his absence.

25. On 20 April 2004, after the applicant was extradited to Montenegro, the High Court issued a new detention order for fear that he might abscond, especially in view of the fact that he had already been in hiding and had been arrested pursuant to an international warrant.

26. The detention was further extended by the High Court on 1 June 2004, 26 September 2005, 8 September 2008, 23 December 2008, 27 February 2009 and 10 April 2009. The decisions to extend the detention appear to have been subsequently upheld by the Court of Appeal.

27. The decision rendered on 8 September 2008 also took account of the gravity of the criminal offence of which the applicant was accused and the sentence that might be imposed on him.

28. In its decision of 10 April 2009 the High Court took account in addition of the applicant's personal circumstances, considering that his being unemployed and single increased the risk that he might flee. The decision specified that the applicant's detention could last until a final decision was issued in the criminal proceedings or, at the most, until he had served fourteen years in prison.

29. The authorities did not consider in any of those decisions the possibility of ensuring the applicant's presence at trial by the use of other preventive measures.

30. On 14 January 2010 the applicant lodged a constitutional appeal complaining about the length of his detention. It would appear that he amended this appeal on three occasions thereafter, 1 March 2010, 8 December 2010 and 9 December 2010, enclosing some of the relevant documents, such as his request for review, the subsequent appeal, the action for fair redress, as well as the Supreme Court's decision thereon. In March 2013, when the Government submitted their observations, the constitutional appeal was still pending.

31. It would appear that the applicant remained in detention until his conviction became final by the Court of Appeal's ruling in 2011, after which he was transferred to prison to serve his sentence.

D. Conditions of detention

32. The parties' submissions in this regard differed.

33. The applicant maintained, in particular, that the cell in which he had been detained had been overcrowded, and that he had lacked drinking water and daily exercise.

34. More specifically, the cell had measured 25 m^2 and had housed fourteen detainees, sleeping on three-tier beds. The cell had also contained closets, a sanitary facility and a dining table. Apparently, the detainees were given a television set in 2007.

35. Furthermore, between 2003 and 2007, especially in the summer, there was no running water during the day. The detainees, including the applicant, had to collect water in containers during the night so that there would be enough during the day, for both drinking and cleaning purposes. A well was dug in 2007, but this water was apparently not suitable for drinking as it was dirty.

36. Lastly, until 2007 the daily walks lasted for forty minutes instead of the 120 minutes provided for by the relevant law, and were cancelled altogether on Thursdays and Fridays, as well as on rainy days. It would appear that after the prisoners' strike in 2007 the duration of walks was increased to sixty minutes and that they were reintroduced on Thursdays. There would still appear to be no walks on Fridays. Until 2009 detainees were not allowed outdoors at all on rainy days and sometimes they would not get out of the cell for twenty days.

37. The Government, for their part, submitted that the applicant had been detained in a cell measuring 28 m^2 with four or five other persons, and only occasionally with nine other detainees. There were general shortages of water supply in the area where the prison was situated and the applicant had two thirty-minute long outdoor walks on a daily basis. They also submitted that the conditions in prison had been significantly improved after the visit of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment ("the CPT") in 2008 (see paragraphs 114-118 below).

E. Medical care

38. On 14 May 2003, when he was extradited to Montenegro and remanded in custody, the applicant was examined by a prison doctor. On that occasion the applicant claimed that he had no illnesses. In December 2003 he had blood and urine tests. There is no evidence in the case file that he was suffering from any illness at the time.

39. In March 2006 the applicant was examined at the clinical centre of Montenegro. The medical report issued at the time is mostly illegible. The legible part states that two months earlier when he was under stress, the applicant had had an abnormal pain in his chest which had not recurred, and that his blood pressure was also high at the time. The doctor recommended a cardiological examination (*holter monitoring*) and a check-up in three months.

40. Between 15 August 2006 and 26 January 2007 the applicant had four blood tests, the results of which showed that at various times one or two parameters were slightly increased while the remaining parameters were either within the normal range or illegible. There is no evidence in the case file that the applicant underwent the recommended cardiological examination or check-up.

41. In March 2011 the applicant was again examined at the clinical centre by a specialist in internal medicine (*internista*). The medical report issued at the time states that the applicant had been having spasms (*stezanje*) behind the breast bone, which had become more frequent and stronger. The prison doctor recommended holter monitoring by a cardiologist and specified that the applicant's condition could worsen if the tests were delayed.

42. Between 22 March and 4 April 2011 the applicant was examined by a cardiologist (holter, electrocardiogram and ergometric tests). The results showed that the applicant's left heart chamber was slightly enlarged, with hypertrophic walls. There was also a grade I diastolic dysfunction.

43. On various dates between February 2005 and May 2011 the applicant was examined several times by a dermatologist, a urologist, a physiatrist and a surgeon, and his abdomen and spine were x-rayed. He was prescribed the relevant treatment where needed.

F. Other relevant facts

44. On 7 December 2006 the Ombudsman (*Zaštitnik ljudskih prava i sloboda*) lodged an application with the Constitutional Court for an assessment of the constitutionality of Article 572 of the Criminal Procedure Code 2003 (see paragraph 70 below). On 3 July 2008 the Constitutional Court terminated the proceedings (*obustavio postupak*) as a new

Constitution had been adopted in the meantime, whereas the Ombudsman's request related to the Constitution that was no longer in force.

45. On 12 September 2008 several detainees, including the applicant, wrote to the President of the Supreme Court complaining about the length of their detention.

46. It would appear that in 2008 and 2010 two amnesties were granted to prisoners who had been convicted before those dates. On 6 June 2011 the Court of First Instance (*Osnovni sud*) in Podgorica dismissed the applicant's request that one of those amnesties be granted to him as well. On 30 June 2011 the High Court upheld that decision.

47. On various dates in 2009 the applicant complained to different international organisations represented in Montenegro, as well as to the Montenegrin Ombudsman, about the length of his detention and of the criminal proceedings. Some of the organisations apparently did not reply at all and others replied that they had no competence to deal with individual cases. The Court of Appeal, in response to an enquiry by the Ombudsman, replied that all realistic measures would be undertaken to expedite the proceedings at issue, although it would be difficult because there had been an influx of urgent and complex cases.

48. On 14 January 2010, as well as lodging a constitutional appeal in respect of the length of his detention, the applicant also applied for an assessment of the constitutionality of Article 572 of the Criminal Procedure Code 2003. On 10 May 2012 the Constitutional Court rejected (*odbacuje se*) the request, as the Code had ceased to be in force as of 1 September 2011 (see paragraph 76 below) and thus there was no legal ground to examine if the above-mentioned provision had been in accordance with the Constitution while it had been in force.

49. On 22 November 2011 the applicant appears to have requested the State Prosecutor (*Osnovno državno tužilaštvo*) to investigate some of the employees of the Court of Appeal responsible for not having forwarded his request for review to the Supreme Court. On 21 February 2012 the Deputy State Prosecutor (*zamjenik osnovnog državnog tužioca*) informed the applicant that she would not pursue any criminal prosecution *ex officio* in this regard. The applicant could, however, take on the prosecution as a subsidiary prosecutor. There is no evidence in the case file as to whether the applicant did so.

50. On 22 February 2012 the applicant's sentence was reduced by six months following an amnesty (*pomilovanje*) granted to him by the President.

51. On 19 August 2013 the applicant's sentence was further reduced in view of an amnesty provided for by the new legislation (see paragraph 81 below). On 27 August 2013 that decision became final and the applicant was released.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of the Republic of Montenegro 1992 (*Ustav Republike Crne Gore*, published in the Official Gazette of the Republic of Montenegro - the OG RM - no. 48/92)

52. Article 23 of the Constitution contained details on detention. In particular, paragraph 3 provided that the duration of detention must be as short as possible (*mora biti svedeno na najkraće vrijeme*).

B. Constitution of Montenegro 2007 (*Ustav Crne Gore*, published in the Official Gazette of Montenegro - the OGM - no. 01/07)

53. Article 30 of this Constitution corresponds to Article 23 of the 1992 Constitution.

54. Article 32 provides that everyone is entitled to a fair and public trial within a reasonable time by an independent and impartial tribunal established by law.

55. Article 149 provides that the Constitutional Court will rule on a constitutional appeal lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

56. The Constitution entered into force on 22 October 2007.

C. Montenegro Constitutional Court Act (*Zakon o Ustavnom sudu Crne Gore*, published in the OGM no. 64/08)

57. Section 48 of the Act provides that a constitutional appeal may be lodged against an individual decision of a State body, an administrative body, a local self-government body or a legal person exercising public authority, for violations of human rights and freedoms guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

58. Sections 49 to 59 provide additional details as regards the processing of constitutional appeals. In particular, section 56 provides that when the Constitutional Court finds a violation of a human right or freedom, it will quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body which rendered the quashed decision.

59. This Act entered into force in November 2008.

D. Criminal Procedure Act 1977 (*Zakon o krivičnom postupku*, published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 4/77, 14/85, 74/87, 57/89 and 3/90, and in the Official Gazette of the Federal Republic of Yugoslavia nos. 27/92 and 24/94)

60. Section 182 of the Act provided that the defendant's participation in the criminal proceedings could be secured by means of sending summonses, his forcible appearance in court, a promise on the part of the defendant that he would not leave his residence (*boravište*), as well as through the imposition of bail or detention. The competent court would not apply a more severe measure in order to secure the defendant's presence if a less severe measure could achieve the same purpose. Also, the measures would cease automatically when the reasons for their application ceased to exist, or would be replaced with other less severe measures once the conditions had been met.

61. Sections 183 to 200 set out details as to each of those measures.

62. Section 190(2), in particular, provided that the detention period would be as short as possible and that all the bodies involved in the criminal proceedings would act with particular urgency if the accused was in detention.

63. Section 197 provided for limitations on detention before any charges had been brought. No such limitations were envisaged for the period after an individual had been indicted.

E. Criminal Procedure Code 2003 (*Zakonik o krivičnom postupku*, published in the OG RM nos. 71/03, 07/04, and 47/06)

64. Article 16 provided, *inter alia*, for an obligation on the part of the courts to conduct proceedings without delay, and to keep the duration of detention to the shortest time needed.

65. Article 136 provided that a defendant's participation in criminal proceedings could be secured by means of summonses, his forcible appearance in court, surveillance measures, as well as the imposition of bail and detention. The competent court would ensure that a more severe measure was not applied if a less severe measure could achieve the same purpose. Also, the measures would be ceased automatically when the reasons for their application ceased to exist, or would be replaced with other less severe measures once the conditions had been met.

66. Articles 137 to 153 set out details as to each of these measures.

67. Article 147 § 2, in particular, provided for a duty on the part of all the bodies involved in the criminal proceedings to act with particular urgency if the accused was in detention.

68. Article 148 § 1 (1) provided that detention could be ordered if there was a reasonable suspicion that the accused had committed a criminal offence, and there were circumstances indicating that he or she might abscond.

69. Article 152 provided, *inter alia*, that the detention could last for two years at most after an individual had been indicted. If the accused did not receive a first-instance judgment within two years, the detention would be repealed and the accused released. After the delivery of the first-instance decision the detention could last for another year at most. If no second-instance judgment overturning or upholding the first-instance judgment was delivered within that year, the detention would be repealed and the accused released. If the second-instance court quashed the first-instance judgment, the detention could last for at most another year after the delivery of the second-instance judgment.

70. Article 572 provided that the limitations on detention prescribed by section 152 of this Code were applicable only to proceedings instituted after the Code had entered into force.

71. Article 155 § 2 provided that every detainee would be able to walk outdoors (*obezbjedi[će] se kretanje*) for at least two hours every day.

72. Article 156 provided that, following a request by a detainee and with the approval of an investigating judge, detainees could be visited by, *inter alios*, a doctor.

73. Article 158 provided that the president of the competent court would supervise the execution of detention. The president of the competent court, or another judge designated by him, would, at least once a month, visit detainees and enquire as to how they were being treated. He would take measures to remove any irregularities observed during his visit. The president of the court and the investigating judge could, at all times, visit all detainees, talk to them and receive their complaints.

74. Article 397 provided, *inter alia*, that a second-instance court could quash a first-instance judgment and order a retrial. If the accused was in detention, the second-instance court would examine whether the reasons for detention still persisted and issue a decision either extending or terminating the detention. No appeal was allowed against that decision.

75. Under Article 401 § 2 the second-instance court was obliged to deliver its decision, together with the entire case file, to the first-instance court within three months at the latest if the accused was in detention.

76. This Code entered into force on 6 April 2004. The previous Act was thereby repealed, except for the chapters relating to international legal assistance and the extradition of accused and convicted persons, which is irrelevant in the present case.

F. Criminal Procedure Code 2009 (*Zakonik o krivičnom postupku*, published in the OGM nos. 570/9 and 49/10)

77. The Code entered into force on 1 September 2011, thus repealing the previous Code, except for the provisions of Chapter XXIX, which is irrelevant in the present case.

G. Right to a Trial within a Reasonable Time Act (*Zakon o zaštiti prava na suđenje u razumnom roku*, published in the OGM no. 11/07)

78. This Act provides, under certain circumstances, for the possibility to have lengthy proceedings expedited by means of a request for review (*kontrolni zahtjev*), as well as an opportunity for claimants to be awarded compensation by means of an action for fair redress (*tužba za pravično zadovoljenje*).

79. Section 2, in particular, provides that in the event of a violation of the right to a trial within a reasonable time, the right to court protection applies to the parties and interveners in civil proceedings, parties and interested persons in administrative disputes, as well as the accused and the injured party in criminal proceedings.

80. Section 44 provides, *inter alia*, for retroactive application of the Act to all proceedings from 3 March 2004, taking into account the duration of the proceedings before that date.

H. Amnesty of Persons Convicted of Criminal Offences provided for in the Legislation of Montenegro and of Persons Convicted by a Foreign Judgment enforced in Montenegro Act (*Zakon o amnestiji lica osuđenih za krivična djela propisana zakonima Crne Gore i lica osuđenih stranom krivičnom presudom koja se izvršava u Crnoj Gori*, published in the OGM no. 39/13).

81. This Act provides, *inter alia*, for the granting of an amnesty to persons convicted of murder by means of a final judgment before the date on which the Act entered into force, and for the reduction of their sanction by 25%. The Act entered into force on 15 August 2013.

I. Detention Rules (*Pravilnik o kućnom redu za izdržavanje pritvora*, published in the Official Gazette of the Socialist Republic of Montenegro no. 10/87)

82. Rule 14 provides that a detainee will be examined by a general practitioner immediately on admission to prison. A medical report will be included in the detainee's medical file.

83. Rule 21(2) provides that a prison doctor will visit detainees at least once a week and, where necessary, suggest adequate measures for the removal of any irregularities observed.

84. Rule 23 provides that in the event of illness the detainee will receive medical treatment in the prison infirmary. If he needs to be hospitalised he will be transferred to a prison with a hospital department. In urgent cases he will be transferred to the nearest hospital. The body conducting the proceedings against the detainee will decide on the transfer to another prison, following a proposal by the prison doctor. In urgent cases, this decision will be made by a prison director, who must immediately inform the body conducting the proceedings.

85. Rule 24 provides that, if a detainee so requests and with the approval of the conducting body and under its surveillance, the detainee may be examined by a doctor of his own choice. Such an examination is, in principle, conducted in the prison in the presence of the prison doctor. Prior to the examination the detainee must first be examined by the prison doctor.

86. Rule 53(3) provides that the prison doctor will examine the detainee at the time of his release, and the medical report will be included in the detainee's medical file.

J. Constitutional Court's practice following constitutional appeals

87. The Government submitted in their observations that between 1 January 2008 and 31 December 2012 the Constitutional Court received 2,171 constitutional appeals, on which 1,391 decisions were rendered: 32 appeals were upheld, 727 appeals were rejected on the merits (*odbijene*), 617 were rejected on procedural grounds (*odbačene*) and in 5 cases the proceedings were terminated (*obustavljeni*).

III. RELEVANT INTERNATIONAL DOCUMENTS

A. Report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment in respect of Montenegro

88. Between 15 and 22 September 2008 the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment ("the CPT") visited Montenegro.[1]

89. During its visit the CPT noted, *inter alia*, "the alarming level of overcrowding" in the remand prison in Podgorica. In particular, a cell measuring 28 m² with fifteen sleeping places (provided on five three-tier beds) was holding twenty-one male prisoners. In many cells prisoners had

[1] The Report prepared by the CPT after the said visit is available at http://www.cpt.coe.int/documents/mne/2010-03-inf-eng.htm .

to sleep on mattresses or just folded blankets placed directly on the floor. The majority of the cells were stuffy and humid, despite the presence of large windows and air conditioners. Remand prisoners remained for twenty-three hours or more a day inside their cells, in some cases for several years. The only out-of-cell activity available to them was outdoor exercise taken in two thirty-minute periods, which was apparently not available on Fridays (see paragraphs 55 and 57 of the CPT report).

90. The situation in terms of health-care staff resources was far from satisfactory. General health care was provided by a sole doctor who was on call continuously, which could lead to long delays in receiving health care and affect its quality (see paragraph 62 of the CPT report).

91. There was no systematic approach to the handling of complaints by prisoners, nor was there any register of complaints. The prisoners' complaints and the reactions to them were kept in the personal files of the inmates concerned, some of the complaints having remained without a written answer (see paragraph 81 of the CPT report).

92. The CPT noted that prison establishments were visited by investigating judges, the Ombudsman and NGOs, but that such visits appeared to be rather infrequent and limited in scope as the visitors did not have any direct contact with prisoners (see paragraph 82 of the CPT report).

93. The CPT recommended that the Montenegrin authorities take a number of steps with regard to the above issues, one of them being a significant reduction of the occupancy level in the cells at the Remand Prison in Podgorica, the objective being to comply with the standard of 4 m² of living space per prisoner (see paragraphs 58, 64, 81 and 82 of the CPT report).

94. In February 2012 the CPT visited Montenegro again. The report prepared after that visit is not yet available.

B. European Commission Reports

95. The issue of prison conditions was also raised in the context of the process of Montenegro's accession to the European Union. In particular, in its Progress Reports of 2011 and 2012, the European Commission stated that although the prison conditions were improving, they were still not in line with international standards, overcrowding remaining a concern.[2]

[2] The relevant European Commission reports are available on the following websites: http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/mn_rapport_2011_en.pdf, and http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/mn_rapport_2012_en.pdf

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 5 § 3 OF THE CONVENTION

96. Relying on Articles 3 and 5 § 3 of the Convention, the applicant complained about the conditions of detention on remand. He also complained of a lack of medical care while in detention, as well as about the length of his detention.

97. The said Articles read as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 5 § 3

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Admissibility

1. Six months

98. The Government maintained that the applicant's submissions sent to the Court after the initial application had been lodged should be rejected as outside the six-month time-limit.

99. The applicant made no comment in that regard.

100. The Court has already held that multiple, consecutive detention periods should be regarded as a whole, and that the six-month period should only start to run from the end of the last period of pre-trial custody (see *Solmaz v. Turkey*, no. 27561/02, § 36, 16 January 2007). It is noted in this regard that the applicant's pre-trial detention ended on 4 October 2010, when he was convicted by the High Court (see paragraph 13 above). It is clear from the case file that the applicant's complaint about the length of detention was introduced on 15 November 2010 and that his complaints of poor conditions of detention and lack of medical care were submitted on 18 March 2011. It follows that those complaints were introduced within six months and cannot therefore be rejected as having been introduced outside the time-limit fixed by Article 35 of the Convention.

2. Non-exhaustion

a. Arguments of the parties

101. The Government maintained that the execution of detention was supervised by the president of the court (see paragraph 73 above), who reported in that regard to the Supreme Court and the Ministry of Justice. In particular, he or she could visit all detainees at any time, including following a request on the part of detainees, when they could complain about any aspect of the execution of their detention. The president of the court, or a judge designated by him or her, had a duty to take all necessary measures to remove any irregularities thus observed.

102. The Government further maintained that the applicant had failed to make use properly of a constitutional appeal, which was an effective domestic remedy. They submitted statistical data in that regard (see paragraph 87 above). The Government averred that in deciding on constitutional appeals, the Constitutional Court also decided on the rights which the applicant had invoked in his application. They did not submit any such decision or any other details in this connection.

103. The applicant, for his part, submitted that he had lodged constitutional appeals, two of which were still pending, which clearly meant that they were not a priority. Furthermore, deciding on his constitutional appeal in respect of his detention no longer made any sense, given that his conviction had become final in the meantime and his detention in the remand prison had thus ceased. He also maintained that in nine years he had witnessed only one delegation of the Supreme Court judges visiting the remand prison.

b. Relevant principles

104. The Court reiterates that, according to its established case-law, the purpose of the domestic remedies rule contained in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court. However, the only remedies to be exhausted are those which are effective.

105. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV).

106. The Court notes that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see *Akdivar and Others*, cited above, § 69).

c. The Court's assessment

i. Supervision of detention

107. The Court observes that the relevant legislation indeed provides for supervision of the execution of detention by the president of the competent court. However, the relevant legislation does not provide for a complaints procedure – before a court or an administrative authority – which would satisfy the effectiveness requirement in respect of the applicant's complaints (see paragraph 73 above; see also, *mutatis mutandis, Đermanović v. Serbia*, no. 48497/06, § 41, 23 February 2010). In addition, the CPT also noted the lack of a systematic approach to the handling of prisoners' complaints. It also observed that visits to prison establishments by judges, the Ombudsman and NGOs were rather infrequent and limited in scope (see paragraph 92 above).

108. In view of the above the Court considers that the supervision of detention by the president of the competent court cannot be considered an effective domestic remedy in this respect. The Government's objection in this regard must therefore be dismissed.

ii. Constitutional appeal

109. As regards the applicant's complaint about the conditions of detention and of a lack of medical care, the Court observes that pursuant to section 48 of the Constitutional Court Act of Montenegro, a constitutional appeal can only be lodged against an individual decision concerning one's human rights and freedoms (see paragraph 57 above). Taking into account that the Government have presented no case-law to the contrary, the Court considers that the constitutional appeal to the Constitutional Court of Montenegro cannot be considered an available remedy in cases of conditions of detention and lack of medical care, given that there was no "individual decision" concerning the applicant's rights in this respect against which such an appeal could have been lodged (see, *mutatis mutandis*, *Mijušković v. Montenegro*, no. 49337/07, §§ 73-74, 21 September 2010).

110. As regards the applicant's complaint about the length of the detention, the Court notes that he did lodge a constitutional appeal in this regard on 14 January 2010, but that the appeal was still pending more than three years later (see paragraph 23 above). As the applicant's detention ceased on 4 October 2010, and taking into account that the proceedings upon his constitutional appeal were still pending at least until March 2013,

the Court considers that a subsequent examination of his constitutional appeal by the Constitutional Court of Montenegro cannot be considered an effective domestic remedy.

111. The Government's objection must therefore be dismissed.

3. The Court's conclusion

112. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Article 3 of the Convention

a. Conditions of detention

i. The parties' submissions

α. The applicant

113. The applicant complained about the conditions of his detention. He maintained, in particular, that the cell in which he had been detained had been overcrowded, and that he had lacked drinking water and daily exercise (see paragraphs 33-36 above). He submitted that this had been witnessed and recorded in 2008 by a CPT delegation which had visited, *inter alia*, his cell and to which he and his cellmates had complained. All the improvements noted by the Government had taken place after the CPT's visit, and were irrelevant to his case.

β. The Government

114. The Government maintained that the cell in which the applicant had been detained had measured 28 m^2. Depending on the overall number of detainees at the time, there had usually been five or six people detained in the cell. Only during one short period of time had ten detainees been held in the cell. They further submitted that the applicant had had outdoor walks for thirty minutes twice a day, in the mornings and in the evenings, and that a shelter had been built over the exercise area. As of 2007 the president of the High Court had allowed the applicant to have weights in the cell.

115. The Government averred that in the summer of 2003 and 2004 there had been occasional shortages of water supply in general in the entire area where the Podgorica Prison is situated. However, they had lasted for several hours only and had not occurred on a daily basis. As of 2007 the problem had been resolved by building two wells within the prison, the water from which was both chemically and bacteriologically safe for use.

116. The Government further submitted that after the CPT's visit in 2008 the prison administration had taken a series of measures aimed at improving prison conditions, including in the remand prison. The most significant improvement was the reduction of inmates: at the time of the CPT visit in 2008 there had been 568 detainees, while in March 2013 there were 295. Furthermore, the remand prison was refurbished in the course of 2009 and 2010 by removing the infirmary and certain equipment, thereby creating seven new cells. Refurbishment of the remand prison continued at the end of 2012, and by March 2013 the first and second floors had been refurbished as well as forty-five cells on the ground floor. The refurbishment involved changing the electricity, sewage and water supply installations.

117. Most of the prison premises were also refurbished and adapted with the aim of resolving the problem of overcrowding, including the wing for short-term prisoners. Other measures included: refurbishment of the kitchen; renovation of sports rooms and outdoor sports grounds; increase in the number of employees, including in the medical service, and their training; preparation of a strategy aimed at preventing violence amongst persons deprived of their liberty; setting up a team for mediation and peaceful resolution of disputes amongst the persons deprived of their liberty; as well as the adoption of a new Criminal Procedure Code and new Detention Rules. There were also plans to build a wing for long-term prisoners, a prison hospital, and a structure for religious purposes.

118. The detainees could also complain to the Ombudsman by means of boxes installed in all the pavilions of the prison, which could be opened only by the Ombudsman's Office staff.

ii. The Court's assessment

119. The Court has already held that severe overcrowding raises in itself an issue under Article 3 of the Convention (see *Kadiķis v. Latvia (no. 2)*, no. 62393/00, § 52, 4 May 2006). In particular, Article 3 was breached in a case where an applicant had been detained for almost nine months in extremely overcrowded conditions (10 m^2 for four inmates) with little access to daylight, limited availability of running water, especially during the night, and strong smells from the toilet, and with insufficient and poor quality food and inadequate bed linen (see *Modarca v. Moldova*, no. 14437/05, §§ 60-69, 10 May 2007).

120. The Court reiterates that Article 3 requires the State to ensure that prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94,

ECHR 2000-XI, and *Melnītis v. Latvia*, no. 30779/05, § 69, 28 February 2012).

121. Turning to the present case, the Court notes the applicant's submissions that the cell in which he had been detained, and which had also contained closets, a sanitary facility and a dining table, had measured 25 m^2 and had housed fourteen detainees, sleeping on three-tier beds.

122. The Court observes that these submissions are supported by the CPT, which observed in its report "the alarming level of overcrowding" in the remand prison at the relevant time. In particular, a cell measuring 28 m² with fifteen sleeping places was holding twenty-one male prisoners, which fell well below the 4 m^2 per person recommended by the CPT (see paragraph 58 of the CPT report). The majority of the cells were stuffy and humid, despite the presence of large windows and air conditioners. Remand prisoners remained inside their cells for twenty-three hours or more a day, in some cases for several years (see paragraph 89 above and the relevant paragraphs of the CPT report cited therein).

123. In the light of the CPT's observations made during its visit to the remand prison and especially in view of the conditions of overcrowding observed by the CPT, the Court finds unconvincing the Government's submission that the applicant was only once and for a short period of time detained with more than nine other people in a cell measuring 28 m^2. They failed, *inter alia*, to say exactly when that happened and how long it lasted. The Court notes that even in such conditions the applicant would have had 2.8 m^2 for himself, which in itself is sufficient for the Court to conclude that there has been a violation of Article 3 of the Convention (see, for example, *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 148, 10 January 2012, and *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, § 68, 8 January 2013).

124. The Court, however, observes in addition the Government's acknowledgment that the applicant had been allowed two thirty-minute walks per day, as noted also by the CPT, whereas the relevant legislation provided for at least two hours' exercise (see paragraph 71 above). They also admitted the shortages of water, although apparently only occasional. The parties' submissions differ as to whether the well built in 2007 resolved that issue.

125. It is noted that the prison administration took a number of measures aimed at improving the conditions in prison, including in the remand prison. It is observed, however, that those measures were taken only after 2008, and that the most significant improvement was the reduction in the number of inmates, which was nearly halved by March 2013. The Court, however, notes that the applicant's detention on remand ended on 4 October 2010 and it is difficult to see from the Government's submissions how the reduction

achieved over time affected the conditions of the applicant's detention while it lasted.

126. While the Government submitted that the remand prison had been renovated in 2009, 2010 and 2012, the Court notes that the works in 2012 took place after the applicant's detention there had ended and that the Government failed to specify exactly when the renovation undertaken in the course of 2009 and 2010 was finalised, or how it resolved the overcrowding in the applicant's cell. It is further noted in this connection that the other improvements specified by the Government related to kitchen and sports facilities, staff and their training, and legislative changes. While those improvements were praiseworthy, they did not affect the issue of overcrowded cells, which would appear to have remained a concern still in 2011 and 2012 (see paragraph 95 above).

127. In view of the above, the Court concludes that there has been a violation of Article 3 of the Convention in this regard.

b. Alleged lack of medical care

i. The parties' submissions

128. The applicant also complained of a lack of medical care in detention. In particular, he maintained that medical examinations had been organised at best once a week, regardless of his needs. He submitted two medical reports in this regard, one issued on 7 March 2006 and the other on 15 March 2011 (see paragraphs 39 and 41 above).

129. The Government maintained that the applicant had been examined by the prison doctor as well as by a number of specialists at the clinical centre of Montenegro. In particular, his chest pain had been thoroughly examined in the cardiology centre in 2006 and 2011. He had also been duly and promptly treated for all other medical complaints, as was noted in his medical file. They submitted the applicant's entire medical file.

ii. The relevant principles

130. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). Ill-treatment must, however, attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Verbinţ v. Romania*, no. 7842/04, § 63, 3 April 2012, and *Gelfmann v. France*, no. 25875/03, § 48, 14 December 2004).

131. The Court reiterates that when assessing the adequacy of medical care in prison, it must reserve, in general, sufficient flexibility in defining the required standard of health care, which must accommodate the legitimate demands of imprisonment but remain compatible with human dignity and the due discharge of its positive obligations by the State. In this regard, it is incumbent upon the relevant domestic authorities to ensure, in particular, that diagnosis and care are prompt and accurate, and that supervision by proficient medical personnel is regular and systematic, and involves a comprehensive therapeutic strategy. The mere fact of a deterioration in an applicant's state of health, albeit capable of raising, at an initial stage, certain doubts concerning the adequacy of the applicant's treatment in prison, cannot suffice, by itself, for the finding of a violation of the State's positive obligations under Article 3 of the Convention, if, on the other hand, it can be established that the relevant domestic authorities have in a timely fashion provided all reasonably available medical care in a conscientious effort to hinder development of the disease in question (see, among many others, *Jashi v. Georgia*, no. 10799/06, § 61, 8 January 2013, and *Fedosejevs v. Latvia* (dec.), no. 37546/06, § 47, 19 November 2013).

iii. The Court's assessment

132. It is noted that when he was arrested the applicant had no illness or special condition. Therefore, he did not require any regular and specialised medical supervision or monitoring of the progression rate of any disease at the time (see paragraph 38 above; see also, *a contrario, Kozhokar v. Russia*, no. 33099/08, § 108, 16 December 2010).

133. The applicant's dissatisfaction with the medical care afforded to him in detention in substance lies in the fact that medical examinations were allegedly organised only once a week, regardless of his needs, and, implicitly, that he had not been afforded the necessary cardiological examinations (see paragraph 128 above).

134. In this respect, the Court notes that during his detention the applicant was examined a number of times by various specialists and duly received the necessary treatment. The only time he did not undergo a further specialist examination was in March 2006 (see paragraph 39 above). However, there is no indication in the case file that the recommended examination was urgent, or that without it the applicant was left to suffer considerable pain, or any pain for that matter (see, *mutatis mutandis*, *Wenerski v. Poland*, no. 44369/02, § 64, 20 January 2009). There is no evidence in the case file that on any other occasion the applicant needed or was denied any – let alone necessary and urgent – medical assistance and was in consequence caused suffering. In this connection, it is noted that in March 2011 the applicant was duly and thoroughly examined by a cardiologist at the clinical centre of Montenegro (see paragraph 42 above). The applicant, for his part, failed to explain in a detailed and convincing

manner why he considered that the medical treatment he received was inadequate or in any other way in breach of the guarantees provided for in Article 3 of the Convention.

135. In these circumstances, on the basis of the evidence before it and assessing the relevant facts as a whole, the Court finds that the failure of the authorities to provide for a further medical examination in March 2006 did not attain a sufficient level of severity to entail a violation of Article 3 of the Convention (see *Kudła*, cited above, § 99; *Matencio v. France*, no. 58749/00, § 89, 15 January 2004; *Filip v. Romania*, no. 41124/02, §§ 39-44, 14 December 2006).

136. In the light of the foregoing, the Court concludes that has been no violation of Article 3 of the Convention in this regard.

2. Article 5 § 3 of the Convention

a. The parties' submissions

137. The applicant complained about the length of his continuous detention between 27 June 2002 and 21 March 2011, when the relevant court's decision became final.

138. The Government contested the applicant's claim. They submitted that the relevant period had begun on 20 April 2004, when the applicant was extradited to Montenegro, and had lasted until 26 April 2011, when he was served with the final decision and transferred to prison.

139. The Government maintained that the applicant's detention was proportionate to the legitimate aim of ensuring his presence at trial and thus conducting the criminal proceedings. There had been no doubt that he might abscond, given that he had fled before and had been arrested pursuant to an international arrest warrant. Confiscating his passport would not have been sufficient, as when he had fled the country he had crossed the border illegally. In view of all the circumstances of the case, the Government considered that neither bail (*jemstvo*) nor any other alternative measure would have been effective.

140. The applicant's detention was also duly re-examined at reasonable intervals and the courts' decisions to extend it were reasonable and in accordance with the law, given that there were still relevant and sufficient reasons for the protection of the public interest, which prevailed over the presumption of innocence in favour of the applicant.

b. The relevant principles

141. The Court reiterates that the persistence of reasonable suspicion that an arrested person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation

of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered in this respect (see, for example, *Solmaz v. Turkey*, no. 27561/02, § 40, 16 January 2007).

142. While previous absconding is a factor to be taken into account (see *Punzelt v. the Czech Republic*, no. 31315/96, § 76, 25 April 2000), the Court reiterates that the risk that the accused might flee cannot be evaluated in isolation. Other factors, especially those relating to his or her character, morals, home, occupation, assets, family ties and all kinds of links with the country in which he or she is being prosecuted may either confirm the existence of a risk of absconding, or make it appear so small that it cannot justify detention pending trial. However, the risk of absconding necessarily decreases as the time spent in detention passes by, because the likelihood that the period spent in custody will be deducted from the prison sentence which the detainee may expect if convicted is likely to make the prospect of prison less daunting and reduce his temptation to flee (see *Neumeister v. Austria*, 27 June 1968, § 10, Series A no. 8).

143. Even if detention is justified under Article 5 § 3, that provision may still be infringed if the accused's detention is prolonged beyond a reasonable time because the proceedings have not been conducted with the required expedition, as Article 5 § 3 requires that in respect of a detained person the authorities show "special diligence in the conduct of the proceedings" (see *Herczegfalvy v. Austria*, 24 September 1992, § 71, Series A no. 244). While very long periods of detention do not automatically violate Article 5 § 3, the Court notes that it is usually exceptional circumstances that justify such long periods of detention (see, for example, *Chraidi v. Germany*, no. 65655/01, §§ 46-48, ECHR 2006-XII).

c. The Court's assessment

144. The Court reiterates that in determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see *Panchenko v. Russia*, no. 45100/98, § 90, 8 February 2005, and *Labita v. Italy* [GC], no. 26772/95, §§ 145 and 147, ECHR 2000-IV).

145. Accordingly, the period to be taken into consideration in the applicant's case consisted of two separate terms: (1) from 3 March 2004, when the Convention entered into force in respect of the respondent State (see *Jablonski v. Poland*, no. 33492/96, §§ 65-66, 21 December 2000), until his conviction on 10 April 2009; and (2) from 29 January 2010, when the applicant's conviction was quashed on appeal, until his subsequent

conviction on 4 October 2010 (see *Đermanović v. Serbia*, cited above, §§ 67-68).

146. As the Court should make a global evaluation of the accumulated periods of detention under Article 5 § 3 of the Convention when assessing the reasonableness of the length of the applicant's pre-trial detention (see *Solmaz v. Turkey*, cited above, §§ 36-37), the period to be taken into consideration in the applicant's case amounts to five years eight months and fifteen days.

147. The Court notes that at the time when the initial detention was ordered there was a reasonable suspicion that the applicant had murdered X. The detention was ordered for fear that he might abscond owing to the fact that he had already fled before. The subsequent decisions extending the detention evolved so as to take into account the gravity of the criminal offence of which the applicant was accused, the sentence that might be imposed on him, as well as his personal circumstances (see paragraphs 25, 27 and 28 above).

148. The Court considers that the reasons advanced by the domestic authorities were certainly relevant. However, in the specific circumstances of the case, it does not consider it necessary to examine whether they were also sufficient or whether the domestic authorities should have considered in addition alternative measures to secure the applicant's presence at trial as in any event the criminal proceedings in question were not conducted with the required expedition, as acknowledged by the domestic courts themselves (see paragraph 22 above), and as required by Article 5 § 3 (see *Herczegfalvy*, cited above, § 71). As there were no exceptional circumstances in the present case that could justify such lengthy proceedings (compare and contrast to *Chraidi v. Germany*, cited above, §§ 43-45), the Court considers that the applicant's detention exceeding five years was extended beyond a reasonable time (see *Korchuganova v. Russia*, no. 75039/01, §§ 71 *in limine* and 77, 8 June 2006; *I.A. v. France*, 23 September 1998, §§ 98 and 112, *Reports of Judgments and Decisions* 1998-VII; and *Khudoyorov v. Russia*, no. 6847/02, §§ 175 and 189, ECHR 2005-X (extracts)).

149. There has accordingly been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

150. Under Article 6 of the Convention the applicant complained about the length of the criminal proceedings, as well as their fairness and outcome.

A. Length of the proceedings

151. The Court reiterates that an individual can no longer claim to be a victim of a violation of the Convention when the national authorities have acknowledged, either expressly or in substance, a breach of the Convention and have provided redress (see *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51). Given the fact that the Supreme Court expressly acknowledged that the criminal proceedings against the applicant had been unreasonably long and awarded him EUR 2,000 on that account, the Court considers that he can no longer claim to have victim status.

152. Although the applicant's constitutional appeal in this regard is still pending, the Court has already held that a constitutional appeal cannot be considered an effective remedy with regard to the length of proceedings and that hence it is not necessary to exhaust that remedy (see *Boucke v. Montenegro*, no. 26945/06, §§ 76-79, 21 February 2012).

153. It follows that this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

B. Fairness and outcome of the proceedings

154. While the Court notes that the applicant withdrew his constitutional appeal in this regard, it does not consider it necessary to examine the effectiveness of the said remedy as, in any event, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

155. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 12

156. The applicant also complained, under Article 14 of the Convention and Article 1 of Protocol No. 12 thereto, that the Criminal Procedure Act 1977, which had been applied to him, had not limited the duration of his detention, whereas the Criminal Procedure Code 2003 would have done so.

157. The Court reiterates that it is not its task to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they affected the applicant gave rise to a violation of the Convention (see, *mutatis mutandis*, *Padovani v. Italy*, 26 February 1993, § 24, Series A no. 257-B), that is whether the applicant's detention was too lengthy or not, which question was examined in paragraphs 144 to 150 above. In so far as it

can be understood that the applicant also implicitly complained that the Criminal Procedure Code 2003 had not been applied in respect of his case, the Court notes that the relevant provisions clearly provided that this Code would apply only to proceedings instituted after 6 April 2004 (see paragraphs 70 and 76 above), whereas the proceedings against the applicant were initiated before that date (see paragraph 10 above). It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

158. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

159. The applicant claimed 300,000 euros (EUR) in respect of pecuniary damage.

160. The Government contested the applicant's claim as unfounded, unrealistic and contrary to the Court's case-law.

161. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As the applicant submitted no claim in respect of non-pecuniary damage or costs and expenses, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning conditions of detention, lack of medical care in detention and the length of detention admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention in respect of the conditions of detention;

3. *Holds* that there has been no violation of Article 3 of the Convention in respect of medical care in detention;

4. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

5. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 July 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Deputy Registrar

Guido Raimondi
President