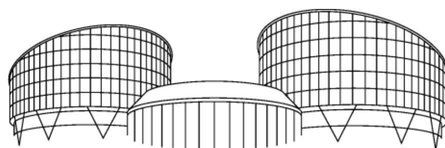

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MAŠIREVIĆ v. SERBIA

(Application no. 30671/08)

JUDGMENT

STRASBOURG

11 February 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

In the case of Maširević v. Serbia,

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

Guido Raimondi, *President,*
Peer Lorenzen,
Dragoljub Popović,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller,
Egidijus Kūris, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 21 January 2014,

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

PROCEDURE

1. The case originated in an application (no. 30671/08) against 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 Milan Maširević (“the applicant”), on 13 May 2008.

2. The applicant was represented by Mr G. Todorić, a lawyer practising in Beočin. The Serbian Government (“the Government”) were represented by their Agent, Mr S. Carić.

3. The applicant alleged, in particular, that he had been unlawfully denied access to the Supreme Court of Serbia.

4. On 6 January 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. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1940 and lives in Sombor.

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

7. On 8 July 1998 the applicant, a practising lawyer, filed a civil claim with the Municipal Court in Novi Sad, seeking payment of fees from a private insurance company (“the respondent”) for the service rendered on account of a legal fee agreement concluded in 1995.

8. On 17 September 1998 the Municipal Court ordered that payment (*izdao platni nalog*). The respondent objected to this order.

9. On 27 September 2001, in the course of a hearing, the respondent filed a counter-claim, requesting the Municipal Court to declare the 1995 contract null and void.

10. On 16 September 2002 the Municipal Court decided to join the proceeding initiated by the claim and the counter-claim.

11. On 24 November 2003 the Municipal Court quashed the payment order of 17 September 1998, rejected the applicant's claim, declared a part of the contract void and decided that the other part of the contract remained in force.

12. On an unspecified date the applicant appealed against this judgment.

13. On 24 February 2005 the District Court in Novi Sad upheld this judgment on appeal.

14. On an unspecified date in April 2005, the applicant filed an appeal on points of law (*revizija*).

15. On 30 November 2006 the Supreme Court returned the file to the District Court, which had apparently failed to adjudicate a part of the applicant's appeal.

16. On 25 April 2007 the District Court adopted a supplementary judgment (*dopunska presuda*), rejecting that part of the applicant's appeal.

17. On 24 October 2007 the Supreme Court dismissed the applicant's appeal on points of law (*odbacio reviziju kao nedozvoljenu*), stating that the applicant was not entitled to lodge it, given that Article 84 of the Civil Procedure Act 2004 prescribes that an appeal on points of law may only be submitted by an attorney at law, not the plaintiff personally. The Supreme Court specified that, according to this Act, parties to the proceedings had lost the legal capacity to file an appeal on points of law individually, even if they were themselves attorneys at law.

18. The decision of 24 October 2007 was served on the applicant on 14 January 2008.

19. On 11 February 2008 the applicant lodged an appeal with the Constitutional Court of Serbia.

20. On 13 May 2008 the Constitutional Court requested the applicant to specify his complaint.

21. On 6 June 2008 the applicant filed his amended constitutional appeal.

22. On 25 March 2009 the Constitutional Court dismissed the applicant's appeal as incomplete.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Civil Procedure 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, 35/91 and the Official Gazette of the Federal Republic of Yugoslavia, nos. 27/92, 31/93, 24/94 and 12/98)

23. Article 382 § 1 provides that parties to the proceedings shall have the right to file an appeal on points of law (*revizija*) with the Supreme Court within one month as of the date of receipt of the judgment rendered on appeal.

24. In accordance with Articles 383 and 394-397, *inter alia*, the Supreme Court shall, should it accept an appeal on points of law lodged by one of the parties concerned, have the power to overturn the impugned judgment or quash it and order a retrial before the lower courts.

B. The Civil Procedure Act 2004 (*Zakon o parničnom postupku*; published in the Official Gazette of the Republic of Serbia - OG RS - nos. 125/04 and 111/09)

25. The Civil Procedure Act 2004 (hereinafter "the 2004 Act") entered into force on 23 February 2005, thereby repealing the Civil Procedure Act 1977 (hereinafter "the 1977 Act").

26. Article 84 § 2 provides that a party must be represented by legal counsel in the proceedings initiated on the basis of an appeal on points of law.

27. Article 401 § 2(2) provides that an appeal on points of law shall be declared inadmissible, *inter alia*, if it was lodged by an individual who is not a practising lawyer.

28. Article 491 § 4 provides that "the applicable rules of civil procedure, as regards an appeal on points of law lodged against a decision of a second-instance court, in proceedings which had been initiated before the date on which the current Act had entered into force, shall be those rules which were in force prior to the said date".

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

C. The Civil Procedure Act 2011 (*Zakon o parničnom postupku*; published in OG RS, no. 72/11)

30. The Civil Procedure Act 2011 (hereinafter "the 2011 Act") entered into force on 1 February 2012, thereby repealing the 2004 Act.

31. Article 85 § 2 provides that a party must be represented by legal counsel in the proceedings initiated on the basis of an extra-ordinary remedy, save if the party is a practising lawyer himself.

32. Article 426.11 provides that a case may be reopened if a party to civil proceedings gains an opportunity to rely on a judgment of the European Court of Human Rights finding a violation of a human right, which may have precluded a more favourable outcome of the civil proceedings in question.

D. The Constitutional Court's case-law

1. *Decisions of the Constitutional Court of 27 January 2010 (Už. 546/2008) and 13 May 2010 (Už. 603/2008)*

33. Finding a violation of the right of access to a court, the Constitutional Court stated, *inter alia*, that the Supreme Court had erred in applying the 2004 Act, because in all cases which had been brought before 23 February 2005, the applicable legislation, as regards an appeal on points of law, should have been the legislation which was in force prior to that date.

2. *Decision of the Constitutional Court of 16 December 2010 (Už. 250/2009)*

34. In this case, the appellant, a practising lawyer, challenged the Supreme Court's dismissal of his appeal on point of law in September 2008 and its finding that, according to Article 84 § 2 of the 2004 Act, the parties to the proceedings had lost the legal capacity to file an appeal on points of law individually, even if they were themselves attorneys at law.

Finding a violation of the right to fair trial, the Constitutional Court, *inter alia*: (a) found that the Supreme Court's interpretation of Article 84 § 2 had not had a basis in domestic law; (b) specified, referring to Articles 84 § 2 and 401 § 2(2), that only the parties to the proceedings who were not registered lawyers had lost the capacity to submit an appeal on points of law, while appeals on points of law which had been submitted by registered attorneys could not be declared inadmissible; and (c) quashed the Supreme Court's decision of September 2008 and ordered a new adjudication of the appeal on points of law in accordance with its findings in the present case.

THE LAW

I. THE GOVERNMENT'S REQUEST FOR THE APPLICATION TO BE STRUCK OUT UNDER ARTICLE 37 OF THE CONVENTION

35. By a letter dated 29 April 2011 the Government submitted a unilateral declaration with a view to resolving the issue raised by the present application and requested the Court to strike it out of its list of cases.

36. On 19 July 2011 the applicant objected to the Government's proposal.

37. The Court reiterates that in certain circumstances it may strike out an application under Article 37 § 1 (c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued. However, having carefully examined the terms of the Government's unilateral declaration in the light of the principles emerging from its case-law (see *Tahsin Acar v. Turkey* (preliminary issue) [GC], no. 26307/95, §§ 74-77, ECHR 2003-VI, and *Van Houten v. the Netherlands* (striking out), no. 25149/03, §§ 34-37, ECHR 2005-IX), the Court finds that the Government have failed to establish a sufficient basis for a finding that respect for human rights as defined in the Convention and its Protocols does not require the Court to continue its examination of the case (see, *for example*, *Šarić and Others v. Croatia*, nos. 38767/07 et seq., §§ 26-30, 18 October 2011 and *Rozhin v. Russia*, no. 50098/07, § 23, 6 December 2011; see also *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003 and paragraphs 29 and 32 above, Article 422.10 of the 2004 Act and Article 426.11 of the 2011 Act respectively).

38. This being so, the Court rejects the Government's request to strike the application out of its list of cases under Article 37 of the Convention and will accordingly pursue its examination of the admissibility and merits of the case.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

39. The applicant complained that the Supreme Court's refusal to consider his appeal on points of law when he had had the right to use this remedy violated his right of access to a court guaranteed by Article 6 § 1 of the Convention, the relevant part of which provides as follows:

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

A. Admissibility

40. In view of the Constitutional Court's practice in cases on the same matter as that of the applicant (see paragraphs 33-4 above), the Government claimed that the constitutional appeal avenue might have been an effective domestic avenue of redress in respect of the alleged violation. The applicant, although a lawyer who should have acted with special diligence, had indeed attempted to exhaust it, but had not complied with the relevant domestic procedural rules. Therefore, the application should be declared inadmissible.

41. The applicant contested the Government's arguments.

42. The Court reaffirms that a constitutional complaint remains, in principle, a remedy to be exhausted within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced as of 7 August 2008 (see *Vinčić and Others v. Serbia*, nos. 44698/06 et seq., § 51, 1 December 2009). In the present case, however, since the applicant had lodged his case with the Court before that date and because the issue of whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged (see *Cvetković v. Serbia*, no. 17271/04, § 41, 10 June 2008; and *Baumann v. France*, no. 33592/96, §§ 24-35, 22 May 2001), the Court considers that the applicant had no obligation to exhaust this particular avenue of redress before turning to Strasbourg. Accordingly, the Government's objection in this respect must be dismissed.

43. The Court also notes that the 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

44. The applicant claimed that the Supreme Court erroneously applied the 2004 Act, as the applicable legislation in the proceedings should have been Article 382 § 1 of the 1977 Act (see paragraph 23 above), based on which provision his appeal would have been admissible.

45. The Government reaffirmed their inadmissibility arguments. In that respect, they further invited the Court to examine the case "having regard to the conduct of the applicant before domestic courts (*Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII)". Finally, the Government invited the Court to reject the application in view of the consistent practice of the Supreme Court. In that respect, the Government provided a letter of the Supreme Court dated 25 February 2011, wherein the said court stated that it had not adopted a general legal opinion (*pravno shvatanje*) on the

application of Article 491 § 4 of the 2004 Act, but that the decision, which was adopted in the applicant's case, corresponded to its consistent practice on the issue.

2. *The Court's assessment*

46. The Convention does not compel the Contracting States to set up courts of appeal in civil cases. However, where such courts do exist, the guarantees of Article 6 must be complied with, *inter alia,* by ensuring to litigants an effective access to the courts for the determination of their "civil rights and obligations" (see, among many other authorities, *Levages Prestations Services v. France*, 23 October 1996, Reports 1996-V, pp. 1544-45, § 44, and *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, § 13-15). The Court reiterates that 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). Nevertheless, the right to a court is not absolute and may be subject to limitations, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State which enjoys a certain margin of appreciation in this matter (see *Golder v. the United Kingdom*, 21 February 1975, § 38, Series A no. 18; *García Manibardo v. Spain*, no. 38695/97, § 36, ECHR 2000-II, and *Mortier v. France*, no. 42195/98, § 33, 31 July 2001). Where an individual's access is limited either by operation of law or in fact, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; specifically, such limitations will only be compatible with Article 6 § 1 if they pursue a legitimate aim and there is a proportionality between the means employed and the aim pursued (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93).

47. As regards courts of cassation, the Court has held that given the special nature of their role, which is limited to reviewing whether the law has been correctly applied, the procedure followed may be more formal (see *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 41, ECHR 2002-VII). In this connection, a requirement that an appellant be represented by a qualified lawyer before the court of cassation, as in the present case, cannot in itself be seen as contrary to Article 6. This requirement is clearly compatible with the characteristics of the Supreme Court as the highest court examining appeals on points of law, and it is a common feature of the legal systems in several member States of the Council of Europe (see *Gillow v. the United Kingdom*, judgment of 24 November 1986, Series A no. 109, § 69; *Vacher v. France*, judgment of

17 December 1996, §§ 24 and 28, *Reports of Judgments and Decisions* 1996-VI; and *Tabor v. Poland,* no. 12825/02, § 39, 27 June 2006).

48. Lastly, it is indeed in the first place for the national authorities, and notably the courts, to interpret domestic law. However, the Court has to verify compatibility with the Convention of the effects of such an interpretation (see *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports* 1997-VIII; *Garzičić v. Montenegro*, no. 17931/07, § 32, 21 September 2010, and *Jovanović v. Serbia*, no. 32299/08, § 50, 2 October 2012). This applies in particular to the interpretation by courts of rules of a procedural nature, given that their particularly strict interpretation may deprive an applicant of the right of access to a court (see *Běleš and others v. the Czech Republic*, no. 47273/99, § 60, 12 November 2002, and *Zvolský* and *Zvolská v. the Czech Republic*, no. 46129/99, 12 November 2002). The Court's role in cases such as the present case is to determine whether the procedural rules were intended to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty (see, *mutatis mutandis*, *Efstathiou and Others v. Greece,* no. 36998/02, §§ 24, 27 July 2006*,* and *Syngelidis v. Greece,* no. 24895/07, § 41, 11 February 2010) and whether the applicant was able to count on a coherent system that struck a fair balance between the authorities' interests and his own interest (see, *mutatis mutandis*, *Lay Lay Company Limited v. Malta*, no. 30633/11, § 56, 23 July 2013).

49. Turning to the present case, the Court notes that the Supreme Court's dismissal of the applicant's appeal on points of law because he was not entitled to lodge it *in propria persona* (i.e. on his own behalf without being represented by an attorney at law), clearly amounts to an interference with the applicant's right of access to a court. In so doing, the Supreme Court relied on Article 84 § 2 of the 2004 Act, which entered into force on 23 February 2005 (see paragraphs 25-6 above).

50. The Court further notes that the applicant filed his civil claim in 1998 and his appeal on points of law in April 2005. Article 491 § 4 of the 2004 Act provided that, as regards an appeal on points of law lodged in proceedings which had been initiated before the date on which the 2004 Act entered into force, it is the procedural rules which were in force prior to that date which should be applicable. Concerning the question which law should have been applied at the material time and therefore whether the impugned interference was in accordance with domestic law, the Court notes that Article 491 § 4 of the 2004 Act may indeed be open to different interpretations (see paragraph 28 above; see also *Momčilović v. Serbia*, no. 23103/07, § 31, 2 April 2013). The Court likewise observes that there appears to have been an inconsistency between the Constitutional Court's and the Supreme Court's interpretation of the relevant wording of Article 491 § 4 (see paragraphs 28, 7, 14, 17, and 33, in that order). In that regard, the Court reiterates that the authorities should respect and apply domestic

legislation in a foreseeable and consistent manner and that the prescribed elements should be sufficiently developed and transparent in practice in order to provide for legal and procedural certainty (see *Jovanović v. Serbia*, no. 32299/08, § 50, 2 October 2012).

51. In any event, even assuming that the Supreme Court had properly applied the 2004 Act, the Court observes that the applicant was himself a practising lawyer qualified to lodge appeals on points of law on behalf of others. In these circumstances, the Supreme Court's strict interpretation of the domestic law in respect of the applicant's *locus standi* precluded a full examination of the merits of his allegations. This barrier imposed on the applicant, therefore, did not serve the aims of legal certainty or the proper administration of justice (see also paragraph 34 above).

52. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 § 1 of the Convention, it being understood that it is not this Court's task to determine what the actual outcome of the applicant's appeal on points of law should have been had the Supreme Court accepted to consider it on its merits (see, *mutatis mutandis*, *Vasilescu v. Romania*, 22 May 1998, § 39, *Reports* 1998-III, and *Jovanović v. Serbia*, cited above, § 51).

III. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

53. The relevant provisions of these Articles 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

54. In respect of pecuniary and non-pecuniary damage, the applicant claimed the amount of the compensation requested domestically, plus default interest, i.e. a total of 8,913,083.91 dinars (approximately 85,810 euros; "EUR").

55. The Government found the claim to be groundless.

56. The Court sees no reason to doubt that the applicant has suffered distress as a result of the breach of his right secured under Article 6 of the Convention, which is why a finding of a violation of this provision alone would clearly not constitute sufficient just satisfaction. Having regard to the above and on the basis of equity, as required by Article 41, the Court awards the applicant EUR 2,000 in respect of non-pecuniary damage.

57. Given the relevant provisions, it follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned any sums awarded under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII). The aim is to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded.

58. The Court's task is not to speculate about the actual outcome of the applicant's appeal on points of law or any pecuniary damage he may have sustained in that connection. The Court considers that the most natural execution of its judgment, and that which would best correspond to the principle of *restitutio in integrum* (see *Emre v. Switzerland (no. 2)*, no. 5056/10, § 69, 11 October 2011), would be that the respondent State ensure, with diligence, through appropriate procedure and if the applicant so requests, that his appeal on points of law receives an examination on its merits in accordance with the requirements of Article 6 § 1 of the Convention (see paragraphs 29 and 32 above, and, *mutatis mutandis*, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003).

B. Costs and expenses

59. The applicant also claimed EUR 500 for the costs and expenses incurred before the Court.

60. The Government contested this claim.

61. 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 requested sum for the proceedings before the Court.

C. Default interest

62. 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, to be converted into Serbian dinars at the rate applicable on the date of settlement:

(i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 500 (five hundred 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 11 February 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President