CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 77784/01
by Zvonko NOGOLICA
against Croatia

The European Court of Human Rights (First Section), sitting on 5 September 2002 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr G. BONELLO,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY,
Mrs E. STEINER, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application lodged on 17 September 2001,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Zvonko Nogolica, is a Croatian citizen, who was born in 1962 and lives in Zagreb. He is represented before the Court by Ms Marta Marić, a lawyer practising in Zagreb.

A. The circumstances of the case

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

On 5 October 1995 the applicant filed two civil actions for damages with the Zagreb Municipal Court (*Općinski sud u Zagrebu*), one against the newspaper "Arena" and the other against the newspaper "Globus International", claiming that these newspapers had published libellous articles about him.

1. Proceedings against "Arena"

On 22 February 1996 and 9 June 1997 the first instance court held hearings.

At the hearing on 17 October 1997 the Court heard the applicant.

At the hearing on 1 October 1998 the court heard one witness.

The hearing scheduled for 19 November 1998 was adjourned for 12 March 1999 when the court heard another witness and an expert.

At the next hearing on 2 February 2000 the court heard yet another witness and concluded the trial.

The first instance judgment, rejecting the applicant's claim, was served on the applicant on 10 April 2000.

On 24 April 2000 the applicant filed an appeal against the judgment.

On 5 March 2001 the case-file was transferred to the Zagreb County Cout (*Županijski sud u Zagrebu*) as the appellate court.

The proceedings are presently pending before the appellate court.

2. Proceedings against "Globus Interantional"

The first instance court held a hearing on 1 April 1996.

At the hearing on 17 April 1998 the defendants submitted their replies to the applicant's claim.

At the next hearing on 13 April 1999 the court heard the applicant.

The hearings scheduled for 27 September 1999 and 26 November 1999 were adjourned because the witnesses summoned for these hearings did not appear.

On 28 February 2000 the court heard one witness and concluded the trial. Four months later the first instance judgment, rejecting the applicant's claim, was served on the applicant.

On 6 June 2000 the applicant appealed against the first instance judgment.

On 5 March 2001 the case-file was transferred to the Zagreb County Court as the appellate court.

The proceedings are presently pending before the appellate court.

B. Relevant domestic law

Section 26 of the Constitutional Act on the Changes of the Constitutional Act on the Constitutional Court (entered into force on 15 March 2002, published in the Official Gazette no. 29 of 22 March 2002 - hereinafter "The Act of 15 March 2002" - *Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu Republike Hrvatske*) introduced a new Section 59 (a), which subsequently became Section 63 of the 2002 Constitutional Act on the Constitutional Court. The relevant parts of that Section read as follows:

> (1) The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted in cases when 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 ...
>
> (2) If the constitutional complaint ... under paragraph 1 of this Section is accepted, the Constitutional Court shall determine a time-limit within which a competent court shall decide the case on the merits...
>
> (3) In a decision under paragraph 2 of this Article, the Constitutional Court shall fix appropriate compensation for the applicant in respect of the violation found concerning his constitutional rights ... The compensation shall be paid from the State budget within a term of three months from the date when the party lodged a request for its payment.

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention about the length of two sets of civil proceedings.

He also complains under Article 13 of the Convention that he has no effective remedy in respect of his claim about the length of the proceedings.

THE LAW

1. The applicant complains that the proceedings concerning his two claims for damages before the Zagreb Municipal and County Courts have not been concluded within reasonable time as required under Article 6 § 1 of the Convention, the relevant parts read as follows:

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

The Court has firstly examined whether the applicant has complied with the rule of exhaustion of domestic remedies as required under Article 35 § 1 of the Convention.

The Court recalls that in the Horvat case (see *Horvat v. Croatia* no. 51585/99, 26 July 2001, §§ 41-43, 45, ECHR - 2002...), it found that the proceedings pursuant to Section 59(4) of the 1999 Constitutional Court's Act were considered as being instituted only if the Constitutional Court, after a preliminary examination of the complaint, decided to admit it. Thus, although the person concerned could lodge a complaint directly with the Constitutional Court, the formal institution of proceedings depended on the latter's discretion.

Furthermore, for a party to be able to lodge a constitutional complaint pursuant to that provision two cumulative conditions must have been satisfied. Firstly, the applicant's constitutional rights had to be grossly violated by the fact that no decision had been issued within a reasonable time and, secondly, there should have been a risk of serious and irreparable consequences for the applicant.

The Court found that terms such as "grossly violated" and "serious and irreparable consequences" were susceptible to various and wide interpretation and that, therefore, a complaint pursuant to Section 59 (4) of the Constitutional Court Act could not be regarded with a sufficient degree of certainty as an effective remedy in respect of the length of proceedings. (see *Horvat v. Croatia*, no. 51585/99, 26 July 2001, §§ 41-43, 45, ECHR - 2002...)

The Court notes that, following the Horvat judgment, on 15 March 2002 the Croatian Parliament enacted the Act on Changes of the Constitutional Court's Act, which was published in the Official Gazette no. 29 of 22 March 2002. It introduced a new Section 59(a) which later became Section 63 of the 2002 Constitutional Act on the Constitutional Court. That Section provides, *inter alia*, that the Constitutional Court must examine a constitutional complaint even before all legal remedies have been exhausted in cases when 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 Court notes that this new provision has removed the obstacles that were decisive when the Court found that the former Section 59(4) did not comply with all the requirements to represent an effective remedy in respect of the length of proceedings.

Although the Constitutional Court has not yet adopted any decision following the introduction of the new remedy, the wording of Section 63 of the 2002 Constitutional Act on the Constitutional Court is clear and indicates that it is specifically designed to address the issue of the excessive length of proceedings before the domestic authorities. According to the new law everyone who deems that the proceedings concerning the determination of his civil rights and obligations or a criminal charge against him have not been concluded within a reasonable time may file a constitutional complaint. The Constitutional Court must examine such a complaint and if it finds it well-founded it must set a time-limit for deciding the case on the merits and it shall also award compensation for the excessive length of proceedings. The Court considers that this is a remedy which must be exhausted by the applicant in order to comply with Article 35 § 1 of the Convention.

The Court recalls that in the Slaviček case (see *Slaviček v. Croatia* (dec.), no. 20862/02, 4 July 2002, to be published in the Court's official reports), it found that there exists in Croatia an effective domestic remedy in respect of alleged unreasonable length of proceedings, namely a complaint pursuant to Section 63 of the 2002 Constitutional Court's Act.

The Court notes that the applicant in the present case has not lodged such a complaint. It is true that he introduced the application with the Court on 17 September 2001, while the legislation providing for an effective remedy in respect of his complaint under Article 6 of the Convention was introduced on 15 March 2002.

The question therefore arises whether under Article 35 § 1 of the Convention it can be required that the applicant exhausts this remedy before this Court examines his complaint.

The Court reiterates that the purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-IV). That rule is based on the assumption, reflected in Article 13 of the Convention - with which it has close affinity - that there is an effective remedy available in respect of the alleged breach in the domestic system (*ibid*). In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 65, and the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, p. 2275, § 51).

The Court recalls that the issue whether domestic remedies have been exhausted shall normally be determined by reference to the date when the application was lodged with the Court. This rule is however subject to exceptions which might be justified by the specific circumstances of each case (see *Baumann v. France*, no 33592/96, 22 May 2001, § 47, unreported). The Court has found in respect of a large number of applications against Italy raising similar issues that there were special circumstances justifying a departure from the general rule (see *Brusco v. Italy*, (dec.), no. 69789/01, ECHR 2001-IX).

The Court considers that the instant case presents many similarities to the Italian cases and a number of elements militate in favour of an exception also in this case.

From a general point of view, the Court would recall that in States which do not provide for an effective remedy in relation to alleged violations of the "reasonable time" requirement the individuals would systematically be forced to refer to the Court in Strasbourg their complaints that would otherwise, and in the Court's opinion more appropriately, be addressed in the first place within the national legal system. In the long term such a situation is likely to affect the operation at both the national and international level, of the system of human rights protection set up by the Convention (*Kudla v. Poland* [GC], no. 30210/96, § 155, ECHR 2000-XI).

The Court further notes that the Government have admitted that the excessive length of proceedings is a widespread problem in the Croatian legal system (see, for example, *Fütterer v. Croatia*, no. 52634/99, 20 December 2001, unreported). Moreover, in a rather limited period of time the Court has received hundreds of applications against Croatia claiming violations of the "reasonable time" requirement.

The Court notes also that the new remedy was introduced following both the Kudla and Horvat judgments (see *Kudla v. Poland*, cited above and *Horvat v. Croatia*, no. 51585/99, ECHR 2001-VIII), and that it is specifically designed to address the problem of the length of proceedings. Furthermore, as is the situation with the present applicant, practically all applications introduced with the Court concerning that issue are still pending before the national courts and, therefore, the new remedy at national level is open to the applicant and may address this problem since it not only provides for compensation to be awarded but also obliges the Constitutional Court to set a time-limit for deciding the case on the merits (see *Slaviček v. Croatia*, cited above).

In the light of these circumstances and recalling the subsidiary character of the Convention machinery, the Court considers that the applicant has to address himself firstly to the Constitutional Court with a complaint pursuant to Section 63 of the 2002 Constitutional Court's Act.

It follows that this complaint must be rejected under Article 35 §§ 1 et 4 of the Convention for non-exhaustion of domestic remedies.

2. The applicant further complains that in respect of his complaint about the length of the proceedings he has no effective remedy as required under Article 13 of the Convention, which reads 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."

As explained above, the Court finds that the newly introduced Section 63 of the 2002 Constitutional Act on the Constitutional Court does provide the applicant with an effective remedy in respect of the length of the proceedings.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President