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

SECOND SECTION

CASE OF KOSTIĆ v. SERBIA

(Application no. 41760/04)

JUDGMENT

STRASBOURG

25 November 2008

FINAL

25/02/2009

This judgment may be subject to editorial revision.

In the case of Kostić v. 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,
Işıl Karakaş, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 4 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 41760/04) 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, at that time, two citizens of the State Union of Serbia and Montenegro, Mr Nedeljko Kostić and Ms Zorka Kostić ("the applicants"), on 2 November 2004.

2. As of 3 June 2006, following the Montenegrin declaration of independence, Serbia remained the sole respondent in the proceedings before the Court.

3. The applicants were represented by Mr A. Mančev, a lawyer practicing in Belgrade. The Government of the State Union of Serbia and Montenegro and, subsequently, the Government of Serbia ("the Government") were represented by their Agent, Mr S. Carić.

4. The applicants complained under Article 1 of Protocol No. 1 to the Convention about the non-enforcement of a demolition order rendered in their favour.

5. On 11 September 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are spouses. They were both born in 1947 and currently live in Belgrade.

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

8. The applicants and a certain M.P. were co-owners of a house and five other buildings in Belgrade.

9. On 21 May 1998 M.P. obtained a building permit for the partial reconstruction of the house co-owned by the applicants, authorising him to convert his flat into a duplex and enlarge it by approximately 100 meters squared.

10. M.P. started with the construction work immediately thereafter.

11. On 7 August 1998, on the basis of an on-site intervention, the Inspectorate of the Voždovac Municipality ("the Municipality") concluded that M.P. was not performing the construction work in line with the building permit. It therefore ordered him to stop all work and to file a request for a new permit.

12. On 2 September 1998 the Inspectorate ordered M.P. to demolish, within three days, that part of the construction which had been erected contrary to the building permit.

13. On 11 September 1998 the Inspectorate issued an enforcement order in this respect.

14. Meanwhile, M.P. filed a request for a new building permit.

15. On 24 September 1998 the Municipality issued a favourable interim decision.

16. On 15 December 1998 the second-instance authority quashed this decision, remitting the case for re-consideration.

17. On 13 July 1999 the Municipality dismissed M.P.'s request for a new building permit, finding that his plan did not satisfy the requirements prescribed by the relevant domestic legislation.

18. On the same date, a technical report noted that "following the recent precipitation" and the construction work undertaken by M.P. the applicants' property had been seriously damaged. In particular, mortar had fallen, walls had cracked, and extensive damp and leakages had appeared throughout the premises.

19. On 27 March 2001 and 20 June 2002 the applicants filed criminal complaints against unidentified officials employed with the Municipality, alleging abuse of office.

20. On 25 November 2003 this complaint was rejected by the Fifth Municipal Public Prosecutor's Office (*Peto opštinsko javno tužilaštvo*) in Belgrade.

21. Following the entry into force of the new Planning and Construction Act in May 2003, M.P filed a request with the Municipality for the "legalisation" of the reconstruction of his flat (see paragraphs 32-34 below).

22. On 22 May 2003 and 11 June 2004 the applicants lodged submissions opposing the said legalisation.

23. On 11 February 2005 the Municipality informed the applicants that M.P. had filed a request for legalisation.

24. On 14 December 2005 M.P. supplemented this request.

25. Over the years, the applicants had repeatedly requested enforcement of the demolition order dated 2 September 1998, but to no avail.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General Administrative Proceedings Act (Zakon o opštem upravnom postupku, published in the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - nos. 33/97 and 31/01)

26. Article 39 defines a party to an administrative case as a person at whose request the proceedings have been instituted, a person against whom the proceedings have been brought, or, indeed, any other person who is entitled to participate in the proceedings with a view to protecting his or her rights or interests.

27. Article 261 § 2 provides that an administrative decision shall be executed once it becomes enforceable.

28. Article 268 § 1 provides, *inter alia*, that the authority in charge of the enforcement of an administrative decision shall, *ex officio* or at the request of a party, issue an enforcement order. Such an order shall declare that the decision has become enforceable and determine the means and object of the enforcement.

29. Article 271 provides, *inter alia*, that enforcement proceedings shall be terminated *ex officio* if the enforcement title itself has been repealed in the meantime. These proceedings shall, however, be stayed "if it is established" that an interim decision, which was being executed, has subsequently been replaced by a contradicting separate "decision in respect of the main issue".

B. Planning and Area Development Act (Zakon o planiranju i uređenju prostora i naselja, published in the Official Gazette of the Republic of Serbia - OG RS - nos. 44/95, 23/96, 16/97 and 46/98)

30. Article 5 provided, *inter alia*, that an area's development was to be carried out in such a way as to: (i) protect its natural and man-made characteristics; (ii) respect the relevant planning regulations; (iii) preserve its natural resources; and (iv) protect the environment, as well as the public interest in general.

31. This Act was repealed on 13 May 2003.

C. Planning and Construction Act (Zakon o planiranju i izgradnji, published in OG RS nos. 47/03 and 34/06)

32. Articles 160-162 provide, *inter alia*, that the owner of a building, a flat or, indeed, of any other object erected or reconstructed in the absence of a valid building permit shall have to inform the competent administrative authority ("the authority") of this situation by 13 November 2003. This authority shall have sixty days to advise the owner about the relevant conditions for the "legalisation" of the construction in question, as well as the documents needed in this regard. The owner himself shall then have another sixty days to comply with this instruction. Should he do so and depending on whether the relevant conditions have been met, the authority shall accept the legalisation sought. In the event, however, that the owner does not abide by the set deadlines, the authority shall adopt a demolition order in respect of the said construction.

33. Article 171 provides, *inter alia*, that requests concerning the "issuance of building permits", as well as those to do with "other individual rights and obligations", lodged before the entry into force of this Act, shall be dealt with on the basis of prior legislation.

34. The Planning and Construction Act entered into force on 13 May 2003.

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 and 57/89, as well as in OG FRY no. 31/93)

35. Article 154 defines different grounds for claiming civil compensation.

36. Article 172 § 1 provides that a legal entity is liable for any damage caused by one of "its own bodies".

E. Domestic case-law referred to by the Government

37. On 17 May 2005 the First Municipal Court (*Prvi opštinski sud*) in Belgrade ordered the Municipality of Stari Grad to pay the plaintiff a specified amount of compensation on account of the lost rent. The court relied, *inter alia*, on Article 172 of the Obligations Act and explained that the plaintiff had been unable to lease his flat for a certain period of time as a result of the Municipality's failure to evict a protected tenant from the flat in question (XVIII P br. 9031/04). On 16 March 2006 this judgment was upheld by the District Court (*Okružni sud*) in Belgrade (Gž. br. 12872/05).

38. On 21 February 2006 the Municipal Court in Novi Sad ordered the respondent State to pay the plaintiff a specified amount of compensation for the breach of his rights guaranteed under Article 5 of the Convention (P br. 1848/05). On 8 November 2006 this judgment was upheld by the District Court in Novi Sad (Gž. br. 3293/06). Based on such jurisprudence, the Government maintained that the Serbian courts were willing to directly apply the Convention, as well as the Protocols thereto.

F. Property Act (Zakon o osnovama svojinskopravnih odnosa; published in OG SFRY nos. 6/80 and 36/90; as well as in OG FRY no. 29/96 and OG RS no. 115/05)

39. Under Article 25 § 1 if a builder was aware of the fact that he was building on land owned by another, or was not aware of this but the land's owner had immediately expressed his opposition to the work undertaken, the latter shall have the right to: (i) seek recognition of his ownership of the building erected; (ii) request that this building be demolished; or (iii) seek compensation from the builder for the usurped land, based on its market price.

40. Under Article 43, *inter alia*, a co-owner shall be entitled to file a claim for the protection of his or her rights in respect of an entire property, as well as the protection of that individual's stake therein.

G. Code of Criminal Procedure (Zakonik o krivičnom postupku; published in OG FRY nos. 70/01 and 68/02, as well as OG RS nos. 58/04, 85/05 and 115 /05)

41. Under Articles 61 and 201-212, should a Public Prosecutor reject a criminal complaint filed in respect of a crime prosecuted *ex officio*, the victim may personally take over the prosecution of his own case before a court and simultaneously file a claim for any civil damages suffered.

THE LAW

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

42. The applicants complained under Article 1 of Protocol No. 1 about the non-enforcement of the demolition order dated 2 September 1998.

43. Article 1 of Protocol No. 1 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 temporis

44. The Government submitted that the application should be rejected as being incompatible *ratione temporis* with the provisions of Article 1 of Protocol No. 1. In this regard, they noted that the damage suffered by the applicants had been instantaneous and had occurred before 13 July 1999 (see paragraphs 17 and 18 above) whilst Serbia had ratified Protocol No. 1 on 3 March 2004.

45. The applicants maintained that the violations in question were of a continuing nature.

46. Given the fact that the impugned non-enforcement of the demolition order has continued to date, the Court finds that the application is compatible with the provisions of Article 1 of Protocol No. 1 *ratione temporis* and dismisses the Governments objection in this regard.

2. Compatibility ratione materiae

47. The Government further argued that the application was incompatible *ratione materiae* with the provisions of Article 1 of Protocol No. 1. They maintained, in particular, that the applicants had requested the adoption of the demolition order based on Article 5 of the Planning and Area Development Act, a provision which was unrelated to the issue of "property rights protection".

48. The applicants argued that the violation alleged fell within the scope of Article 1 of Protocol No. 1.

49. Irrespective of the legal basis for the adoption of the demolition order, the Court finds that it clearly concerns the peaceful enjoyment of the applicants' property rights (see paragraphs 64-67 below). Accordingly, without prejudging the merits of the applicants' complaint, the Government's objection in this regard must be dismissed.

3. Exhaustion of domestic remedies

50. Finally, the Government submitted that the applicants had not exhausted all effective domestic remedies. In particular, they had failed to: (i) file a civil action against the Municipality, under Article 1 of Protocol No. 1, as well as Articles 154 and 172 of the Obligations Act (see paragraphs 35 and 36 above); (ii) bring a separate civil claim against M.P. personally, in accordance with Article 1 of Protocol No. 1, Article 154 of the Obligations Act and Article 43 of the Property Act (see paragraphs 35 and 40 above); and (iii) take over the prosecution of their criminal case, following its initial rejection by the Public Prosecutor's Office, in accordance with Articles 61 and 201 of the Criminal Procedure Code (see paragraph 41 above).

51. The applicants contended that they had exhausted all effective domestic redress.

52. As regards the Government's submissions under (i) and (iii), the Court recalls that it has already held that remedies of this sort were ineffective within the meaning of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *ZIT Company v. Serbia*, no. 37343/05, §§ 45-47, 27 November 2007). It sees no reason to depart from this finding in the present case.

53. Concerning the Government's submissions under (ii), the Court notes that the remedies referred to relate to M.P. only, not the Municipality as but one emanation of the respondent State. Since the applicants' complaint concerns the failure of the Serbian authorities to enforce their own demolition order, the Court finds that such redress against the private individual was not necessary to be exhausted within the meaning of Article 35 § 1 of the Convention.

54. It follows that the Government's objection must be dismissed in its entirety.

4. Conclusion

55. The Court considers that the applicants' 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. The complaint must therefore be declared admissible.

B. Merits

1. *Arguments of the parties*

56. The Government conceded that the demolition order in question remained enforceable, but noted that its actual execution would have been "*contra legem*" and/or served no useful purpose.

57. In particular, whilst the interim building permit was in force it made no sense to undertake the demolition sought which, in any event, should have been stayed in accordance with Article 271 of the General Administrative Proceedings Act.

58. As regards the period thereafter, the Municipality "did not have the time" to proceed with the demolition because of the large number of other illegally erected buildings.

59. In May 2003 the new Planning and Construction Act entered into force whereby, pursuant to Articles 160-162, it was possible to file for the legalisation of all buildings constructed without a valid building permit. Since M.P. had filed such a request with the Municipality, any demolition in the meantime would have been unwarranted.

60. Lastly, the Government observed that there was no evidence that the applicants had been unable to lease their property or dispose of it due to the construction work carried out by M.P. On the contrary, the value of their real estate could have even increased in accordance with Article 25 § 1 of the Property Act.

61. The applicants reaffirmed their complaints, noting that the impugned non-enforcement had resulted in a permanent restriction of their property rights.

62. Further, the said Planning and Construction Act did not provide that all existing demolition orders were to be considered null and void.

63. Ultimately, the applicants noted that M.P. could not obtain the legalisation sought as they, being the co-owners of the house in question, were firmly opposed to this.

2. *Relevant principles*

64. 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).

65. 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.

66. 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 possessions (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 134, ECHR 2004-XII).

67. It is thus the State's responsibility to make use of all available legal means at its disposal in order to enforce a final administrative 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 *Ilić v. Serbia*, no. 30132/04, §§ 74 and 75, 9 October 2007).

3. The Court's assessment as regards the present case

68. The Court, in the first place, notes that the very existence of an unauthorised construction amounts to an interference with the applicants' property rights (see paragraph 64 above).

69. Secondly, the demolition order in question was issued on 2 September 1998 and its enforcement was sanctioned on 11 September 1998 (see paragraphs 12 and 13 above).

70. Thirdly, Serbia ratified Protocol No. 1 on 3 March 2004, meaning that the impugned proceedings have been within the Court's competence *ratione temporis* for a period of more than four years and seven months.

71. Fourthly, the interim building permit issued in favour of M.P. was repealed by 15 December 1998, which is why, *inter alia*, Article 271 of the General Administrative Proceedings Act was irrelevant as regards all developments following the ratification (see paragraphs 16 and 29 above).

72. Fifthly, there is indeed nothing in the Planning and Construction Act to the effect that existing demolition orders are to be deemed null and void. On the contrary, Article 171 thereof would appear to suggest otherwise (see paragraphs 32-34 above).

73. Sixthly, there is no evidence that the value of the applicants' real estate "could have increased" in accordance with Article 25 § 1 of the Property Act", as argued by the Government (see paragraphs 39 and 60 above).

74. In view of the foregoing, the Court finds that the Serbian authorities have failed to fulfil their positive obligation, within the meaning of Article 1 of Protocol No. 1, to enforce the demolition order of 2 September 1998 (see paragraphs 66 and 67 above). There has, accordingly, been a violation of the said provision.

II. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

75. 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

76. The applicants claimed a total of 600.000 euros (EUR) in respect of the pecuniary and non-pecuniary damages suffered. As regards the former, they referred to the "reduced value of their real estate"; concerning the latter they emphasised the mental anguish which they had endured as a result of not being able to freely use their property or, indeed, even leave for holidays since 1998 for fear that their other neighbours might themselves engage in illegal construction.

77. The Government contested these claims.

78. The Court sees no reason to doubt that the applicants have suffered distress as a result of the breach of their rights secured under Article 1 of Protocol No. 1, 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 applicants jointly EUR 4,000 in non-pecuniary damage.

79. The Court further points out that, under Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. 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 the sums awarded by way of just satisfaction, but also to choose, 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 and to redress, in so far as possible, the effects thereof (see

Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

80. The Court considers, therefore, taking into account the fact that the applicants have failed to substantiate the "reduction in the value of their real estate", that their pecuniary damage claim must be met by the Government ensuring, through appropriate means, the speedy enforcement of the demolition order dated 2 September 1998 (see, *mutatis mutandis*, *Ilić v. Serbia*, no. 30132/04, § 112, 9 October 2007).

B. Costs and expenses

81. The applicants did not specify their claim in this respect. Accordingly, the Court makes no award under this head.

C. Default interest

82. 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 1 of Protocol No. 1;

3. *Holds*

(a) that the respondent State shall ensure, by appropriate means, within six months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the enforcement of the decisions adopted by the Municipality of Voždovac on 2 September 1998 and 11 September 1998, respectively;
(b) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final, EUR 4,000 (four thousand euros) in respect of the non-pecuniary damage suffered, which sum is to be converted into the national currency of the respondent State at the rate applicable on the date of settlement, plus any tax that may be chargeable;
(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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 25 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Françoise Tulkens President