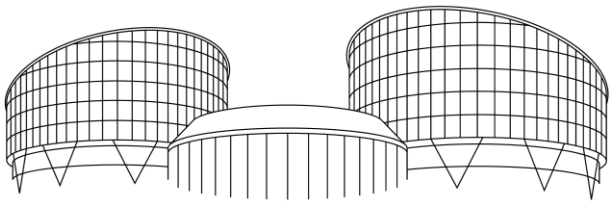

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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civil proceedings had been unfair since the final judgment rendered against them had been based on an Act which was no longer in force at the relevant time.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.