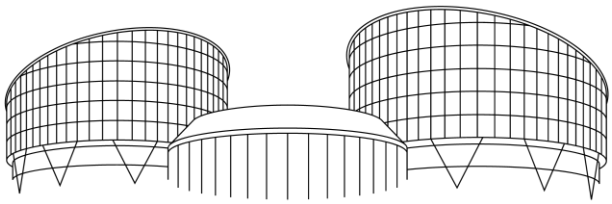

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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 Ž. 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