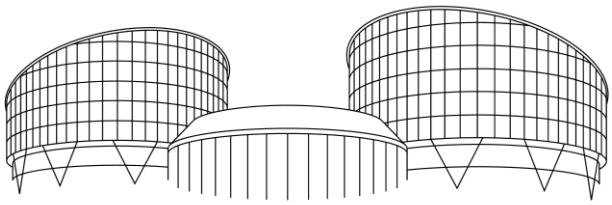

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF TOMIĆ AND OTHERS v. MONTENEGRO

(Applications nos. 18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09 and 7316/10)

JUDGMENT

STRASBOURG

17 April 2012

FINAL

22/10/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tomić 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,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 27 March 2012,

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

PROCEDURE

1. The case originated in ten separate applications against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by twelve Montenegrin nationals whose personal details are set out in the annex to this judgment.

2. The applicants were represented by Mr V. Bjeković, a lawyer practising in Podgorica. The Montenegrin Government ("the Government") were represented by their Agent, Mr Ž. Pažin.

3. The applicants alleged an inconsistent practice on the part of the domestic courts. In particular, they complained that their claims had been rejected by the domestic courts whereas the same courts had at the same time allowed identical claims filed by their colleagues.

4. On 7 October 2010 the applications were communicated to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the cases, as submitted by the parties, may be summarised as follows.

A. Background information and the proceedings before the domestic courts

6. The first, second, third, fourth, eighth, ninth, tenth, eleventh and twelfth applicants, and legal predecessor of the fifth, sixth and seventh applicants, were all employees of the Aluminium Plant in Podgorica (*Kombinat aluminijuma Podgorica*).

7. On various dates they were all certified as totally unfit for work (*potpuni gubitak radne sposobnosti*). Their disability (*invalidnost*) was partly the result of a work-related illness.

8. Between 10 and 16 November 2005 they were made redundant and received a severance payment.

9. On various dates thereafter the Pension Fund (*Republički fond penzijskog i invalidskog osiguranja*) in Podgorica recognised their right to a disability pension (*pravo na invalidsku penziju*), effective from the date on which they had respectively been certified disabled.

10. On various subsequent dates the first, second, third, fourth, eighth, ninth, tenth, eleventh and twelfth applicants, and legal predecessor of the fifth, sixth and seventh applicants, filed claims against their former employer, seeking damages consisting of the difference between the disability pension they were receiving and the salary which they would have received had they not been made redundant. The amounts claimed varied between 581 euros (EUR) (for the third applicant) and EUR 9,273.64 (for the fourth applicant). They expressly stated, either in their claims or further submissions made in the context of appeals, appeals on points of law and/or replies to the defendant's submissions, that these were labour-related claims exempted from court fees. The fifth, sixth and seventh applicants continued the proceedings in their legal predecessor's stead as he had passed away in the meantime.

11. Some of the applicants were successful before the Court of First Instance (*Osnovni sud*) in Podgorica, while others were not. However, all the applicants were unsuccessful in the second-instance proceedings before the High Court (*Viši sud*) in Podgorica, which rendered its decisions between 7 November 2008 and 9 October 2009. The first, third, fourth, eighth, tenth, eleventh, and twelfth applicants lodged an appeal on points of law (*revizija*) with the Supreme Court (*Vrhovni sud*) in Podgorica. Between 18 February and 3 December 2009 the Supreme Court upheld the High Court's judgments and, in substance, endorsed its reasoning. The second, fifth, sixth, seventh and ninth applicants did not lodge an appeal on points of law.

12. In its reasoning in the applicants' cases, the High Court and the Supreme Court held, *inter alia*, that the applicants' employment had been terminated because they had been made redundant, not because their right to a disability pension had been recognised. In particular, when their right to a

pension was subsequently recognised they were no longer employed and thus had no salary in any event; accordingly, no damage had been sustained and their claims were unfounded.

13. In six other judgments, submitted by the applicants, rendered between 7 December 2006 (by the Supreme Court) and 2 February 2009 (by the High Court) the same courts had ruled in favour of the applicants' colleagues, notwithstanding the fact that their claims were based on the same facts and concerned identical legal issues. In their reasoning in those other cases, the courts explained, *inter alia*, that the claim for damages was justified on grounds of their disability and that the employer had to compensate them according to the extent to which the work-related illness had caused the disability. At the same time, the courts found that the claimants' redundancy and the accompanying payment, which the claimants had received, had nothing to do with the legal grounds for seeking damages for their disability. These judgments became final and enforceable (*pravosnažne i izvršne*).

B. Other relevant facts

14. All the applicants lodged constitutional appeals. On 24 March 2011 the Constitutional Court (*Ustavni sud*) rejected (*odbacio*) the constitutional appeal lodged by the ninth applicant on the grounds that he had not exhausted all effective domestic remedies; in particular, he had not lodged an appeal on points of law with the Supreme Court. Between 24 December 2009 and 10 March 2011 the Constitutional Court dismissed (*odbio*) the constitutional appeals lodged by all the other applicants on the grounds that the impugned judgments did not depart from established case-law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution of the Republic of Montenegro 1992 (*Ustav Republike Crne Gore*; published in the Official Gazette of the Republic of Montenegro - OG RM - no. 48/92)

15. Article 17 of the 1992 Constitution provided that "everyone shall be entitled to the equal protection of his or her freedoms and rights in legal proceedings".

16. This Constitution was repealed in October 2007, when the new Constitution, published in OG RM no. 01/07, entered into force.

B. The Constitution of Montenegro 2007 (*Ustav Crne Gore*; published in the Official Gazette of Montenegro - OGM - 01/07)

17. Article 19 of the 2007 Constitution provides that everyone has the right to equal protection of his or her rights and freedoms.

18. Article 32 provides that "everyone shall have the right to a fair ... trial ... before a ... tribunal."

19. Article 124 § 2 provides that the Supreme Court shall ensure that the courts apply the laws consistently.

20. Article 149 § 1 provides, *inter alia*, that the Constitutional Court shall rule on constitutional appeals lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

C. Montenegro Constitutional Court Act (*Zakon o Ustavnom sudu Crne Gore*; published in OGM no. 64/08)

21. Sections 48 to 59 contain additional provisions as regards the processing of constitutional appeals.

22. This Act entered into force in November 2008.

D. Courts Act 2002 (*Zakon o sudovima*; published in OG RM nos. 05/02, 49/04, 22/08 and 39/11)

23. Section 5 § 2 provides that everyone shall be equal before the courts.

24. Section 27 provides that the Supreme Court shall establish general legal principles and opinions in order to ensure consistent application of the Constitution, laws and other acts.

E. Civil Procedure Act 2004 (*Zakon o parničnom postupku*; published in OG RM no. 24/04)

25. Section 2 § 1 provides that the court shall decide the case within the limits of the claims submitted in the proceedings (*u granicama zahtjeva koji su stavljeni u postupku*).

26. Section 397 § 2 provides that an appeal on points of law is "not admissible" in pecuniary disputes where the "value of the part of the final judgment being challenged does not exceed EUR 5,000". However, as provided for in section 397 § 4(2), an appeal on points of law is always admissible in disputes concerning loss of earnings or other labour-related income where the relevant damages have been awarded or revoked for the first time.

27. Section 438 provides that an appeal on points of law is admissible in disputes relating to the establishment, existence or termination of employment.

28. Section 401 provides, *inter alia*, that, when deciding on an appeal on points of law, the competent court shall confine its examination to that part of the judgment which has been challenged by the appeal on points of law and to the stated grounds of appeal.

29. Section 352 § 1 provides that a judgment becomes final (*pravosnažna*) when it can no longer be challenged by an appeal.

F. Amendments to the Civil Procedure Act 2004 (*Zakon o izmjenama i dopunama zakona o parničnom postupku*; published in OG RM no. 76/06)

30. Section 24 of this Act amended section 397 § 2 of the Civil Procedure Act 2004 by providing that an appeal on points of law is "not admissible" in pecuniary disputes where the "value of the part of the final judgment being challenged does not exceed EUR 10,000".

31. Section 26 of this Act amended section 438 of the Civil Procedure Act 2004 by providing, under the "labour disputes" heading, that an appeal on points of law is allowed "only" in disputes relating to the establishment, existence or termination of employment.

32. This Act entered into force on 20 December 2006.

33. However, it contained no transitional provisions specifying which of these two Acts should be applied in pending proceedings.

G. Court Fees Act (*Zakon o sudskim taksama*; published in OG RM nos. 76/05 and 39/07 and OGM no. 40/10)

34. Section 8 provides, *inter alia*, that parties to proceedings concerning labour rights and employment shall be exempted from paying court fees.

H. Relevant domestic case-law

35. Between 20 February 2007 and 21 December 2010 the domestic courts ruled in eighty-nine other cases lodged by the applicants' colleagues. In one of the cases in which the claimant was successful before the Court of First Instance, neither of the parties appealed and the relevant judgment thus became final and enforceable.

36. The High Court examined eighty-eight appeals, in which four of the claimants were successful and the others were not. In two of those four cases neither of the parties lodged an appeal on points of law and those two judgments thus became final and enforceable.

37. Between 20 November 2008 and 21 December 2010 the Supreme Court decided eighty-six appeals on points of law. Two of them were rejected on procedural grounds: one had been lodged out of time and in the other one the value of the claim was considered to be below the statutory threshold allowing for this remedy. Eighty-four appeals on points of law were examined on the merits regardless of the value of the claim, including two cases in which the claimants had been successful before the High Court. In all cases the Supreme Court ruled against the claimants.

38. In December 2006 another colleague of the applicants was successful before the domestic courts, including before the Supreme Court. It is clear from the case file that the claimant in question had never been made redundant and that he had retired after being certified totally unfit for work.

THE LAW

I. JOINDER OF THE APPLICATIONS

39. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

40. The applicants complained under Articles 6, 13 and 14 of the Convention, Article 1 of Protocol No. 1 and Article 1 of Protocol No. 12 that the domestic courts had rejected their claims while at the same time allowing identical claims filed by their colleagues.

41. The Court considers that the applicants' complaints naturally fall to be examined under Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

A. Admissibility

1. Exhaustion of domestic remedies and six-month rule

(a) The parties' submissions

42. The Government submitted that both a constitutional appeal and an appeal on points of law were effective domestic remedies which had not

been used by all the applicants. In support of their submission that a constitutional appeal was an effective remedy, they submitted two decisions of the Constitutional Court delivered in 2010, allowing the relevant constitutional appeals, both of which concerned the right of access to the Supreme Court. The claims at issue were unrelated to the claims of the applicants in the present case. They also submitted statistical data on how many constitutional appeals had been rejected or decided on the merits between 1 January and 1 April 2011.

43. The Government asserted, further, that the applicants' claims were labour-related, so an appeal on points of law was always admissible regardless of the value of the claim. The applicants had been exempted from paying the court fees in the domestic proceedings, which would not have been possible if these had not been labour disputes. In this regard they referred to section 397 § 4(2) of the Civil Procedure Act and Article 8 § 1 of the Court Fees Act (see paragraphs 26 and 34 above). Lastly, they contended that the applicants' rights did not fall within the ambit of social legislation, as, if that had been the case, their claims would have been dealt with in administrative proceedings and not by the civil courts.

44. The applicants maintained that an appeal on points of law was not allowed in cases where the amount in dispute did not exceed the statutory threshold of EUR 10,000 unless it was a labour-related claim, which was not the case here. Their claims were property-related, based on pension and disability insurance, falling within the ambit of social rather than labour legislation. They further submitted copies of their constitutional appeals and the relevant decisions, maintaining, however, that this was not an effective domestic remedy.

(b) The Court's assessment

(i) As regards the constitutional appeal and the related six-month time-limit

45. The Court notes that all of the applicants lodged a constitutional appeal (see paragraph 14 above). The Government's objection in this regard must therefore be dismissed. The Court sees no reason to reconsider the effectiveness of the constitutional appeal in this particular case (see *Koprivica v. Montenegro*, no. 41158/09, § 46, 22 November 2011) as all the applications were, in any event, submitted within six months of the date when the High Court gave its decisions in respect of the second, fifth, sixth, seventh and ninth applicants, and of the date when the Supreme Court gave its decisions in respect of the first, third, fourth, eighth, tenth, eleventh and twelfth applicants (see the Annex appended to the judgment).

(ii) As regards the appeal on points of law

46. The Court has already held that, given its nature, an appeal on points of law must, in principle and whenever available in accordance with the

relevant civil procedure rules, be considered an effective domestic remedy within the meaning of Article 35 § 1 of the Convention (see *Jevremović v. Serbia*, no. 3150/05, § 41, 17 July 2007; *Ilić v. Serbia*, no. 30132/04, §§ 20 and 21, 9 October 2007; and, *mutatis mutandis*, *Debelić v. Croatia*, no. 2448/03, §§ 20 and 21, 26 May 2005).

47. In the specific circumstances of the present case, however, the Court is of the opinion that the exhaustion issue raised by the Government is closely linked to the merits of the complaints. In particular, it involves the question of whether an appeal on points of law to the Supreme Court, if available (see paragraphs 26-27 and 30-33 above) and made use of, could have secured consistency in the adjudication of the claims at issue. Consequently, the Court joins its examination of this question to its assessment of the merits of the applicants' complaints (see, *mutatis mutandis*, *Rakić and Others v. Serbia*, nos. 47460/07 et seq., § 38, 5 October 2010).

2. Conclusion

48. The Court concludes that the applicants' complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring them inadmissible has been established.

B. Merits

1. The parties' submissions

49. The applicants complained that the domestic courts had rejected their claims while at the same time allowing identical claims filed by their colleagues. In support of their allegations, they submitted copies of the domestic courts' rulings in six other cases: a final and enforceable judgment of the Court of First Instance, four High Court judgments in which the claimants were successful, and a decision of the Supreme Court rendered in 2006 (see paragraphs 35, 36 and 38 above).

50. The Government contested the applicants' allegations. In particular, unlike in *Vinčić and Others v. Serbia*, cited above, the last-instance court in the present case was not the High Court but the Supreme Court, which, by ruling consistently in other cases based on the same grounds, had removed any uncertainties as to possible contradictory interpretations by the lower courts. They submitted all the domestic case-law in this regard (see paragraphs 35-38 above).

51. The Government further maintained that in three of the six cases referred to by the applicants the respondent had not exercised its right to appeal or to lodge an appeal on points of law, so the Supreme Court was unable to rule on the claims and bring those judgments into line with the

domestic case-law on this issue, as it had done in other cases. Further, the ruling of the Supreme Court of 2006 was irrelevant in the present context, as in that particular case the respondent had not replied to the claimant's appeal on points of law and the Supreme Court had a statutory obligation to confine its examination to the grounds of appeal as submitted, that is, to the part of the lower court's judgment being challenged (see paragraphs 25 and 28 above). The Government did not comment on the remaining two decisions of the High Court rendered in favour of the claimants, but submitted copies of the Supreme Court's decisions overturning these decisions and ruling against the claimants in question (see paragraph 37 above).

52. The applicants reaffirmed their complaints and referred, in particular, to *Rakić and Others v. Serbia*, cited above, § 43. They further maintained that the domestic courts' decisions submitted by the Government were not yet final (*nisu pravosnažne*).

2. The Court's assessment

53. The Court reiterates that it is not its role to question the interpretation of the domestic law by the national courts. Similarly, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, §§ 49-50, 20 October 2011, and the other authorities cited therein). It has also been considered that certain divergences in interpretation could be accepted as an inherent trait of any judicial system which, like the Montenegrin one, is based on a network of trial and appeal courts with authority over a certain territory (see, *mutatis mutandis*, *Tudor Tudor v. Romania*, no. 21911/03, § 29, 24 March 2009). However, profound and long-standing differences in the practice of the highest domestic court may in itself be contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law (see *Beian v. Romania (no. 1)*, no. 30658/05, §§ 37-39, ECHR 2007-V (extracts)).

54. The criteria in assessing whether conflicting decisions of domestic supreme courts are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], cited above, § 53).

55. Lastly, it has been accepted that giving two disputes different treatment cannot be considered to give rise to conflicting case-law when this

is justified by a difference in the factual situations at issue (see, *mutatis mutandis*, *Erol Uçar v. Turkey* (dec.), no. 12960/05, 29 September 2009).

56. Turning to the present cases, the Court notes that of the six judgments referred to by the applicants only one was delivered by the Supreme Court. It is also noted that this judgment was delivered much earlier than the others and in a case in which the claimant was clearly in a different situation from that of the applicants, as he had never been made redundant but instead had retired when he was declared unfit for work (see paragraphs 8 and 37-38 above). Therefore, the said judgment cannot be considered relevant in the present case (see paragraph 55 above). It is further observed that two of the four decisions made by the High Court in favour of the claimants were later overturned by the Supreme Court (see paragraphs 37 and 51 above). Therefore, only three decisions were rendered in favour of claimants who were in an identical situation to the applicants. These decisions, one rendered by the Court of First Instance and two by the High Court, were never examined by the Supreme Court as the respondent in question had failed to lodge an appeal or an appeal on points of law (see paragraphs 35-36 above).

57. The Court further observes that the High Court examined eighty-eight appeals in total, of which eighty-four decisions were against the claimants and only four in their favour. It would appear that these four favourable decisions could be considered an exception and inconsistent in comparison with the other eighty-four, rather than the other way round. The Supreme Court, for its part, examined on the merits eighty-four appeals on points of law and, in so doing, ruled consistently without a single exception in that respect (see paragraph 37 above; compare and contrast with *Rakić and Others v. Serbia*, cited above). In the light of section 352 § 1 of the Civil Procedure Act, and contrary to the applicants' submissions, it is clear that the High Court and Supreme Court judgments referred to are final (see paragraph 29 above).

58. In view of the foregoing, the Court considers that the Supreme Court ensured consistency of the case-law at issue (see paragraphs 36, 37 and 57 above) and that there are no "profound and long-standing differences" in its case-law in the present case (see paragraph 54 above). It follows, therefore, that there has been no violation of Article 6 § 1 of the Convention.

59. The Court further finds that in the light of this conclusion it is not necessary to rule on the Government's objection as to the exhaustion of domestic remedies in so far as it concerns an appeal on points of law (see *Juhas Đurić v. Serbia*, no. 48155/06, § 67, 7 June 2011; see, also, *mutatis mutandis*, *Palić v. Bosnia and Herzegovina*, no. 4704/04, § 81, as well as the relevant operative provisions, 15 February 2011).

III. OTHER COMPLAINTS

60. The applicants also complained about the outcome of the proceedings.

61. The Government maintained that these complaints were of a fourth-instance nature and, as such, inadmissible as manifestly ill-founded.

62. The Court reiterates that, in accordance with Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function 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 (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

63. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Decides* to join to the merits the Government's objection as to the non-exhaustion of domestic remedies in so far as it concerns an appeal on points of law;

3. *Declares* the complaints concerning the alleged inconsistent practice of the domestic courts admissible and the remainder of the application inadmissible;

4. *Holds* that there has been no violation of Article 6 § 1 of the Convention and that it is not necessary in consequence to rule on the Government's above-mentioned objection.

Done in English, and notified in writing on 17 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Lech Garlicki President

Annex

Application no.	Date of lodging the application	Applicant's name and date of birth	Date of the Court of First Instance decisions	Date of the High Court decisions	Date of the Supreme Court decisions	Date of the Constitutional Court decisions
18650/09	26 March 2009	Miodrag Tomić ("the first applicant"), born in 1956	30 August 2007	7 November 2008	18 December 2009	11 March 2010
18676/09	23 March 2009	Čedomir Čabarkapa ("the second applicant"), born in 1958	1 June 2008	10 February 2009	/	10 March 2011
18679/09	24 March 2009	Aleksandar Đukanović ("the third applicant") born in 1948	8 November 2007	9 December 2008	3 March 2009	11 March 2010
38855/09	30 May 2009	Miraš Furtula ("the fourth applicant") born in 1950	22 October 2008	26 December 2008	14 April 2009	11 February 2010
38859/09	30 May 2009	Dragica Piper ("the fifth applicant"), born in 1954; Srđan Piper ("the sixth applicant"), born in 1987; Mirela Piper ("the seventh applicant") born in 1993	7 April 2008	17 March 2009	/	11 February 2010

38883/09	30 May 2009	Nenad Zindović ("the eighth applicant") born in 1962	13 October 2007	5 December 2008	14 March 2009	11 February 2010
39589/09	15 July 2009	Zoran Ulićević ("the ninth applicant") born in 1954	25 May 2007	27 February 2009	/	24 March 2011
39592/09	15 July 2009	Dragoljub Milačić ("the tenth applicant") born in 1956	28 December 2007	13 March 2009	14 May 2009	11 February 2010
65365/09	25 November 2009	Vaso Jovanović ("the eleventh applicant") born in 1962	9 January 2009	8 July 2009	7 October 2009	24 December 2009
7316/10	22 January 2010	Mr Zoran Raković ("the twelfth applicant") born in 1966	29 December 2008	9 October 2009	3 December 2009	30 September 2010