REVIEW OF COURT DECISIONS

OF THE COURTS IN REPUBLIC OF SERBIA IN THE AREA OF PROTECTION

AGAINST DISCRIMINATION

COMMISSIONER FOR PROTECTION OF EQUALITY

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All the terms in the male grammatical gender that are used in the text include the masculine and feminine gender of the persons they are referred to.

This publication is supported by the European Union Programme for Employment and Social Security – PROGRESS (2007 – 2013).

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FOR DIVERSITY
AGAINST DISCRIMINATION

INTRODUCTION

The Commissioner for Protection of Equality is an independent and autonomous state body established according to the Law on Prohibition of Discrimination, which was adopted in 2009[1]. The jurisdiction of the Commissioner is to prevent all aspects, forms, and cases of discrimination, to protect equality of persons in all areas of social relations, to monitor the implementation of laws and regulations, supervise the implementation of regulations on prohibition of discrimination and to promote the realization and protection of equality.

The Law on Prohibition of Discrimination and other laws dealing with the prevention of discrimination envisage the possibility that protection from discrimination is achieved by initiating the procedure before the competent court.

In accordance with its jurisdiction, the Office of the Commissioner[2] addressed with a written request all courts of general jurisdiction in Serbia to report on the number of cases having discrimination as a matter of litigation , in particular the ones that are initiated on the basis of the Law on Prohibition of Discrimination, Law on the Prevention of Discrimination against Persons with Disabilities, Labour Law, Law on the Prevention of Harassment at Work, the Law on Gender Equality[3]. In order to monitor the jurisprudence, the Office of the Commissioner also required from the courts to submit judicial decisions made under their jurisdiction.

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[1] Law on Prohibition of Discrimination (Off. Gazette RS no. 22/09)
[2] Commissioner for Protection of Equality, see the website: http://www.ravnopravnost.gov.rs/
[3] Law on Gender Equality (Off. Gazette RS no. 104/09)
Law on Prevention of Discrimination of Persons with Disabilities (Off. Gazette RS no.33/06)
Labour Law (Off. Gazette RS no. 24/05, 61/05, 54/09)
Law on Prevention of Harassment at Work (Off. Gazette RS no. 36/10)

The courts have responded and in accordance with their capabilities submitted the court decisions.

In the process of gathering information and decisions, in several memos it was particularly pointed out that the courts were unable to provide complete information. The reason is in the fact that in the civil matters the records are not kept on the basis of the law on which the initial act is based, but on the legal basis of litigation. Civil proceedings in this area of discrimination are usually classified into legal basis of "compensation" or into labour-legal matters, and all have the same index. As the number of these cases is extremely large the only way to get the data is to examine the records, i.e. to determine by an insight into the court's decision whether it is based on some of the "anti-discrimination" laws.

Therefore, in the field of civil law the court decisions were reached based on the information possessed by the trial judges in their records.

Courts have delivered their reports to the office of the Commissioner. A total of 150 decisions were submitted. Court decisions were delivered as copy or as a transcript so these decisions are presented in a form that is delivered to the Commissioner.

The Supreme Court of Cassation submitted 9 decisions.

The Appeal Court in Novi Sad provided the largest number of court decisions. This Court submitted 74 decisions. Decisions of the Appeal Court in Novi Sad are the most represented in this compilation.

The Appeal Court in Niš submitted 11 decisions, the Appeal Court in Belgrade 9, the Appeal Court in Kragujevac 3, the High Court in Pirot 1, the High Court in Kraljevo 1, the Basic Court in Novi Sad submitted 7, the Basic Court in Sombor 2, the Basic Court in Kraljevo 5, the Basic Court in Prokuplje 8, the Basic Court in Kraljevo 4, the Basic Court in Niš 4, the Basic Court in Vršac 3, the Basic Court in Vranje 3, the Basic Court in Pirot 1, the Basic Court in Paraćin 1, the Basic Court in Zrenjanin 2, the Basic Court in Požarevac 2.

Other courts have informed us that they had no cases with elements of discrimination.

During submitting court decisions, the courts also delivered cases from the criminal-legal matter. The total number of these cases is 27, but they are not the subjects of this review.

The fact that is especially pointed out is that the courts have not provided any court decision having as its basis other laws dealing with the prevention of discrimination in certain fields4.

Law on the Prohibition of the manifestations of neo-Nazi and fascist organizations and associations and on the prohibition of the use of neo-Nazi and fascist symbols and insignia (2009) prohibits the actions of these associations in a manner that violates constitutional rights and freedoms of citizens.

Also, in relation to actions within protecting certain groups, no proceedings have been initiated5. With the qualification that there are no specific

[4] The prohibition of discrimination in certain areas is determined by large number of current laws. For example: in the field of health care, by the Law on Health Care (2005), in the field of education, by the Law on High Education (2005), in the area of labour and employment, discrimination provisions are contained, in addition to the Labour Law (2005) and the Law on the Prevention of Harassment at Work (2010) in the Law on Employment and Unemployment Insurance (2003), in the sphere of media by the Law on Public Information (2003) and the Law on Broadcasting (2002). The Law on Free Access to Public Information (2004) also prohibits discrimination against achieving this freedom, and in the field of sports and sports events specific discrimination provisions are contained in the Law on the Prevention of Violence and Misbehaviour at Sports Events. The prohibition of sex discrimination is partially regulated by the Law on Employment and Insurance in the case of Unemployment (2003). Law on the Prohibition of the manifestations of neo-Nazi and fascist organizations and associations and on the prohibition of the use of neo-Nazi and fascist symbols and insignia

[5] A partial review of the laws referring to prohibition of discrimination against certain categories of persons, i.e., groups is included. The review includes: minorities, members of religious communities, people with disabilities, employed and persons seeking employment, patients, persons subject to criminal sanctions, children and minors, persons discriminated on the basis of sex, gender or sexual orientation. Prohibition of discrimination against national minorities is partly regulated by the Law on Protection of Rights and Freedoms (2002) and the Law on National Minorities (2009). Prohibition of discrimination on religious grounds was partially regulated by the Law on Churches and Religious Communities (2006). Prohibition of discrimination against people with disabilities is completely solved by passing the Law on Prevention of Discrimination against Persons with Disabilities (2006), Law on Vocational Rehabilitation and Employment of Persons with Disabilities (2009). Prohibition of discrimination against persons seeking employment and employees is partly regulated by the Labour Law (2005), Prohibition of discrimination against patients is partly regulated by the Law on Health Care (2005), and the prohibition of discrimination against persons subjected to criminal sanctions is partially regulated by the Law on Execution of Criminal Sanctions (2005). Prohibition of discrimination against children and minors was partially stipulated by the Family Law (2005), the Law on the Foundations of Education System (2009) and the Law on Minor

records on litigations for protection from discrimination, this fact points to the insufficient implementation of all legally prescribed possibilities for protection against discrimination.

The "military cases" stand out by being very numerous. A total of 63 of these cases were delivered, of which 8 are first instance decisions and 55 are decisions on appeals and 4 are decisions of the Supreme Cassation Court. The judgments delivered indicate that the Appeal and the Supreme Cassation Court took a clear stand on this issue and in their explications for their decisions they gave the reasons whether this life situation is discrimination or not.

In these cases, plaintiffs have requested to decide on the discrimination of social welfare beneficiaries in relation to persons who were disabled in wars and who have a right to extra protection according to the Law on the basic rights of veterans, disabled veterans and families of fallen soldiers.

It was pointed out that discrimination is the fact that they have fewer rights even if their general health condition is the same or more difficult compared to the persons who are disabled veterans. It was specifically pointed out that the needs of persons with the same degree of “civilian" and "military" disabilities are quantitatively not different, but the "civil" invalids due to the amount of their monthly earnings made in accordance with current legal provisions, can meet a smaller amount of needs.

The lawsuits allege that the plaintiffs with their monthly income have to purchase expensive medicines and orthopaedic aids that are necessary to them, and after the payment of these necessities they are not left with sufficient financial means to enable them, for example, going on a trip outside their place of residence.

According to current legislation, civil disabled persons who accomplish their rights in accordance with the provisions of the Law on Social Protection and Social Security of Citizens, were put in a different position compared to disabled veterans of the same percentage of disability who accomplish

Offenders and on Criminal Protection of Minors (2005). The Law on Gender Equality (2009) governs the creation of equal opportunities between women and men regarding accomplishment of the rights and obligations, makes possible taking special measures to prevent and eliminate discrimination based on race and gender, and provides legal remedies for persons exposed to discrimination based on sex or gender.

their rights in accordance with the provisions of the Law on Fundamental Rights of Veterans, Disabled Veterans and Families of Fallen Soldiers.

As an illustration, it is stated that by current legislation, the allowance for the care and assistance of another person in case of civilian disabled person with impairment of 100% is determined at the amount of 70% of the base (the average monthly earnings without taxes and fees per employee in the Republic of Serbia), while war veterans with the same percentage of impairment are eligible for assistance and care of another person is determined at the amount of 100% of the base (the average net salary in the FRY and the RS from the previous month increased by 80%). In addition, in accordance with the current legislation, disabled veterans compared to disabled civilians are recognized the rights to compensation based on wider grounds (orthopaedic aids, spa and climatic treatment, the right to a passenger motor vehicle), which causes that monthly income of disabled veterans exceeds monthly income of disabled civilians of the same percentage of disability.

It is specifically stated that for these reasons the plaintiffs felt humiliated, felt that they belong to a lower category of people, and this is followed by a sense of being offended and a sense of mental pain. Humiliation is expressed and kept in daily contact of plaintiffs with other people and in family relations.

Acting on these cases, a large number of the basic courts adopted the claim in their judgments. However, second instance courts and the Supreme Court of Cassation uniformly acted by recognizing that this is neither discrimination issue nor discriminatory treatment.

The Serbian Constitution from 20066 proclaims the principle of equality, the prohibition of discrimination and positive discrimination measures, as well as collective rights. Article 21 of the Constitution guarantees that "before the Constitution and law, everyone is equal" (Art. 21, para. 1) and that "everyone has the right to equal legal protection without discrimination" (Art. 21, para. 2), then it is specified that " any discrimination, direct or indirect, on any grounds, particularly on race, gender, nationality, social origin, birth, religion, political or other opinion, financial status, culture, language, age, or mental or physical disability is prohibited "(Art. 21,para. 3). The final provision of this article emphasizes that " the special measures which the Republic of Serbia may

[6] Constitution of Republic Of Serbia (Off. Gazette RS no. 98/06)

introduce to achieve full equality of persons or groups of persons who are substantially in unequal position compared to other citizens are not considered as discrimination " (Art. 21, para. 4).

Special measures (measures of affirmative action) introduced in order to achieve full equality, protection and progress of a person, that is, group of persons who are in unequal position, are not considered as discrimination.

These are the measures that represent the state intervention and which are regulated by law, and their essence is to achieve full equality, primarily of a certain group of people. The very measures are temporary because by the achievement of equality the need for their existence no longer exists. Compared to collective rights that are of permanent character, affirmative action measures have exceptional and temporary nature.

The Law on Prohibition of Discrimination also stipulates that the special measures introduced to achieve full equality are not considered as discrimination, but as protection and progress of persons or groups of persons who are in an unequal position. Many affirmative actions are contained systematically in the Law on Prevention of Discrimination against Persons with Disabilities, Law on Vocational Rehabilitation and Employment of Disabled Persons, the Law on Protection of Rights and Freedoms of National Minorities, the Law on National Councils of National Minorities, the Law on Gender Equality, Labour Law, Law on Employment and the Unemployment Insurance, Law on State Officials etc.

Not every distinction constitute discrimination. In this regard "military cases" represented a great part of practice of Serbian courts in the previous period.

- The judgment of Basic Court in Vršac number, 6 P 209/10 from 22.11.2010.
- The judgment of the Appeal Court in Novi Sad, Gž 1618/11 from 12.05.2011.
- The judgment of the Supreme Court of Cassation Court, Rev. 759/11 from 25.08.2011.
- The judgment of the Supreme Court of Cassation, Rev. 99/11 from 10.2.2011.

The second by its number are court decisions in labour litigations. A total of 40 court decisions were delivered. However, all delivered decisions were related to litigation on termination of employment (25) and the harassment at work (15).

In situations where there are contested relations in communication, when there are demands for respect of work discipline, when there are requirements regarding the work processes etc., it cannot be concluded that an employee is unjustifiably or unequally treated based on personal characteristics. It is precisely a personal characteristic what characterizes a particular behaviour as discrimination. In this publication is included only one decision that gives a clear legal insight and makes a clear distinction about which treatment is considered as discriminatory and which is not.

- The judgment of the Court of Appeal in Novi Sad, Gž1 1196/11 of 13 June 2011.

In litigations on protection from discrimination all prescribed means of evidence are permitted, in order to prove the discriminatory conduct of the offender and the discrimination which is suffered, and violation of personal rights. However, proving with the methods that are only prescribed by the Law on Civil Procedures does not allow the possibility of proving to the person who asked court protection. Because of the specificity of the relation in which, in most cases, there is no relation of equality and equality in power, proving discrimination is a particular problem. These are the main reasons for the establishment of special mechanisms to improve the position in the particular litigation, but also to, by the complaints of other people, more easily point to the presence of discrimination in society.

With that in mind, the general rules on the burden of proof are limited by specific regulations governing the protection from discrimination so that the defendant cannot get rid of the responsibility by proving not being guilty, if the court determined that an act of direct discrimination is committed or if that is beyond question between the parties.

In litigations on protection from discrimination, if the plaintiff makes it probable that the defendant committed an act of discrimination, the burden of proof that the measure taken was justified, and that such an act was not a case of discrimination and that the principle of equality and the principle of equal rights and obligations was not violated, shifts to the defendant.

During proving it is considered that the plaintiff has made it probable that the defendant committed an act of discrimination, if he makes probable the existence of different treatment of persons based on of personal characteristics or assumed personal characteristics. In particular case, it is enough to make probable the existence of differential treatment, and he does not have to make it probable that the measures taken in particular case was unjustified.

This issue is not dealt with in the courts judgments we received, and the court proceedings were conducted by the rules of the Law on Civil Procedure, failing to appreciate the moment when the burden of proof should be shifted from the plaintiff to the defendant.

Likewise, there were no examples of "situational testing". The Law on Prohibition of Discrimination (Article 46, paragraph 3, 4, 5 and 6) provides that the tester is the person who is knowingly exposed to discriminatory treatment, in order to directly verify the application of rules on prohibiting discrimination in particular case. It is interesting that there are examples of situational testing but the courts have not provided such a decision in this survey[7].

In the judgments received, the most frequent evidence of discrimination is the testimony of people who have directly participated in the event. In almost all examples the witnesses expressed before the court their conclusions regarding the events they attended. Examples under number 11 point to that.

Witnesses are, as a rule, immediately questioned at the hearing. However, the new Law on Civil Procedure (LCP) allows the possibility that the evidence is derived from reading written statements of witnesses, stating the knowledge of the relevant disputable facts, where they got it and how it is related to the parties in the proceedings. The written statement must be certified by the court or by a person who performs public authorization. Before giving the statement, the person taking the statement must warn the witness to the rights and duties of witnesses prescribed by this Law. A party to the court may file written statement of the witness or the court may require it from the witness. The court may at any time call a witness who has given a written statement or whose statement was recorded to confirm his testimony before the court at the hearing.

This possibility prescribed by LCP in procedures for protection from discrimination can be widely used because it allows persons who have direct knowledge, but different constraints and possibilities of access to the courts (for example, fear of testimony) to give their statement.

In proceedings on protection against discrimination the parties and the court are entitled to use all means of evidence. Discrimination itself is proved in different ways, primarily depending on the circumstances of the case.

[7] See: prof. PhD. Nevena Petrušić, Kosana Becker, Practicum for protection from discrimination, Partners for Democratic Changes of Serbia, Centre for Alternative Dispute Resolution, Belgrade, 2012, pg. 53

• The judgment of the Court of Appeal in Novi Sad, Gž 4114/1 of 16.11.2011.

• The judgment of the Court of Appeal in Novi Sad, Gž 4514/11 of 03.08.2012.

Discrimination means unjustified, unlawful distinction, or prohibited unequal treatment that comes from an individual or legal person and which is committed to a person or group regarding their personal characteristics.

However, not every distinction between individuals regarding their personal characteristics is illegal. Just the examples above indicate that in certain situations distinction is justified and legitimate. It is on the courts to decide on the existence or non-existence of discrimination by application of special legal regulations.

According to the general rule, different treatment is illegal, or in particular case, there would be discrimination if, as first, the purpose or effect of the measures are unjustified, and as second, if there is no proportionality between the measures taken and the goals to be achieved by these measures.

This rule is prescribed the Law on Prohibition of Discrimination[8] and the Law on Prevention of Discrimination against Persons with Disabilities[9]. The same laws stipulate that it is permissible and legitimate to indulge justified interests of discriminated people or to take "measures of affirmative action" by which a group of individuals who share certain personal characteristics is put in an equal position with other persons, such as setting up audible signals that serve to blind and visually impaired persons for safe street crossing or ensuring minimum representation of women in public bodies (Article 14 of the Law on

[8] Law Against Discrimination: Violation of the principle of equal rights and obligations exists if a person or group of persons, because of his or their personal characteristics, are unjustly denied their rights and freedoms or are imposed obligations that are in a similar situation not denied or imposed to another person or group of persons, if the purpose or effect of the measures taken are unjustified, and if there is no proportionality between the measures taken and the goals to be achieved by these measures (Article 8).

[9] Law on Prevention of Discrimination against Persons with Disabilities: Violation of the principle of equal rights and obligations exists: 1. if to discriminated people solely or mainly because of their disability are unjustly denied their rights and freedoms, or are imposed obligations, which are in a similar situation not denied or imposed to another person or group; 2. if the purpose or effect of the measures taken is unjustified, 3. If there is no proportionality between the measures taken and the goals to be achieved by these measures (Article 7).

Prohibition of Discrimination and Article 8 of the Law on Prevention of Discrimination against Persons with Disabilities).

In particular case the courts had the above-mentioned "principles" as a very basis for their decisions, but the Supreme Court of Cassation clearly pointed to the right of each country to regulate the relations in various areas of life, with the right to give, by different regulations to the various categories of persons, a different range of rights. Discrimination could arise in the application of these regulations, unless persons who are in the same or similar situations are treated differently.

Similarly, in determining whether a treatment is a discrimination or not, it is necessary to evaluate the justification of distinction in the treatment of the plaintiff, or whether it is based on objective and reasonable justification, whether the purpose or effect of the taken measures are unjustified, and if there is proportionality between measures taken and the legitimate objective to be achieved by these measures. The assessment whether a person is discriminated or not, does not have to be judged in terms of proportionality and the legitimate objective to be achieved by the measures.

- The judgment of the Court of Appeal in Novi Sad, Gž 10400/10 of 27.3.2011.
- The judgment of the Supreme Court of Cassation Court, Rev. 1036/11 of 27.10.2011.

In reviewed judicial decisions the Court analyzed various life situations in which the participants in the judicial process had found themselves and provided an explanation of the existence of discrimination. We think that the presentation of these court decisions may contribute to better understanding of the fine specificity of "nuance" of behaviour that leads to unallowed distinction and places a person in a favourable or unfavourable position

Besides determining the existence of discrimination, discrimination can be the basis for compensation of the damage caused. In this sense, the general mode of compensation, determined by the Law on Contract and Torts and which is realized according the provisions of Law on Civil Procedure, may be one of the tools used in civil proceedings proving the relation between committed discrimination and the material and moral damages caused.

In the examples of judgments that are presented in this section we point to the problem of recognizing discriminatory behaviour, determining which

behaviour is discrimination and which is not; civil proceedings for damage compensation caused by discrimination is possible, but it is long and does not meet the urgent need for quick resolution of cases of discrimination.

In the procedures for the protection from discrimination the plaintiff need not prove his legal interest. The Law on Prohibition of Discrimination does not require proof of legal interest for filing the lawsuit on protection from discrimination, so that the plaintiff need not prove that he has a legitimate interest to protect, or to state why he/she is seeking protection from discrimination.

In the process of determining whether a particular action or failure to act is discrimination, it is necessary to start with the definition of discrimination under the Law on Prohibition of Discrimination, and with the elements that this definition contains.

Making a difference, that is, unequal treatment is reflected in the exclusion, restriction or preference, and it consists of committing or omission, and by its form, discrimination has many forms and aspects.

In the basis of discriminatory behaviour is that the whole person is reduced to one personal characteristic.

The Law on Prohibition of Discrimination provides a list of personal characteristics, but life is always more inventive than the legislature. Therefore, the definition of personal characteristics must be understood solely as a list that is not closed and the prohibition of discrimination applies to all personal characteristics.[10]

It is essential that the personal characteristics are the basis for discriminatory behaviour.

- The judgment of the Basic Court of Kraljevo, Court Unit Raška, 7 P 2580/10 of

  19.05.2010.

- The judgment of the High Court in Kraljevo, Gž 953/10 of 1.9.2010.

[10] One of the few exemptions from "unlimited definition" of personal characteristics is in the Law on Public Information (Official Gazette no. 43/03, 61/05, 71/09, 89/10 - U.S., 41/11-U.S.), Article 38: "It is forbidden to publish ideas, information and opinions inciting discrimination, hatred or violence against persons or groups because of their belonging or not belonging to a particular race, religion, nationality, ethnicity, gender or their sexual orientation, regardless of whether by publishing the offense is done."

- The judgment of Supreme Cassation Court, Rev. 3602/10 of 16.12.2010.
- The judgment of Court of Appeal in Novi Sad, Gž 4656/11 of 18.1.2012.
- The judgment of Basic Court in Zrenjanin, 16 P 567/10 of 17.6.2010.
- The decision of Court of Appeal in Novi Sad, Gž 785/12 of 01.03.2012.
- The judgment of Court of Appeal in Niš, Gž 2747/10 of 7.6.2011.
- The judgment of Supreme Cassation Court, Rev. 66/12 of 2.2.2012.

At the end are the decisions that have as their basis discrimination or decisions incurred as a result of court proceedings initiated by the Commissioner for Protection of Equality. These decisions provide a clear picture on which conducts the Commissioner recognized as discrimination and decided to initiate legal proceedings.

In this review the final decision of the European Court for Human Rights in the case of Vučković and others against Serbia is included by which the court, considering all the facts of the case, concluded that there was "objective and reasonable justification" for the different treatment of the applicants only based on a personal characteristic
– in this particular case of residence of the applicants, and the court determines that there has been a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1. In this case, the Court fully supported the assessment made by the Commissioner for Protection of Equality regarding this case (paragraphs 23 and 84 of the judgment).

SECOND SECTION

CASE VUČKOVIĆ AND OTHER APPLICANTS against SERBIA

(Application No. 17153/11 and the 29 other applications listed in Enclosure of this judgment)

JUDGEMENT

STRASBOURG

August 28th,
2012.

This judgment will become final in the circumstances anticipated in Article 44 Paragraph 2, of the Convention. Editorial changes are possible.

In the case of Vučković and others against Serbia,
the European Court of Human Rights (Second Department) at the session of a Council consisted of:
Françoise Tulkens, *chairman,*
Danutė Jočienė,
Dragoljub Popović,
Isabelle Berro-Lefèvre,
András Sajó,
Ilş Karakaş,
Guido Raimondi, *judges,* and Françoise Elens-Passos, *deputy secretary of the department*,

after deliberating at the closed session, which took place on July 10, 2012, delivered the following judgment, which was adopted on that date:

PROCEDURE

1. The case is formed based on thirty separate petitions against Serbia that were submitted to the Court according to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "The Convention"), on February 14, 2011. All applicants were citizens of Serbia, and their personal data are listed in the Annex to this judgment.

2. Applicants were represented before the Court by Mr. S. Aleksić, a lawyer from Niš. The Serbian Government ("the Government") was represented by its representative, Mr. S. Carić.

3. The applicants complained of discrimination and inconsistency of domestic court practice regarding the payment of wages granted to all reservists who were in the Yugoslav Army between March and June in 1999.

4. Applications were submitted to the Government on August 24, 2011.
It was decided also that their admissibility and validity should be considered at the same time (Article 29, paragraph 1).

FACTS

I. CIRCUMSTANCES OF THE CASE

5. The facts of the case, as the parties displayed them, can be summarized in the following way.

A. Context and procedures initiated by the applicants

6. All the applicants were reservists that the Yugoslav Army mobilized in relation to the intervention of the North Atlantic Treaty Organization in Serbia. They were in the military service from March to June in 1999, and on that basis they were entitled to certain wages, as recognized by a number of decisions and orders from April 1999, signed by the then Chief of the General Staff of the Yugoslav Army. These decisions and orders are also based on relevant by-laws adopted in accordance with the legislation on military service, more precisely, with the Rule Book on

Travel and Other Expenses in the Yugoslav Army, which were changed in March 1999.

7. However, after demobilization, the Government refused to fulfil its obligations to reservists, including the applicants.

8. The reservists later organized a series of public protests, some of which ended in an open conflict with the police. Finally, after extended negotiations, the Government, on January 11, 2008, reached a deal with some reservists, especially with those residing in the municipalities of Kuršumlija, Lebane, Major, Žitorađa, Doljevac, Prokuplje and Blace, to whom the payment in six monthly instalments was guaranteed . This payment was supposed to be made through their municipalities, the collective amounts for each municipality were provided. The above-mentioned municipalities were selected because of their status of the "underdeveloped", which implied that the reservists were economically vulnerable, or of low financial status. For their part, the reservists accepted to give up all remaining claims based on the military service in 1999, that were still pending before the civil courts, as well as all other claims in this regard. Finally, it was anticipated that the criteria for the distribution of the "financial assistance" in question would be established by the Committee composed of representatives of local government and representatives of the reservists.

9. The applicants, as well as all other reservists without registered permanent residence in those municipalities, could not receive aid under the Agreement of January 11, 2008.

10. The applicants, therefore, on March 26, 2009 submitted a civil action against the defended State, seeking payment of wages and claiming that they are discriminated.

11. The Basic Court in Niš passed the judgement against the applicants on July 8, 2010. Thus it confirmed the validity of the legal basis of the complaint, but ascertained, as the defendant pointed out, that the valid statute of limitations was three years from their demobilization in accordance with Article 376, paragraph 1, of the Law of Contract and Torts. Applicants' complaint was therefore untimely submitted.

12. On November 16, 2010 the Appeal Court in Niš= confirmed this judgement by the complaint, which, in that way, became final. In the explanation of the judgement the Appeal Court noted that the statute of

limitations of three and five years prescribed by Article 376, para. 1 and 2 of the Law of Contract and Torts had already expired before the applicants submitted civil claim (see paragraph 40 below).

13. After the decision of the Appeal Court was delivered to them, the applicants complained on January 21, 2011, to the Constitutional Court. In the complaint, inter alia, they stated that the disputed judgment of the Appeal Court in Niš is inconsistent to numerous judgments made by other appeal courts in Serbia – i.e. district courts while they existed, and the higher and appeal courts after that - which applied to the same facts a longer, ten-year statute of limitations and in that way adjudicated in favour of the plaintiffs (see Article 371 of the Law of Contract and Torts in paragraph 39, below). The applicants also referred to the Agreement concluded between the Government and some reservists from January 11, 2008, which excluded all other reservists, including themselves.

14. Proceedings before the Constitutional Court is still pending

B. Other civil litigation

15. In the period from 2002 to the beginning of March 2009, the first instance and appeal courts throughout Serbia were passing judgements on the reservists' behalf in a situation such as the situation of the applicants is, and against them, relying on a three-year / five-year or ten-year statute of limitations.

16. Meanwhile, in 2003 and in 2004, the Supreme Court granted two legal interpretations, both of which considered that the applicable statute of limitations should be three / five years under Article 376, para. 1, and 2 of the Law of Contracts and Torts (see para. 40, 43, and 44 below).

17. The Government also claimed that the Supreme Court granted another legal interpretation on this issue in 2009, with the same effect, but more specific, but that view was never published in the "Bulletin of the court practice".

18. In the period from February 25, 2010 to September 15, 2011, the various appeal courts essentially passed the judgements in accordance with legal views of the Supreme Court from 2003 and 2004. (see, for example, decisions of the Higher Court in Kraljevo, Gž. 1476/11 of September 15, 2011; the Higher Court in Valjevo, Gž. 252/10 of February 25, 2010, 806/10 of May 27, 2010, 1301/10 of September 30, 2010, 1364/10, of November 4, 2010, and 355/11 of

March 24, 2011; Higher Court in Kruševac, Gž. 38/11 of January 27, 2011, 282/11 of April 7, 2011, and 280/11 of April 26, 2011; and the Court of Appeal in Niš, Gž. 2396/10 of June 23, 2010, 3379/2010 of July 2, 2010, 2373/2010 of July 21, 2010, and 4117/2010 of November 30, 2010.).

19. Between June 17, 2009 and November 23, 2011, a number of decisions was passed in which the appeal courts passed judgements against reservists, although on a different basis. In particular, their claims, unlike the claims of the applicants were rejected because of an administrative nature, and as such, they were outside the jurisdiction of the civil courts (see decision of the District Court in Belgrade Gž. 7773/09 of June 17, 2009, as well as the decision of the Higher Court in Belgrade Gž. 11139/10, 11636/10 and 10897/10 of November 17, 2010, and November 23, 2011.).

20. On July 17, 2010 the Basic Court in Leskovac, adopted a default judgment in favour of a reservist (P. no. 1745/07). According to information submitted by the parties, there is no evidence that this has ever become the final judgment.

C. Additional facts relating to the Agreement of January 11, 2008.

21. On January 17, 2008 the Government confirmed the Agreement from January 11, 2008, and decided to pay to the subject municipalities the amounts stated in the agreement.

22. On August 28, 2008, the Government formed a working group with the task to process the demands of all other reservists, i.e. of those who do not reside in the seven listed municipalities. However, as it talked with the various groups of reservists about this issue, this working group has finally decided that their demands are not acceptable, among other things, because: (1) they did not harmonize or specify their demands, (2) some of their representatives had ambiguous attitude on how to be represented, (3) the state funds that could be used for this purpose were missing, and (4) in most cases, the war wages have already been paid to reservists.

23. The Commissioner for Protection of Equality, the office like that of the Ombudsman, founded on the basis of the Law Against Discrimination (published in “Off. Gazette RS“, no. 22/09), on July 26, 2011 gave the opinion on the complaints of one organization which represented the interests of the reservists in the situation same to that of the applicants. She concluded that they were discriminated on the basis

of their registered permanent residence, i.e. because they were not residents of the seven privileged municipalities, and she recommended the Government to take all necessary measures to ensure that all reservists receive payments specified by the decision from January 17, 2008. The Government was also urged to submit appropriate "action plan" to the Commissioner within thirty days. In the explanation of the Commissioner's decision it was concluded, among other things, that the subject payments, wages, regardless of the fact that the Government considered them as a social aid granted to the underprivileged, and that this is best illustrated by the fact that the subject reservists had to give up claims relating to wages and the fact that reservists residing in seven particular municipalities have never been required individually to prove financial status and social vulnerability. Therefore, it is clear that there was no objective and reasonable justification for the different treatment of reservists on the basis of residence.

24. On December 7, 2011 the Ministry of Labour and Social Policy found that the negotiations should be continued with the various groups of reservists, and that, if possible, the financial aid should be given to the most vulnerable of them.

D. The letter from March 16, 2009

25. The Ministry of Economy and Regional Development sent a letter to the Ministry of Justice on 16 March 16, 2009, in which, among other things, it is stated that there are many employment litigations against the existing or former public companies, which could jeopardize the economic stability of the country. It therefore urged the Ministry of Justice to consider the possibility of informing the courts to stop some types of these litigations until the end of 2009, and to withdraw the execution of the already issued judgments in these cases. According to reports in the media, after receiving it, the Ministry of Justice had forwarded the letter to the Supreme Court, which then forwarded it by fax to the presidents of the courts of appeal as information.

26. The Supreme Court on March 23, 2009 informed the public that it rejected the recommendation of the Ministry of Economy and Regional Development. Among other things, it stated that the Serbian judiciary is independent of the executive and legislative branches of the Government.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution of the Republic of Serbia (published in the "Official Gazette of Republic of Serbia "-" Off. Gazette of RS ", No. 98/06)

27. The relevant provisions of the Constitution are worded as follows:

Article 21, paragraphs 2 and 3

“Everyone has the right to equal legal protection without discrimination.

Any discrimination on any grounds, particularly on race, sex, national or social origin, birth, religion, political or other opinion, financial status, culture, language, age, mental or physical disabilities, is prohibited.”

Article 32 para 1.

"Everyone has the right to ... [fair trial before] ... Court ... [in deciding] ... of his [or her] rights and obligations ... "

Article 36, para 1.

“Equal protection of rights is guaranteed ...before the courts.”

Article170

“A constitutional complaint may be stated against individual acts or actions of state bodies or organizations entrusted with public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection are exhausted or are not provided."

B. The practice of the Constitutional Court

28. The Constitutional Court on June 9, 2010 and February 17, 2011 rejected two separate constitutional complaints of reservists in a situation like that of the applicants. That court, among other things, stated that the decisions against them adopted by the civil courts were "based on the valid domestic legislation." The applicants, however, have never specifically complained about the inconsistency of the relevant court practice or that they have been discriminated. (Už. 460/08 and Už. 2293/10).

29. The Constitutional Court on February 17, 2011, in one more case such as the case of the applicants, among other things, practically ignored the complaint about two different treatment of two groups of reservists under the Agreement on January 11, 2008. It especially did not provide substantive evaluation of the questions of the applicants, with the further statement that they did not provide adequate evidence regarding the existence of inconsistent court practice on this issue (Už. 2901/10).

30. In another case such as that of the applicants, the Constitutional Court on 7 April 7, 2011 passed the judgement against the complainants regarding their complaint on the outcome of their cases before the lower courts. The decision itself was not referring to the Agreement of January 11, 2008, so it remains unclear whether the plaintiffs raised this question at all (Už. 4421/10).

31. In a case such as the case of the applicants, but in which the civil courts had rejected the claims of the reservists as claims outside their jurisdiction ratione materiae (see, for example, paragraph 19 above), the Constitutional Court on March 8, 2012 decided in favour of the complainants who argued that the court practice is inconsistent (judgment in their cases, and several other judgments passed by courts in 2002) and ordered that the arguable civil lawsuit be repeated. Regarding the applicants' complaint about discrimination, the Constitutional Court reasoned that the alleged inconsistency does not constitute discrimination because arguable court decisions were not made on the basis of personal characteristics of the applicants. In the opinion of the court there was also no reference to the Agreement of January 11, 2008 (Už. 2289/09).

32. By the decision Už. 61/09, adopted on March 3, 2011, and decisions Už. 553/09, 703/09 and 792/09, adopted on March 17, 2011, and decisions Už. 2133/09, 1928/09, 1888/09, 1695/09, 1578/09, 1575/09, 1524/09, 1318/09

and 1896/09, issued between October 7, 2010 and February 23, 2012, the Constitutional Court found the existence of inconsistencies of domestic jurisprudence in the litigation context, and found that this violated the principle of legal certainty, which is an integral part of the applicants' right to a fair trial. Applicants' complaints that the same situation resulted in discrimination against them was rejected by the Constitutional Court as obviously unfounded, since the arguable court decisions were not made on the basis of personal characteristics of the applicants. A retrial was not ordered. The above-mentioned decisions were related to issues that actually have nothing to do with the personal characteristics of the applicants in this case.

C. Law on Civil Procedure (published in "Off. Gazette" No. 125/04 and 111/09)

33. Article 2, Paragraph 1 provides, inter alia, that all parties are entitled to equal protection of their rights.

34. Article 476 determines the circumstances in which a judgment for absence can be passed, based on, among other things, the failure of the defendant to appear before the court despite a subpoena delivered to him.

35. Article 422.10 provides that the procedure can be restarted if the European Court of Human Rights passes a judgment in relation to Serbia regarding the same or similar legal issues.

D. The Law on Organisation of Courts (Published in "Off. Gazette of RS", no. 63/01, 42/02, 27/03, 29/04, 101/05 and 46/06)

36. Article 40, paragraphs 2 and 3 provides, inter alia, that the session of the Supreme Court department shall take place if there is any question regarding the consistency of its jurisprudence. The legal opinions adopted based on that are obligatory for the councils of that department.

E. Rulebook on reimbursement of travel and other expenses in the Yugoslav Army (published in the "Official Military Gazette", no. 38/93, 23/93, 3/97, 11/97, 12/98, 6/99 and 7/99)

37. This Rulebook determines the relevant details regarding compensation for expenses incurred in relation to military service.

F. Law on Contract and Torts (published in the "Official Gazette of the Socialist Federal Republic of Yugoslavia, no. 29/78, 39/85, 45/89, 57/89 and" Official Gazette of the Federal Republic of Yugoslavia, No. 31/93)

38. Article 360, paragraph 3 provides that courts do not have to, during the proceedings before them, pay attention to the statute of limitations unless the debtor had not referred to it.

39. Article 371 provides that the general statute of limitations for civil lawsuits is ten years unless otherwise specified.

40. Article 376, paragraphs 1 and 2 provides, inter alia, that the limitation period of demands for compensation is three years from the moment when the applicant became aware of the damage, but that, in any case, the absolute statute of limitations is five-year of the damage.

41. Articles 388 and 387 provide, inter alia, that the statute of limitation ends when the debtor recognizes the subject claim, directly or indirectly, as well as when the applicant submits a civil complaint in this regard.

42. Article 392, para 1-3, prescribes, among other things, that the effect of such termination is that the current statute of limitations period begins to run as a new one from the moment when the debtor accepts the subject application or from the end of civil litigation.

G. A legal opinion adopted by the Supreme Court

43. The Supreme Court found on May 26, 2003, inter alia, that, completely separately from the jurisdiction of administrative authorities regarding the demands of the reservists for wages, civil courts have jurisdiction to decide on grounds of all relevant cases in which they seek compensation (see paragraph 40 above) based on the illegal act of the State (legal opinion of the Civil Department of the Supreme Court of Serbia determined at the session on May 26, 2003, published in the Bulletin of the Supreme Court No. 1/04).

44. On April 6, 2004 the Supreme Court in effect reconfirmed the legal opinion of May 26, 2003, expanding its application to other determined "rights based on military service". It also stated that in the meantime there has been certain inconsistence before the courts (legal opinion of the Civil Department of the Supreme Court of Serbia determined at the session on April 6, 2004, published in the Bulletin of the Supreme Court No. 1/04).

LAW

I. JOINING APPLICATIONS

45. The Court considers, that, accordingly to the Rule 42, paragraph 1 of the Operating Procedure of the Court, the applications should be joint, considering similar factual and legal situation.

II. ALLEGED VIOLATION OF ARTICLE 6, PARAGRAPH 1, OF THE **CONVENTION**

46. According to Article 6, Paragraph 1 of the Convention, the applicants complained about the inconsistent court practice of the courts in Serbia, especially because the Court of Appeal in Niš refused their demands and because other civil courts had adopted the identical demands of other reservists based on a different interpretation of the current statute of limitations.

47. Article 6, Paragraph 1 in the relevant part, is worded as follows:

"Everyone, while deciding on his civil rights and obligations..., is entitled to fair... argument ... before independent ... court..."

A. The parties' allegations

48. The Government stated that the Constitutional Court had made decisions on twenty-three cases as is the case of the applicants to that date. In twenty-one of these cases, in the relevant part, it rejected the complaint, and in the remaining two it dismissed the complaints for procedural reasons. The Government, however, remained of the opinion that none of the applicants in these cases had properly claimed and / or documented complaints about the inconsistency of court practice (see, for example, paragraphs 28-30 above).

49. The Government further submitted to the Court a copy of the decision of the Constitutional Court from March 8, 2012 (see paragraph 31 above), which, as the Government claimed, is an example of the effectiveness of the constitutional appeal, although in a slightly different context.

50. Since the resolution of the applicants' complaints is in progress before Constitutional Court, the Government remained of the opinion that their complaints were premature in the sense of Article 35, Paragraph 1 of the Convention.

51. Alternatively, the Government claimed that the facts of this case clearly indicate that there was no violation of Article 6, Paragraph 1 of the Convention. In particular: (1) the Supreme Court granted two legal opinions in 2003 and in 2004, stating that the statute of limitation of three / five years should be applied; (2) in 2009, it adopted a specific legal opinion in this regard, removing the remaining uncertainty; (3) since then the domestic jurisprudence on this issue has been consistent, that is, the trial and appellate courts have unanimously applied the statute of limitation of three / five years, except in incidental judgment for absence passed before the first instance court where the competent trial court could not take into account the statute of limitation for failure of the defendant to submit a complaint on that.

The Government concluded that because of that it should have been clear to the applicants from the beginning that their demands were going to be rejected as outdated.

52. Finally, the Government stated that the recommendation contained in the letter from the Ministry of Economy of 16 March 16, 2009 was not applied (see para. 25 and 26 above). It is therefore not relevant to the case.

53. Observations of the applicants, after submission of their case to the Government, were filed after the deadline established by the Court. President of the Council has therefore decided that, under Rule 38, paragraph 1, of the Rules of Procedure of the Court, they should not be included in the case file that the Court is about to consider (see also paragraph 20 of the Practical guidance on written applications). All updates of the facts are, however, attached to the files and forwarded to the Government for information.

B. Court evaluation

54. In a recent judgment of the Grand Chamber in Nejdet Şahin and Perihan Şahin v. Turkey ([GC], No. 13279/05, October 20, 2011.), the court reminded of the key principles that apply in cases related to the issue of conflicting court decisions (paragraphs 49 -58). They can be summarized as follows:

(1) The Court's role is not to deal with the factual or legal errors allegedly made by a national court unless and so far as the rights protected by the Convention are violated (see García Ruiz v. Spain [GC], No. 30544/96, para. 28, ECHR 1999 - I). In the same way, it is not the Court's task to compare, except in the case of obvious randomness, various decisions of national courts, even when they are passed in apparently similar procedures considering that the independence of the courts must be respected (see Adamsons v. Latvia, no. 3669/03, para. 118, June 24, 2008.);

(2) The existence of conflicting court decisions is a permanent feature of legal systems that are based on the network of trial and appeal courts, with jurisdiction over the particular territory. Such differences may occur within the same court. This, by itself, cannot be considered contrary to the Convention

(see Santos Pinto v. Portugal, no. 39005/04, para 41, May 20, 2008, and Tudor Tudor, quoted above, para 29);

(3) The criteria that guided the Court while deciding whether the conflicting decisions of various national courts, which decided in the last instance, are in accordance with the right to a fair trial under Article 6, Paragraph 1 of the Convention, is to establish whether there are "profound and lasting differences" in the case law of domestic courts, whether domestic law provides a mechanism to overcome these differences, and whether this mechanism is applied and what is the effect of this application (see Iordan Iordanov and others, cited above, p. 49-50; see also Beian (No. 1), quoted in the text above, para. 34-40; Ştefan and Ştef v. Romania, no. 24428/03 and 26977/03, para. 33-36, January 27,2009; Schwarzkopf and Taussik, quoted above, December 2, 2008; Tudor Tudor, quoted above, para. 31; and Ştefănică and others, quoted in the text above, para 36.); (4) The Court's evaluation is based also on the principle of legal certainty, which is implicitly contained in all the articles of the Convention and is an essential aspect of the rule of law (see, among other authorities, Beian (no. 1), quoted in the text above, para 39; Iordan Iordanov and others, quoted in the text above, para. 47; and Ştefănică and others, quoted in the text above, para. 31);

(5) The principle of legal safety guarantees, among other things, certain stability and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can lead to legal insecurity that would likely lead to impairment of public confidence in the legal system, where it is clear that such confidence is one of the essential elements of the state based on the rule of law (see Paduraru v. Romania , paragraph 98, the number 63 252/00, ECHR 2005-XII (excerpts); Vinčić and Others v. Serbia, no. 44 698/06 and others, paragraph 56, December 1, 2009, and Ştefănică and others, quoted above, paragraph 38);

(6) However, the requirements of legal safety and protection of legitimate public confidence do not give an acquired right to the consistency of case law (see Unédic v. France, No. 20153/04, paragraph 74, December 18, 2008). The development of the case law is not by itself contradictory to proper implementation of justice, because the failure to maintain a dynamic and developmental approach could lead to the risk of disruption of a reform or a progress (see Atanasovski against the former Yugoslav Republic of Macedonia, No. 36 815/03, paragraph 38, January 14, 2010.).

55. If we get back to present case, the Court first observes that the applicants complained of the refusal of their demands by the Appellate Court in Niš and the adoption by other civil courts of identical demands submitted by other reservists based on a different interpretation of current statute of limitations.

56. Second, it is clear that in this matter there was conflicting case law in the period since 2002 to the beginning of March 2009, and possibly after that, but it seems that, from February 2010, it was effectively adjusted on the second instance in accordance with the legal interpretation of the Supreme Court from 2003, and 2004, i.e. with consistent application of statute of limitations of three / five years, rather than the general term of ten years (see para. 15-18, 39 and 40 in the text above). In such context it is of little significance whether the Supreme Court adopted additional legal interpretation in 2009 (see paragraph 17 above).

57. Third, the applicants submitted a claim on March 26, 2009 and the Basic Court issued a judgment against them on July 8, 2010, using the statute of limitations of three years (see para. 10 and 11, in the text above). Therefore, it follows that the relevant practice of the appeal courts was adjusted less than a year after filing the complaint of the applicants and, in any case, more than four months before reaching the first instance verdict in their case.

58. Fourth, it can be noticed that on July 17, 2010, the Basic Court in Leskovac issued a judgment for absence in favour of a reservist, i.e. judgment based on the defendant's failure to appear before the court where he was invited regularly (see paragraph 34 above). However, according to information from the parties, there is no evidence that this judgment became final (see paragraph 20 above). It is further noticed that, as the Government pointed out, Article 360, Paragraph 3 of the Law on Contracts and Torts requires that civil courts cannot, during the proceedings before them, take into account the statute of limitations if the debtor did not make the objection in this regard (see paragraph 38 above). There is no indication that in the present case, the debtor / defendant did so. The Court finally notices that the mentioned judgment of the Basic Court in Leskovac is the one that could be considered as the exception rather than the case law that has already been adjusted by February 2010, and not vice versa (see, mutatis mutandis Tomić and others against Montenegro, no. 18,650 / 09 and others, paragraph 57, April 17, 2012, not yet final).

59. Fifth, however, regardless of the letter of March 16, prepared by the Ministry of Economy and which content is lamentable, it was irrelevant to the complaints of the applicants as it refers to different types of cases and, in any way, has never been applied (see para. 25 and 26 above).

60. In such circumstances, it cannot be said, at least so far as it is about the case of the applicants, that in the respective case law there were "deep and lasting differences," nor that it has led to legal insecurity in this period. Accordingly, the Court considers that the applicants' complaints in this regard are clearly unfounded and must be rejected in accordance with Article 35 paragraphs 3 (a) and 4 of the Convention.

61. The Court further finds that in light of this conclusion it is not necessary to make a decision on the note of the Government whether the same complaints should be dismissed as premature.

III. THE ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

62. The applicants further complained about discrimination based on the Agreement from January 11, 2008 (see para. 8 and 21 above), They relied upon the Article 14 of the Convention.

63. The court referred these complaints to the Government according to the Article 14 of the Convention, in conjunction with Article 1, Protocol No. 1

64. The above two provisions are worded as follows:

Article 14 of the Convention

"The entitlement to the rights and freedoms anticipated in this Convention shall be provided without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. "

Article 1 of Protocol no. 1

“Any physical or legal person is entitled to the unobstructed enjoyment in his property. No one shall be deprived of his property except in the public interest and under circumstances provided by law and by the general principles of international law.

The preceding provisions, however, do not in any way affect the right of a State to enforce laws which it considers to be 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. Permissibility

65. The Government claimed that the applicants' complaints should be dismissed as premature because the resolution of their appeal before the **Constitutional Court is in the course.**

66. In this regard, they referred to the decision of the Constitutional Court Už. 2901/10 of February 17, 2011, noticing that in that decision the position of the complainants is not compared to reservists who have received compensation under the Agreement of January 11, 2008, since there was no evidence that the complainants have ever claimed to conclude an agreement of this kind with the Government (see paragraph 29 above). However, in many other cases, the Constitutional Court has constantly judged in favour of the complainants (see para. 31 and 32 above).

67. In their applications before submission of the case to the Government, the applicants remained of the opinion that, besides the fact that they have used it, the constitutional complaint cannot, in the particular circumstances of their case, be considered an effective legal remedy.

68. The Court reminds that according to Article 35, Paragraph 1 of the Convention, it may deal with an application only after exhausting all domestic legal remedies. The purpose of Article 35 is to give to the States Parties the opportunity to prevent or correct the alleged violation against them before those allegations are forwarded to the Court (see, for example, Mifsud v.

France (dec.) [GC], No. 57220/00, para. 15, ECHR 2002 - VIII). The obligation to deplete domestic legal remedies requires the applicant to normally use legal remedies which are effective, sufficient and accessible in terms of violation of his or her rights according the Convention. To be effective, a legal remedy must be able to directly correct the case situation (see Balogh v. Hungary, No. 47940/99, para. 30, July 20, 2004.).

69. Regarding the burden of proof, it is on the Government, which claims that domestic legal remedies have not been exhausted, to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant moment (see, among other things, Vernillo v. France, judgement from February 20, 1991, series A no. 198, pgs. 11–12, para. 27, and Dalia v. France, judgement from February 19, 1998, Reports 1998-I, pgs. 87-88, para. 38.). Once this burden of proof is met, it is on the applicant to establish that the legal remedy offered by the government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances, and that there were special circumstances that set him or her free from that claim (see Dankevich v. Ukraine, no. 40679/98, para. 107, April 29, 2003).

70. Regarding legal systems which provide constitutional protection of fundamental human rights and freedoms, the Court observes that, in principle, it is on the violated individual to verify the extent of that protection (see Vinčić and Others v. Serbia, quoted above, para. 51).

71. If we get back to present case, the Court observes that the applicants' complaints before it refer to discrimination arising from the Agreement of January 11, 2008, which should be differentiated from any specific complaints in the sense that the disputed inconsistent case law resulted in discrimination against reservists before the very civil courts (see, for example, para. 31 and 32 above).

72. Furthermore, according to information available to the Court, complaints, such as applicants' complaints, were filed by the plaintiffs in the case Už. 2901/10, but the Constitutional Court ignored them on February 17, 2011, without offering any substantive evaluation of that issue (see paragraph 29 above). Indeed, the Government has acknowledged this in its remarks, but it remained of the opinion that there was no evidence that the complainants in those cases had asked at all to conclude the agreement, as it is the

Agreement of January 11, 2008. However, this claim, even assuming that it is relevant to the applicant in the present case, is not made on the basis of facts because the Government and the reservists, in general, have had long negotiations, but without success, on extending the principles accepted on January 11, 2008 to all others, and the applicants themselves have clearly shown that they held this opinion by initiating a litigation on March 26, 2009 (see para. 8, 23 and 10 above, in that order).

73. Finally, the remaining case law of the Constitutional Court to which the Government invoked is irrelevant as it refers to the inconsistent case law and / or any discrimination arising only from its inconsistencies, or issues that are not entirely related to the situation of the applicants in this case. In any case, even in these cases, the Constitutional Court did not find any discrimination (see para. 31 and 32 above).

74. In such circumstances, it is clear that despite the fact that "the constitutional complaint should, in principle, be considered effective domestic remedy within the meaning of Article 35, Paragraph 1 of the Convention in relation to all applications filed [against Serbia] from August 7, 2008"(see Vinčić and others against Serbia, quoted above, para 51), this special way of compensation cannot be considered effective regarding cases involving complaints, such as complaints noted by the applicants.

75. The Court therefore dismisses the Government's objection in this regard. Moreover, it finds that the applicants' complaints are not obviously unfounded within the meaning of Article 35, Paragraph 3 of the Convention. No other basis has been identified for them to be declared inadmissible. Therefore, they must be declared admissible.

B. Merits

1. The parties' allegations

76. The Government claimed that the applicants were not discriminated.

77. First, the Agreement of January 11, 2008 primarily related to

a kind of social welfare than the payment of wages. Second, the Government have limited resources, so it was decided to help the most vulnerable reservists, i.e. those residing in the least developed municipalities in Serbia. Third, those reservists had to give up all their demands regarding military service while the applicants, as all other persons in their situation, kept the possibility to address civil courts for compensation.

78. Considering the above, acknowledging that the applicants were actually treated differently than their colleagues with residence in one of the seven municipalities, the Government claimed that there was a reasonable and objective justification for this treatment.

79. As already noticed, the observations of the applicants after submitting their case to the Government were filed after the deadline determined by the court. The President of the Council has therefore decided, under Rule 38, paragraph 1 of the Rules of Procedure of the Court, that they should not be included in the case file that the Court is going to consider (see also paragraph 20 of the Practical guidance on written applications). Updating the facts in the case records is, however, allowed, and they were passed to the Government for information.

2. Relevant principles

80. The Court recalls that Article 14 complements other substantive provisions of the Convention and the Protocol, but is not independent since it is applied only in relation to "the entitlement of rights and freedoms" protected by those provisions. Application of Article 14 need not to presuppose a violation of one of the substantive rights under the Convention. It is sufficient - and also necessary – that the facts of the case fall "within the framework" of one or more articles of the Convention (see Burden v. the United Kingdom [GC], No. 13378/05, para 58, ECHR 2008 -). The prohibition of discrimination under Article 14 therefore goes beyond entitlement to the rights and freedoms that every state must guarantee according to the Conventions and Protocols. It also applies to those additional rights, which fall within the scope of any article of the Convention, that the State Party has voluntarily decided to provide. This principle is well established in the case

law of the Court. It was first expressed in the case "regarding certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (merits) (judgment of July 23, 1968, Series A, No. 6, paragraph 9).

81. The court also found in its case law that only differences in treatment based on characteristics that can be identified, or "position", can be reduced to discrimination within the meaning of Article 14 (Kjeldsen, Busk Madsen and Pedersen v. Denmark, December 7, 1976, para 56, Series A, No. 23). Moreover, to have an issue raised from Article 14, there must be a difference in the treatment of persons in analogous or relevantly similar situations (DH and Other Applicants v. the Czech Republic [GC], No. 57325/00, para. 175, ECHR 2007; Burden v. the United Kingdom [GC], quoted above, paragraph 60). Such a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not aim to a legitimate aim or if there is no reasonable relation of proportionality between the means used and the aim sought to be achieved. States Parties enjoy a margin of appreciation in evaluating whether and to what extent the differences, in otherwise similar situations, justify a different treatment (Burden v. the United Kingdom [GC], quoted above, paragraph 60).

3. Court evaluation

(a) Application of Article 14 of the Convention in conjunction with Article 1, Protocol No. 1

82. The Court notices that the applicants' wages are officially recognized as unsettled financial obligation of the defendant State from 1999 (see paragraph 6 above). It also notices that the payments referred to in the Agreement of January 11, 2008 i.e. exclusion of applicants from that agreement, are associated with these rights themselves (see para. 8 and 21 above). Therefore, it follows that the applicants' complaints concerning the rights that have "sufficiently financial" nature fall within the scope of Article 1, Protocol No. 1 (see mutatis mutandis, Willis v. United Kingdom, no. 36042/97, para 36., ECHR 2002-IV).

83. The Court further finds that, since the applicants are allegedly discriminated on the basis of difference covered by Article 14 of the Convention, that is, on the basis of their registered residence (see, mutatis

mutandis, Carson and Others v. the United Kingdom [GC], no. 42184/05, para. 66, ECHR 2010), this provision shall also be applied to their complaints.

(b) Accordance with Article 14 of the Convention taken together with Article 1, Protocol No. 1

84. The Court notices that the payments that the Agreement of January 11, 2008 refers to, and that the Government confirmed on January 17, 2008 are clearly wages, not social welfare given to vulnerable persons. In this regard, the Court fully supports the evaluation made by the Commissioner for Protection of Equality described in paragraph 23 in the text above.

85. Further, the mentioned agreement stipulated that the reservists from the territory of the municipalities Kuršumlija, Lebane, Bojnik, Žitorađa, Doljevac, Prokuplje and Blace were guaranteed gradual payment of a part of their rights. These municipalities were obviously selected because of their “underdeveloped” status including social vulnerability of the reservists. The reservists themselves, however, were not required to submit any evidence from which their financial status was to be determined, that is, social vulnerability, while the applicants in the present case, as well as all other reservists without registered permanent residence in these areas, could not get aid under the Agreement, i.e. under subsequent decision by the Government which confirms it, regardless of their means. Thus, although the Government's objection in terms of limited resources is not taken lightly, in the context of the existence of a "legitimate aim", its response to the whole situation was arbitrary (see paragraph 23 in the text above).

86. Finally, the suggestion of the Government that, unlike the reservists residing in one of the seven municipalities, the applicants had an opportunity to turn to the civil courts for compensation was the same thing all over again, as the applicants had tried exactly to do that, but in vain.

87. Considering the above and regardless of the margin of evaluation of the State, the Court cannot conclude that there was "objective and reasonable justification" for the different treatment of the applicants on the basis of their residence. Accordingly, there has been a violation of Article 14 of the Convention in conjunction with Article 1, Protocol No. 1

IV. ALLEGED VIOLATION OF ARTICLE 1, OF PROTOCOL NO. 12

88. Applicants' complaints about discrimination the Court also submitted to the Government according to Article 1 of the Protocol No. 12

89. However, considering what is found according to Article 14 in the text above, the Court declared these complaints admissible, but considers that their grounds need not to be considered separately (see, mutatis mutandis, the Alliance of Churches "Word of Life" and others v. Croatia, No. 7798/08, para. 114 and 115, December 9, 2010.).

V ARTICLE 41 OF THE CONVENTION

90. Article 41 of the Convention, prescribes: “When the Court finds violation of the Convention or the Protocols thereto, and if the internal law of the concerned High State Party allows only partial recompense, the Court shall, if necessary, afford just satisfaction to the violated party."

91. Each applicant asked for 3,000 Euros for pecuniary and non-pecuniary damage and 250 Euros for costs incurred in relation with the proceedings before the Court. The applicants have also noticed that the present litigation may be repeated (see para. 35 in the text above).

92. The Government claimed that these demands were outdated.

93. The Court observes that the applicants' claims for just compensation were listed in the application form, but they were actually just repeated (delivered by mail) on March 5, 2012, four days after the deadline for doing so, which was determined by the Court itself after receiving initial observations of the Government. Accordingly, the applicants did not follow the Rule 60, para. 2 and 3 of the Rules of Procedures of the Court, nor paragraph 5 of the Practical guidance on the requirements for a fair compensation, which, in relevant part, provides that the Court "also shall reject the demands listed in the application form, which, however, are not repeated at the appropriate stage of the proceedings and claims filed out of

date." The applicants' claims for just compensation therefore must be dismissed.

VI. APPLICATION OF ARTICLE 46 OF THE CONVENTION

94. Article 46 of the Convention, prescribes:

“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 delivered to the Committee of Ministers, which supervises its execution."

95. Considering these provisions, it follows, among other things, that judgment in which the Court finds a violation imposes to the State a legal obligation not just to pay the amount awarded to the applicants like a just compensation, but also to choose, under a supervision of the Committee of Ministers, the general and / or, according to the case, individual measures to be adopted in the domestic legal system to end the violations found by the Court and to correct, if possible, its effect (see Scozzari and Giunta v. Italy [GC], no. 39221/98 and 41963/98 , para. 249, ECHR 2000-VIII).

96. Considering the above, as well as more than 3,000 petitions currently before the Court asking the same question on discrimination (direct or indirect), the defendant State must, within six months from the date on which the judgment becomes final, in accordance with Article 44, Paragraph 2 of the Convention, take all appropriate measures to ensure the payment of the wages without discrimination to all those who are entitled to them. It is understood that in this regard a certain reasonable and fast factual and / or administrative verification may be necessary.

97. Regarding similar applications that have already been submitted to the Court, the Court decides to postpone its consideration in the specified period. This decision does not violate the authority of the Court to be able at any time to declare inadmissible any such case, or to remove it from the list of cases in accordance with the Convention.

FOR THESE REASONS, THE COURT

1. decides unanimously to join the applications;

2. declares by the majority of votes the complaints under Article 14 of the Convention in conjunction with Article 1 of Protocol no. 1, as well as the complaints under Article 1 of Protocol no. 12, admissible;

3. declares unanimously remaining complaints inadmissible;

4. determines by votes 6 to 1 that the violation of Article 14 of the

Convention in relation to Article 1 of Protocol no. 1 occurred;

5. determines unanimously that there is no need to consider the complaints according to Article 1 of Protocol no.12 separately;

6. determines by votes 6 to 1 that the defendant government must, within six months from the date on which the judgment becomes final, in accordance with Article 44, Paragraph 2 of the Convention, take all appropriate measures to ensure the payment of the wages without discrimination to all those who are entitled to them, and it is understood that in this regard a certain reasonable and fast factual and / or administrative verification may be necessary;

7. decides by the majority of votes to postpone, in the six months period from the date when this judgement becomes final, all similar decisions already submitted to the Court, without violation of the authority of the Court to be able at any time to declare inadmissible any such case, or to remove it from the list of cases in accordance with the Convention.;

8. rejects unanimously applicants' demands for just gratification.

Drafted in English and delivered in writing on 28 August 28, 2012, in accordance with Rule 77 para. 2 and 3, of the Rules of Procedure of the Court.

Françoise Elens-Passos	Françoise Tulkens
Deputy Secretary	Chairman

In accordance with Article 45, Paragraph 2 of the Convention and Rule 74, para. 2, of the Rules of Procedure of the Court, the separate opinion of Judge Sajó is annexed to this judgment.

F.T.

F.E.P.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÒ

I am in full agreement with my colleagues regarding their conclusion that the complaints with regard to the alleged violation of Article 6 § 1 of the Convention must be rejected. However, to my regret I have to dissent regarding the finding of a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. I voted against the admissibility of the complaint submitted in that regard, partly in view of the facts established in the context of the admissibility of Article 6 § 1 complaint.

The applicant's appeal is pending before the Constitutional Court. In respect of Serbia a constitutional appeal is considered a generally effective remedy to be exhausted (*Vinčić and Others v. Serbia*, nos. 44698/06 and others, December 2009). In that case the Court stated "a constitutional appeal should, in principle, be considered an effective domestic remedy ... in respect of all applications" (paragraph 51). The present judgment argues that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one at the relevant time. This position disregards the fact that *Vinčić* reversed that burden. Moreover, one cannot prove a negative. As the Government have demonstrated, the Constitutional Court dealt with decisions concerning other reservists, considering inconsistencies in the case law. In a case decided on 17 February 2011 where the applicants also referred to discrimination (paragraph 29) the Constitutional Court accepted that the complaint could be related to the right to equal protection, but it stated that the issue was the statute of limitations. These considerations apply to the applicants' claims both under Article 6 and under Article 14 in conjunction with Article 1 of Protocol No. 1.

It seems that the Court is of the opinion that the 2008 Agreement on the payment to some groups of reservists created a right that is not subject to the statute of limitations. Of course, the legal nature of the Agreement and its applicability to the applicants are matters intimately related to the interpretation of domestic law. It is not for an international court to offer its interpretation of this law in the absence of domestic interpretation, especially where the Constitutional Court is considering the matter.

Even assuming that the application is admissible, I am not convinced that Article 14 is applicable as there is no possession right in the present case that would trigger the applicability of Article 14. The Court notes, in

paragraph 82 of the judgment, that “the applicants’ *per diems* had been formally recognised as the respondent State’s outstanding pecuniary obligation as of 1999 (see paragraph 6 above)”, and states that the applicants’ complaints concern rights which are of a “sufficiently pecuniary” nature to fall within the ambit of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Willis v. the United Kingdom*, no. 36042/97, § 36, ECHR 2002-IV). In *Willis*, however, the amount and the conditions of applicability of a statutorily defined benefit were not contested, only that the applicant was not entitled to it on discriminatory grounds. The present case is different. A “claim” can constitute a “possession” within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established to be enforceable (*Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B). No court ever established an enforceable claim in respect of the applicants, whose entitlement remains unrecognised; nor do they have a recognised specific claim that is not enforceable only because of the statute of limitations. No court ever recognised a specific claim. The court of first instance recognised the claim only in the sense that it had the legal nature of a damage compensation claim, but it could not rule on the merits (that is, whether the applicants were or were not entitled to a given amount of compensation) because it was barred from doing so by its correct finding that the statute of limitations applied. Therefore the applicants’ claim for damages remains speculative.

One could, of course, argue that the applicants had a legitimate expectation under the Agreement. In that context, at least arguably, the statute of limitations would not apply. In that case, however, the Court should have waited for the final judgment of the Constitutional Court, also in view of the fact that in so far as the Agreement was applicable to the applicants (a disputed matter), it was certainly to be implemented gradually. There is a working group tasked with addressing the requests of all reservists, though it is not clear that the group is charged to act *ex gratia* or in recognition of specific claims. Given the *prima facie* more favourable handling of the claims of some other reservists, I fully respect and understand the position of my colleagues, but I find that in the circumstances of the case, even in view of the troubling delays, considerations of subsidiary should have prevailed.

No.	Application number	
1.	17153/11	Boban VUČKOVIĆ 27/09/1971 Niš
2.	17157/11	Ljubiša VELIČKOVIĆ 24/08/1954 Village Prva Kutina
3.	17160/11	Igor VELIČKOVIĆ 10/06/1979 Niš
4.	17163/11	Saša GROZDANOVIĆ 29/04/1975 Niška Banja
5.	17168/11	Dragan GROZDANOVIĆ 05/12/1967 Niška Banja
6.	17173/11	Ljubiša MILOŠEVIĆ 05/10/1959 Niš
7.	17178/11	Miodrag NIKOLIĆ 29/02/1956 Niška Banja
8.	17181/11	Siniša MILOŠEVIĆ 03/10/1958 Niš
9.	17182/11	Grujica MARKOVIĆ 25/06/1965 Niš
10.	17186/11	Radomir TODOROVIĆ 15/07/1958 Niška Banja
11.	17343/11	Dejan ZDRAVKOVIĆ 19/11/1971 Sidevo

13.	17362/11	**Branislav MILIĆ** 15/08/1944 Niš
14.	17364/11	**Miroslav STOJKOVIĆ** 01/09/1947 Doljevac
15.	17367/11	**Dejan SEKULIĆ** 09/08/1970 Niška Banja
16.	17370/11	**Slavoljub LUĆKOVIĆ** 24/06/1955 Niš
17.	17372/11	**Goran LAZAREVIĆ** 17/08/1970 Niš
18.	17377/11	**Goran MITIĆ** 15/02/1979 Niš
19.	17380/11	**Petar ADAMOVIĆ** 02/08/1952 Niš
20.	17382/11	**Radisav ZLATKOVIĆ** 12/04/1952 Niš
21.	17386/11	**Jovan RANĐELOVIĆ** 25/02/1944 Niš
22.	17421/11	**Bratislav MARKOVIĆ** 26/05/1949 Niška Banja
23.	17424/11	**Desimir MARKOVIĆ** 08/07/1965 Niš
24.	17428/11	**Ćaslav SPASIĆ** 21/02/1960 Niš
25.	17431/11	**Ljubiša NIKOLIĆ** 05/12/1958 Village Jelašnica

26.	17435/11	**Dragan Đorđević** 19/02/1957 Niška Banja
27.	17438/11	**Radiša ĆIRIĆ** 10/02/1958 Нишка Бања
28.	17439/11	**Siniša PEŠIĆ** 31/10/1961 Niš
29.	17440/11	**Boban CVETKOVIĆ** 28/08/1967 Niška Banja
30.	17443/11	**Goran JOVANOVIĆ** 15/01/1965 Suvi Do

CONCLUSION

Today in the Republic of Serbia there is a great number of regulations governing the protection from discrimination, by governing certain areas of protection of certain vulnerable groups. On the other hand, discrimination in Serbia still exists. This creates the need to improve the existing legislation. Experience acquired from comparative law and standards of the UN, Council of Europe and the European Union, are a reliable basis for the definition of precise and highly effective legal mechanisms of protection against discrimination. The state must not make discriminatory laws, and also must create a legal environment in which all its agencies will be obliged to apply the law equally to all, and be provided with the applicable legal provisions. The state, in addition, has to punish any discrimination, regardless of whether their own officers are responsible, or its agencies, or individuals or legal entities. If not, victims of discrimination have other possibilities at their disposal, that is, the possibilities of direct addressing to international bodies for the protection of human rights, and above all to the European Court of Human Rights in Strasbourg.

While working on the cases and making the decisions, the existence of differential treatment of judges is justified to have. If the judges were not able to freely express their legal opinions in the application of substantive law, that would have a significant impact on the quality and scope of human rights protection provided by the courts. The freedom and independence of the court serve precisely to development of the full and real equality before the law.

The first instance judgment is only one step in achieving the ultimate protection of human rights and fundamental freedoms. The role of judicial bodies is to provide the persons who are victims of discrimination the protection from discrimination and to reach proper and legal sentence by enforcement of the law.

In all court proceedings, including proceedings for protection against discrimination, the role of the party or representative / attorney of the party is very important.

Different treatment of courts is determined by the different conduct of the parties in the court proceedings. It is on the parties to, through the lawsuit and through the evidence, bring all facts that prove the merits of the claim.

It should be noted that in none of the cases submitted did the plaintiff request a temporary measure. Also, there are no examples of cases in which the plaintiff was a family member or a close person to person who is the victim of discrimination, there is no example of "situational testing" to prove the existence of discrimination, nor was there an example where the rule on the burden of proof and the transfer of burden of proof from the prosecution to the defendant was applied.

Also, the fact that the cases for protection from discrimination do not have their special mark in the court records indicate that the resolution of problems related to the implementation of laws in the field of non-discrimination must be approached comprehensively.

An integrated system of protection against discrimination is established in the legal system of the Republic of Serbia, which provides general terms, measures and instruments. It is necessary to improve the system of measures and regulations that enable more efficient fight against discrimination.

The existence of an independent and impartial body for protection of equality has particular importance because precisely the Commissioner should encourage and ensure the future development of legislation in this field, and have a coordinating role in determining the future of a uniform system of prohibition of discrimination, which is apparently missing today.

We hope that we have left in the past distinction by national or ethnic origin, sexual orientation, political affiliation, gender and other personal characteristics. The fact is that prejudices and stereotypes still appear as a reminder of the past. It is extremely important to properly understand what is meant by the principle of non-discrimination, and what is the role of the state, of the performers of public functions, organizations dealing with human rights, lawyers and every individual in society.

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