Case of Mikuljanac, Mališić and Šafar v. Serbia

THE MIKULJANAC CASE REPORT

INTRODUCTION

YUCOM recently won their second case before the European Court of Human Rights. The following is a brief summary of the Mikuljanac, Mališić and Šafar v. Serbia case, which the European Court of Human Rights (ECHR) decided on 9 October 2007, as well as an analysis of the importance of the decision. The Mikuljanac case involved Serbia's violation of Article 6 § 1 as it relates to unreasonable trial delays. The Mikuljanac decision followed the same reasoning as the V.A.M. v. Serbia decision (the first decision YUCOM won in front of the ECHR). The ECHR ruled against Serbia in the V.A.M. case because Serbia did not have a proper domestic remedy to expeditiously resolve long-lasting cases. The Mikuljanac decision is important because it showed the ECHR would continue to rule against Serbia until they adopted a new law to create a specific domestic procedure to protect the human rights of citizens in the area of unreasonable trial delays.

CHRONOLOGY

Mr Miroslav Mikuljanac, Mrs Vesna Mališić and Mr Željko Šafar (the applicants) were fired from their jobs on 23 May 2001. On 6 June 2001 YUCOM, on behalf of the three applicants, filed a civil suit in the Belgrade Third Municipal Court against the applicants' former employer, including each of their claims in the same suit. The applicants sought reinstatement and salary arrears. The next hearing did not occur for over two years.

The Republic of Serbia (the government) ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms on 3 March 2004. At some point after Serbia's ratification of the Convention the case was assigned to another Judge, with a hearing scheduled for 26 October 2004. The next hearing, on 23 December 2004, was adjourned and assigned to yet another Judge with the next hearing scheduled for 9 September 2005. The hearing on 9 September 2005 did not take place because witnesses had not been properly summoned, and another hearing was scheduled for 23 November 2005.

YUCOM also represented the applicants in front of the ECHR by filing an application (no. 41513/05) against the Republic of Serbia on 4 November 2005,

in accordance with Article 34 of the Convention.

The 23 November 2005 hearing was adjourned because the summoned witnesses did not appear. Additional hearings were held in 2006 on 26 February, 31 March, and 15 May. On 18 May 2006, the Court ordered the applicants to pay for the costs of and to suggest the name of an expert witness, and they did so on 1 June 2006.

On 28 August 2006, the ECHR, applying Article 29 § 3, gave notice of the admissibility of the applicants' application. After the ECHR ruled the application was admissible, and after notification of the Agent of the Republic of Serbia and YUCOM, the trial process in the Serbian courts sped up significantly.

There was another hearing on 16 June 2006, where the Court ordered the expert witness to submit his opinion. The expert complied and submitted his opinion on 5 October 2006. There were additional hearings on 13 October 2006 and 15 November 2006.

The respondent requested a transfer of jurisdiction, which was dismissed by the Supreme Court on 6 December 2006. There were additional hearings in 2007 on 2 February, 16 February, and 16 March. On 16 March 2007 the Court accepted the applicants' claim, and the applicants appealed against the decision on costs. At the time of the judgment, the proceedings were pending before the second-instance Court.

ECHR DECISION

Although the government claimed the applicants were able to use a Constitutional Appeal as a way to get an effective remedy, the ECHR found that this would not be effective. The ECHR noted that judges still had not been elected to the Constitutional Court, and procedural rules for the Court had also not yet been adopted, making a constitutional complaint under Article 170 of the new Constitution impractical. Therefore, the applicants had exhausted all domestic remedies under Article 35. Also, in countering the government's objections that other domestic remedies should have been attempted by the applicants, the ECHR cites numerous sections of the V.A.M. case.

Specifically, when the ECHR cited the V.A.M. case (V.A.M. v. Serbia, §§ 85-88 and 119), they rebutted the government's argument that the applicants' case was inadmissible under Article 35 § 1 by stating that hierarchical complaints (i.e. requests to the President of two domestic courts, the Ministry of Justice and the judiciary advisory board) would have been ineffective because the applicants would not have been direct parties in those proceedings and because the government could not show they would have been speedier than the civil action filed by the applicants. In

addition, filing a complaint with the Court of Serbia and Montenegro was also not an effective source of remedy since such a complaint would have been ineffective until 15 July 2005, remaining ineffective until the breakup of Serbia and Montenegro.

For the above reasons, the ECHR found the applicants' complaint admissible on 28 August 2006.

MERITS AND ASSESSMENT

The ECHR rejected the government's argument that the case was factually complex because three similar claims were filed in the same suit. The ECHR also rejected the government's excuse that they had suffered a large backlog of cases, stating it was not a valid reason for the excessive delay. Finally, the ECHR stated the case, due to the applicants' request for reinstatement, was of great importance to them.

Even though Court proceedings were initiated on 6 June 2001, the ECHR was only able to consider the relevant time period (relevant to determining a "reasonable time" under Article 6 § 1) as beginning on 3 March 2004, when Serbia ratified the Convention. The resulting timeframe was three years and six months. Nevertheless, the ECHR considered the fact that the case, on 3 March 2004, had already been pending for two years and nine months.

The ECHR concluded: "in the present case the length of the proceedings was excessive and failed to meet the 'reasonable time' requirement."

Article 13 is violated if a national court provides no mechanism for a party complaining of a possible breach of Article 6 § 1 (i.e. the right to a trial within a reasonable time) to find a remedy. The ECHR ruled there was such a violation in this case. Also, in their conclusion, the ECHR again cites the V.A.M. case, which stands for the proposition that those proceedings (alleged to be effective domestic remedies by the government) would be ineffective because they would have resulted in additional delay. In addition, the V.A.M. decision cites the excessively formalistic nature of the available domestic remedies as another reason for their inadequacy.

IMPORTANCE OF THE V.A.M. v. SERBIA DECISION

The V.A.M. decision was very important because it set the precedent that Serbia's judicial processes were inadequate for completing trials within a reasonable time. Further, the Mikuljanac case made it clear the ECHR would continue to rule against Serbia in most cases of unreasonable delay until they passed laws to make the general provisions of Article 170 of the Constitution a reality. The Mikuljanac decision signaled that the V.A.M. case would continue to be cited when the ECHR ruled in cases involving unreasonable delays, further encouraging Serbia to adopt a new law with provisions that provide for new remedies before the Constitutional Court in long-lasting cases. In response to the V.A.M. decision and also the Mikuljanac decision, on 24 November 2007 Serbia finally passed a new law – the Law on the Constitutional Court of the Republic of Serbia - that created a specific remedy in front of the Constitutional Court, in accordance with Article 170 of the Constitution. If Serbia had not passed a law that created a new remedy in the Constitutional Court, they would have likely continued to lose cases before the ECHR that involved unreasonable delays.

Hence, the applicants were each awarded 1,000 Euros in non-pecuniary damage on an equitable basis.

CONCLUSION

The new law that gives complainants a right to a Constitutional Appeal states that you can go before the Constitutional Court if either 1) all other domestic remedies have been exhausted; 2) no procedure exists that will allow the complainant to get an effective remedy; or 3) the complainant's right to a trial within a reasonable time was breached.

If the Constitutional Court finds the complainant's rights have been violated, the Commission for Non-Pecuniary Damage will try to reach an agreement with the aggrieved party with regard to the amount for satisfaction of non-material damage in cases where individuals' rights to a trial within a reasonable time are violated. If there is no agreement within 30 days, the aggrieved party can appeal to the relevant Court.

It remains to be seen how effective this new law will be, as there are only a limited number of judges on the Constitutional Court. It will probably take a couple of years to see if this new law will be effective in speeding up long-lasting trials.

Nelson Berardinelli