Judgment in *Mitrović v Serbia*, ECtHR

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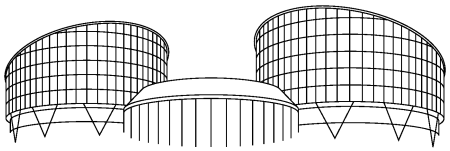
Date of the decision: 21 March 2017

Author of the decision: European Court of Human Rights

Summary of the decision: The applicant was convicted for murder by a "court" of an unrecognized entity which operated outside the Serbian judicial system. The Court holds that detention on the basis of a decision of a foreign court which has not been recognised by Serbian authorities in an appropriate procedure is *ipso facto* unlawful under the rules of domestic law.

Cited international law materials: European Convention on Human Rights

Key words: non-recognised courts, recognition of criminal law decisions, conviction, Republic of Serbian Krajina



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

THIRD SECTION

CASE OF MITROVIĆ v. SERBIA

(Application no. 52142/12)

JUDGMENT

STRASBOURG

21 March 2017

FINAL

21/06/2017

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

In the case of Mitrović v. Serbia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Helena Jäderblom, *President,*
Branko Lubarda,
Luis López Guerra,
Helen Keller,
Dmitry Dedov,
Alena Poláčková,
Georgios A. Serghides, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 28 February 2017,

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

PROCEDURE

1. The case originated in an application (no. 52142/12) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bosnia and Herzegovina national, Mr Miladin Mitrović ("the applicant"), on 31 July 2012.

2. The applicant was represented by Ms D. Milovanović, a lawyer practising in Temerin. The Serbian Government ("the Government") were initially represented by their former Agent, Ms V. Rodić, who was recently substituted by their current Agent, Ms N. Plavšić.

3. The applicant alleged that his detention in a Serbian prison on the basis of the judgment of a court of an internationally unrecognised entity violated Article 5 of the Convention.

4. On 18 December 2014 the complaint concerning the applicant's detention between 7 July 2010 and 15 November 2012 was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. Further to the notification under Article 36 § 1 of the Convention and Rule 44 § 1 (a), the Government of Bosnia and Herzegovina did not wish to exercise their right to intervene in the present case.

6. On 26 October 2015, the applicant's legal representative informed the Court that the applicant had died on 20 October 2014 and that his heirs, Ms Toma Mitrović, Mr Mladen Mitrović, Mr Milorad Mitrović and Ms Radmila Siroćuk expressed their wish to pursue the application before the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Introduction

7. The applicant was born in 1943 and lived in Sremska Mitrovica. He died on 20 October 2014.

B. Criminal Proceedings in the "Republic of Serbian Krajina"

8. On 26 December 1993 the applicant was detained on remand by the "Police of the Republic of Serbian Krajina" (*Policija Republike Srpske Krajine*) under suspicion of murder. His detention was subsequently extended by the "investigative judge" (*istražni sudija*) on 29 December 1993 and by the "District Court of Beli Manastir" (*Okružni sud u Belom Manastiru*) on 25 January 1994, 15 February 1994, 8 April 1994 and 9 May 1994.

9. On 9 May 1994 the "District Court of Beli Manastir" sentenced the applicant to 8 years of imprisonment for murder. It found that the applicant, after a quarrel in which his neighbour accused him of war profiteering, intentionally shot the neighbour in the head with a rifle, leaving him dead on the spot. It further found that the entire event had taken place in front of several eyewitnesses.

10. On 21 July 1994 this sentence was confirmed by the "Supreme Court of the Republic of Serbian Krajina" (*Vrhovni sud Republike Srpske Krajine*). The applicant was then sent to serve his prison sentence in "Beli Manastir District Prison" (*Okružni zatvor u Belom Manastiru*).

11. All of the above institutions were at the relevant time under the control of the "Republic of Serbian Krajina" (*Republika Srpska Krajina*), an internationally unrecognised self-proclaimed entity established on the territory of the Republic of Croatia during the wars in the former Yugoslavia. The entity ceased to exist after the adoption of the *Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium* of 12 November 1995 (hereinafter *Erdut Agreement*) by which the Republic of Croatia assumed sovereignty over the entirety of its territory. The entity was never recognised as a state by the Respondent State.

C. Applicant's transfer to Serbian custody

12. Shortly after the adoption of the *Erdut Agreement*, and upon the request of the "Beli Manastir District Prison", the applicant was transferred on 20 June 1996 to Sremska Mitrovica prison (*Kazneno-popravni zavod Sremska Mitrovica*), which is on the territory of the Respondent State. The

reason for the transfer was listed as "security concerns". No proceedings for recognition and enforcement of a foreign prison sentence were conducted by the authorities of the Republic of Serbia.

13. The applicant remained in Sremska Mitrovica prison until 5 February 1999, when he was released for annual leave until 15 February 1999. Due to the applicant's failure to return to the prison on the specified date, a warrant for his arrest was issued.

14. On 7 July 2010, the applicant was arrested when he attempted to enter Serbia from Croatia. He was sent to Sremska Mitrovica prison to serve the remainder of his sentence.

15. The applicant remained in prison until 15 November 2012 when he was pardoned by the President of the Republic of Serbia and released.

D. The proceedings before the Constitutional Court

16. On 4 February 2011 the applicant lodged a constitutional appeal challenging the lawfulness of his imprisonment.

17. On 10 May 2012 the Constitutional Court found that there was no violation of the applicant's right to liberty. It concluded that the legal ground for the applicant's detention was his conviction by the "Supreme Court of Serbian Krajina" of 21 July 1994. It further noted that the procedure governing the recognition of a foreign criminal sentence and its enforcement was not applicable in the applicant's case because Serbian Krajina was not a state. The court concluded that the applicant's transfer had been carried out for factual reasons – the deteriorating security situation in the war zone which could lead to the applicant's escape from prison or his death. The court further noted that the applicant had been convicted of murder by which the right to life was violated, and that states have positive obligations to protect this right. It finally held that the lack of procedure for recognition of a foreign judgment was proportionate to the obligation to enforce a prison sentence for murder especially given that the applicant had access to the Constitutional Court which had the power to review the legality of his detention and that he had access to other procedures available to any other prisoner in Serbia, including the procedure for applying for a pardon.

E. Civil proceedings

18. On 7 March 2011 the applicant initiated civil proceedings for compensation for unlawful imprisonment. On 13 December 2012 the First Instance Court in Belgrade rejected the applicant's claim finding that he had been lawfully convicted of murder by the courts of the "Republic of Srpska Krajina" and that his imprisonment cannot be considered as unlawful. On 16 April 2014 the Belgrade Appellate Court confirmed this judgment. On 6 June 2014 the applicant lodged an appeal on points of law before the Supreme

Court of Cassation. On 8 July 2015 the Supreme Court of Cassation rejected the applicant's appeal on points of law on procedural grounds, finding that the value of the dispute in question was below the applicable statutory threshold.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of the Republic of Serbia (*Ustav Republike Srbije*; published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/06)

19. Article 27 of the Constitution provides, *inter alia*:

"Everyone has the right to personal freedom and security. Deprivation of liberty shall be allowed only on the grounds and in a procedure prescribed by law... Any person deprived of liberty shall have the right to initiate proceedings in which the court shall review the lawfulness of the arrest or detention and order the release if the arrest or detention was against the law."

B. Criminal Procedure Code 1977 (published in the Official Gazette of the Socialist Federative Republic of Yugoslavia – OG SFRY - 4/77, 36/77, 14/85, 26/86, 74/87, 57/89 as well as in the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - 27/92 and 24/94)

20. The relevant article of this Code read as follows:

Article 520

1) The domestic courts will not respond to the requests of foreign organs relating to the enforcement of criminal judgments of foreign courts.

2) By way of exception to paragraph 1 of this Article, the domestic courts will enforce a final judgment in relation to the sentence pronounced by a foreign court if it is regulated by an international agreement and if the sanction is pronounced also by the domestic court in accordance with the criminal law of the Socialist Federative Republic of Yugoslavia.

3) The competent court shall deliver a judgment in a chamber from Article 23, paragraph 6 of this Act without presence of the parties.

4) Competence *ratione loci* is determined in accordance with the last residence of the convict in the territory of the Socialist Federative Republic of Yugoslavia. If the convict did not have residence on the territory of the Socialist Federative Republic of Yugoslavia, his place of birth shall be relevant. If the convict had no residence and was not born on the territory of the Socialist Federative Republic of Yugoslavia, the Federal Court shall appoint one of the courts which is competent *ratione materiae* to conduct the proceedings.

5) The competent court *ratione materiae* is determined by the law of the republics, or the laws of the autonomous provinces ...

6) The operative part of the judgment referred to in paragraph 3 of this Article must contain the entire operative part and the name of the [foreign court] and it will pronounce sentence. The reasoning must contain the grounds which led the court to deliver a particular sentence.

7) An appeal against the judgment can be lodged by the public prosecutor or the convicted person or his legal representative.

8) If a foreign national convicted by a domestic court or a person entitled to do so by an agreement lodges a request to the first instance court to serve his prison sentence in his home country, the first instance court will act in accordance with the international agreement.

C. Obligations Act (*Zakon o obligacionim odnosima*; published in the OG SFRY - nos. 29⁄78, 39⁄85, 45⁄89, 57⁄89 and OG FRY no. 31⁄93)

21. Articles 199 and 200 of the Obligations Act provide, *inter alia*, that anyone who has suffered fear, physical pain or mental anguish as a consequence of a breach of his "personal rights" (*prava ličnosti*) is entitled, depending on the duration and intensity of the suffering, to sue for financial compensation in the civil courts, as well as to request other forms of redress "which might be capable" of affording adequate non-pecuniary satisfaction.

D. Practice of the Supreme Court of Cassation

22. In cases factually similar to the present one, the Supreme Court of Cassation of the Republic of Serbia found that the imprisonment of the individuals convicted in the "Republic of Srpska Krajina" who were serving their sentence in Serbian prisons was unlawful (see, for example, *Judgment* of the Supreme Court of Cassation Rev. 1031⁄11 of 30 May 2012). The Supreme Court reasoned that the formal requirement of Article 520 of the Criminal Procedure Code, according to which the prison sentence must be confirmed by a domestic court, was not met. It found that the individuals in that case were entitled to compensation because of procedural shortcomings related to their imprisonment.

THE LAW

I. LOCUS STANDI

23. The Court takes note of the death of the applicant in 2014, after the introduction of the present application, and of the wish expressed by his wife and children to continue the application before the Court in his name.

24. The Government did not oppose their wish.

25. The Court has already ruled that the next-of-kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 97, ECHR 2014).

26. The Court thus accepts that the applicant's wife and children have a legitimate interest in pursuing the application on his behalf and that it must continue to examine the application at the request of Ms Toma Mitrović, Mr Mladen Mitrović, Mr Milorad Mitrović and Ms Radmila Siroćuk. The Court will refer to the late Mr Mitrović as "the applicant".

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

27. The applicant complains under Article 5 § 1 (a) of the Convention that his detention between 7 July 2010 and 15 November 2012 was not lawful. The relevant part of that Article reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...."

28. The Government deny that there has been any violation.

A. Admissibility

1. Exhaustion of domestic remedies

29. In their written observations of 20 May 2015 the Government argued that the applicant's civil case regarding the essentially same complaint as the one submitted to this Court was pending before the Supreme Court of Cassation and that, therefore, the application should be rejected as premature. In their additional observations of 7 December 2015, however, the Government informed the Court that the Supreme Court of Cassation had rejected the applicant's appeal on the points of law and that the proceedings were, therefore, finished.

30. The Court reiterates that where there are several effective remedies available, it is for the applicant to choose the remedy to be pursued (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 12, § 2). The Court notes that the applicant had already raised the same complaint before the Constitutional Court and that court ruled on it on the merits (see paragraphs 16 and 17 above). Therefore, the applicant could not have reasonably been expected to embark upon yet another avenue of "potential redress". In any event, the applicant did pursue the remedy before the civil courts to the Supreme Court of Cassation.

31. In light of these circumstances, the Court finds that the applicant did exhaust all domestic remedies within the meaning of Article 35 § 1 of the Convention and dismisses this Government's objection in this respect.

2. Abuse of the right of individual application

32. The Government argued that the applicant had failed to inform the Court about the civil proceedings which he had initiated and which were concerned with essentially the same complaints as the one submitted before the Court. They maintained that this was important information the omission of which should be deemed as an abuse of the right to individual application.

33. The Court reiterates that an application may be rejected as an abuse of the right of individual application within the meaning of Article 35 § 3 (a) of the Convention if, among other reasons, it was knowingly based on false information (see *Kerechashvili v. Georgia* (dec.), no. 5667/02, 2 May 2006; *Bagheri and Maliki v. the Netherlands* (dec.), no. 30164/06, 15 May 2007; *Poznanski and Others v. Germany* (dec.), no 25101/05, 3 July 2007; and *Simitzi-Papachristou and Others v. Greece* (dec.), no. 50634/11, § 36, 5 November 2013) or if significant information and documents were deliberately omitted, either where they were known from the outset (see *Kerechashvili*, cited above) or where new significant developments occurred during the procedure (see *Predescu v. Romania*, no. 21447/03, §§ 25-27, 2 December 2008; and *Tatalović and Dekić v. Serbia* (dec.), no. 15433/07, 29 May 2012). However, not every omission of the information will amount to abuse; the information in question must concern the very core of the case (see, for example, *Komatinović v. Serbia* (dec.), no. 75381/10, 29 January 2013).

34. Turning to the present case, the Court notes that the applicant indeed failed to inform the Court about the civil proceedings in question. The Court notes, however, that the applicant obtained a decision of the Constitutional Court prior to lodging his application. It further notes that the Constitutional Court itself did not consider the civil proceedings to be an obstacle to deciding on the applicant's constitutional appeal on the merits. Since the applicant exhausted all domestic remedies in this case, his choice to pursue another avenue domestically after submitting his application could in no way mislead the Court while considering the present case. It would have been open to the Court to declare the application inadmissible, if the applicant had been successful in the civil proceedings and received compensation, and had failed to inform the Court of that fact (compare and contrast *Caballero Ramirez v. Spain* (dec.), no. 24902/11, 3 November 2016, §§ 35-40). The applicant, however, was unsuccessful in the civil proceedings, and so that question does not arise.

35. The Court, therefore, dismisses the Government's objection regarding the abuse of the right to individual application.

3. Conclusion

36. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

37. The applicant claimed that his detention between 7 July 2010 and 15 November 2012 on the basis of a judgment delivered by a "court" of an entity which had not been recognised by the respondent Government violated his right to liberty guaranteed by Article 5 of the Convention. He alleged that the failure of the domestic courts to follow the procedure for the recognition of a foreign decision in criminal matters rendered his detention unlawful.

38. The Government contested the applicant's allegations. They largely reiterated the reasoning offered by the Constitutional Court in its decision related to the present case (see paragraph 17 above).

39. The Court notes at the outset the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is for that reason that the Court has repeatedly stressed in its case-law that any deprivation of liberty must be lawful (see, among many other authorities, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 230, ECHR 2012; and *Chahal v. the United Kingdom*, 15 November 1996, § 118, *Reports of Judgments and Decisions* 1996-V).

40. In order to meet the requirement of lawfulness, a deprivation of liberty must be "in accordance with a procedure prescribed by law". This means that it must conform to the substantive and procedural rules of national law (*Del Río Prada v. Spain* [GC], no. 42750/09, § 125, ECHR 2013) or international law where appropriate (see, among many other authorities, *Medvedyev and Others v. France* [GC], no. 3394/03, § 79, ECHR 2010; and *Toniolo v. San Marino and Italy*, no. 44853/10, § 46, 26 June 2012).

41. Article 5 § 1 of the Convention contains an exhaustive list of permissible grounds for deprivation of liberty. No deprivation of liberty will be lawful unless it falls within one of the grounds set out in sub-paragraphs (a) to (f) of Article 5 § 1.

42. Turning to the present case, the Court notes that the applicant was convicted for murder by a "court" which operated outside the Serbian judicial system. He was then transferred to a Serbian prison to serve his sentence. The Court further notes that the Serbian authorities conducted no proceedings for the recognition of a foreign decision as prescribed by the relevant provisions of the Criminal Procedure Code then in force (see paragraph 20 above). The Supreme Court of Cassation took the view that the omission of such procedure in the cases substantially similar to the present one was unlawful

(see paragraph 22 above). The reasoning of the Constitutional Court with regard to the same issue does not contradict this conclusion since it also found that the relevant procedure was not followed in the applicant's case. The Constitutional Court, however, took the view that the applicant's right to liberty was not violated because his detention was "proportionate" to the crime he had committed (see paragraph 17 above).

43. The Court considers that, even if proportionality was a factor which should be taken into consideration when assessing whether a deprivation of liberty satisfies the requirements of Article 5 § 1 of the Convention, it would be relevant only subject to the precondition that such deprivation of liberty was lawful. In that respect, the Court notes that detention on the basis of a decision of a foreign court which has not been recognised by Serbian authorities in an appropriate procedure is *ipso facto* unlawful under the rules of domestic law (compare and contrast *Drozd and Janousek v. France and Spain*, 26 June 1992, §§ 107 and 110, Series A no. 240). It is clear that, in the present case, the domestic authorities did not implement the appropriate procedure required by domestic law for recognition of a foreign decision in criminal matters. The Court finds that given that the applicant was detained on the basis of a non-domestic decision which had not been recognized domestically, and in the absence of any other basis in domestic law for the detention, the requirement of lawfulness contained in Article 5 § 1 was not met. The Court, therefore, finds that the applicant's detention between 7 July 2010 and 15 November 2012 was unlawful.

44. There has accordingly been a violation of Article 5 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

46. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention.

Done in English, and notified in writing on 21 March 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Helena Jäderblom President