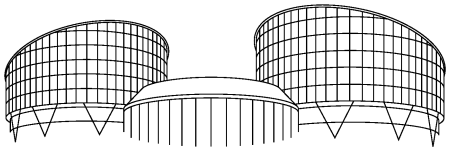

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ŠIMECKI v. CROATIA

(Application no. 15253/10)

JUDGMENT

STRASBOURG

30 April 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Šimecki v. Croatia,

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

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Mirjana Lazarova Trajkovska,
Paulo Pinto de Albuquerque,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 8 April 2014,

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

PROCEDURE

1. The case originated in an application (no. 15253/10) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Ms Maja Šimecki ("the applicant"), on 1 March 2010.

2. The applicant was represented by Ms V. Šnur, a lawyer practising in Vinkovci. The Croatian Government ("the Government") were represented by their Agent, Mrs Š. Stažnik.

3. The applicant alleged, in particular, that she had been deprived of access to court in the enforcement proceedings instituted against her and that she had no effective remedy in that respect.

4. On 9 June 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1981 and lives in Mirkovci.

A. Enforcement proceedings

6. On 7 July 2004 the Krk Municipal Court (*Općinski sud u Krku*) issued an enforcement order (hereinafter "the first enforcement order") against the

applicant's movable assets for unpaid mobile telephone bills in the period between 5 July and 6 October 2003. This decision was served on a certain M.K. on 22 October 2004, and subsequently became final.

7. At the plaintiff's request, on 7 July 2006 the Krk Municipal Court ordered the enforcement (hereinafter "the second enforcement order") by way of attachment of the applicant's earnings. This decision was served on the applicant on 27 November 2006.

8. On 4 December 2006 the applicant lodged an appeal against both enforcement orders. She argued that she could not have made the said telephone calls, because she had been in prison between 14 August 2003 and 26 October 2004 and the police seized her mobile telephone. She enclosed a receipt to show that her mobile telephone and SIM cards had been taken from her.

9. She further argued that the first enforcement order had never been served on her as she was in prison at the time.

10. Finally, the applicant requested the quashing of the certificate of enforceability (*klauzula ovršnosti*) of the first enforcement order.

11. The recipient of the applicant's submission of 4 December 2006 was the Krk Municipal Court, which forwarded it to the Koprivnica County Court (*Županijski sud u Koprivnici*) as an appeal against the second enforcement order.

12. On 29 August 2007 the Koprivnica County Court declared the applicant's appeal inadmissible as lodged out of time, finding that the last day for lodging an appeal was 5 December 2006, whereas the appeal had been lodged on 6 December 2006.

13. On 17 September 2007 the applicant asked the County Court to rectify its decision, as in fact she had lodged her appeal on 4 December 2006.

14. On 12 October 2007 the Koprivnica County Court dismissed the applicant's request for rectification. The relevant part of that decision reads as follows:

> "... the Court can rectify mistakes in names and numbers and other obvious mistakes... and flaws... In this case, the complaint was indeed erroneously declared inadmissible as out of time... Nevertheless, a mistake of this sort is not an obvious mistake... which can be rectified, but it is an erroneous decision binding the Court after its service on the parties, notwithstanding its invalidity...
>
> It should be mentioned, however, that the enforcement debtor did not suffer any disadvantage as a result of such a decision. The enforcement debtor in fact appealed against the enforcement order... of 7 July 2006 on the grounds of a serious breach of procedural rules, arguing that the enforcement order was not served on her. Since the enforcement order in question was merely a decision changing the means of enforcement, and a decision of such nature can be appealed against only if it orders enforcement of objects and rights exempted from enforcement (section 46 (2) of the Enforcement Act)... the enforcement debtor's appeal should have been dismissed.

If the enforcement debtor's claim that the initial enforcement order was never served on her were true, that decision could not have become final and the enforcement debtor should, in the view of this Court, have asked the first-instance court to duly serve the enforcement order on her, so that she could appeal against it..."

15. The applicant subsequently made a constitutional complaint, following which the Constitutional Court (*Ustavni sud Republike Hrvatske*) separated that complaint into a complaint against the decision of the Koprivnica County Court to declare the applicant's appeal inadmissible and a complaint against the refusal of the Koprivnica County Court to rectify its previous decision. The Constitutional Court declared both complaints inadmissible on 26 October 2009, on the grounds that they did not concern decisions on the merits of the case and as such were not susceptible to constitutional review.

B. Proceedings following the applicant's request for protection of the right to a hearing within a reasonable time

16. Meanwhile, on 30 November 2007 the applicant lodged a complaint with the Supreme Court (*Vrhovni sud Republike Hrvatske*) about the length of the enforcement proceedings.

17. On 10 December 2007 the Supreme Court ruled that it lacked jurisdiction, and forwarded the case to the Rijeka County Court (*Županijski sud u Rijeci*).

18. On 29 January 2009 the Rijeka County Court found a violation of the applicant's right to a hearing within a reasonable time, awarded her 4,500 Croatian kunas (HRK) in compensation, and ordered the Krk Municipal Court to complete the enforcement proceedings within six months of service of its decision.

19. It appears that the Krk Municipal Court failed to meet that deadline.

II. RELEVANT DOMESTIC LAW

20. The relevant provisions of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 4/1977, 36/1977 (corrigendum), 36/1980, 69/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990 and 35/1991, and Official Gazette of the Republic of Croatia nos. 53/1991, 91/1992, 58/1993, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008, 123/2008, 57/2011, 148/2011 and 25/2013) as in force at the material time, were as follows:

Section 118

"(4) Return to the *status quo ante* cannot be requested more than three months after the date of omission ..."

Section 137

"Documents shall be served on persons deprived of liberty through the prison management ..."

Section 142

(1) "... a judgment and a decision against which an appeal is allowed, and a legal remedy, shall be served personally on the party or its legal representative or attorney ..."

(2) "If the person on whom the documents should be served in person is not present, the process server shall inquire as to where and when that person may be found and must leave ... a notice indicating that the person should be present on a specific date and time at his or her residence or workplace ..."

21. The relevant provisions of the Enforcement Act (*Ovršni zakon*, Official Gazette of the Republic of Croatia nos. 57/1996, 29/1999, 42/2000, 173/2003, 194/2003, 151/2004, 88/2005, 121/2005 and 67/2008), as in force at the material time, were as follows:

Section 5

" (3) If the enforcement order cannot be executed on a given object or by given means, the enforcement creditor can request a new object or new means of enforcement. In that event the court shall order the enforcement in accordance with the enforcement creditor's request ..."

Section 33

" (3) Any certificate of enforceability which has been issued without meeting the necessary statutory requirements shall be quashed by the court or [another] authority by a ruling, upon a request or of its own motion."

Section 46

" (2) The enforcement debtor can lodge an appeal against the decision from section 5 paragraph 3 of this Act only if it orders enforcement in respect of assets that should have been exempted from the enforcement ..."

22. The relevant part of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette nos. 99/1999, 29/2002 and 49/2002) reads as follows:

Section 62

"1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that an individual act of a state body, a body of local and regional self-government, or a legal person with public authority, concerning his or her rights and obligations, or a suspicion or an accusation of a criminal act, has violated his or her human rights or fundamental freedoms or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter: " a constitutional right") ...

2. If another legal remedy exists in respect of the violation of the constitutional right [complained of], a constitutional complaint may be lodged only after that remedy has been exhausted."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

23. The applicant complained that she had no access to court in the enforcement proceedings instituted against her. She relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

A. Admissibility

24. The Government disputed the admissibility of this complaint on two grounds. They argued that the applicant had failed to comply with the six-month time-limit and had not exhausted domestic remedies.

1. The parties' arguments

25. The Government submitted that the applicant had lodged her application with the Court outside the six-month time-limit. In the Government's view, this time-limit had started to run much earlier than the date of service of the decisions of the Constitutional Court, which the applicant had relied on when lodging her application with the Court. According to the Government, the Constitutional Court had previously stated in its well-established case-law that it would not decide the merits of complaints against procedural decisions in enforcement proceedings.

26. The Government also argued that the applicant had failed to exhaust available domestic remedies, as she could have made a complaint against the first enforcement order or could have requested that the proceedings be restored to the *status quo ante* (*povrat u prijašnje stanje*), if, for justified reasons, she had been unable to comply with the statutory time-limit for appeal. In addition, the Government argued that the applicant could have requested the quashing of the certificate of enforceability of the first enforcement order, if her allegations concerning the failure of the Krk Municipal Court to serve that decision on her were true.

27. The applicant argued that there were no reasons to use all the remedies the Government had been suggesting.

2. The Court's assessment

28. The Court firstly reiterates that the requirements contained in Article 35 § 1 concerning exhaustion of domestic remedies and the six-month period are closely interrelated, since not only are they combined in the same Article, but they are also expressed in a single sentence whose grammatical construction implies such a correlation (see *Berdzenishvili v. Russia* (dec.), no. 31697/03, ECHR 2004-II (extracts) and *Dolenec v. Croatia*, no. 25282/06, § 191, 26 November 2009).

29. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Article 35 § 1 cannot be interpreted in a manner which would require an applicant to inform the Court of his complaint before his position in connection with the matter had been finally settled at the domestic level. In this regard, the Court has already held that in order to comply with the principle of subsidiarity, before bringing complaints against Croatia to the Court applicants are in principle required to afford the Croatian Constitutional Court an opportunity to remedy their situation (see *Orlić v. Croatia*, no. 48833/07, § 46, 21 June 2011).

30. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The Court notes that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV).

31. In the present case the Court notes that the refusal of the Koprivnica County Court to rectify its decision to declare the applicant's appeal inadmissible was served on the applicant's representative on 4 May 2009. The applicant then lodged a constitutional complaint, and on 26 October 2009 the Constitutional Court, after separating the applicant's complaint into two, declared both of them inadmissible. The decisions of the Constitutional Court were served on the applicant's representative on 3 and 7 December 2009 respectively.

32. The application to the Court was introduced on 1 March 2010, that is to say less than six months after the date on which the decisions of the Constitutional Court had been served on the applicant's representative, but more than six months after the decision of the Koprivnica County Court had been served on the applicant's representative. It follows that the Court may only deal with the application if a constitutional complaint against the decision of the Koprivnica County Court dismissing the applicant's request for rectification of its previous decision was a remedy within the meaning of Article 35 § 1 of the Convention, in which case the six-month period

provided for in that Article should be calculated from the date of service of the Constitutional Court's decision.

33. In this connection the Court notes that, under section 62 of the Constitutional Court Act, anyone who deems that an individual act of a State body determining his or her rights and obligations, or a suspicion or accusation of a criminal act, has violated his or her human rights or fundamental freedoms, may lodge a constitutional complaint against that act. In her constitutional complaint, the applicant alleged that the decisions of the Koprivnica County Court had infringed her right of access to court. Without questioning the decision of the Constitutional Court as to the relevant criteria for assessing the admissibility of constitutional complaints, the Court considers that by lodging a constitutional complaint the applicant acted neither unreasonably nor contrary to the wording of section 62 of the Constitutional Court Act. Therefore, the Court finds that in the present case the constitutional complaint was a remedy that the applicant had to attempt to make use of.

34. Turning to the Government's objection that the applicant had failed to use other available domestic remedies, the Court reiterates that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain, not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in both theory and practice at the relevant time, that is to say that it was accessible, was capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success (see, among other authorities, *Akdivar*, cited above, §§ 65 and 68).

35. In the present case, the applicant learned about the enforcement proceedings on 27 November 2006, when the second enforcement order was served on her. She responded by making a submission on 4 December 2006 in which she appealed against both enforcement orders and requested the quashing of the certificate of enforceability of the first enforcement order. After she learned that the Koprivnica County Court had erroneously declared her appeal inadmissible as lodged out of time, she requested rectification of that decision. However, the Koprivnica County Court dismissed that request.

36. The Government did not dispute the fact that the applicant had been in prison at the time of the service of the first enforcement order. It is also clear from the acknowledgment of the acceptance of service of the first enforcement order that the Krk Municipal Court failed to serve it on the applicant through the prison authorities, as prescribed by section 137 of the Civil Proceedings Act. Instead, it was served on a certain M.K. This error of

the Krk Municipal Court leaves the Court with no other choice but to accept the applicant's allegations that she had learned about the enforcement proceedings only after the second enforcement order had been served on her. It follows that the applicant was unable to appeal against the first enforcement order in time, or to subsequently request the restoration of the proceedings to the *status quo ante* within the three-month statutory time-limit (see paragraph 20 above).

37. As regards the request for the certificate of enforceability to be quashed, the applicant lodged such a request in her submission of 4 December 2006 (see paragraph 10 above). However, the domestic courts did not reach a separate decision on that request.

38. In view of the foregoing, the Court finds that the applicant made proper use of available domestic remedies and complied with the six-month rule. It follows that the Government's objections in this regard must be dismissed.

39. 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

1. The parties' arguments

40. The applicant argued that the enforcement proceedings instituted against her had concerned telephone calls she could not have made, since she had been in prison at the relevant time and her telephone had been taken away from her. The applicant further argued that the first enforcement order had never been served on her and therefore could not have become final. The applicant also argued that all of her arguments from the appeal to the second enforcement order were erroneously declared inadmissible as lodged out of time, since the Koprivnica County Court had deemed her appeal to have been lodged on 6 December 2006, while it had in fact been lodged on 4 December 2006. According to the applicant, the County Court's error was an obvious one, but that court had failed to rectify it even after her intervention. In the applicant's view, the domestic courts had acted unfairly and had deprived her of access to court.

41. The Government reiterated its arguments regarding the failure of the applicant to exhaust available domestic remedies, and pointed out that the applicant's appeal against the second enforcement order had not been allowed in any event, since it did not concern an object exempted from enforcement.

2. The Court's assessment

(a) General principles

42. The Court reiterates that Article 6 § 1 of the Convention secures for everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal. The right of access to court includes not only the right to institute proceedings but also the right to obtain a judicial "determination" of the dispute (see, for example, *Kutić v. Croatia*, no. 48778/99, § 25, ECHR 2002-II; *Multiplex v. Croatia*, no. 58112/00, § 45, 10 July 2003; and *Menshakova v. Ukraine*, no. 377/02, § 52, 8 April 2010). The most important factor is that the dispute submitted for adjudication was the subject of a genuine examination (see *Kostadin Mihaylov v. Bulgaria*, no. 17868/07, § 39, 27 March 2008, and *Yanakiev v. Bulgaria*, no. 40476/98, § 69, 10 August 2006).

43. It is first and foremost up to the national authorities, and notably the courts, to interpret domestic law. The Court's role is limited to verifying the compatibility with the Convention of the effects of such interpretations. This applies in particular to the interpretation by courts of rules of a procedural nature (see *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII). The Court must make its assessment in each case in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1 (see, *mutatis mutandis*, *Miragall Escolano and Others v. Spain*, nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98, § 36, ECHR 2000 I).

(b) Application of these principles to the present case

44. In the present case, the Krk Municipal Court, as a recipient of the applicant's submission of 4 December 2006, confined itself to forwarding it as an appeal against the second enforcement order to the Koprivnica County Court. The latter court erroneously declared the applicant's appeal inadmissible as lodged out of time and subsequently, although admitting its obvious error, refused to rectify it. The Koprivnica County Court merely found that the applicant's appeal against the second enforcement order would have been declared inadmissible in any event, since it had not been allowed under section 46 of the Enforcement Act.

45. Even assuming that the applicant's appeal against the second enforcement order would not have been allowed, the Court notes that the applicant's submission of 4 December 2006 was the first submission the applicant lodged after she had learned about the enforcement proceedings. The Court has already found, in paragraph 36 above, that the unlawful service of the first enforcement order had effectively deprived the applicant of the opportunity to use remedies against enforcement at an earlier date.

The applicant's submission of 4 December 2006 contained appeals against both enforcement orders, as well as a request for the certificate of enforceability of the first enforcement order to be quashed. However, the domestic courts restrictively examined the applicant's submission as merely an appeal against the second enforcement order, and even then declared it inadmissible on incorrect grounds.

46. The Court reiterates that the risk of any mistake made by a State authority must be borne by the State, and errors must not be remedied at the expense of the individual concerned (see *Gashi v. Croatia*, no. 32457/05, § 40, 13 December 2007, and *Gladysheva v. Russia*, no. 7097/10, § 80, 6 December 2011). In the present case, the domestic courts made several mistakes. Firstly, the service of the first enforcement order was not carried out in accordance with law, so that it became final without ever reaching the applicant. Secondly, the domestic courts interpreted the applicant's submission of 4 December 2006 restrictively and did not decide on the applicant's appeal against the first enforcement order or on her request for its certificate of enforceability to be quashed. Thirdly, the applicant's appeal was erroneously declared inadmissible as lodged out of time.

47. In these circumstances, the Court finds that the domestic courts created an impediment to the applicant's having the merits of her case examined by a judicial authority in such a way or to such an extent that the very essence of her right of access to court was impaired (see, *mutatis mutandis*, *Ateş Mimarlik Mühendislik A.Ş v. Turkey*, no. 33275/05, § 48, 25 September 2012).

48. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

49. The applicant also complained that she had no effective remedy in respect of her complaint concerning access to court. She relied on Article 13 of the Convention which reads as follows:

> "Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

50. The applicant reiterated the arguments made in her access-to-court complaint.

51. The Government contested these arguments.

52. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

53. Having regard to its findings above, and given that Article 6 § 1 is to be considered as constituting a *lex specialis* in relation to Article 13 (see, for example, *Sukhorubchenko v. Russia*, no. 69315/01, § 60, 10 February 2005,

and *Jalloh v. Germany* (dec.), no. 54810/00, 26 October 2004), the Court considers that it is not necessary to examine separately the merits of the applicant's identical complaint made under Article 13 of the Convention (see *Jovanović v. Serbia*, no. 32299/08, § 53, 2 October 2012).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides:

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

A. Damage

55. The applicant claimed HRK 15,000 in compensation for non-pecuniary damage.

56. The Government argued that the applicant's claim for just satisfaction was excessive, unfounded and unsubstantiated, as there was no causal link between the violations complained of and the applicant's financial claims.

57. The Court awards the applicant EUR 1,950 in compensation for non-pecuniary damage, plus any tax that may be chargeable to her.

B. Costs and expenses

58. The applicant also claimed HRK 9,150 for costs and expenses incurred before the domestic courts and HRK 6,150 for those incurred before the Court.

59. The Government found the applicant's claim under this head to be excessive, and argued that the applicant had failed to submit relevant documents in support of the costs she had allegedly incurred. They asserted that such omissions should lead the Court to reject the applicant's claim in whole or in part.

60. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress (see *Belchev v. Bulgaria*, no. 39270/98, § 113, 8 April 2004, and *Hajnal v. Serbia*, no. 36937/06, § 154, 19 June 2012). In the present case, regard being had to the above criteria, the Court considers it reasonable to award

EUR 1,150 for costs and expenses in the proceedings before the domestic courts and EUR 850 for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

61. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 6 § 1 and 13 of the Convention admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 13 of the Convention separately;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
      (i) EUR 1,950 (one thousand nine hundred fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 30 April 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President