



International Covenant on Civil and Political Rights

Distr.: General
7 June 2022

Original: English

Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2869/2016*, **

<i>Communication submitted by:</i>	D.M. (represented by counsel, Marija Ivanović)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Serbia
<i>Date of communication:</i>	20 December 2012 (initial submission)
<i>Document reference:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 30 November 2016 (not issued in document form)
<i>Date of adoption of decision:</i>	25 March 2021
<i>Subject matter:</i>	Legal representation requirement for submission of constitutional complaints
<i>Procedural issues:</i>	Exhaustion of domestic remedies; manifestly ill-founded; jurisdiction <i>ratione materiae</i>
<i>Substantive issues:</i>	Access to court; discrimination; fair trial
<i>Articles of the Covenant:</i>	14 (1), read alone and in conjunction with 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1. The author of the communication is D.M., a national of Serbia born on 24 March 1943. He claims that the State party has violated his rights under article 14 (1), read alone and in conjunction with article 26 of the Covenant. The Optional Protocol entered into force for the State party on 6 December 2001. The author is represented by counsel.

Facts as submitted by the author

2.1 In 2001, the author was dismissed from his employment at Belgrade City Library. Later that year, the author filed a civil complaint against the Library before Belgrade First Municipal Court, requesting annulment of the decision to terminate his employment. In 2003, the Court ruled in favour of the author. However, Belgrade District Court subsequently granted the Library's appeal of that decision and ordered a retrial.

* Adopted by the Committee at its 131st session (1–26 March 2021).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.



2.2 In May 2009, Belgrade First Municipal Court issued a decision in which it found in favour of the Library. The Court ordered the author to pay court costs in the amount of 173,500 dinars (equivalent to approximately 2,000 euros at the time). On 31 July 2009, Belgrade District Court dismissed the author's appeal of the lower court decision, which then became enforceable.

2.3 On 9 September 2010, the decision of Belgrade District Court dated 31 July 2009 was delivered to the author's attorney.¹ Under the 2004 Civil Procedure Code, a cassation appeal may be filed in labour law disputes. The 30-day statutory period for initiating a cassation appeal begins to run on the date of delivery of a copy of the final judgment.² The author maintains that the last day to file a cassation appeal of the decision of the District Court was 9 October 2010.

2.4 The author had an argument with his then attorney, who was reluctant to file a cassation appeal on the author's behalf. The author believes that the attorney's reluctance was due to the author's inability to pay for the appeal, given that the costs that the court had ordered the author to pay were more than four times his monthly salary. In the end, the attorney decided not to file an appeal on the author's behalf, and returned the author's case materials to him on 6 October 2010, three days before the deadline to file a cassation appeal. The author prepared his cassation appeal on his own and sent it on 8 October 2010.³

2.5 On 11 February 2011, the Supreme Court of Cassation declared that the author's appeal of the decision of Belgrade District Court dated 31 July 2009 was inadmissible because it had been submitted and signed by the author himself, not by his legal representative.⁴

2.6 The author then filed a complaint with the Constitutional Court in which he alleged that the Supreme Court of Cassation had violated his right to a fair trial by misapplying the relevant provisions of the Civil Procedure Code. In the alternative, he argued that the obligation to be represented by a lawyer before the Supreme Court of Cassation, in the absence of a legal aid system and without a realistic opportunity to obtain legal representation in a timely fashion, violated his right to access a court. The author also raised a claim of indirect discrimination, arguing that the rule requiring legal representation before the Supreme Court of Cassation discriminated against those who could not afford to pay for legal services.

2.7 On 4 July 2012, the Small Council of the Constitutional Court dismissed the author's complaint on the ground that the author's claims were not "constitutional provided reasons." The author maintains that he has exhausted domestic remedies, as there are no further avenues of appeal. He also states that he has not submitted the same matter for examination by another international body of investigation or settlement.

2.8 Regarding the applicable domestic law, the author states that under the 2004 Civil Procedure Code, which was in force at the relevant time, "a party with legal competence may themselves undertake acts in the proceedings (litigation competence)"; however, a "party must have a legal counsel in the review proceedings or the proceedings initiated for the protection of legality".⁵ The author maintains that the term *revizija* in Serbian may be translated both as "review proceedings" and "cassation proceedings". In addition, the Code states that "when a party is exempted from the liability of paying the costs of litigation, the first instance court shall recognize the right to free legal aid, if it is necessary to protect the rights of a party".⁶ The State party's Constitution prohibits all direct or indirect discrimination and guarantees the implementation of human and minority rights and the right to a public hearing before an independent and impartial tribunal.

¹ It appears that the decision was delivered to the author in 2009.

² The author cites art. 394 (1) of the Civil Procedure Code.

³ The author's cassation appeal is dated 8 October 2008. According to the author's constitutional complaint, he filed his cassation appeal on 8 October 2009.

⁴ The decision of the Supreme Court of Cassation is dated 11 February 2010.

⁵ The author cites arts. 74 (1) and 84 (2) of the Civil Procedure Code, respectively.

⁶ The author cites art. 166 (1)–(3) of the Civil Procedure Code (internal citations omitted).

Complaint

3.1 The author claims that by failing to allow him to appeal the decision of Belgrade District Court to the Supreme Court of Cassation without legal representation, in circumstances where it was not feasible for him to obtain such representation in a timely fashion or apply for and obtain legal aid, the State party violated his rights under article 14 (1), read alone and in conjunction with article 26 of the Covenant. The author was denied access to justice and subjected to indirect discrimination because the inflexible law requiring applicants to the Supreme Court of Cassation to be represented by counsel discriminates against those who cannot afford to pay for legal services.

3.2 The decision of the Small Council of the Constitutional Court was procedurally flawed. The Court stated that the author's claims were not "constitutionally provided reasons". The author maintains that this reasoning is strange and unclear. If the author's claims were substantively incorrect, an 8-judge panel or the 15-judge Grand Chamber of the Constitutional Court should have decided on his complaint, not the 3-judge Small Council. The Constitutional Court incorrectly dismissed the author's complaint on procedural grounds when in fact its reasoning related to the substance of the complaint.

3.3 The decision of the Constitutional Court was also substantively flawed. It is important to address access to courts in the context of civil proceedings, because at the time the complaint was submitted, the State party did not have a legal aid system for civil proceedings. In *Airey v. Ireland*, the European Court of Human Rights found that an applicant lacked access to a court in circumstances where she could not afford to pay a lawyer to obtain a marital separation decree and was unable to represent herself.⁷ The European Court did not dictate the measures that States should take to ensure access to a court, but indicated that possible measures may include free legal aid schemes or the simplification of court procedures. In the author's case, the denial of access to a court was even more unjust than in *Airey v. Ireland*, for the author was prepared to represent himself before the Supreme Court of Cassation but was not permitted to do so under the law. The European Court has also repeatedly found that the failure to provide for legal aid for appeals on points of law constitutes a violation of the right to a fair trial.⁸ The author invoked the aforementioned jurisprudence of the European Court in his appeal before the Constitutional Court. However, the Constitutional Court ignored his arguments.

3.4 The conclusions of the Constitutional Court are misleading and erroneous. The Court misinterpreted the author's stated reasons for not wishing to hire a new attorney before submitting his appeal to the Supreme Court of Cassation. The Constitutional Court reasoned that the author's claim that he did not have the resources to afford to hire a new attorney was irrelevant, since he had not requested legal aid through the procedures set forth in articles 164 to 169 of the Civil Procedure Code. However, in his constitutional complaint, the author wrote:

We recall that the applicant is a retiree and the amount owed (2,000 euros) is greater than his four-month income. In such a situation, for it was not possible to allocate new funds for hiring a lawyer in the cassation proceedings. But financial moment is not the only important moment here. After his former attorney finally declined to prepare and launch the cassation request (three days before the deadline), the petitioner did not want a new attorney to whom he (the petitioner) needed to explain the whole process and the facts of the case in three days and, at the end, expect that new lawyer to write a good cassation request. Instead of that, the petitioner himself, in his own name and for [his] own account sent the cassation request. This cassation request was on time and based on the legally provided substantive reasons. There is no reason why that request would not be decided on the merits.

3.5 Legal remedies must be available, effective and adequate. The procedure for free legal aid under article 166 of the Civil Procedure Code fulfils none of these criteria and is therefore

⁷ European Court of Human Rights, *Airey v. Ireland*, Application No. 6289/73, Judgment of 9 October 1979.

⁸ The author cites, inter alia, European Court of Human Rights, *Twalib v. Greece*, Application No. 42/1997/826/1032, Judgment of 9 June 1998.

not a remedy that the author was required to exhaust. The author is unaware of any circumstances in which an applicant has been granted free legal aid under article 166 of the Civil Procedure Code to file a cassation appeal. Moreover, that provision does not apply to proceedings involving extraordinary legal remedies. Even if it did, as a practical matter, the author still could not have obtained free legal aid because the competent court would not have been able to decide on his request in such a short period. The Civil Procedure Code does not specify the time frame within which the first instance court must decide on a request for free legal aid. In its judgment on *Sialkowska v. Poland*, the European Court of Human Rights found that it would have been impossible for an applicant to find a new lawyer under a legal aid scheme because when he met his lawyer, the time limit for lodging a cassation appeal was to expire three days later.⁹

3.6 As remedies, the author requests that the Committee find that the State party violated his right of access to a court and subjected him to indirect discrimination in relation to the right to a fair trial. He also requests that the Supreme Court of Cassation annul its judgment against him, re-examine his appeal and issue a decision on its substance. He further requests compensation for the violations suffered and reimbursement of legal expenses he incurred during the proceedings before the Committee.

State party's observations on admissibility and the merits

4.1 In its observations dated 18 May 2017, the State party confirms that under article 84 (2) of the Civil Procedure Code, a party shall be represented by a legal counsel in review proceedings and in writ of certiorari proceedings. Under article 401 of the same Code, review shall not be permitted, inter alia, if a motion is filed by a person who is not a lawyer.

4.2 The nature of courts of cassation and their role in the assessment of the application of the law is special, as the European Court of Human Rights has repeatedly noted. Thus, it is reasonable for proceedings before the Court of Cassation to be more formal than ordinary judicial proceedings. The requirement that claimants before the Court of Cassation be represented by a qualified legal counsel does not violate article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The same requirement has been implemented by several Member States of the Council of Europe. In addition, under the Advocacy Act, which was in force at the relevant time, lawyers must provide competent and conscientious legal assistance to their clients and are permitted to recuse themselves, except when such recusal would cause irreparable harm to their client. Thus, the author could have filed a lawsuit requesting damages from his then attorney if he believed that the attorney's actions had harmed him.

4.3 Under article 170 of the Constitution, a constitutional complaint is a special and exceptional legal remedy. It may concern general acts or actions performed by State bodies or by organizations exercising delegated public powers, where such acts or actions violate or deny human or minority rights and freedoms that are guaranteed by the Constitution. Individuals filing constitutional complaints must have previously sought legal protection before the ordinary courts.

4.4 In the present case, the Constitutional Court rejected the author's complaint on the basis of the jurisprudence of the European Court of Human Rights, according to which a violation of rights must be analysed in a comprehensive and convincing manner. The Constitutional Court denied the author's appeal because the Supreme Court of Cassation had applied in an acceptable manner the legal requirements of article 84 (2) of the Civil Procedure Code, according to which a party must be represented by legal counsel in review proceedings, and article 401 (2) of the same Code, according to which review is not permitted if a motion is filed by a person who is not a lawyer.

4.5 Regarding the author's claim that he was denied access to courts, the Constitutional Court considered that under the jurisprudence of the European Court of Human Rights, the right of access to courts is linked to lower and first instance proceedings, whereas access to the highest instance may be narrowed in various ways, within certain limitations. The

⁹ European Court of Human Rights, *Sialkowska v. Poland*, Application No. 8932/05, Judgment of 22 March 2007.

Constitutional Court had also established in its own jurisprudence that articles 84 (2) and 401 (2) of the Civil Procedure Code are indeed constitutional in that they do not limit the protection of citizens' rights.¹⁰ On the contrary, the legal representation requirement protects appellants' rights, given the complexity and importance of constitutional procedures and disputes and the efficiency of court proceedings. The Constitutional Court considered in its previous jurisprudence that appellants require protection in the form of professional legal knowledge and experience in order to enable their constitutional rights and obligations to be determined in an effective and timely manner.

4.6 The Constitutional Court also considered that the author's claim that he could not have afforded legal representation was irrelevant because, under articles 164 to 168 of the Civil Procedure Code, those who cannot afford to pay for the costs of legal proceedings are exempt from an obligation to reimburse those costs. Articles 165 and 166 of the Civil Procedure Code also set forth the procedure for claiming such reimbursement.

4.7 As indicated in the decision of the Constitutional Court, the author should have exhausted domestic remedies with respect to his claim for protection before submitting his constitutional complaint. However, during the civil proceedings, the author did not even attempt to raise a claim of inability to pay court costs so as to enable the courts to grant the author free legal representation if it were necessary for the protection of his rights, as required by the Civil Procedure Code.

4.8 The Constitutional Court has been consistent in its position on this issue. In its decision IU-28/2005 of 30 April 2009, the Court determined that the mandatory legal representation requirement for appellants did not constitute discrimination on the basis of property. This was because the relevant provisions of the Civil Procedure Code set forth exemptions for individuals who cannot afford to reimburse the costs of proceedings, and establish a right to legal aid for those who have been fully exempted from such reimbursement and who require legal aid for the protection of their rights. Although the right of exemption must be exercised in first instance proceedings, its effect extends to the proceedings involving extraordinary legal remedies.

Author's comments on the State party's observations on admissibility and the merits

5.1 In his comments dated 2 August 2017, the author reiterates his arguments and further states that he never claimed, as the State party contends, that the requirement for legal representation violates article 6 of the European Convention on Human Rights. Rather, the problem lies in the fact that in addition to the requirement for legal representation, there is no real and feasible opportunity to obtain legal representation, if needed, in the absence of a legal aid scheme. The State party's argument regarding the Advocacy Act is irrelevant because the author's attorney did not recuse himself from the case while proceedings were pending. The State party's argument that the author could have sought compensation from his attorney is preposterous and irrelevant.

5.2 The author disagrees with all of the points raised in the decision of the Constitutional Court and provides a translation of articles 164 to 167 of the Code of Civil Procedure. Submission of a motion to the court of first instance to request reimbursement for court fees was not a realistic and effective remedy that the author was required to exhaust. Cassation appeals must be filed within 30 days of receipt of a final court decision. It is not possible to request an extension of time to file a cassation appeal. After the author had obtained a final court decision requiring him to pay court costs in the amount of 173,500 dinars, it was legally impossible for him to be exempted from the obligation to reimburse court costs. This is because after the issuance of that decision, a court of first instance would not have been permitted to change any part of the decision. Without an exemption from reimbursement of court costs, the author could not obtain free legal representation.

5.3 Even if that procedural obstacle were overcome, the author would have faced other difficulties in obtaining reimbursement for court costs. To apply for exemption, individuals must submit a property certificate issued by a competent authority; obtaining such a certificate would take at least several days. In addition, even if the request for exemption is

¹⁰ The State party cites Constitutional Court decision No. IU-28/2005 of 30 April 2009.

granted in full, individuals must still demonstrate that legal representation is necessary for the protection of their rights in order to obtain free legal aid. The reimbursement process could also be prolonged because it involves more than one deciding authority; while the court of first instance decides on the request for legal aid, the President of the court of first instance decides who to appoint as counsel. The State party could have produced statistics concerning the average processing time for requests for reimbursement of court costs and for free legal aid, but did not do so.

5.4 In sum, it is highly unrealistic to expect a cassation appellant, within 30 days, to gather all of the necessary documents, submit a court cost exemption request, obtain a decision on that request, obtain a separate decision appointing a legal aid counsel, familiarize the counsel with the facts of the case and have the counsel file the appeal. For this reason, the procedure for obtaining a court costs exemption and free legal aid was not an effective remedy that the author was required to exhaust.

5.5 Citing the jurisprudence of the European Court of Human Rights on *Maširević v. Serbia*,¹¹ the author reiterates that by dismissing his cassation appeal, the Supreme Court of Cassation interfered with his right to access a court and denied him justice.

5.6 One of the main goals of the national Judicial Reform Strategy for the period 2013–2018 and its related action plan is improving access to justice. The Strategy and action plan underline the importance of adopting and implementing the draft law on free legal aid.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not currently being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's position that the author did not, as required by article 5 (2) (b) of the Optional Protocol, exhaust all available domestic remedies. The Committee notes the State party's argument that the author did not avail himself of the procedure, set forth under the Civil Procedure Code, for requesting reimbursement of court costs and free legal aid. The Committee considers that in the present case, the issue of the availability and effectiveness of those remedies is closely linked to the substance of the author's arguments regarding access to justice. The Committee further notes that in his appeal of the decision of the Supreme Court of Cassation before the Constitutional Court, the author raised the substance of his allegations under article 14 (1), read alone and in conjunction with article 26 of the Covenant. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the merits of the present communication.

6.4 The Committee notes the author's claim that he was denied access to the Supreme Court of Cassation in violation of his rights under article 14 (1), read alone and in conjunction with article 26 of the Covenant. The Committee takes note of the author's position that the domestic law requiring cassation appellants to be represented by a lawyer prevented him from accessing the Court, since his then lawyer declined to file the appeal and only returned his file to him a few days before the filing deadline, thus leaving him insufficient time to find a new lawyer. The Committee notes the author's assertion that when he submitted the appeal in his own name, the Supreme Court of Cassation rejected it because it had not been submitted by a lawyer. The Committee notes the author's argument that this constituted discrimination based on the author's economic status. The Committee also notes the author's assertion that the brief 30-day filing period would not have allowed him to obtain in a timely fashion

¹¹ European Court of Human Rights, *Maširević v. Serbia*, Application No. 30671/08, Judgment of 11 February 2014.

reimbursement of court costs and/or legal aid had he requested them through the procedures provided for by law.

6.5 The Committee recalls its general comment No. 32 (2007), in which it is stated that the right of equal access to a court, embodied in article 14 (1) of the Covenant, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.¹² The Committee also notes that the present communication concerns a civil labour matter, and observes that article 14 (3) (d) of the Covenant, which provides for a limited right to defend oneself, applies to criminal defendants and not to civil litigants. The Committee further recalls that the right to review by a higher tribunal under article 14 (5) of the Covenant does not apply to procedures determining rights and obligations in a suit at law, or any other procedure not being part of a criminal appeal process.¹³ Accordingly, the Committee considers that the author's claim regarding a denial of access to the Supreme Court of Cassation lies outside the scope of the protection of article 14 of the Covenant and is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.6 The Committee also takes note of the author's claim that the decision of the Constitutional Court was unclear and erroneous, presumably in violation of the right to a fair hearing under article 14 (1) of the Covenant. The Committee recalls that it is generally for the courts of States parties to the Covenant to evaluate both the facts and evidence, and the application of domestic legislation in the case in question, unless it is shown that their evaluation was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.¹⁴ The Committee considers that the information available to it does not demonstrate that the decision of the Constitutional Court on the author's complaint suffered from such deficiencies. Rather, the Court dismissed the complaint because the contested decision of the Supreme Court of Cassation was based on the facts that articles 84 (2) and 401 (2) of the Civil Procedure Code require individuals to be represented by a lawyer in revision proceedings, and the author had not attempted to seek legal aid through the procedures allowed for by law. The Committee therefore considers that the author has not demonstrated, for the purpose of admissibility, that the decision of the Constitutional Court was manifestly arbitrary or erroneous, or amounted to a denial of justice. Accordingly, the Committee declares this aspect of the communication under article 14 (1) of the Covenant inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;
- (b) That the present decision shall be transmitted to the State party and to the author.

¹² General comment No. 32 (2007), para. 12, citing *I.P. v. Finland* (CCPR/C/48/D/450/1991), para. 6.2.

¹³ General comment No. 32 (2007), para. 46.

¹⁴ General comment No. 32 (2007). See also *Tyvanchuk et al. v. Belarus* (CCPR/C/122/D/2201/2012), para. 6.6.