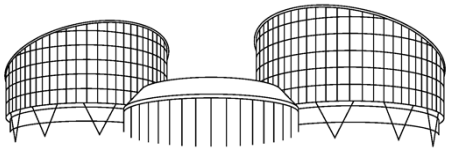

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF MIRKOVIĆ AND OTHERS v. SERBIA

(Applications nos. 27471/15 and 12 others – see appended list)

JUDGMENT

This version was rectified on 13 November 2018
under Rule 81 of the Rules of Court.

STRASBOURG

26 June 2018

FINAL

03/12/2018

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

In the case of Mirković and Others v. Serbia,

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

Helena Jäderblom, *President,*
Branko Lubarda,
Dmitry Dedov,
Pere Pastor Vilanova,
Alena Poláčková,
Jolien Schukking,
María Elósegui, *judges,*

and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 5 June 2018,

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

PROCEDURE

1. The case originated in thirteen separate applications against Serbia (nos. 27471/15, 27288/15, 27751/15, 27779/15, 27790/15, 28156/15, 28418/15, 30893/15, 30906/15, 32933/15, 35780/15, 40646/15 and 55066/15) lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eighteen Serbian nationals.

2. A list of applicants, as well as their additional personal details, the dates of introduction of their complaints before the Court, and information regarding their legal representation is set out in the appendix. Applications nos. 30906/15, 32933/15 and 40646/15 have two, three and three applicants, respectively.

3. The Serbian Government ("the Government") were represented by their Agent, Ms N. Plavšić.

4. Alleging rejections of their civil claims by the domestic courts and the simultaneous acceptance of identical claims lodged by other claimants, the applicants complain that there have been breaches of their right to legal certainty. Relying on essentially the same facts, they also allege violations of their right to a fair trial, their right to peaceful enjoyment of their possessions, and violations of the prohibition on discrimination.

5. On 30 August 2016 the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. Background to the cases

6. The applicants were all employees of the Ministry of Justice's directorate for the execution of criminal sanctions in Serbia. Because of the hardships prison staff endure during service at penal institutions in Serbia, Serbian law provides that they are eligible for certain employment benefits, such as benefits concerning the calculation of their old-age pensions and salary increases.

7. In general, pension and work-related issues in Serbia are regulated by two laws: 1) the Old-Age Pension and Disability Insurance Act (*Zakon o penzionom i invalidskom osiguranju*, published in the Official Gazette of the Republic of Serbia no. 34/2003, as amended); and 2) the Labour Act (*Zakon o radu*, published in the Official Gazette of the Republic of Serbia no. 24/2005, as amended). However, in regards to employees of correctional facilities, pension and work-related issues are also regulated by: 1) the Execution of Criminal Sanctions Act (*Zakon o izvršenju krivičnih sankcija*, published in the Official Gazette of the Republic of Serbia -OG RS- no. 85/2005, amendments published in the Official Gazette no. 72/2009); and 2) the Directive on personal coefficients for the calculation and payment of salaries to individuals employed within the Ministry of Justice's directorate for the execution of criminal sanctions (*Uredba o koeficijentima za obračun i isplatu plata u Upravi za izvršenje krivičnih sankcija*, published in the Official Gazette of the Republic of Serbia -OG RS- no. 16/2007, amendments published in the Official Gazette nos. 21/2009, 1/2011 – Constitutional Court decision (implementing decision of the Constitutional Court of 18 November 2010), 83/2011 and 102/2011 – hereinafter "the Directive").

8. Under Article 262 of the Execution of Criminal Sanctions Act, the director and other employees of the directorate for the execution of criminal sanctions are entitled to an accelerated accumulation of pension rights: this means that twelve months of full-time employment is counted as sixteen months of full-time employment in the civilian economy when their old-age pensions are calculated. Also, the personal coefficient of employees in correctional facilities may, according to the said Article, be increased by up to 30%. The posts to which the accelerated accumulation of pension rights applies are determined by the minister responsible for the judiciary and the minister responsible for pension and disability insurance.

9. In accordance with Article 7 § 3 of the Directive, in the period between 1 January 2007 and 14 January 2011 the personal coefficients of

the applicants and their colleagues were increased by 10% instead of 30% as provided by the Execution of Criminal Sanctions Act.

10. On 18 November 2010, the Constitutional Court adopted a decision (no. IU 63/2007) stating that Article 7 § 3 of the Directive was unconstitutional. The said Article was struck down. The amendments to the Directive entered into force on 14 January 2011. As of 14 January 2011 the personal coefficients were increased by 30%.

11. Between 1 January 2007 and 14 January 2011, while this unconstitutional norm (*neustavna odredba*) was in force, the employees of the Ministry of Justice's directorate for the execution of criminal sanctions received lower salaries that they had been entitled to. For that reason, their old-age pensions were also reduced.

2. Relevant circumstances of the cases

(a) Judgments of the courts of first instance and courts of appeal

12. Throughout 2011, 2012 and 2013 the applicants, as well as many of their colleagues, lodged with various courts of first instance (*osnovni sudovi*) separate civil claims against the Republic of Serbia, asking for compensation for the damage caused while the four-year-long unconstitutional norm pertained.

13. Some of the courts of first instance upheld the claimants' applications for compensation, while others dismissed them. Decisions of the courts of first instance were appealed against either by claimants or the defendant.

14. Certain claimants were successful before the courts of appeal; yet all the applicants were unsuccessful. In particular, the applicants' complaints were rejected by the courts of appeal in Belgrade and Kragujevac for the applicants' failure to pursue the proper avenue of redress. In the view of these courts the applicants should have first initiated administrative proceedings and afterwards lodged a complaint with the civil courts. In any event, the Belgrade and Kragujevac Courts of Appeal also held that they did not have jurisdiction to decide on the applicants' cases.

15. In contrast, in the following cases other courts of appeal or chambers thereof ruled in favour of the applicants' colleagues:

1) The Kragujevac Court of Appeal (for example: decisions nos. Gž1. 43/11 of 15 March 2011 and Gž1. 3034/14 of 2 October 2014);
2) The Niš Court of Appeal (for example: Gž1. 2444/13 of 27 December 2013);
3) The Novi Sad Court of Appeal (for example: Gž1. 3549/13 of 24 December 2013 and Gž1. 2379/14 of 7 November 2014).

16. In the above-mentioned decisions the courts of appeal upheld the claimants' requests, stating that the applicants' colleagues should be paid

the differences in their salaries together with interest on the unpaid amounts, and the contributions in respect of the their old-age pensions, for the period during the which unconstitutional norm had been applied.

(b) Decision of the Supreme Court of Cassation (*Vrhovni kasacioni sud)* no. Rev.2 393/2013 of 26 September 2013

17. Given the differences in adjudication on the matter, on 27 March 2013 the Novi Sad Court of Appeal requested, in accordance with Article 395 of the Civil Procedure Act (*Zakon o parničnom postupku*, published in the Official Gazette of the Republic of Serbia – OG RS – 125/04 and 111/2009), that the Supreme Court of Cassation amend its judgment no. Gž1-2352/12 of 12 December 2012 and harmonise the case-law of the courts of appeal in matters concerning the payment of the differences between the salaries claimants had received and those they had been entitled to.

18. On 26 September 2013, in response to the said request, the Supreme Court of Cassation found, acting in accordance with Articles 395 and 399 of the Civil Procedure Act, that there was an interest of general concern to deal with this issue. It held that the Novi Sad Court of Appeal in delivering the judgment of 12 December 2012 had incorrectly applied and interpreted domestic law. The Supreme Court of Cassation held that the judgment should have been rendered in the claimant's favour and, accordingly, set the judgment of the Novi Sad Court of Appeal aside.

19. After the impugned decision, the Courts of Appeal in Novi Sad, Niš and Kragujevac assumed the following approach:

> "... as the Supreme Court of Cassation explicitly stated in its decisions nos. Rev. 2 br. 393/2013 of 26 September 2013 and Rev. br. 983/2012 of 26 September 2013, State organs [were engaging in what had to be considered] unlawful work, as the Constitutional Court failed to adopt a decision [regarding] in which manner the consequences of the unconstitutional norm should have been overcome[, and] the Government of the Republic of Serbia, as the regulatory authority, within the scope of their jurisdiction did not secure the execution of the impugned decision of the Constitutional Court concerning the disputed period during which the claimant's salary was unconstitutionally and illegally reduced, the claimant had a right to lodge a claim for compensation for damage with the civil courts, and the civil courts are in charge of deciding on the matter in accordance with Article 1 of the Civil Procedure Act." (cited from the judgment no. Gž1. 2444/13 of 27 December 2013, p. 4)

(c) Decisions of the Constitutional Court

20. In the period between 26 September 2012 and 13 May 2014 the applicants appealed to the Constitutional Court.

21. They complained, *inter alia,* of the inconsistent domestic case-law of the Serbian courts which had caused the rejection of their claims and the simultaneous acceptance of identical claims lodged by their colleagues. Relying on Article 6 of the Convention or Articles 32 and 36 of the

Constitution (provisions that correspond to Article 6 of the Convention) the applicants asked the Constitutional Court to find that there had been a breach of the principle of legal certainty as an integral part of the right to a fair trial.

22. Between 23 October 2014 and 25 March 2015, the Constitutional Court rejected the applicants' constitutional appeals as unsubstantiated.

3. Specific circumstances of each applicant's case

23. The facts relating to each applicant may be summarised as follows:

(a) As regards application no. 27471/15 (Ms Aleksandra Mirković – the first applicant)

24. At the relevant time, the first applicant was an employee of Belgrade Special Prison Hospital.

25. On 20 December 2011 she lodged a civil claim with the First Basic Court (*Prvi opštinski sud*) in Belgrade asking for payment of the difference between the salary she had received and the one she had been entitled to.

26. On 3 June 2013 the first-instance court rejected her claim. On 3 October 2013 the Belgrade Court of Appeal upheld that judgment following an appeal by the applicant.

27. The applicant lodged a constitutional appeal on 25 November 2013 complaining, *inter alia,* of the existence of inconsistent domestic case-law of Serbian courts, in particular the rejection of her own claim and the simultaneous acceptance of identical claims lodged by her colleagues, and asked the Constitutional Court to find that there had been a breach of the principle of judicial certainty as an integral part of her right to a fair trial. She provided the Constitutional Court with copies of several judgments in support of her allegation regarding the inconsistent case-law.

28. On 12 June 2014 she provided the Constitutional Court with the decision of the Supreme Court of Cassation of 26 September 2013.

29. On 23 October 2014 the Constitutional Court rejected the applicant's constitutional appeal and decided not to evaluate the decision of the Supreme Court of Cassation of 26 September 2013 because it had been adopted after the judgment of the Belgrade Court of Appeal of 3 October 2013 had been adopted in the applicant's case (*Ustavni sud nije posebno cenio imajući u vidu da ona potiče iz perioda nakon donošenja osporene presude Apelacionog suda u Beogradu GŽ1 556/13 od 3. oktobra 2013*. g*odine.*)

(b) As regards application no. 27288/15 (Ms Biljana Sarić – the second applicant)

30. At the relevant time, the second applicant was an employee of Belgrade Special Prison Hospital. On 20 December 2011 she lodged a civil claim with the First Basic Court in Belgrade. Her complaint was rejected on

8 February 2013. The judgment of the first-instance court was upheld by the Belgrade Court of Appeal on 15 May 2013.

31. On 24 July 2013 the applicant lodged a constitutional appeal. She amended her appeal following the decision of the Supreme Court of Cassation of 26 September 2013 on 12 June 2014.

32. On 23 October 2014 the Constitutional Court rejected the applicant's constitutional appeal for the same reason as in the case of the first applicant.

(c) As regards application no. 27751/15 (Ms Sanja Popović-Radivojević – the third applicant)

33. At the relevant time, the third applicant was an employee of Juvenile Detention Centre (*Kazneno-popravni zavod za maloletnike*) in Valjevo. On an unspecified date in 2011, she lodged a civil claim with the Basic Court in Valjevo. On 16 March 2012 the Basic Court ruled in her favour. This judgment was overturned by the Belgrade Court of Appeal on 15 August 2012.

34. On 26 September 2012 the applicant lodged a constitutional appeal. She provided the Constitutional Court with the copy of one relevant judgment in which the Kragujevac Court of Appeal had accepted a similar claim to her own.

35. On 23 October 2014 the Constitutional Court rejected her appeal for failure to adequately substantiate her complaint. In particular it held that one relevant judgment submitted by the applicant could not amount to proof of either profound or long-standing differences in the adjudication of the courts' ruling at final instance in cases similar to the applicant's.

(d) As regards application no. 27779/15 (Mr Branislav Marković – the fourth applicant)

36. At the relevant time, the fourth applicant was an employee of the prison in Požarevac-Zabela (*Kazneno-popravni zavod Požarevac-Zabela*). On 14 July 2011, the applicant lodged a civil claim with the Basic Court in Požarevac. On 8 February 2012 the Basic Court ruled in his favour. This judgment was overturned by Belgrade Court of Appeal on 29 August 2012.

37. On 13 November 2012 the applicant lodged a constitutional appeal, alleging a violation of his right to a fair trial. He failed to provide the Constitutional Court with copies of any of the judgments in which the civil courts had allegedly accepted claims similar to his own.

38. On 23 October 2014 the Constitutional Court rejected the applicant's constitutional appeal as unsubstantiated.

(e) As regards application no. 27790/15 (Ms Milica Bogićević – the fifth applicant)

39. At the relevant time, the fifth applicant was an employee of Belgrade Special Prison Hospital. On 20 December 2011, the applicant lodged a civil

claim with the First Basic Court in Belgrade. On 23 January 2013 the First Basic Court ruled in her favour. This judgment was overturned by Belgrade Court of Appeal on 19 March 2014.

40. On 13 May 2014 the applicant lodged a constitutional appeal. She provided the Constitutional court with the copy of one relevant judgment in which the Novi Sad Court of Appeal had accepted a claim similar to her own.

41. On 23 October 2014 the Constitutional Court rejected her appeal for the same reason as in the case of the third applicant.

(f) As regards application no. 27288/15 (Ms Gordana Maslovarić – the sixth applicant)

42. At the relevant time, the sixth applicant was an employee of Belgrade Special Prison Hospital. On 20 December 2011 she lodged a civil claim with the First Basic Court in Belgrade. Her complaint was rejected on 25 December 2012. The judgment of the first-instance court was upheld by the Belgrade Court of Appeal on 20 March 2013.

43. On 17 May 2013 the applicant lodged a constitutional appeal. She amended her appeal following the decision of the Supreme Court of Cassation of 26 September 2013 on 12 June 2014.

44. On 30 October 2014 the Constitutional Court rejected the applicant's constitutional appeal for the same reason as in the case of the first applicant.

(g) As regards application no. 28418/15 (Mr Velimir Vidić – the seventh applicant)

45. At the relevant time, the seventh applicant was an employee of Penitentiary institution in Belgrade-Padinska Skela (*Kazneno-popravni zavod u Beogradu – Padinska Skela*) and the prison in Požarevac-Zabela. On 30 November 2011 he lodged a civil claim with the First Basic Court in Belgrade. His complaint was rejected on 3 December 2012. The judgment of the first-instance court was upheld by the Belgrade Court of Appeal on 1 March 2013.

46. On 16 May 2013 the applicant lodged a constitutional appeal. He amended his appeal following the decision of the Supreme Court of Cassation of 26 September 2013 on 21 March 2014.

47. On 23 October 2014 the Constitutional Court rejected the applicant's constitutional appeal for the same reason as in the case of the first applicant.

(h) As regards application no. 30893/15 (Mr Nebojša Nejković – the eighth applicant)

48. At the relevant time, the eighth applicant was an employee of the prison in Požarevac-Zabela. On an unspecified date in 2013 he lodged a civil claim with the Basic Court in Požarevac. His complaint was rejected

on 21 August 2013. The judgment of the first-instance court was upheld by the Belgrade Court of Appeal on 30 October 2013.

49. On 10 December 2013 the applicant lodged a constitutional appeal. He amended his appeal following the decision of the Supreme Court of Cassation of 26 September 2013 on 27 February 2014.

50. On 13 November 2014 the Constitutional Court rejected the applicant's constitutional appeal for the same reason as in the case of the first applicant.

(i) As regards application no. 30906/15 (Ms Aleksandra Pešić – the ninth applicant; and Ms Jelena Jevremović – the tenth applicant)

51. At the relevant time, the ninth and the tenth applicants were employees of Penitentiary institution in Požarevac (*Kazneno-popravni zavod za žene*). On an unspecified date in 2011, the applicants lodged a joint civil claim with the Basic Court in Požarevac. On 13 January 2012 the Basic Court ruled in their favour. This judgment was overturned by Belgrade Court of Appeal on 4 April 2013.

52. On 21 May 2013 the applicants lodged a constitutional appeal. They amended the appeal following the decision of the Supreme Court of Cassation of 26 September 2013 on 27 February 2014.

53. On 23 October 2014 the Constitutional Court rejected the applicants' constitutional appeal for the same reason as in the case of the first applicant.

(j) As regards application no. 32933/15

(i) Mr Željko Gradiška – the eleventh applicant

54. At the relevant time, the eleventh applicant was an employee of the women's prison in Požarevac. On an unspecified date in 2011, the applicant lodged a civil claim with the Basic Court in Požarevac. On 24 February 2012 the Basic Court ruled in his favour. This judgment was overturned by Belgrade Court of Appeal on 16 October 2013.

55. On 10 December 2013 the applicant lodged a constitutional appeal. He subsequently amended the appeal with the decision of the Supreme Court of Cassation of 26 September 2013.

56. On 23 October 2014 the Constitutional Court rejected the applicant's constitutional appeal because in its view the decision of the Supreme Court of Cassation could not have been considered as proof of inconsistent case-law of courts ruling at final instance (*revizijsko rešenje ne može biti dokaz o različitom postupanju sudova najviše instance*).

(ii) Mr Milan Vučićević – the twelfth applicant

57. At the relevant time, the twelfth applicant was an employee of the prison in Požarevac-Zabela. On an unspecified date in 2012, the applicant lodged a civil claim with the Basic Court in Požarevac. His complaint was

rejected on 2 October 2012. The judgment of the first-instance court was upheld by the Belgrade Court of Appeal on 22 November 2012.

58. On 15 January 2013 the applicant lodged a constitutional appeal. He failed to provide the Constitutional Court with copies of any of the judgments in which the civil courts at final instance had allegedly accepted claims similar to his own.

59. On 23 March 2015 the Constitutional Court rejected the applicant's constitutional appeal as unsubstantiated. The Constitutional Court failed to separately address his complaint concerning the divergent case-law.

(iii) Mr Draško Veljković – the thirteenth applicant

60. At the relevant time, the thirteenth applicant was an employee of Kraljevo District Prison (*Okružni zatvor u Kraljevu*). On an unspecified date in 2011, the applicant lodged a civil claim with the Basic Court in Kraljevo. On 23 December 2011 the Basic Court ruled in his favour. This judgment was overturned by Kragujevac Court of Appeal on 12 March 2013.

61. On 13 May 2013 the applicant lodged a constitutional appeal. On several occasions, between 30 December 2013 and 19 August 2014, he amended the appeal, adding copies of a few other judgments in which the civil courts at final instance had accepted claims similar to his own, and adding the decision of the Supreme Court of Cassation of 26 September 2013.

62. On 23 October 2014 the Constitutional Court rejected the applicant's constitutional appeal for the same reason as in the case of the first applicant.

(k) As regards application no. 35780/15 (Ms Branislava Stojanović – the fourteenth applicant)

63. At the relevant time, the fourteenth applicant was an employee of the women's prison in Požarevac. On an unspecified date in 2012 she lodged a civil claim with the Basic Court in Požarevac. Her complaint was rejected on 22 May 2012. The judgment of the first-instance court was upheld by the Belgrade Court of Appeal on 13 September 2012.

64. On 22 October 2012 the applicant lodged a constitutional appeal. She subsequently amended the appeal following the decision of the Supreme Court of Cassation of 26 September 2013.

65. On 29 January 2015 the Constitutional Court rejected the applicant's constitutional appeal for the same reason as in the case of the first applicant.

(l) As regards application no. 40646 (Ms Nevenka Bijelić – the fifteenth applicant; Ms Vesna Vulević – the sixteenth applicant; and Ms Zorica Jovanović – the seventeenth applicant)

66. At the relevant time, the fifteenth, the sixteenth and the seventeenth applicants were employees of the women's prison in Požarevac. On an unspecified date in 2012, the applicants lodged a joint civil claim with the

Basic Court in Požarevac. Their complaint was rejected on 29 May 2013. The judgment of the first-instance court was upheld by the Belgrade Court of Appeal on 11 September 2013.

67. On 16 October 2013 the applicants lodged a constitutional appeal. They subsequently amended the appeal, adding copies of a few other judgments in which the civil courts ruling at final instance had accepted claims similar to their own, and adding the decision of the Supreme Court of Cassation of 26 September 2013.

68. On 11 February 2015 the Constitutional Court rejected the applicants' constitutional appeal for the same reason as in the case of the first applicant.

(m) As regards application no. 55066/15 (Mr Dejan Stepanović – the eighteenth applicant)

69. At the relevant time, the eighteenth applicant was an employee of Belgrade Special Prison Hospital. On 20 December 2011 he lodged a civil claim with the First Basic Court in Belgrade. His complaint was rejected on 26 February 2013. The judgment of the first-instance court was upheld by the Belgrade Court of Appeal on 5 June 2013.

70. On 5 August 2013 the applicant lodged a constitutional appeal. He amended his appeal following the decision of the Supreme Court of Cassation of 26 September 2013 on 12 June 2014.

71. On 25 March 2015 the Constitutional Court rejected the applicant's constitutional appeal for the same reason as in the case of the first applicant.

II. RELEVANT DOMESTIC LAW

A. Civil Procedure Act (*Zakon o parničnom postupku* – published in the Official Gazette of the Republic of Serbia nos. 125/04 and 111/2009)

72. The Civil Procedure Act was in force from 22 February 2005 until 1 February 2012 (hereinafter "the former Civil Procedure Act"). However, in accordance with Article 506 § 1 of the new Civil Procedure Act (*Zakon o parničnom postupku*, published in the Official Gazette of the Republic of Serbia nos. 72/2011, 49/2013 – Constitutional Court decision, 74/2013 – Constitutional Court decision 55/2014 – hereinafter: "the new Civil Procedure Act") provisions of the former Civil Procedure Act are applicable to all proceedings which commenced before the new Civil Procedure Act entered into force.

Article 1

"This Act shall govern the rules of proceedings for providing legal protection of the court applied in acting and adjudicating upon civil-law disputes arising from personal,

family, labour, business, property and other civil legal relations, with and exception of the disputes in respect of which another type of proceedings is provided in accordance with the specific law."

Article 395

"Exceptionally, an appeal on points of law shall be permitted against a second-instance decision which is not liable to an appeal on points of law under the provisions referred to in Article 394 of this Law, if, in the assessment of the Court of Appeal on the admissibility of an appeal on points of law, this is required to examine legal issues in the common interest, achieve uniformity of application of the law in court judgments, or when a new legal interpretation is required."

Article 399

"The court of revision (*revizijski sud*) shall examine solely the part of a judgment contested by the application for an appeal on points of law and within the limits of the reasons stated in the appeal on points of law, and shall, of their own motion, take due care of a substantial violation of the civil-procedure rules pursuant to Article 361, paragraph 2, subparagraph 9 of this Act, and about the correct application of the law."

Article 407

"(1) If the court of revision establishes that substantive law was applied incorrectly, it shall render a judgment granting an application for review and reverse the contested judgment.

(2) If the court of revision finds that the facts were established incompletely owing to incorrect application of substantive law, and consequently no grounds for the contested judgment to be reversed existed, it shall render a ruling to grant an application for review and, entirely or partially, and set aside the judgments of a court of first instance and a court of second instance, or solely the judgment of a former. The Supreme Court of Cassation shall consequently refer the case for retrial to the same or another court chamber of the court of first instance, or of the court of second instance, or another competent court."

B. Civil Procedure Act (*Zakon o parničnom postupku* – published in the Official Gazette of the Republic of Serbia nos. 72/2011, 49/2013 – Constitutional Court decision, 74/2013 – Constitutional Court decision, 55/2014)

73. The new Civil Procedure Act has been in force since 1 February 2012. It applies to all proceedings which commenced after its entry into force, or to proceedings which were reopened after its entry into force. The relevant provisions read as follows:

Article 404

"An appeal on points of law shall exceptionally be permitted in the event of a wrongful implementation of substantive law and against a second-instance judgment which could not be disputed by an appeal on points of law if, according to the estimates of the Supreme Court of Cassation, it would be necessary to consider legal issues of general interest or legal issues in the interest of equal rights of citizens, for

the purpose of the harmonisation of domestic case-law, as well as, if necessary, for the purpose of providing a new interpretation of law (special appeal on points of law) [*posebna revizija*].

The Supreme Court of Cassation shall decide on the admissibility and legitimacy of an appeal on points of law from paragraph 1 hereof by deliberating in a panel of five judges."

Article 408

"The Supreme Court of Cassation shall examine solely the part of a judgment contested by the application for an appeal on points of law and within the limits of the reasons stated in the appeal on points of law, and shall, of their own motion, pay due attention to a substantial violation of the civil-procedure rules pursuant to Article 374, paragraph 2, subparagraph 2 of this Act, and about the correct application of the law. "

Article 426

"The proceedings in which a final decision was adopted by a court may be opened for a retrial following an application by a party if: ...

11) the party has an opportunity to make use of a judgment of the European Court of Human Rights in which a violation of human rights, relevant to the more favourable outcome of proceedings, is found

12) the Constitutional Court, while deciding on a constitutional appeal, finds a violation or denial of a human or minority right or a freedom guaranteed by the Constitution in the civil proceedings, and that might be relevant for a more favourable outcome."

C. Courts Organisation Act (*Zakon o uređenju sudova* – published in the Official Gazette of the Republic of Serbia – OG RS – nos. 116/2008, 104/2009, 101/2010, 31/2011 – other law, 78/2011 – other law, 101/2011, 101/2013, 106/2015, 40/2015 – other law, 13/2016 and 108/16)

74. The Courts Organisation Act was enacted in 2008 and came into force on 1 January 2010. This Act regulates the judicial system in the Republic of Serbia, as well as the organisation, competence and jurisdiction of the courts.

75. The Supreme Court of Cassation has its seat in Belgrade, and as set out in Articles 30 and 31 of the Courts Organisation Act it: i) decides on extraordinary legal remedies lodged against decisions of courts of the Republic of Serbia; ii) decides on conflicts of jurisdiction between courts if this does not fall under the jurisdiction of any other court as well as on transfers of jurisdictions of the courts; iii) determines general legal views in order to ensure the uniform application of law; iv) evaluates the application of the laws and other regulations, as well as the work of courts; v) appoints judges of the Constitutional Court, provides opinions on candidates for the President of the Supreme Court of Cassation; and vi) exercise other competences set forth in the Act.

76. As provided in Article 43 of the Act, the Supreme Court of Cassation must hold departmental meetings of the Supreme Court of Cassation (*sednice odeljenja Vrhovnog kasacionog suda*) where the issues arising from the scope of work of different courts' departments are analysed. The departmental meetings of the Supreme Court of Cassation are, in particular, convened when an issue of inconsistency of domestic case-law appears. Legal opinions (*pravna shvatanja*) adopted at those meeting are binding for all chambers (*veća*) of the relevant court' departments.

D. Rules of Court (*Sudski poslovnik* – published in the Official Gazette of the Republic of Serbia – OG RS – nos. 110/2009, 70/2011, 19/2012, 89/2013, 96/2015, 104/2015, 113/2015 – addendum, 39/2016, 56/2016 and 77/2016)

77. Articles 27, 28, 29 and 31 provide, *inter alia*, that: (i) courts with a larger number of judges may have case-law departments entrusted with the monitoring of relevant domestic and international case-law; (ii) courts must keep a register of all legal opinions which are deemed to be of significance for case-law; (iii) courts of appeal may hold joint consultations on case-law related issues, including with the Supreme Court of Cassation; and (iv) the case-law departments shall prepare proposals for judges' plenary sessions with a view to securing harmonisation of the relevant case-law.

E. Constitutional Court Act (*Zakon o Ustavnom sudu* - published in Official Gazette of the Republic of Serbia nos. 109/07, 99/2011, 18/13-decision of the Constitutional Court, 40/15 and 103/15)

78. Article 85 § 2 provides that appellants should substantiate their constitutional appeals with any and all evidence of relevance for the determination of their case, provide a copy of the impugned decision, and document that all other effective remedies have already been exhausted.

III. RELEVANT DOMESTIC PRACTICE

A. Relevant decisions of the Supreme Court of Cassation

1. Decision of the Supreme Court of Cassation no. Rev2 400/2015 / Rž 134/2015 of 2 April 2015

79. On 2 April 2015 the Supreme Court of Cassation overturned judgment no. Gž1-2008/13 of the Belgrade Court of Appeal of 20 March 2013 and ruled in favour of the claimant in a matter concerning the payment of the difference between the value of the received and

anticipated salaries. It held that, while delivering the judgment of 20 March 2013, the Belgrade Court of Appeal had incorrectly applied and interpreted domestic law.

80. The Supreme Court of Cassation acted by virtue of Articles 395 and 399 of the former Civil Procedure Act; those were the provisions the Supreme Court of Cassation used when a need to harmonise case-law of the courts of appeal arose.

2. Decision of the Supreme Court of Cassation no. Rev2 381/2016 of 17 March 2016

81. Acting under Article 404 of the new Civil Procedure Act and with the purpose of harmonising the inconsistency in the domestic case-law, on 17 March 2016 the Supreme Court of Cassation overturned judgment no. Gž1 3851/2014 of the Belgrade Court of Appeal of 30 October 2015 in which the complaint of a certain J.T. concerning the payment of the difference between his anticipated and received salaries was rejected. The Supreme Court of Cassation found that the judgment should have been rendered in the claimant's favour.

82. The case was remitted to the Belgrade Court of Appeal.

3. Decision of the Supreme Court of Cassation no. Rev2 1383/2016 of 21 July 2016

83. Acting under Article 404 of the new Civil Procedure Act and with the purpose of harmonising the inconsistency in the domestic case-law, on 21 July 2016 the Supreme Court of Cassation overturned judgment no. Gž1 2644/2015 of the Belgrade Court of Appeal of 25 November 2015 and judgment no. P1 5570/11 of the Court of First Instance in Belgrade of 26 May 2014 in which the complaint of a certain R.R. concerning the payment of the difference between the anticipated and received salaries was rejected. The Supreme Court of Cassation found that the judgments should have been rendered in the claimant's favour.

84. The case was remitted to the court of first instance.

B. Decision of the Constitutional Court of 13 January 2016

85. On 13 January 2016 the Constitutional Court found a violation of the right to a fair trial in a case with facts similar to the applicants'. In particular, it found that because of the inconsistent domestic case-law in regards to the payment of damages for the delayed payment of the same salary increase granted to employees of correctional facilities, the right to a fair trial of a certain D.B. had been violated.

86. D.B had been an employee of Belgrade Special Prison Hospital (*Specijalna zatvorska bolnica Beograd*). On 19 September 2013 the

Belgrade Court of Appeal had rejected D.B.'s appeal. On 21 October 2013 D.B. had lodged a constitutional appeal (Už-8442/2013).

87. D.B. had been represented before the domestic courts by the same lawyer who is representing the first, second, fifth, sixth, eleventh, twelfth, thirteenth and eighteenth applicants before this Court. D.B.'s claims and appeals at the domestic level had been the same as the claims and appeals of those applicants; the time-frame had also been the same. In the course of the proceedings before the Constitutional Court, D.B. referred to the decision of the Supreme Court of Cassation of 2 April 2015.

88. Finding the violation of D.B.'s right to legal certainty was an integral part of her right to fair trial, the Constitutional Court stated, in particular, that:

> "... the fact that the courts of last instance have been adopting discordant decisions while deciding on the same factual and legal issues has created a situation of legal uncertainty for the complainant. In the Constitutional Court's view those circumstances are enough for the Constitutional Court to find a violation of the right to equal protection guaranteed under Article 36 § 1 of the Constitution."

THE LAW

I. JOINDER OF THE APPLICATIONS

89. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

90. The applicants complained that the domestic courts' rejection of their civil claims and the simultaneous acceptance of identical claims lodged by other claimants had resulted in a breach of their rights guaranteed under Article 6 § 1 and Article 14 of the Convention, and Article 1 of Protocol no. 1 and Article 1 of Protocol no. 12 to the Convention. The Court, however, considers that the applications fall to be examined solely under Article 6 § 1 of the Convention, which in relevant part reads as follows:

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

A. Admissibility

1. The parties' submissions

(a) The Government

91. The Government submitted that the applicants had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. Their arguments are fourfold:

Firstly, the Government asserted that making an application for reopening of proceedings on the grounds provided in Article 426 § 1 (12) of the new Civil Procedure Act (see paragraph 73 above) was an effective remedy in the applicants' situations. They pointed to the decision of the Constitutional Court of 13 January 2016 (see paragraph 85 above) in which a violation of an appellant's right to a fair trial had been found in a case similar to the applicants'. In accordance with Article 426 § 1 (12) such a decision, in the Government's view, had constituted relevant grounds for the reopening of proceedings;

Secondly, the Government claimed that the applicants had failed to make use of the appeal on points of law as provided for in Article 395 of the former Civil Procedure Act (see paragraph 72 above). In their view, since this remedy had been effective in the cases of the applicants' colleagues, it was highly probable that had the applicants used it, they would have succeeded (see paragraphs 17-18 and 79-80 above);

Thirdly, the Government argued that the applicants had failed to pursue an adequate avenue of redress in order to be successful in their claims for compensation. Specifically, the Government claimed that the applicants should have first initiated administrative proceedings and, if the outcome of those proceedings had been unfavourable, lodged complaints with the civil courts (see paragraph 14 above);

Fourthly, the Government submitted that the applicants had failed to complain properly before the Constitutional Court.

92. In the alternative, the Government indicated, in respect of the fourth applicant, that in his constitutional appeal he had alleged a violation only of his right to a fair trial and, accordingly, had failed to raise the complaint concerning the violation of his right to legal certainty properly.

(b) The applicants

93. All the applicants contested the Government's claims. They stated that by lodging the compensation claims before the civil courts they had pursued an adequate avenue of redress.

94. The first, second, third, fifth, sixth, eleventh, twelfth, thirteenth and eighteenth applicants, also, disputed the Government's view about the effectiveness of an application for the reopening of proceedings.

95. The seventh applicant contested the Government's allegation concerning the use of an appeal on points of law. He claimed that, as an extraordinary legal remedy, an appeal on points of law could not be deemed an effective remedy. Moreover, in accordance with Article 395 of the former Civil Procedure Act the success of the said remedy depended on the positive assessment of the court of appeals; those courts had in fact already taken a negative view on the applicant's request.

2. The Court's assessment

(a) Relevant principles

96. At the outset, the Court reiterates that under Article 35 § 1 of the Convention it may only deal with an application after all domestic remedies have been exhausted. 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).

97. The Court notes that the obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. 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 (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 71, 25 March 2014).

(b) Reopening of the proceedings

98. The Court's assessment of an applicant's obligation to exhaust domestic remedies, including an application for the reopening of proceedings, is normally carried out with reference to the date on which the application was lodged with it (see, for example, *Cvetković v. Serbia,* no. 17271/04, § 41, 10 June 2008). However, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (compare and contrast *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001‑IX).

99. The Court does not consider that the present case is an exception to the above rule. It notes that in the present case the applications were lodged between 29 May 2015 and 23 October 2015. The Constitutional Court's decision which might, in accordance with Article 426 § 1 (12) of the new Civil Procedure Act, present relevant information for the reopening of proceedings was adopted on 13 January 2016 (see paragraphs 85-88 above). The fact that the proceedings in question were still pending at the time the applicants lodged their applications with the Court cannot be held against them in this context, since the applicants had no relevant grounds to apply

for the reopening of proceedings (see, *mutatis mutandis, Salah Sheekh v. the Netherlands*, no. 1948/04, § 125, 11 January 2007).

100. In any event, a request for the reopening of a proceedings concluded by means of a final court decision cannot usually be regarded as an effective remedy within the meaning of Article 35 § 1 of the Convention (see *Šorgić v. Serbia*, no. 34973/06, § 54, 3 November 2011 and authorities cited therein).

101. Accordingly, the Government's objection concerning the applicants' failure to make use of an application for the reopening of proceedings must be rejected.

(c) Appeal on points of law

102. In respect of the Government's objection that the applicants should have made use of an appeal on points of law as provided in Article 395 of the former Civil Procedure Act, the Court observes that it is an extraordinary legal remedy which is only exceptionally granted. As provided in Article 395 a competent court of appeal may, "exceptionally", decide that an appeal on points of law is admissible if this would be useful in order to deal with "a legal issue of general interest", harmonise inconsistent case-law, or adopt a "new interpretation of the law".

103. In its guidelines (*Stavovi Ustavnog suda koji se odnose na postupak prethodnog ispitivanja ustavne žalbe*) of 2 April 2009 the Constitutional Court noted that an appeal on points of law must be exhausted before a constitutional appeal may be lodged only if the former Civil Procedure Act itself provided for the direct admissibility of the former, thus implicitly excluding Article 395 of the former Civil Procedure Act, whose application has always been contingent upon a favourable, discretionary, assessment of the court of appeal concerned.

104. In view of the above, it would be unduly formalistic of the Court to require the applicants to exercise a remedy which even the highest court of their country would not oblige them to exhaust (see, *mutatis mutandis*, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 117 and 118, ECHR 2007-IV). In any event, the Constitutional Court did not reject the applicants' constitutional appeals for their failure to lodge appeals on points of law.

105. Consequently, the Government's objection concerning the applicants' failure to make use of an appeal on points of law, in the particular circumstances of the present case (compare and contrast *Rakić and Others v. Serbia*, nos. 47460/07 and 29 others, §§ 37-38, 5 October 2010), must be dismissed.

(d) Adequacy of the redress pursued

106. The Government further submitted that the applicants' complaints were also inadmissible on non-exhaustion grounds since the applicants had

failed to apprise the domestic authorities in the proper manner by lodging their complaints with the civil courts instead of initiating administrative proceedings first. In the Government's view, by failing to make use of the administrative avenue prior to the civil one, the applicants could not have expected a favourable outcome to their civil claims.

107. The Court considers that this limb of the Government's objection raises issues which are not connected to the violation alleged, that being the inconsistent case-law of the civil courts in the adjudication of cases with the same facts as the applicants'. The Government's objection must therefore be dismissed.

(e) Complaints made before the Constitutional Court

108. The Government also argued that the applicants had failed to complain properly before the Constitutional Court.

109. The Court reiterates that the rule of exhaustion of domestic remedies normally requires that the complaints intended to be made subsequently in Strasbourg should have been raised before the domestic courts, at least in substance and in compliance with the formal requirements and time-limits laid down in the domestic law (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I).

110. The obligation to exhaust domestic remedies incumbent on applicants, in respect of the alleged violation of the right to legal certainty, contains two connected aspects: on the one hand, the applicants must have aired a Convention complaint at national level (see *Azinas v. Cyprus,* GC], no. 56679/00, § 38, ECHR 2004-III; *Vučković and Others v. Serbia*, cited above, § 75; and *Perihan and Mezopotamya Basın Yayın A.Ş. v. Turkey*, no. 21377/03, § 47, 21 January 2014), and on the other they must substantiate their complaint with the proper evidence (see *Golubović and Others v. Serbia* (dec.), no. 10044/11 *et seq*., § 43, 17 September 2013, and, *mutatis mutandis*, *Ştefănică and Others v. Romania*, no. 38155/02, § 35, 2 November 2010)

111. In respect of the first aspect, the Court finds that it is apparent from the copies of the applicants' constitutional appeals and the decisions of the Constitutional Court that, contrary to the Government's argument, and with the exception of the fourth applicant, who only mentioned the violation of his right to a fair trial (see paragraph 37 above), all the applicants submitted specific complaints in respect of the violation of their right to legal certainty. Those complaints were identical to the complaints raised before this Court (see paragraph 21 above), which is in accordance with the requirement that the violation alleged must have been raised at the domestic level.

112. In respect of the second aspect, that is to say the requirement that the applicants must have furnished the Constitutional Court with the proper evidence (see *Golubović and Others v. Serbia*, cited above, § 43) or

evidence proving the divergence of interpretation of national law by the different courts ruling at final instance (see, *mutatis mutandis*, *Ştefănică and Others v. Romania*, cited above, § 35, 2 November 2010), the Court notes that all but the fourth and twelfth applicants (see paragraphs 37 and 58 above) provided the Constitutional Court with at least one copy of a judgment in which domestic courts, ruling at final instance, had accepted the same claims as the applicants'. It further observes that all but the third and fifth applicants (see paragraphs 34 and 40 above) subsequently amended their constitutional appeals and furnished the Constitutional Court with the decision of the Supreme Court of Cassation of 26 September 2013.

113. So far, the Court has rejected for non-exhaustion of domestic remedies complaints where the applicants failed to comply with the formal requirements laid down in domestic law (see *Vučković and Others*, cited above, § 105), or failed to complain in the proper form and to include proper evidence in support of their complaints (see *Golubović and Others v. Serbia,* cited above, § 43).

114. The Court has however repeatedly held that the application of the rule of exhaustion of domestic remedies must make due allowance for the context. It has, thus, recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism.

115. Turning to the circumstances of the present case, the Court observes that despite some differences in the applicants' constitutional complaints, their forms and the ways in which corroborating evidence were submitted, they have all been rejected for the same reason, that is to say because of their failure to substantiate their complaints concerning the divergence of the case-law on the matter.

116. In particular, the constitutional appeal of the fourth applicant was rejected because of his failure to address the complaint concerning the divergent case-law (see paragraph 38 above).

117. The complaint of the twelfth applicant was rejected because of his failure to provide the Constitutional Court with copies of any of the judgments in which the civil courts at final instance had allegedly accepted claims similar to his own (see paragraph 59 above).

118. The constitutional appeals of the third and fifth applicants were rejected because the evidence submitted by those applicants was not sufficient to establish the existence of either profound or long-standing differences in the adjudication of the courts ruling at final instance in cases same as the applicants' (see paragraphs 35 and 59 above).

119. In respect of the first, second, sixth, seventh, eighth, ninth, tenth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth applicants the Constitutional Court rejected their complaints alleging violations of their right to legal certainty as in its view the inconsistency in the domestic case-law could not have affected the applicants because the Supreme Court of Cassation had made the decision of 26 September 2013

after the courts of appeal had adopted the judgments in their cases (see paragraph 29 above).

120. In the case of the eleventh applicant the Constitutional Court rejected his constitutional appeal because in its opinion the decisions of the Supreme Court of Cassation did not present proof of inconsistencies in the case-law of the courts of final instance (see paragraph 56 above).

121. The Court observes that in accordance with its settled case-law, the failure of an applicant at the domestic level to bring a complaint at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law will cause the application to be declared inadmissible before this Court (see *Cardot v. France*, 19 March 1991, § 34, Series A no. 200, *Károly Nagy v. Hungary* [GC], no. 56665/09, § 42, ECHR 2017).

122. The Court observes that for complainants to be successful before the Constitutional Court, their complaints should be made in compliance with the formal requirements as laid down in domestic law (see *Skenderi and Others v. Serbia* (dec.), nos. 15090/08 and 4 others, § 109, 4 July 2017). In accordance with Article 85 § 2 of the Constitutional Court Act the complaints raised before the Constitutional Court should be properly substantiated and furnished with the proper evidence (see paragraph 78 above). Failure to do so will lead to the rejection of the constitutional complaint.

123. The Court further notes that the constitutional appeals of the third, fourth, fifth, and twelfth applicants were rejected for their failure to substantiate their constitutional appeals with any or proper evidence of the violation alleged. Had the third, fourth, fifth and twelfth applicants supported their constitutional appeals with the proper evidence, the constitutional remedy would have offered them a reasonable prospect of success (see, *mutatis mutandis*, *Cupara v. Serbia*, no. 34683/08, § 16-17, 12 July 2016). Besides, the requirement to include proper evidence in support of their complaints seems anything but unreasonable (compare and contrast *Golubović and Others v. Serbia,* cited above, § 46).

124. The third, fourth, fifth and twelfth applicants, thus, failed to make the proper use of the constitutional-appeal procedure.

125. In respect of all the other applicants, the Court observes that they all, at least, supported their complaints concerning the violations of their right to legal certainty with the decision of the Supreme Court of Cassation of 26 September 2013. In their cases, the Constitutional Court decided not to evaluate the relevance of the decision of the Supreme Court of Cassation either because it did not consider the decision of the said court to be evidence of inconsistent case-law at the domestic level, or because it did not consider it relevant to the applicants' cases.

126. As in accordance with the Courts Organisation Act and the Rules of Court (see paragraphs 74 - 77 above) the Supreme Court of Cassation is the

authority charged with the harmonisation of domestic case-law, the Court has no reason to doubt that the impugned decision actually established the divergence in the case-law in the matter. The Court further notes that, contrary to its reasoning in the applicants' cases (see paragraphs 119 and 120 above), the Constitutional Court itself found a violation of a complainant's right to legal certainty and established the inconsistency in domestic case-law based on the decision of the Supreme Court of Cassation (see paragraph 88 above). Accordingly, the decision of the Supreme Court of Cassation was deemed to be sufficient substantiation of the applicants' constitutional appeals as well.

127. In view of the foregoing, the constitutional appeals of the first, second, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth applicants were lodged in compliance with the formal domestic requirements and with the proper evidence. The Government's objection concerning the failure of those applicants to properly complain before the Constitutional Court thus must be rejected.

128. In view of paragraph 124 above, the Court does not consider it necessary to examine the Government's separate objection in respect of the fourth applicant.

3. Conclusion

129. The Court notes that the third, fourth, fifth and twelfth applicants had failed to complain properly before the Constitutional Court and rejects their complaints under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

130. The Court further notes that the remaining applicants complained properly before the Constitutional Court. The Court finds that their complaints are not inadmissible within the meaning of Article 35 § 1 of the Convention. It also finds that they are not inadmissible on any other grounds. They must, therefore, be declared admissible.

B. Merits

1. Submissions by the parties

131. The applicants reaffirmed their complaints, adding that the case-law had remained inconsistent during the relevant period. They also claimed that the Belgrade Court of Appeal had, despite continuous efforts by the Supreme Court of Cassation to harmonise the case-law at issue, continued to reject other claimants' complaints concerning the same situations throughout 2015 and 2016.

132. The Government did not dispute the fact that at the time relevant in the applicants' case competent courts in Republic of Serbia had reached

different conclusions in the same factual and legal situations as the applicants'. However, in their view the mere existence of such divergence could not be considered to constitute violations of applicants' right to a fair trial.

133. The Government argued that principles concerning the divergent case-law have been set out in the Grand Chamber's judgment *Nejdet Şahin and Perihan Şahin v. Turkey* ([GC], no. 13279/05, 20 October 2011) and that they were applicable to the present case. In their view the differences in the case-law of the domestic courts had been neither profound nor long-standing. The Government, relying on the case of *Cupara v. Serbia* (cited above, § 36), also, alleged that the Serbian legal system provided machinery capable of overcoming the inconsistency in domestic case-law. However, they also stated that the differences in adjudication between the Supreme Court of Cassation and the Constitutional Court in the present case could not be explained.

2. The Court's assessment

134. In its judgment in *Nejdet Şahin and Perihan Şahin* (cited above) the Court restated the main principles applicable in cases concerning the issue of conflicting court decisions (§§ 49-58). Those principles were summarised as follows in the case of *Stanković and Trajković v. Serbia* (nos. 37194/08 and 37260/08, § 40, 22 December 2015):

> "(i) It is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). Likewise, it is not its function, save in the event of evident arbitrariness, to compare different decisions of national courts, even if given in apparently similar proceedings, as the independence of those courts must be respected (see *Ādamsons v. Latvia*, no. 3669/03, § 118, 24 June 2008);
>
> (ii) The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see *Santos Pinto v. Portugal*, no. 39005/04, § 41, 20 May 2008, and *Tudor Tudor v. Romania*, no. 21911/03, § 29, 24 March 2009);
>
> (iii) The criteria that guide the Court's assessment of the conditions in which conflicting decisions of different domestic courts, ruling at last instance, are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether 'profound and long-standing differences' exist in the case-law of the domestic courts, whether the domestic law provides for a machinery capable of overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (*Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, §§ 49-50, 2 July 2009; *Beian v. Romania (no. 1)*, no. 30658/05, §§ 34-40, ECHR 2007-V (extracts); *Ştefan and Ştef v. Romania*, nos. 24428/03 and 26977/03, §§ 33-36, 27 January 2009; *Schwarzkopf and Taussik v. the Czech Republic* (dec.), no. 42162/02, 2 December 2008; *Tudor Tudor*, cited above, § 31; *Ştefănică and Others v. Romania*, no. 38155/02, § 36, 2 November 2010);

(iv) The Court's assessment has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (see, amongst other authorities, *Beian (no. 1)*, cited above, § 39; *Iordan Iordanov and Others*, cited above, § 47; and *Ştefănică and Others*, cited above, § 31);

(v) The principle of legal certainty guarantees, *inter alia*, a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see *Paduraru v. Romania*, § 98, no. 63252/00, ECHR 2005-XII (extracts); *Vinčić and Others*, cited above, § 56; and *Ştefănică and Others*, cited above, § 38);

(vi) However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see *Unédic v. France*, no. 20153/04, § 74, 18 December 2008). Case-law development is not, in itself, contrary to the proper administration of justice, since failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see *Atanasovski v. 'the Former Yugoslav Republic of Macedonia'*, no. 36815/03, § 38, 14 January 2010)."

135. The Court observes that, in the present case, the parties did not dispute the fact that there were inconsistencies in the adjudication of civil claims brought by many individuals who were in identical or similar situations to the applicants. The Court also observes that according to the relevant case-law provided by the parties such inconsistencies continued for four years; that is to say between 2012 and 2016.

136. The Court also notes that during that period the inconsistencies in the case-law had not been the same. Two distinct periods can be discerned:

i) the first period – from 2012 until 26 September 2013;

ii) the second period – from 26 September 2013 until 21 July 2016.

137. During the first period, all four courts of appeal in the respondent State adjudicated situations which were the same as the applicants' differently. That period ended in September 2013 with the decision of the Supreme Court of Cassation (see paragraphs 17-18 above).

138. During the second period the courts of appeal in Novi Sad, Kragujevac and Niš adopted an approach in the adjudication of cases with the same facts as the applicants' that was consistent with the Supreme Court of Cassation's recommendation. The Belgrade Court of Appeal continued with a conflicting approach. On three occasions, the Supreme Court of Cassation censured the inconsistency in the adjudication of the Belgrade Court of Appeal (see paragraphs 79-84 above).

139. The applicants' situation concerns both periods and with the exception of the thirteenth applicant, all their judgments were given by the Belgrade Court of Appeal. The judgment on appeal in respect of the thirteenth applicant was given by the Kragujevac Court of Appeal (see paragraph 14 above).

140. Even though domestic law in Serbia provided a judicial machinery capable of resolving inconsistencies in adjudication (see paragraphs 72 and 73 above), it would appear that the Supreme Court of Cassation's case-law on the matter as well as the efforts of that court to harmonise the case-law did not in the present case have any effect until, at best, the later part of 2016. Besides, even though in the Serbian legal system the Constitutional Court plays an important part in the protection of an individual's right to legal certainty (see *Cupara v. Serbia,* cited above, § 36), the inconsistencies in the adjudication here in issue existed within this court as well (see paragraphs 85-88 above).

141. Under these circumstances, the Court finds that the undisputed inconsistencies in the adjudication of civil claims during the relevant period cannot be considered as having been institutionally resolved. The aforesaid inconsistencies created a state of continued uncertainty, which in turn must have reduced the public's confidence in the judiciary, such confidence being one of the essential components of a State based on the rule of law. The Court notes that the respondent Government themselves were unable to explain the said inconsistencies (see paragraph 133 above). Moreover, the said inconsistencies were not eliminated until July 2016 by virtue of the procedures provided in the Courts Organisation Act and the Rules of the Court (see paragraphs 74-77 above) and other provisions providing for machinery capable of overcoming conflicting decisions within the courts at the domestic level.

142. The Court therefore, without deeming it appropriate to pronounce as to what the actual outcome of the applicants' lawsuits should have been (see *Vinčić and Others v. Serbia*, nos. 44698/06 and 30 others, § 56, 1 December 2009), considers that the four years of judicial uncertainty in question deprived the applicants of a fair hearing, uncertainty the Supreme Court of Cassation or the Constitutional Court failed to resolve with their decisions. Given the "profound and long-standing" character of the differences in adjudication, the Court finds that in respect of the remaining applicants there has been a violation of their right to legal certainty enshrined in Article 6 § 1 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

143. 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

1. Pecuniary damage

144. The applicants requested that the State be ordered to pay, from its own funds, the respective sums sought in their compensation claims brought before civil courts.

145. The Government contested those claims.

146. Having regard to the violation found in the present case and its reasons for so doing (see paragraph 142 above, particularly the reference to the outcome of the applicants' suits), the Court considers that the applicants' claims, in so far as they relate to the payment of the respective sums sought domestically, must be rejected (see *Vinčić and Others v. Serbia*, cited above, § 61).

2. Non-pecuniary damage

147. The first, second, sixth, eleventh, thirteenth, and eighteenth applicants further claimed 1,000 euros (EUR) each as the compensation for the non-pecuniary damage suffered as a result of the violation of their rights guaranteed under Article 6 § 1 of the Convention.

The seventh applicant claimed EUR 4,000, while the eighth, ninth, tenth, fourteenth, fifteenth, sixteenth, and seventeenth applicants claimed EUR 4,200 each in the same respect.

148. The Government contested the applicants' claims.

149. The Court while making its assessment on an equitable basis, awards the first, second, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth applicants EUR 1,000 in respect of the non-pecuniary damage suffered.

B. Costs and expenses

150. The applicants also claimed between EUR 1,000 and EUR 2,200 each for the costs and expenses incurred before the domestic courts and between EUR 650 and EUR 2,000 each for those incurred before the Court.

151. The Government contested those claims.

152. 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, or in connection to the violation found. Rule 60 of the Rules of Court further requires that an applicant submit itemised particulars of all

claims, together with any relevant supporting documents. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part.

153. Turning to the circumstances of the present case, the Court finds no correlation between the violation found before it and the domestic proceedings. It therefore rejects the claims for costs and expenses in the domestic proceedings.

154. In respect of the costs and expenses incurred before it, the Court observes that the first, second, sixth, eleventh, thirteenth, and eighteenth applicants were represented by one lawyer, and that the eighth, ninth, tenth, fourteenth, fifteenth, sixteenth, and seventeenth applicants were represented by another lawyer. Regard being had to Rule 60 and the submissions of the applicants' lawyers and the documents in the case-file, the Court considers it reasonable to award each group jointly the sum of EUR 2,500 for the proceedings before the Court. In respect of the seventh applicant who was represented by his own lawyer, the Court considers it reasonable to award him EUR 1,500.

C. Default interest

155. 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. *Decides* to join the applications;

2. *Declares* the complaints under Article 6 § 1 concerning the divergence in the case-law of the domestic courts raised by the first, second, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth applicants admissible;

3. *Declares* the applications lodged by the third, fourth, fifth, and twelfth applicants inadmissible;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention concerning the divergence in the case-law of the domestic courts in respect of first, second, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth applicants;

5. *Holds* that the respondent State is to pay, 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 the currency of the respondent State at the rate applicable at the date of settlement:
(a) the first, second, sixth, seventh,[1] eighth, ninth, tenth, eleventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth applicants each EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(b) the first, second, sixth, eleventh, thirteenth, and eighteenth EUR 2,500 (two thousand five hundred euros) jointly, plus any tax that may be chargeable, in respect of costs and expenses before the Court;
(c) the eighth, ninth, tenth, fourteenth, fifteenth, sixteenth, and seventeenth EUR 2,500 (two thousand five hundred euros) jointly, plus any tax that may be chargeable, in respect of costs and expenses before the Court;
(d) the seventh applicant EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of costs and expenses before the Court;
(e) 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;

6. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 26 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Helena Jäderblom
President

1. Rectified on 13 November 2018: the word "seventh" has been added in point 5(a) of the operative part.

APPENDIX

No	App.nos.	Lodged on	Applicant nos.	Applicant's name Date of birth Place of residence	Represented by Practising in
1.	27471/15	29/05/2015	First applicant	**Aleksandra MIRKOVIĆ** 04/03/1974 Belgrade	Rajka JASIKA Inđija
2.	27288/15	29/05/2015	Second applicant	**Biljana SARIĆ** 24/06/1973 Beograd	Rajka JASIKA Inđija
3.	27751/15	02/06/2015	Third applicant	**Sanja POPOVIĆ-RADIVOJEVIĆ** 22/08/1975 Valjevo	Spomenka NEGIĆ Valjevo
4.	27779/15	29/05/2015	Fourth applicant	**Branislav MARKOVIĆ** 01/04/1960 Požarevac	Dragan SOKNIĆ Požarevac
5.	27790/15	29/05/2015	Fifth applicant	**Milica BOGIĆEVIĆ** 13/07/1976 Zemun	Rajka JASIKA Inđija
6.	28156/15	29/05/2015	Sixth applicant	**Gordana MASLOVARIĆ** 08/04/1970 Beograd	Rajka JASIKA Inđija
7.	28418/15	05/06/2015	Seventh applicant	**Velimir VIDIĆ** 12/08/1954 Beograd	Predrag AVRAMOVIĆ Smederevo
8.	30893/15	17/06/2015	Eight applicant	**Nebojša NEJKOVIĆ** 09/02/1958 Požarevac	Ružica LEKIĆ Požarevac
9.	30906/15	17/06/2015	Ninth applicant	**Aleksandra PEŠIĆ** 07/11/1980 Požarevac	Ružica LEKIĆ Požarevac
			Tenth applicant	**Jelena JEVREMOVIĆ** 30/11/1977 Malo Crniće	
10.	32933/15	16/06/2015	Eleventh applicant	**Željko GRADIŠKA** 29/06/1959 Požarevac	Rajka JASIKA Inđija

No	App.nos.	Lodged on	Applicant nos.	Applicant's name Date of birth Place of residence	Represented by Practising in
			Twelfth applicant	**Milan VUČIĆEVIĆ** 09/01/1961 Požarevac	
			Thirteenth applicant	**Draško VELJKOVIĆ** 10/08/1962 Kraljevo	
11.	35780/15	15/07/2015	Fourteenth applicant	**Branislava STOJANOVIĆ** 25/07/1955 Požarevac	Ružica LEKIĆ Požarevac
12.	40646/15	21/07/2015	Fifteenth applicant	**Nevenka BIJELIĆ** 13/05/1964 Požarevac	Ružica LEKIĆ Požarevac
			Sixteenth applicant	**Vesna VULEVIĆ** 18/03/1961 Požarevac	
			Seventeenth applicant	**Zorica JOVANOVIĆ** 27/06/1954 Požarevac	
13.	55066/15	23/10/2015	Eighteenth applicant	**Dejan STEPANOVIĆ** 01/02/1967 Belgrade	Rajka JASIKA Inđija