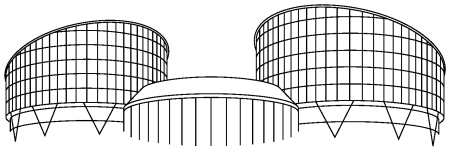

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF STANKOVIĆ AND TRAJKOVIĆ v. SERBIA

(Applications no. 37194/08 and 37260/08)

JUDGMENT

STRASBOURG

22 December 2015

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

In the case of Stanković and Trajković v. Serbia,

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

Luis López Guerra, *President*,
Helena Jäderblom,
Helen Keller,
Johannes Silvis,
Dmitry Dedov,
Branko Lubarda,
Pere Pastor Vilanova, *judges*,
and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 1 December 2015,

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

PROCEDURE

1. The case originated in two separate applications (nos. 37194/08 and 37260/08) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Serbian nationals, Ms Slobodanka Stanković ("the first applicant") and Ms Sonja Trajković ("the second applicant"). Both applications were lodged on 28 July 2008.

2. The applicants were represented by Mr G. Stanišić, a lawyer practising in Belgrade. The Serbian Government ("the Government") were represented by their Agent, Ms V. Rodić.

3. The applicants' allegations concern inconsistent domestic case-law as regards the payment of non-pecuniary damages to individuals whose family members had disappeared or been kidnapped in the aftermath of the North Atlantic Treaty Organisation's intervention in Kosovo[1].

4. On 30 September 2014 the applications were communicated to the Government.

[1] All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with the United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first and second applicants were born in 1948 and 1970 respectively and live in Bujanovac Municipality.

A. The relevant context

6. Following the North Atlantic Treaty Organisation's intervention in Kosovo, on 9 June 1999 the Yugoslav and Serbian Governments agreed to a phased withdrawal of their military and police forces from the territory and a transfer of all effective control to an international security force ("KFOR"). Concerning a number of municipalities, including Suva Reka, the transfer, according to the Military Technical Agreement, was to take place by 15 June 1999. It was further envisaged that it would be up to KFOR to "maintain a secure environment for all citizens of Kosovo". Pursuant to their own phased withdrawal plan, which was to be synchronised with the Yugoslav Army plan, the Serbian police forces envisaged that a transfer of all effective control in Suva Reka Municipality would in fact take place on 13 June 1999.

B. As regards the first applicant (Ms Slobodanka Stanković, application no. 37194/08)

7. On 13 June 1999 the first applicant's husband was kidnapped by the *Kosovo Liberation Army* ("KLA") in Suva Reka Municipality.

8. On 12 March 2002 the Bujanovac Municipal Court declared the first applicant's husband dead. This ruling became final by 3 April 2002.

9. On 19 May 2005 the first applicant, together with her children, lodged a civil claim against the Republic of Serbia with the First Municipal Court in Belgrade, seeking compensation for the mental anguish suffered as a consequence of the incident.

10. On 19 May 2006 the said court ruled against the plaintiffs.

11. On 21 November 2007 the first-instance judgment was upheld by the Belgrade District Court on appeal. The first applicant was served with the District Court judgment on 23 May 2008.

12. In their reasoning the First Municipal Court and the District Court opined, *inter alia*, that while the first applicant's husband had indeed been kidnapped on 13 June 1999 the Republic of Serbia could not be held liable, within the meaning of Article 180 § 1 of the Obligations Act (see paragraph 26 below), since it was up to KFOR to provide for the safety of all citizens of Kosovo from 9 June 1999 onwards (see paragraph 6 above). The fact that

national security forces had been in the process of withdrawing from Suva Reka Municipality on 13 June 1999 was therefore merely a technical issue.

13. The first applicant could not have lodged a further appeal on points of law (*revizija*), given that the amount of compensation claimed was below the statutory threshold.

C. As regards the second applicant (Ms Sonja Trajković, application no. 37260/08)

14. On 13 June 1999 the second applicant's husband was kidnapped by the KLA in Suva Reka Municipality.

15. On 24 June 2002 the Bujanovac Municipal Court declared the second applicant's husband dead. This ruling became final by 16 July 2002.

16. On 31 May 2005 the second applicant, together with her children and other family members, lodged a civil claim against the Republic of Serbia with the First Municipal Court in Belgrade, seeking compensation for mental anguish suffered as a consequence of the incident.

17. On 19 May 2006 the said court ruled against the plaintiffs.

18. On 3 April 2008 the first-instance judgment was upheld by the Belgrade District Court on appeal.

19. In their reasoning the First Municipal Court and the District Court opined, *inter alia*, that while the second applicant's husband had indeed been kidnapped on 13 June 1999 the Republic of Serbia could not be held liable within the meaning of Article 180 § 1 of the Obligations Act, since it was up to KFOR to provide for the safety of all citizens of Kosovo from 9 June 1999 onwards. The fact that national security forces had been in the process of withdrawing from Suva Reka Municipality on 13 June 1999 was therefore merely a technical issue.

20. The second applicant could not have lodged a further appeal on points of law, given that the amount of compensation claimed was below the statutory threshold.

D. Other relevant facts

21. The applicants maintained that in other judgments, rendered between 2006 and 2010, the Belgrade District Court and subsequently the Belgrade Appeals Court, as well as the Supreme Court at third instance, had ruled in favour of other plaintiffs, notwithstanding the fact that their claims were based on very similar facts and concerned identical legal issues.

22. Given the case-law provided by the parties, in their reasoning in those judgments where the said courts/different benches of the same court had indeed ruled in favour of the plaintiffs, the Serbian authorities were deemed responsible for the lives and safety of all persons residing in Kosovo up until the actual transfer of effective control to KFOR in respect

of each of the municipalities considered separately (see, for example, the judgment of the First Municipal Court in Belgrade P. 431/07 of 24 February 2009, upheld on appeal by the Belgrade District Court; the judgments of the Belgrade District Court Gž. 10832/06, 13799/06, and 11483/08 of 26 December 2006, 5 June 2007 and 14 October 2008 respectively; the judgments of the Belgrade Appeals Court Gž. 2005/10 and 605/10 of 17 March 2010 and 10 June 2010 respectively; and the judgments of the Supreme Court Rev. 1551/07, 1092/08 and 939/08 of 5 September 2007, 24 April 2008 and 7 May 2008 respectively).

23. On 18 March 2008, according to the Government, the Supreme Court's Civil Division endorsed this line of reasoning, specifically the reasons given in the same court's ruling Rev. 1551/07 of 5 September 2007 (cited in paragraph 22 above).

24. On 10 March 2010, in Rev. 1540/10, the Supreme Court of Cassation ruled against other plaintiffs on the same basis as in the applicants' case, but in its decision Už. 2786/10 of 28 June 2012 the Constitutional Court quashed this ruling and ordered the re-examination of the matter. On 19 April 2013 the Supreme Court of Cassation apparently ruled in favour of the plaintiffs, this time holding that the Serbian authorities were responsible for the lives and safety of all persons residing in Kosovo until the actual transfer of effective control to KFOR in respect of the municipality in question.

25. On 1 April 2014 the Supreme Court of Cassation adopted a detailed action plan aimed at ensuring the general harmonisation of case-law throughout the Serbian judicial system. This plan contained a series of measures to be undertaken at various levels of jurisdiction, and, *inter alia*, included the following: (i) the adoption of guiding legal opinions based on the principles developed in the jurisprudence of the European Court of Human Rights; (ii) the dissemination of such opinions; (iii) regular information sharing between the courts; (iv) an increased number of thematic discussions and training programmes; (v) the adoption of specific action plans by the courts at various levels; and (vi) the development of various IT tools and related intranet databases.

II. RELEVANT DOMESTIC LAW

A. The Obligations Act (*Zakon o obligacionim odnosima*, published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 29/78, 39/85, 45/89 and 57/89, as well as in the Official Gazette of the Federal Republic of Yugoslavia no. 31/93)

26. Article 180 § 1 of this Act reads as follows:

"Responsibility for loss caused by death or bodily injury or by damage or destruction of another's property, when it results from violent acts or terror or from public demonstrations or manifestations, lies with the ... authority whose officers were under a duty, according to the laws in force, to prevent such loss."

B. The Courts Organisation Act 2001 (*Zakon o uređenju sudova*; published in the Official Gazette of the Republic of Serbia – OG RS – nos. 63/01, 42/02, 27/03, 29/04, 101/05 and 46/06)

27. Article 40 §§ 2 and 3 provides, *inter alia*, that a meeting of a division (*sednica odeljenja*) of the Supreme Court shall be held if there is an issue as regards the consistency of its case-law. Any guiding opinions (*pravna shvatanja*) adopted thereupon shall be binding for the panels (*veća*) of the division in question.

C. The Courts Organisation Act 2008 (*Zakon o uređenju sudova*; published in OG RS nos. 116/08, 104/09, 101/10, 31/11, 101/11 and 101/13)

28. The substance of Article 43 §§ 2 and 3 of the Courts Organisation Act 2008 corresponds to the substance of Article 40 §§ 2 and 3 of the Courts Organisation Act 2001.

D. The Rules of Court 2003 (*Sudski poslovnik*; published in OG RS nos. 65/03, 115/05, 4/06 and 50/06)

29. Article 28 § 1 provides that all courts shall be obliged to harmonise their own case-law on any given issue, and that they shall do so by means of adopting specific opinions.

E. The Rules of Court 2009 (*Sudski poslovnik*; published in OG RS nos. 110/09, 70/11, 19/12 and 89/13)

30. 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 the relevant domestic and international jurisprudence; (ii) the courts shall keep a register of all legal opinions which are deemed to be of significance for the case-law; (iii) the courts may hold joint consultations on case-law related issues, including with the Supreme Court of Cassation; and (iv) the said case-law departments shall prepare proposals for judges' plenary sessions with a view to securing harmonisation of the relevant case-law.

THE LAW

I. JOINDER OF THE APPLICATIONS

31. 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 VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

32. Under Article 6 § 1 of the Convention, the applicants complained about the rejection of their own civil claims by the domestic courts and the simultaneous acceptance by the same courts of identical claims filed by other plaintiffs.

33. The relevant part of Article 6 § 1 reads as follows:

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

A. Admissibility

34. The Government noted that the applicants had failed to make use of the constitutional appeal avenue. They had thus not exhausted available and effective domestic remedies.

35. The applicants maintained that a constitutional appeal had not been an effective domestic remedy at the relevant time.

36. The Court reiterates that it has consistently held that a constitutional appeal should, in principle, be considered an effective domestic remedy, within the meaning of Article 35 § 1 of the Convention, in respect of all applications introduced against Serbia from 7 August 2008 onwards (see *Vinčić and Others v. Serbia*, nos. 44698/06 and others, § 51, 1 December 2009). It sees no reason to hold otherwise in the present case, and notes that the applicants introduced their application before the Court on 28 July 2008. The Government's objection in this regard must therefore be rejected (see, among other authorities, *Šorgić v. Serbia*, no. 34973/06, §§ 76 and 77, 3 November 2011, and *Lakatoš and Others v. Serbia*, no. 3363/08, § 87, 7 January 2014).

37. The Court further notes that the applicants' complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also notes that they are not inadmissible on any other ground. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

38. The Government submitted that there had been no violation of Article 6 § 1 of the Convention. In particular, from 5 September 2007 onwards, at the latest, the case-law on the issue remained consistent, in that the Serbian authorities were deemed responsible for the lives and safety of all persons residing in Kosovo until the actual transfer of effective control to KFOR in respect of each of the municipalities, considered separately. The only exception was the judgment of the Supreme Court of Cassation Rev. 1540/10 of 10 March 2010, but appropriate redress was subsequently also offered in this matter (see paragraph 24 above). Finally, the Government pointed out that on 1 April 2014 the Supreme Court of Cassation had adopted a detailed action plan aimed at ensuring the overall harmonisation of all case-law throughout the Serbian judicial system (see paragraph 25 above).

39. The applicants reaffirmed their complaints, adding that the case-law had remained inconsistent during the relevant period. They acknowledged, however, that the domestic courts had, in fact, predominantly ruled in favour of the plaintiffs, while the rejection of their claims had remained exceptional. Finally, the applicants maintained that inconsistent case-law has continued to be a major systemic issue in the Serbian judicial system, notwithstanding the adoption of the Supreme Court's action plan of 1 April 2014.

2. The Court's assessment

40. In the Grand Chamber judgment in *Nejdet Şahin and Perihan Şahin v. Turkey* ([GC], no. 13279/05, 20 October 2011), the Court reiterated the main principles applicable in cases concerning the issue of conflicting court decisions (§§ 49-58). These can be summarised as follows:

(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).

41. Turning to the present case, the Court notes that according to the relevant case-law provided by the parties, between 26 December 2006 and 10 June 2010 the applicants' cases were the only ones in which the domestic courts ruled against the plaintiffs. In all other cases they accepted the claims as specified by the plaintiffs and reasoned that the Serbian authorities had indeed been responsible for the lives and safety of all persons residing in Kosovo until the actual transfer of effective control to KFOR in respect of

each of the municipalities, considered separately (see paragraphs 10, 11, 17, 18, 22 and 23 above). The only exception in this regard was the judgment of the Supreme Court of Cassation Rev. 1540/10 of 10 March 2010, but even this matter was subsequently resolved in favour of the plaintiffs, albeit after the intervention of the Constitutional Court (see paragraph 24 above). As for the applicants themselves, they have also acknowledged that throughout the period in question the domestic courts predominantly ruled in favour of the plaintiffs, while the rejection of their claims was exceptional. It would appear, therefore, that the Serbian judiciary had, generally speaking, harmonised their case-law on the matter at the relevant time, but that as regards the applicants the courts had ruled against them. While this is obviously upsetting for the persons concerned, as already noted above, 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 a certain area. Such divergences may also arise within the same court. That in itself, however, cannot be considered to be in breach of the Convention.

42. Finally, it can neither be said that the reasoning in the domestic judgments rendered in the applicants' cases was arbitrary. In particular, the municipal and district courts held that the respondent State could not be deemed liable, since it was up to KFOR to provide for the safety of all citizens of Kosovo from 9 June 1999 onwards. This approach, while at odds with the views expressed by the courts in other cases of this type, was certainly not untenable, particularly bearing in mind the somewhat vague national and/or international provisions that needed interpreting (see paragraph 6 above).

43. The foregoing considerations are sufficient to enable the Court to conclude that there had been no "profound and long-standing differences" in the relevant case-law, nor that this had resulted in judicial uncertainty, during the period in question. It is, of course, understood that it is not for the Court to pronounce as to what the actual outcome of the applicants' legal actions should have been (see, for example, *Vinčić and Others*, cited above, § 56, and *Rakić and Others*, cited above, § 44).

44. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 22 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Luis López Guerra President