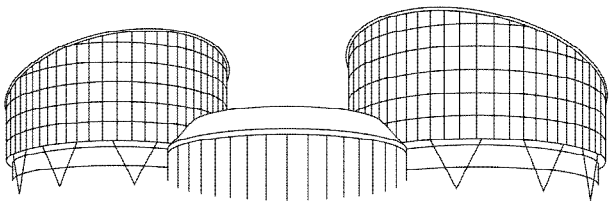

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

**FIFTH SECTION**

# CASE OF SPASOVSKI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

*(Application no. 45150/05)*

**JUDGMENT**

**STRASBOURG**

**10 June 2010**

***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 Spasovski v. the former Yugoslav Republic of Macedonia,**

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

**Peer Lorenzen, *President,***
**Karel Jungwiert,**
**Rait Maruste,**
**Mark Villiger,**
**Isabelle Berro-Lefèvre,**
**Mirjana Lazarova Trajkovska,**
**Zdravka Kalaydjieva, *judges,***
**and Claudia Westerdiek, *Section Registrar*,**

**Having deliberated in private on 11 May 2010,**

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

# PROCEDURE

**1. The case originated in an application (no. 45150/05) against the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Macedonian national, Mr Tomislav Spasovski ("the applicant"), on 8 December 2005.**

**2. The applicant was represented by Mrs K. Jandrijeska Jovanova, on behalf of the "Helsinki Committee for Human Rights of the Republic of Macedonia". The Macedonian Government ("the Government") were represented by their Agent, Mrs R. Lazareska Gerovska.**

**3. The applicant alleged that the proceedings had been unfair and, in particular, that contradictory rulings of the domestic courts had denied his right of access to a court.**

**4. On 5 January 2009 the President of the Fifth Section decided to communicate the above-mentioned complaints to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).**

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

**5. The applicant was born in 1964 and lives in Skopje.**

**6. On 10 February 2002 the applicant was seriously injured in an explosion caused by a bomb placed in a house located in the municipality of**

**Aracinovo ("the municipality"). The incident happened after the 2001 armed conflict in the former Yugoslav Republic of Macedonia.**

**7. On 30 January and 1 June 2004 respectively the applicant, represented by counsel, brought two separate actions seeking compensation from the municipality and the State. They were subsequently joined.**

**8. On 8 November 2004 the Skopje Court of First Instance ("the first-instance court") accepted the applicant's claim in respect of the State and ordered the latter to pay 750,000 Macedonian denars (MKD) (approximately 12,230 euros) in respect of non-pecuniary damage, plus interest. It relied on section 166 of the Obligations Act (see paragraph 13 below), stating that it had been in force at the time of the incident and that it was still in force. It dismissed the claim in respect of the municipality, stating that it was not liable to be sued (*поради немање на пасивна легитимација*). It found that section 3 of the amended Obligations Act (see paragraph 14 below), under which it falls to local self-government units rather than the State to pay compensation for any damage caused by acts of violence, had been set aside by the Constitutional Court's decision of 17 July 2002. The court declared the State liable to pay compensation for the damage, because the applicant was the victim of a clear act of violence and no investigation had been carried out by State authorities. This decision was served on the applicant on 15 December 2004.**

**9. The State appealed arguing that the Constitutional Court's decision had not been retroactive and that the State accordingly, could not be held liable to be sued. The appeal was received by the first-instance court on 27 December 2004 and communicated to the applicant on 13 January 2005. The applicant did not submit any observations in reply.**

**10. On 21 April 2005 the Skopje Court of Appeal allowed the appeal and overturned the lower court's decision in part related to the State. It confirmed the remainder, because no appeal had been lodged in that respect. The court endorsed the facts established by the first-instance court but held that the substantive law had been incorrectly applied. It found that section 3 of the amended Obligations Act had already entered into force at the time of the incident and applied in the applicant's case given the non-retroactive legal effect of the Constitutional Court's decision. This decision was served on the applicant on 8 June 2005.**

**11. On 23 August 2005 the applicant asked the public prosecutor to institute legality review proceedings (*барање за заштита на законитоста*) before the Supreme Court. He argued that both courts had accepted that he had sustained a bodily injury as a result of acts of violence or terrorism. However, no compensation had been awarded owing to the contradictory decisions of the first and second-instance courts as to who had been the proper defendant to his action.**

**12. On 27 October 2005 the public prosecutor informed the applicant that there were no grounds for lodging such a request against the Court of Appeal's decision.**

## II. RELEVANT DOMESTIC LAW

### *1. Obligations Act (Закон за облигационите односи)*

**13. Section 166 (1) of the Obligations Act of 5 March 2001 provided for the State's responsibility for any damage caused, *inter alia*, by a bodily injury sustained as a result of acts of violence or terrorism.**

**14. On 25 January 2002 the Obligations Act was amended. Under section 3 of the amended Obligations Act, the term "the State" was replaced with "the local self-government units where damage occurred".**

### *2. Civil Proceedings Act of 1998*

**15. Under section 334 of the Civil Proceedings Act ("the Act"), as valid at the time, parties can appeal the first-instance decision within fifteen days of the date of service of this latter decision.**

**16. Section 340 § 2 (13) prescribes the following as a substantial procedural flaw: if the impugned decision contains deficiencies which makes its review impossible, in particular if it is illegible, contradictory, lacks reasoning or does not provide reasons for the relevant findings of fact or if they are unclear or contradictory.**

**17. Under section 351 of the Act, the second-instance court examines the first-instance court's decision in the challenged part. Section 351 § 2 provides that the Court of Appeal examines the first-instance court's decision on the basis of the grounds set out in the appeal and having regard to its *ex officio* capacity to consider any substantial procedural flaw and the correct application of the law.**

### *3. Constitutional Court's decision of 17 July 2002 (U.br.67/2002)*

**18. The Constitutional Court rejected (*укинува*) section 3 of the amended Obligations Act as unconstitutional. It found that it was the State's responsibility to protect citizens from acts of violence and, accordingly, to cover any damage thereof.**

# THE LAW

## I. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

**19. The applicant complained that the manner in which the domestic courts had dismissed his claim had not been in compliance with Article 6 of the Convention. In this connection, he also relied on Article 13 of the Convention. The Court considers that these complaints should be examined as an "access to a court" complaint under Article 6 (see *Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005). The applicant also complained that the judges had been biased and the principle of equality of arms had been violated. Article 6 § 1 of the Convention, in so far as relevant, reads as follows:**

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

### A. "Access to a court" complaint

#### *1. Admissibility*

##### a) The parties' submissions

**20. The Government submitted that the applicant had not exhausted all effective domestic remedies, although he had been represented by a lawyer. In particular, he had neither appealed against the first-instance court's decision of 8 November 2004 nor had he submitted any observations in reply to the State's appeal (see paragraph 9 above). Any of those remedies, if used, would have prompted the Court of Appeal to examine *ex lege* the municipality's capacity to be sued and correct the "injustice" done. Furthermore, the applicant's request for the protection of legality concerned the first-instance court's decision, in part related to the municipality's standing, which, having not been challenged, had become final on 30 December 2004. Consequently, it had been submitted out of time. According to the Government, although ineffective, that remedy, if used, would have prompted the Supreme Court to take a decision on "the manifest inconsistency in the final judgment".**

**21. The applicant submitted that he had not appealed against the first-instance court's decision because it had been to his significant advantage. However, even in the absence of an appeal, the Court of Appeal had had jurisdiction, under sections 340 § 1 (13) and 351 § 2 of the Act (see paragraphs 16 and 17 above), to overturn the first-instance court's decision in respect of the municipality, on the basis of the incorrect application of law.**

**b) The Court's consideration**

**22. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to first use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. Article 35 § 1 also requires that complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see, *mutatis mutandis, Merger and Cros v. France* (dec.), no. 68864/01, 11 March 2004; *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, ECHR 1996-VI; and *Akdivar and Others v. Turkey,* 16 September 1996, §§ 65-67, ECHR 1996-IV).**

**23. The Court emphasises that the application of the exhaustion rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights and that it must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see *Jasar v. the former Yugoslav Republic of Macedonia* (dec.), no. 69908/01, 19 January and 11 April 2006).**

**24. In the present case, the Court notes that the applicant did not appeal against the first-instance court's decision nor did he submit observations in reply to the State's appeal. Given the fact that he received a favourable decision at first level, he could have legitimately expected not to have an interest in appealing the unfavourable part, namely, in respect of the municipality. Furthermore, as specified under section 334 of the Civil Proceedings Act, the applicant had a time-limit of fifteen days in which to lodge an appeal, which, in his case, expired before 13 January 2005, the date when the State's appeal was communicated to him. If submitted, his observations in reply to the State's appeal would have concerned the State's arguments as to its capacity to be sued. No domestic jurisprudence was presented to prove the Government's arguments that such observations would have prompted *ex lege* examination of a decision which was not challenged by way of an appeal, being the municipality's capacity to stand in the present case. Lastly, the Court has already stated that a request for the protection of legality under the then applicable rules of civil proceedings**

**cannot be regarded as an effective remedy within the meaning of Article 35 § 1 of the Convention (see *Dimitrovska v. the former Yugoslav Republic of Macedonia* (dec.), no. 21466/03, 30 September 2008). It sees no reason to depart from that finding in the present case. Consequently, the Government's arguments that the applicant failed to exhaust this remedy in time are without force.**

**25. Having regard to the circumstances of this case, the Court finds that the applicant must be regarded as having exhausted domestic remedies. The Government's objection must accordingly be rejected.**

**26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.**

*2. Merits*

**27. The applicant reiterated the complaints under this head.**

**28. The Government contested them.**

**29. The Court reiterates that Article 6 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the "right to a court", of which the right of access constitutes one aspect (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36, and *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3166, § 136, and p. 3169, § 147).**

**30. As to the present case, while it is clear that the applicant was not prevented from bringing his action, that does not suffice, as the right of access to a court includes not only the right to institute proceedings, but also the right to obtain a determination of the dispute by a court (see *Petkoski and Others v. the former Yugoslav Republic of Macedonia,* no. 27736/03, § 40, 8 January 2009).**

**31. The Court notes that the sole reason relied on by the domestic courts for dismissing the applicant's action was that he had not directed his claim against the proper defendant. While the first-instance court opined that this defendant was the State, the Court of Appeal held that it was the municipality. The courts thus twice disposed of the case on purely procedural grounds, without touching upon the substance of the dispute (see, *a contrario*, *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 94-101, ECHR 2001-V).**

**32. For the reasons described in the case of *Kostadin Mihaylov (*see *Kostadin Mihaylov v. Bulgaria*, no. 17868/07, § 42, 27 March 2008), which likewise apply to this case, the Court considers that, as a result of the conflicting positions taken by the domestic courts, the applicant was wholly prevented from having the merits of his claim determined by a court.**

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

### B. Remaining complaints

**34. The applicant also complained that the judges had been biased and the principle of equality of arms had been violated.**

**35. The Court has examined these complaints. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.**

**36. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.**

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

**37. 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

**38. The applicant claimed 500 euros (EUR) in respect of pecuniary damage for medical expenses related to the injuries sustained as a result of the incident in 2002. He also claimed EUR 5,000 in respect of non-pecuniary damage for the pain and stress suffered from that incident.**

**39. The Government contested these claims as unsubstantiated and unrelated to the alleged violations.**

**40. The Court observes that the applicant claimed compensation for the pecuniary and non-pecuniary loss he had sustained as a result of the 2002 incident and, furthermore, that he did not claim any damage as a consequence of the violation found. Given that there is no causal link between the violation found and the damage alleged, the Court rejects this claim (see *Dika v. the former Yugoslav Republic of Macedonia*, no. 13270/02, § 65, 31 May 2007).**

**41. However, the Court is of the opinion that the most appropriate form of redress in cases where it finds that, in breach of Article 6 § 1 of the Convention, an applicant has not had access to a tribunal, would, as a rule, be to reopen the proceedings in due course and re-examine the case in**

**keeping with all the requirements of a fair trial (see *Kostadin Mihaylov,* §§ 59 and 60, cited above).**

### B. Costs and expenses

**42. The applicant also claimed EUR 2,620 for the costs and expenses incurred before the Court. These included legal fees for 106 hours of legal work and expenses for mailing and copying. A fee note based on the scale rates of the Macedonian Bar was produced. No payment slip or other supporting document was provided for the mailing and copying expenses.**

**43. Because the applicant did not pay any of the financial charges during the proceedings, his representative has requested that the fees be paid directly to the Helsinki Committee for Human Rights of the Republic of Macedonia.**

**44. The Government contested this claim as excessive and unsubstantiated.**

**45. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). In the present case, regard being had to the information in its possession and the above criteria, the Court finds the amount claimed by the applicant in respect of the costs and expenses incurred in the proceedings before it to be excessive and partly unsubstantiated, and awards instead the sum of EUR 1,000, plus any tax that may be chargeable to him. This amount is to be paid into the bank account of the "Helsinki Committee for Human Rights of the Republic of Macedonia".**

### C. Default interest

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

## FOR THESE REASONS, THE COURT UNANIMOUSLY

**1. *Declares* the complaint concerning the applicant's right of access to a court admissible and the remainder of the application inadmissible;**

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

**3. *Holds***

**(a) that the respondent State is to pay the "Helsinki Committee for Human Rights of the Republic of Macedonia", within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1, 000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement;**

**(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;**

**4. *Dismisses* the remainder of the applicant's claim for just satisfaction.**

**Done in English, and notified in writing on10 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.**

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|---|---|
| **Claudia Westerdiek** | **Peer Lorenzen** |
| **Registrar** | **President** |