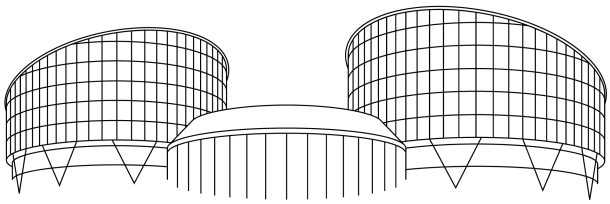

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

SECOND SECTION

CASE OF STOJANOVIĆ v. SERBIA

(Application no. 34425/04)

JUDGMENT

STRASBOURG

19 May 2009

FINAL

19/08/2009

This judgment may be subject to editorial revision.

In the case of Stojanović v. Serbia,

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria, *judges,*
Milenko Kreća, ad hoc *judge,*
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 7 April 2009,

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

PROCEDURE

1. The case originated in an application (no. 34425/04) against the State Union of Serbia and Montenegro, lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by, at that time, a citizen of the State Union of Serbia and Montenegro, Mr Ljubiša Stojanović ("the applicant"), on 10 August 2004.

2. As of 3 June 2006, following the Montenegrin declaration of independence, Serbia remained the sole respondent in the proceedings before the Court.

3. The applicant was represented by the Belgrade Centre for Human Rights, a human rights organisation based in Serbia. The Government of the State Union of Serbia and Montenegro and, subsequently, the Government of Serbia ("the Government") were represented by their Agent, Mr S. Carić.

4. The applicant, a convicted prisoner, complained in particular about the refusal of the respondent State to provide him with dentures free of charge, as well as the opening of his correspondence by the prison authorities.

5. On 6 September 2005 the Court decided to communicate these complaints to the Government and declared the remainder of the application inadmissible. Under Article 29 § 3 of the Convention, it was also decided that the merits of the communicated complaints would be examined together with their admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1956.

7. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The applicant's dentures

8. Following his conviction by a court of law, between 20 June 1999 and 28 August 2002, the applicant served his first term in the Niš Penitentiary (*Kazneno-popravni zavod u Nišu;* hereinafter "the prison").

9. During this time the prison dentist diagnosed that he had been suffering from paradontosis (i.e. "shaky teeth and their spontaneous falling out"). On two separate occasions extractions were carried out and on a third occasion the applicant complained about facial paresis, which was determined to be unrelated to his dental problems.

10. After his release, on 17 March 2003 the applicant was apparently placed in detention on remand, as part of a separate criminal case.

11. Following yet another conviction, on 5 January 2004 the applicant started serving his second prison term in the Niš Penitentiary.

12. On the same date his medical file was opened. Several medical problems, involving his knees and facial paresis were apparently identified, but no dental examination appears to have been carried out.

13. On 13 February 2004 the applicant was first examined by the prison dentist, who confirmed his complete toothlessness (*terminalna krezubost*).

14. On 5 March 2004 the dentist proposed that the applicant be provided with dentures.

15. On 4 May 2004 the applicant sent a letter to the Ministry of Health (*Ministarstvo zdravlja*), requesting dentures.

16. On 25 June 2004 the said Ministry's inspectorate (*Sektor za zdravstveni nadzor*) informed the applicant that convicted persons had to exercise their rights through the Ministry of Justice (*Ministarstvo pravde*) rather than the Ministry of Health.

17. By letter of 21 July 2004 the Health Inspection (*Zdravstvena inspekcija Ministarstva zdravlja - odsek Niš*) observed that, in accordance with Article 4 of the Decision on the Participation of Insured Persons in the Costs of Health Care (*Odluka o učešću osiguranih lica u troškovima zdravstvene zaštite*; see paragraphs 46 and 47 below), blood donors, such as the applicant, were not exempted from the obligation to cover 60% of the cost of obtaining dentures (*pokretne stomatološke nadoknade od akrilata.*)

18. On 21 October 2004 the applicant was admitted to the prison hospital, where his loss of appetite was noted, while on 2 December 2004 he complained of anxiety.

19. On 23 December 2004 the applicant fainted during a head count and sustained an injury above his left eye.

20. On an unspecified date in 2004 the applicant was informed by the prison authorities that he had to pay 10,000 dinars (at that time approximately 110 euros) towards meeting the total cost of his dentures. The applicant instead proposed that he be allowed to pay this amount in instalments corresponding to his monthly prison salary.

21. On 1 February 2005 the applicant again fainted and sustained an injury to his left cheekbone, requiring maxillofacial surgery, which was performed on 4 February 2005.

22. The applicant alleges that throughout this time he had continued having problems with his eating. In particular, he could eat no solid foods, including meat or even fruit. The prison authorities, however, attempted to alleviate the applicant's plight by providing him with additional soft bread at each meal.

23. On 7 June 2006 the applicant repeated his request concerning the payment of his dentures through monthly instalments.

24. On 30 January 2007 the prison governor informed the applicant that the prison would cover the full costs of his dentures. In so doing, he noted that the reason for this was humanitarian and that the relevant domestic legislation imposed no such obligation on the authorities. Lastly, the governor emphasised that the price of the dentures in prison was, in any event, 50% less than the normal price since the prisoner's income was itself below the average monthly salary in Serbia.

25. On 25 June 2007 the applicant was provided with the dentures in question.

B. The applicant's correspondence

26. As noted above, by letter of 21 July 2004 the Health Inspection informed the applicant about his health insurance coverage. This letter bore the prison stamp dated 22 July 2004 and registration number 713/9033.

27. The applicant's letter of 10 August 2004, sent to the Court, also bore the prison stamp dated 10 August 2004, as well as registration number 24/9684.

28. In its own letter of 21 December 2004, *inter alia*, the Court's Registry therefore informed the applicant in Serbian of the said stamp, assuming that he may not have been aware of it.

29. In his subsequent letter of 11 January 2005, the applicant stated that all his mail addressed to the Court, as well as to other bodies, had to go through the prison administration, where it was opened, and alleged that this

was standard practice based on the provisions of the applicable prison regulations. This letter also bore the prison stamp dated 11 January 2005 and registration number 24/267.

30. In June 2006 the applicant provided the Court with a statement signed by 78 prisoners confirming, *inter alia*, that their correspondence had been routinely opened by the prison authorities.

C. Other relevant facts

31. As of 2002 the applicant had a limited liability company registered in his name. It would appear, however, that this company never became operational.

32. By October 2005 the applicant seems to have inherited 25% of a one-bedroom flat from his mother.

33. On 12 February 2006 and 16 May 2006, respectively, the applicant apparently sent two separate letters to the prison governor, seeking an audience.

34. On 26 October 2006 the Ministry of Justice forwarded a complaint of the applicant to the prison governor for consideration.

35. On 24 November 2006 the Social Care Centre (*Centar za socijalni rad*) in Jagodina confirmed, *inter alia*, that the applicant had been receiving unemployment benefits between 1 December 1994 and 31 May 1999.

36. Whilst in prison the applicant appears to have received a salary in the total amount of 19,000 dinars, through monthly instalments. As of July 2006, however, 3,537 dinars remained on his personal prison account as part of a "compulsory savings scheme".

II. RELEVANT DOMESTIC LAW

A. Charter on Human and Minority Rights and Civic Freedoms of the State Union of Serbia and Montenegro (Povelja o ljudskim i manjinskim pravima i građanskim slobodama državne zajednice Srbija i Crna Gora; published in the Official Gazette of Serbia and Montenegro - OG SCG - no. 6/03)

37. The relevant provisions of this Charter provided as follows:

Article 24 §§ 1 and 3

"Everyone has the right to respect for his private and family life, his home and his correspondence.

...

The confidentiality of letters and other means of communication shall be inviolable. Exceptions shall be permitted for a limited period of time and only on the basis of a court decision, if necessary for the purposes of conducting criminal proceedings or the defence of the country, in a manner prescribed by law."

B. Constitution of the Republic of Serbia 1990 (Ustav Republike Srbije; published in the Official Gazette of the Socialist Republic of Serbia - OG SRS - no. 1/90)

38. The relevant provisions of this Constitution provided as follows:

Article 19

"The confidentiality of letters and other means of communication shall be inviolable.

Laws may provide that, on the basis of a court decision, ... [this principle] ... may be departed from, if it is indispensable for the conduct of criminal proceedings or the defence of the Republic of Serbia."

Article 30

"Everyone is entitled to the protection of his health.

Children, pregnant women and the elderly shall have the right to health care financed from public funds, if this right is not secured on some other ground, while other persons shall enjoy such care under the conditions provided by law."

Article 40

"Under the obligatory insurance scheme, in accordance with the law, employed persons ...[enjoy] ... the right to health care and other rights in the event of sickness, ... pregnancy, childbirth, impairment or loss of the ability to work, unemployment and old age ... , as well as rights to other forms of social security ...

Social security rights for those citizens who are not covered by the obligatory social insurance scheme shall be regulated by law."

C. Enforcement of Criminal Sanctions Act 1997 (Zakon o izvršenju krivičnih sankcija; published in OG RS nos. 16/97 and 34/01)

39. The relevant provisions of this Act read as follows:

Article 6 § 1

"Individual decisions concerning the rights and obligations of persons subjected to criminal sanctions may not be challenged through the judicial review procedure."

Article 21

"The health care unit [of the penitentiary] shall provide preventive assistance, treat convicted persons and persons detained on remand, and supervise the hygiene and quality of the food and water."

Article 23

"Details concerning the life and work of convicted persons shall be further regulated in the Prison Rules.

Prison Rules shall be adopted by the Minister of Justice"

Article 56

"Everyone shall respect the dignity of a convicted person.

No one may endanger the physical and mental health of a convicted person."

Article 61

"Convicted persons shall have the right to nutrition capable of sustaining their good health and strength ..."

Article 65 §§ 1 and 3

"Convicted persons shall have the right to send written communications to competent State bodies.

...

Convicted persons shall receive and send written communications through the prison authorities."

Article 66

"Convicted persons shall have an unrestricted right to correspond."

Article 90 §§ 1 and 2

"Convicted persons shall enjoy free health care.

Convicted persons who cannot receive adequate medical treatment in the penitentiary shall be transferred to the prison hospital, a psychiatric ward or another medical institution."

Article 103

"Convicted persons shall have the right to complain to the governor [of the penitentiary] concerning a violation of their rights or other irregularities which they have suffered.

The governor is obliged to examine such complaints carefully and take a decision.

Convicted persons who do not receive a response to their complaints or are not satisfied with the decision adopted shall have the right to submit a written application to the head of the Directorate [for the Enforcement of Institutional Sanctions].

Convicted persons shall have the right to complain to the official authorised to supervise the operation of the penitentiary, without the prison staff or the officials appointed to serve in the institution being present.

The substance of the complaint as well as the application shall be confidential."

40. In addition, according to Articles 346-352, the Directorate for the Enforcement of Institutional Sanctions ("the Directorate"), as a constituent part of the Ministry of Justice, had the competence to monitor the implementation of the relevant legislation concerning the enforcement of criminal sanctions. The Directorate proceeded *ex officio*. It could interview convicted persons without the prison staff being present and ultimately adopt binding recommendations addressed to respective governors which the governors themselves could subsequently appeal to the Minister of Justice. In addition, Article 353 provided, *inter alia*, that the quality of health care in prisons had to be monitored by the Ministry of Health.

D. Enforcement of Criminal Sanctions Act 2005 (Zakon o izvršenju krivičnih sankcija; published in OG RS no. 85/05)

41. This Act entered into force on 1 January 2006, thereby repealing the Enforcement of Criminal Sanctions Act 1997.

E. Prison Rules 2001 (Pravilnik o kućnom redu u zavodima zatvorenog i strogo zatvorenog tipa; published in OG RS no. 5/01)

42. The relevant provisions of these Rules read as follows:

Article 23 §§ 1 and 2

"Convicted persons shall have an unrestricted right to correspond, in accordance with the law.

Their mail shall be received and dispatched through the prison authorities."

F. Prison Rules 2006 (Pravilnik o kućnom redu u kazneno popravnim zavodima i okružnim zatvorima; published in OG RS no. 27/06)

43. These Rules entered into force on 8 April 2006, thereby repealing the Prison Rules 2001.

G. Code of Criminal Procedure (Zakonik o krivičnom postupku; published in the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - nos. 70/01 and 68/02, as well as OG RS no. 58/04, 85/05 and 115/05)

44. Articles 148-153 set out the principles for the treatment of persons detained on remand (*pritvorenici*) and do not apply to those serving their prison sentences.

H. Health Care Insurance Act (Zakon o zdravstvenom osiguranju; published in OG RS nos. 18/92, 26/93, 53/93, 67/93, 48/94, 25/96, 46/98, 54/99, 29/01, 18/02, 80/02, 84/04 and 45/05.)

45. Article 28 § 1 of this Act provided as follows: "With respect to certain kinds of health care, it may be provided that insured persons have to contribute towards the costs ... [incurred,] ... while taking into account that this contribution must not deter them from making use of their health coverage."

I. Decision on the Participation of Insured Persons in the Costs of Health Care 2001 (Odluka o učešću osiguranih lica u troškovima zdravstvene zaštite; published in the OG RS no. 31/01)

46. The relevant provisions of this Decision read as follows:

Article 1

"This decision sets out the modalities and the level of contributions by insured persons to the costs of health care ..., any exemptions from paying such contributions, as well as the location and manner of payment."

Article 3

"A contribution is to be made for ... the production or procurement of prosthetics ... [as follows:] ...

16. [for] dental prosthetics ...

16.2. removable dental prosthetics ... 60% ... [of the price set by the health insurance board]"

Article 4 § 2

"Blood donors are exempt from paying contributions within a period of 12 months following each blood donation, except the contribution referred to in [Article 3] paragraphs 15, 16, 17, 19 and 20 ..."

J. Decision on the Participation of Insured Persons in the Costs of Health Care 2004 (Odluka o učešću osiguranih lica u troškovima zdravstvene zaštite; published in the OG RS no. 83/04, 118/04, 71/05 and 18/06.)

47. This Decision repealed the above decision in 2004 but the relevant participation remained the same.

K. Criminal Code 1977 (Krivični zakon Republike Srbije; published in OG RS nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, 21/90, 16/90, 49/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03 and 67/03.)

48. The relevant provisions of this Code read as follows:

Article 72

"1. Whoever, without authorisation, opens a letter or a telegram or any other closed communication or item of mail of another person, or in some other way violates their privacy, or without authorisation, keeps, conceals, destroys or delivers to another a person's letter, telegram, closed communication or item of mail shall be punished by imprisonment not exceeding one year.

...

3. If the offence referred to in paragraph 1 ... of this Article is committed by an official in the performance of his public duties, that person shall be punished by imprisonment from six months to five years."

L. Obligations Act (Zakon o obligacionim odnosima; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia - OG SFRY - nos. 29/78, 39/85, 45/89, 57/89 and OG FRY no. 31/93*)*

49. Under Articles 199 and 200, *inter alia*, anyone who has suffered fear or physical pain or, indeed, mental anguish as a consequence of a breach of his or her "personal rights" (*prava ličnosti*) or has been subjected to adverse

circumstances seriously affecting health (*umanjenje životne aktivnosti*) may, depending on their duration and intensity, sue for financial compensation before the civil courts and, in addition, request other forms of redress which may be capable of affording adequate non-pecuniary satisfaction.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AS REGARDS THE APPLICANT'S CORRESPONDENCE

50. The applicant complained about the interference with his correspondence with the Court, as well as with various domestic bodies, by the prison authorities.

51. The Court considers that this complaint falls to be examined under Article 8 of the Convention, rather than Article 34, there being no evidence that the correspondence between the Court and the applicant was unduly delayed, tampered with, or otherwise "hindered" (see *Manoussos v. the Czech Republic and Germany* (dec.), no. 46468/99, 9 July 2002).

52. Article 8, as relevant, provides as follows:

> "1. Everyone has the right to respect for his ... correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime ..."

A. Admissibility

1. Compatibility ratione temporis

53. The Government argued that the applicant's complaint was incompatible *ratione temporis* with the provisions of the Convention since the impugned actions undertaken by the prison authorities were based on legislation which had itself been adopted prior to the Serbian ratification of the Convention on 3 March 2004.

54. The applicant contested this argument.

55. The Court notes that the alleged interference with the applicant's correspondence took place after 3 March 2004 (see paragraphs 26-29 above). Irrespective of the fact that this occurred on the basis of legislation adopted before that date, the applicant's complaint therefore clearly falls within the Court's competence *ratione temporis* (see, among other

authorities, *Yağcı and Sargın v. Turkey*, 8 June 1995, § 40, Series A no. 319-A).

56. In view of the above, the Government's objection must be dismissed.

2. Exhaustion of domestic remedies

(a) Arguments of the parties

57. The Government stated that the applicant had not exhausted all effective domestic remedies, within the meaning of Article 35 § 1 of the Convention. In particular, he had failed to:

- file a criminal complaint based on Article 72 of the Criminal Code 1977 (see paragraph 48 above);

- bring a civil claim in accordance with Articles 199 and 200 of the Obligations Act (see paragraph 49 above) or, indeed, the Convention itself (in support of the said civil claim, the Government provided the Court with several judgments whereby the domestic courts had awarded compensation to plaintiffs, in various contexts and had, in so doing, relied on the Convention);

- make use of the remedies provided for in the Enforcement of Criminal Sanctions Act 1997 (see paragraphs 39 and 40 above, Articles 103 and 347 in particular); or

- lodge a specific complaint with the Court of Serbia and Montenegro in respect of the violations alleged.

58. The applicant explained that none of the above remedies could have been effective in the particular circumstances of his case.

(b) Relevant principles

59. The Court observes that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 65). 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 (ibid.).

60. It recalls that in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden has been

satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (ibid., p. 1211, § 68).

61. The Court has recognised that Article 35 § 1 (formerly Article 26) must be applied with some degree of flexibility and without excessive formalism (see, for example, *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 18, § 34). It has further held that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see, for example, *Van Oosterwijk v. Belgium*, judgment of 6 November 1980, Series A no. 40, p. 18, § 35). This means, amongst other things, that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general context in which they operate as well as the personal circumstances of the applicants (see the *Akdivar* judgment cited above, p. 1211, § 69).

(c) The Court's assessment in the present case

62. Although recourse to administrative bodies cannot be ruled out as an effective remedy in respect of complaints concerning the implementation of prison regulations (see, among other authorities, the *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, p. 26, § 65), the Court considers that the Government have failed to produce relevant case-law which would demonstrate that any of the administrative remedies on which they relied could have provided the applicant with adequate redress for the violation alleged. In addition, the Government themselves acknowledged that the alleged interference stemmed from an administrative practice (see paragraph 69 below), which would, in the Court's view, strongly suggest that the remedies in question were indeed an unlikely avenue of redress.

63. Secondly, Serbian law does not provide for a possibility to bring a criminal case against the State itself. A criminal complaint could not therefore have afforded the applicant with adequate redress (see on this point exactly *Cenbauer v. Croatia* (dec.), no. 73786/01, 5 February 2004).

64. Thirdly, even assuming that the applicant could have obtained compensation by means of a separate civil suit, the Government have failed to show that a civil claim could have had any impact on the handling of his correspondence. In other words, whilst civil proceedings might have had an effect upon the consequences of the violation alleged, there is no evidence that they could have addressed the root cause thereof (ibid., see also *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, §§ 59 and 60, 27 May 2008).

65. Lastly, the Court recalls that it has already held that a complaint filed with the Court of Serbia and Montenegro was unavailable until 15 July 2005 and, further, that it had remained ineffective until the very break up of the State Union of Serbia and Montenegro (see *Matijašević v. Serbia*, no. 23037/04, §§ 34-37, ECHR 2006-...). The Court sees no reason to depart from this finding in the present case.

66. In view of the above, the Government's objection must be dismissed.

3. Conclusion

67. The Court considers that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and finds no other ground to declare it inadmissible. The complaint must therefore be declared admissible.

B. Merits

1. Arguments of the parties

68. The Government maintained that there had been no violation of Article 8 of the Convention. In particular, the system operated as follows: (i) prisoners would submit their correspondence in two copies; (ii) the second copy would then be stamped and dated, in response to their own requests, and returned to them; and (iii) the first copy would be placed in an envelope and forwarded to the designated address. Prisoner's correspondence was thus neither opened nor read by the prison authorities.

69. The Government argued that this system was based on Article 65 § 3 of the Enforcement of Criminal Sanctions Act 1997 (see paragraph 39 above), which although perhaps not sufficiently precise could not have been interpreted to mean that all the correspondence of prisoners automatically had to be supervised. A possible breach of the Convention was not therefore a result of the legislator's intent, but rather a consequence of an administrative practice which had been established before the Convention had entered into force in respect of Serbia. The Government further contended that the applicant, in particular, had submitted open letters to the prison authorities and had not asked to be provided with an envelope.

70. Finally, the Government pointed out that the interference with the applicant's correspondence was undertaken in order to preserve public safety and prevent crime and acknowledged that, at the relevant time, judicial review of this interference was not possible (see paragraph 39 above). However, new prison legislation, in accordance with Council of Europe standards, had subsequently been enacted (see paragraph 41 above).

71. The applicant argued, in the first place, that he had not requested to be provided with a stamped copy of his outgoing mail, while he certainly

could not have made such a request in respect of his incoming correspondence, which was also censored. Secondly, the mere existence of an obligation to submit opened letters to the prison authorities in all situations was a clear interference with the prisoners' right to respect for their correspondence since there was no guarantee that these letters would not be subjected to some sort of censorship and/or monitoring. Thirdly, the applicable domestic legislation was overly vague, which is why the said interference could not have been "in accordance with the law", as required by the second paragraph of Article 8. Fourthly, the Government provided no substantiation as to why their interference with the applicant's correspondence was indeed necessary in a democratic society. Finally, the applicant noted that the recently adopted legislation referred to by the Government had not significantly improved the situation, as it had also failed to indicate with reasonable clarity the scope of the discretion conferred on the public authorities.

2. The Court's assessment

72. There being no evidence that the applicant had ever consented to the practice whereby prisoners were obliged to submit their open letters to the prison authorities (see paragraph 68 above) and in view of the fact that his incoming correspondence was also opened and stamped by them (see paragraph 26 above), the Court considers that there was clearly an "interference by a public authority" with the exercise of the applicant's right to respect for his correspondence guaranteed by Article 8 paragraph 1 of the Convention. Such an interference shall contravene Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 thereof and furthermore is "necessary in a democratic society" (see the following judgments: *Niedbała v. Poland*, no. 27915/95, § 78, 4 July 2000; *Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61, p. 32, § 84; *Campbell v. the United Kingdom*, 25 March 1992, Series A no. 233, p. 16, § 34; *Calogero Diana v. Italy*, 15 November 1996, *Reports* 1996-V, p. 1775, § 28; *Petra v. Romania*, 23 September 1998, *Reports* 1998-VII, p. 2853, § 36). The expression "in accordance with the law", however, does not only require compliance with domestic law, but also relates to the quality of that law (see *Niedbała v. Poland*, cited above, § 79). Domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which they are entitled in a democratic society (see the *Domenichini v. Italy* judgment of 15 November 1996, *Reports* 1996-V, p. 1800, § 33).

73. As regards the present case, the Court observes that Article 19 of the Serbian Constitution 1990 and Article 24 §§ 1 and 3 of the Charter on Human and Minority Rights and Civic Freedoms, which were in force at the

relevant time, both provided that no one's correspondence could be interfered with in the absence of a specific court decision to this effect (see paragraphs 37 and 38 above). Since no such decision was ever issued in respect of the applicant and the applicable prison rules and regulations were themselves vague in this regard (see paragraph 39 above, Articles 65 and 66 in particular, as well as paragraph 42 above), it follows that the interference complained of was not "in accordance with the law" at the material time.

74. Having regard to the foregoing conclusion, the Court does not consider it necessary to ascertain whether the other requirements of paragraph 2 of Article 8 were complied with.

75. Consequently, the Court concludes that there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLES 3 AND 8 OF THE CONVENTION AS WELL AS OF ARTICLE 1 OF PROTOCOL NO. 12 IN RESPECT OF THE APPLICANT'S DENTURES

76. The applicant complained about the refusal of the Serbian authorities to provide him with dentures free of charge, which, in turn, had allegedly caused him various health problems. The Court communicated this complaint to the Government under Articles 3 and 8 of the Convention.

77. Furthermore, the applicant subsequently complained under Article 1 of Protocol No. 12, explaining that in accordance with Serbian law he had to pay 60% of the price of his dentures, which meant that no distinction was being made between him as an obviously impecunious prisoner, on the one hand, and the population at large, on the other, despite the fact that his situation was profoundly different.

78. The Government rejected those allegations, submitting that the applicant had failed to exhaust various domestic remedies, that his complaint under Article 1 of Protocol No. 12 was brought out of time and/or was incompatible *ratione personae*. In any event, he had lost his victim status by virtue of the provision of dentures for him at the respondent State's expense.

79. The Court does not consider it necessary to examine any of the Government's objections to these complaints since they can now be considered to have been "resolved" within the meaning of Article 37 § 1 (b) of the Convention (see *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 96, ECHR 2007-...).

80. In this respect, the Court reiterates that, under Article 37 § 1 (b), it may "... at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that ... the matter has been resolved ..." In order to ascertain whether that provision applies to the present case, the Court must answer two questions: first,

whether the circumstances complained of directly by the applicant still obtain; and, secondly, whether the effects of a possible violation of the Convention and/or of Protocol No. 12 have been redressed (ibid.). With this in mind and despite some factual uncertainties, the Court notes that the applicant has been provided with dentures free of charge on 25 June 2007. Moreover, there is no indication that he has suffered any related health problems thereafter. Nor is there any medical evidence that he had been starved or otherwise unable to receive sufficient sustenance before the said date. The matter giving rise to the applicant's complaint can therefore now be considered to have been "resolved" within the meaning of Article 37 § 1 (b). In addition, there are no particular reasons relating to respect for human rights as defined in the Convention which would require the Court to continue its examination of this complaint under Article 37 § 1 *in fine*.

81. Accordingly, this part of the application should be struck out of the case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. The relevant provisions of this Article read as follows:

Article 41

> "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

83. The applicant claimed 1,000 euros (EUR) for the non-pecuniary damage suffered as a result of the violation of the right to respect for his correspondence and requested guarantees of non-repetition thereof.

84. The Government contested that claim.

85. In the circumstances of the case, the Court considers that the finding of a violation of Article 8 of the Convention alone constitutes adequate just satisfaction in respect of the compensation claimed under that head (see, *mutatis mutandis*, *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 141, Series A no. 80; *Calogero Diana v. Italy*, 15 November 1996, § 44, Reports of Judgments and Decisions 1996-V; *Sałapa v. Poland*, no. 35489/97, §§ 100-102 and 107, 19 December 2002; and *Savenkovas v. Lithuania*, no. 871/02, 18 November 2008).

B. Costs and expenses

86. The applicant also claimed EUR 1,700 for the costs and expenses incurred before the Court. In particular, he sought EUR 1,550 for the preparation of the case and his representative's extensive written pleadings, plus another EUR 150 for secretarial expenses, including postage.

87. The Government considered the applicant's claim to be unsubstantiated.

88. 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 were also reasonable as to their quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

89. In the present case, regard being had to the above criteria, as well as the EUR 850 already granted to the applicant under the Council of Europe's legal aid scheme, the Court rejects this claim for costs.

FOR THESE REASONS, THE COURT

1. *Declares* by a majority the complaint under Article 8 of the Convention concerning the interference with the applicant's correspondence admissible;

2. *Holds* unanimously that there has been a violation of Article 8 of the Convention in this respect;

3. *Holds* by 6 votes to 1 that the complaint concerning the applicant's dentures has been resolved and therefore *decides* to strike it out of the case;

4. *Holds* unanimously that the finding of a violation of Article 8 in itself constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

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

Done in English, and notified in writing on 19 May 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

F. TULKENS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly concurring opinion of Judge Mr Kreća,

(b) partly dissenting opinion of Judge MR Zagrebelsky.

F.T.
S.D

PARTLY CONCURRING OPINION OF JUDGE KREĆA

I agree with the finding that the Respondent's law does not provide grounds for considering that a criminal complaint could afford the applicant adequate redress.

I could also go along with the finding – although it is one of a more delicate nature – that civil proceedings as such do not necessarily address the root cause of the matter, as well as that regarding a specific complaint with the Court of Serbia and Montenegro.

My reservations essentially have to do with the treatment of the administrative remedy concerning the implementation of prison regulations. They are basically derived from the intrinsic requirements of the principle of judicial consistency.

Judicial consistency understood as consistency with its own past case-law "is the essence of judicial reasoning" (Case concerning Legality of Use of Force (*Serbia and Montenegro v. Belgium*), judgment of 15 December 2004, ICJ Reports 2004, Joint Declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Koojimans, Al-Khasawneh, Buergenthal and Elaraby, paragraph 3).

This is particularly true of this Court, having in mind that in its judicial activity the principle of judicial consistency possesses not only the ideal meaning of stability and predictability of the jurisprudence of the Court, but also a practical meaning in that, considering the large number of cases submitted to the Court, it enables proper administration of justice.

In the *Novak v. Croatia* Case (application no. 8883/04, judgment of 14 June 2007), the applicant alleged that the prison authorities had opened his correspondence with the Court, thus violating his right established under Article 8 of the Convention.

The Government objected that "the applicant had failed to exhaust domestic remedies because he had not addressed this complaint to the domestic authorities, such as the Varaždin Prison Administration or the judge responsible for the execution of sentences" (paragraph 49 of the judgment).

In its judgment the Court found that:

"... the applicant did not address a complaint concerning the opening of his correspondence with it to any domestic authorities, although under

section 15(2) of the Enforcement of Prison Sentences Act he was able to lodge such a complaint with either the Varaždin Prison governor, a judge responsible for the execution of sentences or the Head Office of the Prison Administration" (paragraph 51 of the judgment; emphasis added).

From this specific finding follows the conclusion that:

"... in respect of this complaint the applicant has not exhausted domestic remedies and that therefore this complaint must be rejected in accordance with Article 35, §§ 1 and 4 of the Convention" (paragraph 52 of the judgment).

4. It goes without saying that the Court has the power to depart from its previous decision, but the Court should exercise this power with good reason. Precedential authority of a previous decision is non-existent where cases, resting on different principles, are distinguishable.

As regards these cases – *Horvat v. Croatia* and *Stojanović v. Serbia* – it appears that there exists almost complete identity of the relevant elements of both the factual and the legal framework.

In both cases, the applicants allege that their right to confidentiality guaranteed under Article 8 of the Convention was violated by the acts of the prison authorities. The internal laws of both Governments provide for, *inter alia*, administrative remedies for the protection of the relevant right in the form of a complaint "to the governor of the penitentiary" (section 103 of the Enforcement of Criminal Sanctions Act) or "the right to submit a written application to the Head of the Directorate for the Enforcement of Institutional Sanctions" according to the law of Serbia, and a complaint to the prison governor or the Head Office of the Prison Administration (section 15(2) of the Enforcement of Prison Sentences Act) according to the law of Croatia. Neither of the applicants Novak and Stojanović addressed a complaint to any of the above-mentioned authorities concerning the opening of their correspondence.

It is true, however, that there are two differences in the circumstances surrounding these two cases.

Firstly, Croatia's law also provides, in the Enforcement of Prison Sentences Act, for a complaint to a judge responsible for the execution of sentences, in addition to a complaint to the prison governor and the Head Office of the Prison Administration; and

Secondly, "the Government have failed to produce relevant case-law which would demonstrate that any of the administrative remedies on which they relied could have provided the applicant with adequate redress for the violation alleged" (paragraph 62 of the judgment), followed by the observation that "the Government [of Serbia] themselves acknowledged that the alleged interference stemmed from an administrative practice" (ibid.).

It appears that neither of the said differences makes these two cases distinguishable, being objectively inadequate to justify departure from the precedent established by the *Novak v. Croatia* case.

6.1. The fact that under Croatia's law, in addition to the governor of the prison and the Head Office of the Prison Administration the applicant could also have addressed the judge responsible for the execution of sentences is irrelevant here. In its Judgment in the *Horvat v. Croatia* case, the Court indicated as alternatives the possible addressees with whom the applicant could have lodged a complaint. This means, clearly and unambiguously, that a complaint lodged with any of the addressees indicated in paragraph 51 of the judgment is an effective remedy for the purposes of Article 35 of the Convention. Or, if we apply the precedential authority of the Court's judgment in the *Horvat v. Croatia* Case to this particular case, that the administrative remedies as provided for by the Enforcement of Criminal Sanctions Act are effective remedies for the purposes of Article 35 of the Convention.

6.2. It is worth mentioning that in the *Horvat v. Croatia* case the Court did not demand the production of relevant case-law demonstrating that any of the administrative remedies on which the Government relied could have provided the applicant with adequate redress for the violation alleged.

Such an approach seems a proper one in the light of the well-established principle in the jurisprudence of the Court that "the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism" (*Azinas v. Cyprus*, application no. 56679/00, § 38; *Ilhan v. Turkey*, application no. 22277/93, §59). Failure to produce relevant case-law, in particular when Contracting Parties are concerned which, like Croatia and Serbia, belong to the continental system of law, could hardly, in itself, constitute a basis for disqualifying a particular remedy as an effective one. From the standpoint of the question whether a particular remedy is an effective one, sometimes recourse to testing on an empirical basis, as indicated by the *dictum* of the Chamber of the International Court of Justice in the ELSI case, may be the most appropriate answer:

"for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success". (ICJ Reports 1989, p. 15 at p. 42, paragraph 50; emphasis added).

Indeed, it seems exaggerated to disqualify a particular remedy as effective exclusively on the basis of formalistically established standards relating to the distribution of the burden of proof while neglecting its substantive capability of affording redress in respect of the breaches alleged.

6.3. An additional argument of the majority that "the Government themselves acknowledged that the alleged interference stemmed from an administrative practice" does not seem to be of decisive importance in this particular context either.

The acknowledgment was expressed, in the first place, in an abstract form, as a defence, rather than as a substantiated and formal acknowledgment.

Moreover, even assuming that opening correspondence was an administrative practice, that circumstance is not in itself reason for disqualifying the complaint to higher administrative structures as an effective one. The practice of lower administrative structures opening correspondence is one thing, whereas the practice, whether established or reasonably possible, of higher structures vested with the power to censor mail based on specific rules is quite another.

Having found that the applicant's complaint concerning the dentures, based, *inter alia*, on Protocol No. 12, had been resolved within the meaning of Article 37, § 1 (b) of the Convention, the Court was no longer in a position to address the normative potential of Protocol No. 12.

That potential is unfathomable; it encompasses the almost revolutionary perspective of the convergence of civil and political rights, on the one hand, and economic, social and cultural rights, on the other. Ultimately, it could be conducive to the establishment of the right to dignified life (*divina vitae*) as the embodiment of the eternal goal relating to the purpose and nature of human existence.

It is certain, in this connection, that the Court's future jurisprudence must provide guidelines as to how the normative potential of Protocol No. 12 should be perceived.

PARTLY DISSENTING OPINION OF JUDGE ZAGREBELSKY

I voted against striking out the complaint concerning the applicant's dentures for the following reasons, which relate solely to the impact of this judgment for the Court's case-law on Article 37 of the Convention. The merits of the applicant's complaint (which was not declared inadmissible by the Chamber as manifestly ill-founded) are in no way the subject-matter of my dissent, any more than of the judgment itself.

In my view the matter giving rise to the applicant's complaint under Article 3 of the Convention cannot be considered resolved.

According to the Court's case-law, "[i]n order to conclude that the matter has been resolved within the meaning of Article 37 § 1 (b) and that there is therefore no longer any objective justification for the applicant to pursue his application, the Court considers that it must examine, firstly, whether the circumstances complained of directly by the applicant still obtain and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed. This approach reflects the structure of the Convention's supervisory machinery, which provides both for a reasoned decision of judgment as to whether the facts in issue are compatible with the requirements of the Convention (Article 45), and, if they are not, for the award of just satisfaction (Article 41)" (see *Pisano v. Italy* [GC] (striking out), no. 36732/97, § 42, 24 October 2002).

The Court, in a number of its judgments concerning the expulsion of aliens has accepted that to put an end to the risk of their being removed from the country by way of the delivery of (one of the various kinds of) residence permits can constitute an adequate and sufficient form of redress and thus a reason for finding that both of the above-mentioned conditions are met in cases concerning Article 8 (see, among other authorities, *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 97, ECHR 2007-..., and *Ibrahim Mohamed v. the Netherlands* (striking out), no. 1872/04, §§ 19-24, 10 March 2009). The same case-law has been adopted by the Court under Article 3 of the Convention in cases concerning expulsions or extraditions whose execution was no longer possible (see *Bilasi-Ashri v. Austria* (dec.), no. 3314/02, ECHR 2002-X; *Abraham Lunguli v. Sweden* (dec.), no. 33692/02, 1 July 2003; *Laleh Mir Isfahani v. the Netherlands* (dec.), no. 31252/03, 31 January 2008; *Bari v. Sweden* (dec.), no. 56726/00, 5 March 2002; *Hesam Safawi Bayat v. the Netherlands* (dec.), no. 7233/02, 8 July 2003; *R.N. v. the United Kingdom* (dec.), no. 28242/02, 2 September 2003; *Q v. Finland* (dec.), no. 42640/04, 22 May 2007; *Azzedine Chelghoum v. France* (dec.), no. 54654/00, 10 October 2000; and *Tony Chidobe v. Italy*

(dec.), no. 30978/04, 9 September 2004). Apparently, the Court found that the matter had been resolved in a case where leave to remain in the country had finally been granted to the applicant (see *Mostafa Kordoghliazar v. Romania* (dec.), no. 8776/05, 20 May 2008). In *El Majjaoui and Stichting Touba Moskee v. the Netherlands* ((striking out) [GC], no. 25525/03, §§ 30-34, 20 December 2007), the Court reached similar findings in a very specific case, brought under Article 9 of the Convention, concerning the denial and then the delivery of a residence and work permit to a foreign imam.

The Court, to my knowledge, has never found the matter to have been resolved in a case under Article 3 of the Convention such as the present one. The applicant suffered from the refusal of the authorities to provide him with the dentures he needed from at least February 2004 (see paragraph 13) to 26 June 2007 (see the note of 27 June 2007 from the applicant's representative, the Belgrade Centre for Human Rights). The Government's action was taken after a long period of three years and four months (nearly three years after the application had been lodged). No redress has been granted in respect of the violation complained of (still less have the Government taken action to fulfil their procedural obligations under Article 3 of the Convention).

I am unable to see how it can be said that the issue of the case has been resolved by the sole fact that a possible violation of Article 3 has finally ended and I am deeply worried by a judgment that sets such a precedent in the Court's Article 3 case-law. Moreover one can easily conceive possible developments and applications of this new precedent, capable of spreading across a broader range of Convention violations such as serious violations of Article 3, or of Article 5 and so forth.

I respectfully suggest that this judgment should not establish a precedent in the Court's case-law.