2021, Vol. 10, Issue 2

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INTERSTATE APPLICATION ON BEHALF OF ORGANISATIONS LACKING NON-GOVERNMENTAL STATUS IS INADMISSIBLE – ECTHR DECISION IN SLOVENIA V. CROATIA (APPLICATION 54155/16)

Abstract: The present commentary concerns the claims alleging a violation under Article 6(1) (right to a fair trial), Article 14 (Prohibition of Discrimination) and Article 13 (Right to an Effective Remedy) of the European Convention on Human Rights as well as Article 1 of Protocol No. 1 (Peaceful Enjoyment of Possessions) to the European Convention on Human Rights by preventing Ljubljana Bank (a Slovenian bank) from enforcing and collecting the debts of its Croatian debtors in Croatia by the Croatian authorities. The case under discussion is an inter-state case and the applicant was the Republic of Slovenia. The decision is significant from the perspective of the development of case law in inter-state cases, which are still rare in the practice of the European Court of Human Rights. It has been confirmed that inter-state applications are additional measures for the protection of the rights of individuals which cannot be used to protect State interests.

Keywords: inter-state applications, admissibility, 'non-governmental organisations'

1. Introduction

On 15 September 2016 the Government of the Republic of Slovenia lodged an interstate application with the European Court of Human Rights (hereinafter referred to as 'the Court' or 'the ECtHR') against the Republic of Croatia under Article 33 of the European Convention on Human Rights (hereinafter referred to as 'Convention') (no. 54155/16).[1] On 18 December 2018, the Chamber which was allocated the case relinquished jurisdiction in favour of the Grand Chamber. And finally, on 18 November 2020, in its decision, the Court declared that it did not have jurisdiction to hear the case.[2]

The case deserves particular attention for several reasons. Firstly, inter-state applications are rare occurrences. Nevertheless, they have an impact on a large number of people, many cases also have important political consequences. Secondly, it is the first inter-state case before the ECtHR between two EU Member States. In all previous inter-states cases, the states involved in disputes were not yet EU member states at the time of the proceedings before the Court.[3] Membership of Contracting Parties in the EU raised the question of potential concurrence of jurisdiction between the ECtHR and the CJEU. And last, but not least, the case is about the protection of the right of a legal person. Most other inter-states applications concerned natural persons.[4]

The applicant government alleged that Croatia has repeatedly violated Article 6(1) (right to a fair trial) of the Convention, as well as Article 1 of Protocol No. 1 (peaceful enjoyment of possessions) to the Convention, Article 14 (prohibition of discrimination) and Article 13 (right to an effective remedy) of the Convention. Under Article 41 of the Convention, they also requested just satisfaction corresponding to the losses incurred by Ljubljana Bank as a result of the alleged violations. The amount of the satisfaction was estimated by Slovenia at EUR 429.5 million.[5]

[1] *Slovenia v Croatia*, no. 54155/16.

[2] *Slovenia v Croatia*, no. 54155/16, Decision of the ECtHR of 18 November 2020.

[3] The list of all inter-state applications available here: https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf.

[4] The exception is the case *Ukraine v Russian Federation (re Crimea)*, Application 20958/14, where there has been an attempt to partly protect the rights of legal persons.

[5] Inter-state application against Croatia, https://www.gov.si/en/registries/projects/sfry-succession/inter-state-application-against-croatia.

At the outset it should be noted that the Court had already repeatedly examined cases related to this bank.[6] One of them, namely, the *Lujbljanska dd. v. Croatia* case was similar to the case being discussed. Ljubljana Bank essentially complained about the non-enforcement of writs of execution in its favour in the proceedings it had brought against Croatian companies in order to recover debt. The Court declared the case inadmissible because the bank was state-controlled and had no standing to lodge an application.

2. Facts of the Case

Generally, the discussed case concerned unpaid and overdue debts owed to Ljubljana Bank by Croatian companies on the basis of loans granted at the time of the former Yugoslavia.

Ljubljana Bank was founded in 1955 under the laws of the then People's Republic of Slovenia. In 1969 it opened an office in Zagreb in the then Socialist Republic of Croatia. From 1978 until 1 January 1990 Ljubljana Bank Ljubljana operated as an 'associated bank' and was composed of several banks, among them, Ljubljana Basic Bank Sarajevo, Ljubljana Basic Bank Zagreb, Ljubljana Basic Bank Skopje. In the same period the Ljubljana Bank's Zagreb office operated as a 'basic bank', that is, as Ljubljana Basic Bank Zagreb and had separate legal personality under the law of the then Socialist Republic of Croatia. It was, however, integrated into the organisational structure of the Ljubljana Bank.[7] From 1 January 1990 Ljubljana Bank Ljubljana started to operate as joint stock company in the then Socialist Republic of Slovenia and Ljubljana Basic Banc Zagreb as Zagreb Main Branch which was registered in the registries of commercial companies in both the then Socialist Republic of Slovenia and the Socialist

[6] *Kovačić and others v Slovenia*, nos. 44574/98, 45133/98 and 48316/99, Judgment of the ECtHR of 3 October 2008; *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, no. 60642/08, Judgment of the ECtHR of 16 July 2014; *Ljubljanska banka d.d. v Croatia*, no. 29003/07, Decision of the ECtHR of 12 May 2015.

[7] The Socialist Federal Republic of Yugoslavia's commercial banking system consisted of 'basic' and 'associated' banks. Basic banks had separate legal personality but were integrated into the organisational structure of one of the nine associated banks. As a rule, basic banks were founded and controlled by socially-owned companies based in the same territorial unit (republic or autonomous provinces). At least two basic banks could form an associated bank.

Republic of Croatia as a business unit of Ljubljana Bank without legal personality. After Slovenia declared independence in 1991, Ljubljana bank was nationalized. And in 1994 most of the bank's assets and part of its liabilities were transferred to a new bank, the New Ljubljana Bank. The old Ljubljana Bank is now controlled by a Slovenian Government agency – the Succession Fund.

The Slovenian application concerned 48 particular civil cases brought before the Croatian courts by Ljubljana Bank (Head Office and Zagreb Main Branch). Due to the fact that the bank's Croatian debtors, mainly the Croatian companies, had failed to repay their liabilities, from 1991 to 1994 Ljubljana Bank lodged 80 civil claims with the Croatian courts. These legal proceedings lasted on average about 18 years. Thus, for a period of more than 20 years Ljubljana Bank could not recover its claims from Croatian companies. Some of the claims were still pending as for the date of the application; in some other cases judgments favourable to the bank could never be enforced. Moreover, for some, since 2004 the Croatian courts, including the Constitutional Court, denied the *locus standi* of Ljubljana Bank as the claims that were the subject of the cases resulted from loans granted in the former Yugoslavia were transferred to the New Ljubljana Bank in 1994. The Slovenian Government stated, inter alia, that Ljubljana Bank was a victim of an arbitrary interpretation of Slovenian law by the Croatian courts. They highlighted the interference of the Croatian executive authorities in the court proceedings, as well as impossibility to obtain the enforcement of final judgments in many cases. Slovenia stated that the purpose of this application was to obtain a just solution to the dispute concerning the problem of old foreign-currency savings following the dissolution of the former Socialist Federal republic of Yugoslavia.[8] In *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, the Court stated that Slovenia had been responsible for the debts owed to the applicant by Ljubljana Bank Sarajevo and Slovenia was obliged to pay the vast majority of old foreign-currency savings in Yugoslavia. And with this case Slovenia expected the Court to remedy the violation of Ljubljana Bank's rights committed by Croatia.

The respondent government was given notice of the applications with questions from the Court in accordance with Rule 54 of the Rules of Court. Croatia raised three preliminary objections to the admissibility

[8] Inter-state application against Croatia, https://www.gov.si/en/registries/projects/sfry-succession/inter-state-application-against-croatia.

of the application. Firstly, they maintained that the application was incompatible with Article 33 of the Convention due to the fact that the applicant Government was not entitled to lodge it with the Court in the form of an inter-state case. The second and third objections were related to two formal procedural admissibility conditions set by Article 35(1), that is, the exhaustion of domestic remedies and the respect of the six-month time limit.

3. Decision of the Court

On 18 December 2018, the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber.[9] This step of the Court was in the accordance with Court practice and with the proposals for more efficient processing of inter-states cases of the Steering Committee for Human Rights, which recommended that 'having regard to the priority and sensitive nature of inter-state cases, it may be appropriate for the Chamber to relinquish the case as quickly as possible to the Grand Chamber'.[10] In the course of the proceedings, the Court firstly verified whether it may examine the first objection of the respondent government, namely, the incompatibility of the application with Article 33. The respondent Government considered that at the admissibility stage the Court does have competence to determine whether the application is wholly unsubstantiated by not limiting itself to examine two formal procedural admissibility conditions set by Article 35(1). In support of its assertion, the Croatian Government referred to several decisions of the Court in inter-state applications in which it was recognised that the Court might at this stage carry out some admissibility assessment going beyond the two criteria laid down in Article 35(1).[11] It was also stressed by the respondent Government that according to Article 32(1) the jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention, thus the question whether the applicant Government is entitled to submit an application under Article 33 of the Convention is a dispute as to whether the Court has jurisdiction within the meaning

[9] Article 30 of the Convention and Article 72 of the Rules of Court.

[10] *Proposals for a more efficient processing of inter-state cases,* Steering Committee for human rights (CDDH), CDDH (2019) 22, 06 June 2019, para. 19.

[11] *Slovenia v Croatia*, para. 36.

of Article 32(2). The applicant initially argued, that the Court was not competent do deal with the question of the compatibility of the application with Article 33 of the Convention at the admissibility stage of proceedings, however, at the hearing the Slovenian Government agreed that this was an issue of jurisdiction for the purpose of Article 32 of the Convention and the Court was empowered to examine it at the admissibility stage.

The Court agreed with both parties, that the main question before the Court was whether it had 'jurisdiction' within the meaning of Article 32 of the Convention and stated that the question could be adjudicated at any stage of proceedings. Consequently, the Court declared that in order to be able to consider the key issue of the case it does not need to declare the present application admissible. It allowed the Court to proceed whether it was able to examine an inter-state application that had been lodged by a State in order to protect the rights and interests of an entity which was not a 'non-governmental organisation' for the purposes of Article 34 of the Convention and was therefore precluded from lodging an individual application. During the proceedings the Court concluded that it is not allowed to examine an inter-state application seeking to protect the rights of a legal entity which did not qualify as a 'non-governmental organisation' and therefore would not be entitled to lodge an individual application under Article 34. It was emphasised that due to the specific nature of the Convention as an instrument for the effective protection of human rights, inter-state case always concerned individuals, groups of individuals or legal entities which qualified as 'non-governmental organisations' who were harmed and injured by a violation of the Convention. The Court reiterated its findings in *Ljubljanska Banka D.D. v Croatia* no. 29003/07, in which it was stated that, although the Ljubljana Bank was a separate legal entity, it did not enjoy sufficient institutional and operational independence from the State and must, for the purposes of Article 34 of the Convention, be regarded as a governmental organisation and it had no standing to lodge an individual application with the Court.[12] As Ljubljana Bank was not a 'non-governmental organisation' within the meaning of Article 34, Article 33 did not empower the Court to examine an inter-state application alleging a violation of Convention rights in respect of this legal entity. Consequently, the Court decided that it did not have jurisdiction hear this case.

[12] *Ljubljanska banka d.d. v Croatia*, para. 54.

4. Evaluation of the Court's Decision

This Court's decision contributes greatly to the case-law of inter-state cases. Generally, it is in line with the previous case law of the Court. However, in some issues, the Court goes further by developing existing approaches.

At the very beginning, the Court decided if there was any possibility to carry out a preliminary assessment of the contents of the case outside the framework of Article 35(1). Inter-state applications are subject to fewer admissibility requirements than individual applications. Article 35 stipulates only two conditions for dismissing an inter-state application, namely, non-exhaustion of domestic remedies and failure to comply with a six-month time limit. Thus, with regard to inter-state complaints, the Convention expressly excludes admissibility criteria set out in Article 35(2) and (3). In previous cases, however, the Court stated, that it was entitled to reject an inter-state application without declaring it admissible if it was clear from the outset that it was completely unsubstantiated. According to the Court in its decision on *Georgia v. Russia (II)*, Article 35(3) of the Convention '[...] cannot prevent the Court from establishing already at this preliminary stage, under general principles governing the exercise of jurisdiction by international tribunals, whether it has any competence at all to deal with the matter laid before it'.[13] It should be noted that such an approach of the Court endorsed findings of the European Commission of Human Rights in the decision on the admissibility of application *Cyprus v. Turkey*. It was stated that the inability of the Commission to examine an issue related to the merits at the admissibility stage '[...] cannot prevent the Commission from establishing, already at this preliminary stage, under general principles governing the exercise of jurisdiction by international tribunals, whether it has any competence at all to deal with the matter laid before it'.[14] On the basis of the foregoing, the Court stated that the question of whether Slovenia could lodge an application for the benefit of Ljubljanska Banka constituted a genuine dispute related to the special character of the Convention as an international instrument of human rights protection and could be examined at the admissibility phase. However, in the present case,

[13] *Georgia v. Russia (II)*, no. 38263/08 , Decision of the ECtHR of 12 December 2011, para. 64.

[14] *Cyprus v. Turkey*, no. 25781/94, Decision on the admissibility of the Commission of 28 June 1996, p. 22.

the Court decided to expand the scope of existing case law and related this approach to the principle of procedural economy.[15]

Addressing the key issue raised by the case, whether it was able to examine an inter-state application that had been lodged by State in order to protect the rights of an entity which was not a 'non-governmental organisation' for the purposes of Article 34 and as was previously precluded from lodging an individual application, the Court focused on three issues.

Firstly, the well-established general principle of interpretation of the Convention was analysed and the Court confirmed, based on its case law, that the Convention must be read as a whole and its Articles should be internally consistent and harmonised.[16] This principle of interpretation of the Convention applies to substantive provisions, as well to jurisdictional and procedural provisions. Therefore, the Court concluded that 'it applies to [...] to Articles 1, 33 and 34'.[17] Thus, the term 'non-governmental organisation' had the same meaning and scope in all Convention's provisions.

Furthermore, the Court reviewed documents of the international courts and bodies, as well as its case law and stated that since the Convention was an instrument for the effective protection of human rights, only individuals, groups of individuals and legal entities that qualify as 'non-governmental organisations' are bearers of Convention rights, and even in the case of the inter-state case lodged, it was always the individual who was harmed by violation of the Convention, but not a state or 'governmental' legal entity.[18] Even the European Commission of Human Rights characterised the inter-state applications as an expression of the system of collective guarantees enshrined in the Convention, rather than a mechanism for inter-state dispute resolution or enforcing the rights of States.[19] Thus, the obligations taken by States are designed to protect the fundamental rights of individuals or groups of individuals, rather than to create rights for states themselves. An inter-state application provides an additional measure to ensure the protection of the rights of individuals. On one hand, the above-mentioned statement of the Court is consistent with the previous one, when the Court held that even in an inter-state case

[15] *Slovenia v Croatia*, para. 41.
[16] Ibid., para. 65.
[17] Ibid.
[18] Ibid., para. 66.
[19] *Austria v. Italy*, no. 788/60, Decision of the Commission of the admissibility of 11 January 1961, p. 20.

it is always the individual, and not the State, who is harmed and primarily 'injured' by a violation of Convention rights.[20] It is quite clear that an inter-state application can only be used to protect entities which enjoy rights under the Convention. On the other hand, it is the first time when the Court explicitly pointed out that an inter-state application cannot be used to bypass the requirements of Article 34.

To confirm this statement, the Court referred to the principle laid down in *Cyprus v. Turkey* (just satisfaction), according to which if just satisfaction was afforded in an inter-state case, it should always be for the benefit of individual victims and not for that of the State.[21] This principle has also been confirmed in another inter-states judgment (just satisfaction) of the Court.[22] Following the above, it appears obvious that just satisfaction should also be for the benefit of a group of individuals and an entity with complete independence from the applicant State.

The Court reiterated its decision in *Ljubljanska Banka D.D. v Croatia*, in which it was stated that Ljubljana Bank did not enjoy sufficient institutional and operational independence from the State and could not be regarded as a 'non-governmental organisation' within the meaning of Article 34. Therefore, the Court did not have power to examine an inter-state application of a violation of the Convention's right in respect of this legal entity.

In the discussed decision, the Court endorsed once more its approach in which a State under Article 33 cannot be regarded as exercising a right of action for the purpose of enforcing its own rights (or rights of public companies under the control of a state). Therefore, it can be argued that the Court determined unequivocally that the State cannot benefit from using inter-state applications in its own interests.

On a sidenote, one of the greatest challenges in inter-state cases is the establishment of facts in particular when the Court has to act as a court of first instance for lack of a prior examination of the cases by the national courts. In the discussed case, the general factual and legal background was established mostly by the Court during hearings of numbers of individual cases regarding Ljubljana Bank.

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[20] *Cyprus v. Turkey*, no. 25781/04, Judgment (Just Satisfaction) of the ECtHR of 12 May 2014, para. 46.

[21] Ibid., paras. 43-45.

[22] *Georgia v. Russia*, no. 13255/07, Judgment (Just Satisfaction) of the ECtHR of 31 January 2019, para. 26.

The discussed decision also raised questions of the relationship between the Court of Justice of the European Union and the European Human Rights Court. Parties discussed the issue of the existence of the case-law of the Court of Justice of the European Union according to which foreign state-owned companies enjoy fundamental rights and may lodge direct appeals with the EU Courts.[23] Obviously, according to the general Court, '[...] neither in the Charter of Fundamental Rights of the European Union [...] nor in European Union primary law are there any provisions which state that legal persons who are emanations of States are not entitled to the protection of fundamental rights'.[24] However, the Court correctly stated that the conditions of admissibility of various complaints before the Court may differ from those that are applicable before the European Union Courts.[25] This statement is fully consistent with the position of the General Court of the EU which recognised that 'Article 34 of the ECHR is a procedural provision which is not applicable to procedures before the Courts of the European Union'.[26] The Convention and the Charter of Fundamental Rights of the European Union are different instruments which are applied by two different courts, the European Court of Human Rights and the Court of Justice of the European Union.

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The Court's decision under discussion has not generally affected the situation with succession negotiations between Slovenia and Croatia from a political point of view. As it was stated by the Slovenian government, 'Slovenia will endeavour to resolve the issue of the Ljubljanska banka claims in Croatia at the political level and with diplomatic talks'.[27] However, from the inter-state case law point of view the Court has significant impact. The Court emphasised once more the role of the State in fulfilling the obligations resulting from the Convention. It had to guarantee the protection of the fundamental rights of individuals, group of individuals

[23] E.i. T-496/10, *Bank Mellat v Council*, ECLI:EU:T:2013:39.

[24] Ibid., para. 36.

[25] *Slovenia v. Croatia*, para. 69.

[26] *Bank Mellat,* para. 38.

[27] Inter-state application against Croatia, https://www.gov.si/en/registries/projects/sfry-succession/inter-state-application-against-croatia.

or/and ‘non-governmental organisations’. However, it is not permitted to use Article 33 to protect entities which are not entitled for protection, including the protection of its own interests.