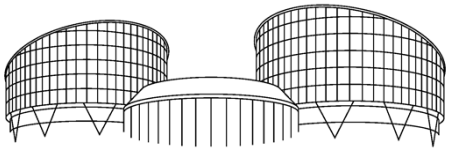

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF PAUNOVIĆ v. SERBIA

(Application no. 54574/07)

JUDGMENT

Art 6 (criminal) • Independant tribunal • Impartial tribunal • Presence on bench in appeal court of judge who had been deputy municipal public prosecutor at the time of applicant's indictment • Judge not involved in preparatory stages of impugned criminal proceedings or in drafting indictment • Absence of dual role

STRASBOURG

3 December 2019

FINAL

03/03/2020

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

In the case of Paunović v. Serbia,

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

Jon Fridrik Kjølbro, *President,*
Faris Vehabović,
Branko Lubarda,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Jolien Schukking, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 12 November 2019,

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

PROCEDURE

1. The case originated in an application (no. 54574/07) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Dragoslav Paunović ("the applicant"), on 3 December 2007.

2. The applicant was represented by Mr I. Pavlović, a lawyer practising in Sokobanja. The Serbian Government ("the Government") were represented by their former Agent, Ms N. Plavšić, who was recently substituted by their current Agent, Ms. Z. Jadrijević Mladar.

3. The applicant alleged that the Niš District Court had lacked impartiality, in breach of his right to a fair hearing.

4. The application was initially allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 29 September 2015 notice of the application was given to the Government. On 20 September 2019 the Court changed the composition of its Sections (Rule 25 § 1) and the present case was thus assigned to the newly composed Fourth Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The criminal proceedings against the applicant

5. The applicant was born in 1956 and lives in Soko Banja.

6. On 2 August 2006 I.S., a deputy prosecutor of the Aleksinac Municipal Public Prosecutor's Office, indicted the applicant for causing bodily harm and death by dangerous driving (*teško delo protiv bezbednosti javnog saobraćaja*).

7. On 24 October 2006, at the first main hearing of the case against the applicant before the Aleksinac Municipal Court (*Opštinski sud u Aleksincu*), as well as at later hearings (*tokom glavnog pretresa*), the prosecutor's office was represented by deputy prosecutors S.S. and I.S.

8. On 12 December 2006 the Aleksinac Municipal Court sentenced the applicant to six months' imprisonment for the said offence. Both the applicant and the deputy prosecutor, I.S., appealed against this judgment.

9. On 17 April 2007 the Niš District Court (*Okružni sud u Nišu*) sitting on a bench of three judges, namely Judge N.S. as President, Judge B.K. as judge rapporteur and Judge S.M., upheld the first-instance judgment on appeal. Judge B.K. had been elected as a judge of the District Court on 15 August 2006.

10. The applicant appealed on points of law (*zahtev za ispitivanje zakonitosti pravosnažne presude*), complaining, *inter alia*, about the presence of Judge B.K. on the bench of the Niš District Court in the appeal proceedings. The applicant argued that as Judge B.K. had held the position of deputy municipal public prosecutor in Aleksinac during the first-instance criminal proceedings against him, the composition of the Niš District Court's bench had breached the guarantee of impartiality. He complained as follows:

> "Judge [B.K.], who took part as a member of the second-instance chamber and a judge rapporteur in the proceedings on appeal, held the position of the deputy municipal public prosecutor in Aleksinac at the time of the first-instance proceedings ...
>
> ... the public interest in the criminal proceedings against [the applicant] was championed by the Aleksinac Municipal Public Prosecutor's Office, whose representative was B.K. ...
>
> ... that [B.K.] should have been withdrawn because of the incompatibility of the positions of judge and prosecutor."

11. On 23 October 2007 the Supreme Court of Serbia dismissed the applicant's appeal on points of law, finding that Judge B.K. had not participated in proceedings against the applicant as a prosecutor, and it upheld the decisions of the lower courts. As regards the complaint that the second-instance court had not been impartial, the Supreme Court stated:

> "The Supreme Court finds the complaints in the appeal to be groundless as it appears from the case file that a member of the bench, Judge B.K., did not participate in these proceedings as a deputy municipal public prosecutor, nor did he take part in the investigation, and therefore he did not have to be removed from the bench purely because during the first-instance proceedings he held the said function in Aleksinac."

12. The applicant was released from prison on 11 June 2008, after serving four months of his sentence.

B. Other relevant facts

13. The applicant worked as a tax inspector for the Tax Inspectorate of the Ministry of Finance.

14. In exercising his duties, the applicant reviewed the work of a particular company and in 2005 lodged an application for the institution of misdemeanour proceedings against that company and a person in charge, V.K., who is the brother of Judge B.K.

15. On 20 March 2008, pursuant to the State Administration Act, the Ministry of Finance dismissed the applicant *ex lege* from the civil service because he had been convicted of a crime and sentenced to six months' imprisonment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The provisions of the Code of Criminal Procedure 2001 (*Zakonik o krivičnom postupku*, Official Gazette of the Federal Republic of Yugoslavia nos. 70/01 and 68/02; and Official Gazette of the Republic of Serbia – "OG RS" – nos. 58/04, 85/05, 115/05 and 46/06), as in force at the material time, provided various grounds for the compulsory disqualification of judges from the bench, as follows:

Article 40

"A judge or lay judge shall be excluded from sitting in a case:

1) if he has suffered an injury or damage as a result of the offence;

...

4) if in the same criminal case he took part in the investigation [*vršio istražne radnje*] or if he has taken part in the proceedings as a prosecutor, defence lawyer, legal guardian or legal counsel of the injured person or of the prosecutor, or if he has testified as a witness or as an expert witness;

...

6) if there are other circumstances which may cast doubt on his impartiality."

17. The grounds set out in paragraphs 1 to 5 of Article 40 are considered mandatory grounds for the recusal of a judge or lay judge from sitting in a case. Article 41 provided that, from the moment that a judge or lay judge became aware of any absolute ground disqualifying him or her from sitting in a case, that judge was required to take no further part or to bring the circumstances which would disqualify him or her from sitting to the immediate attention of the president of the court of which he or she was a

member, whereupon the president would be required to appoint another judge in his or her stead. A judge or lay judge was also required to inform the president of the court of any other circumstances (under Article 40(6)) which would warrant his withdrawal.

18. Articles 7 and 14 of the Public Prosecutor Office Act (*Zakon o javnom tužilastvu*, OG RS nos. 63/01, 42/02, 39/03, 44/04, 61/05, 46/06 and 106/06 – the last-mentioned reference published a relevant decision of the Constitutional Court) prescribe that a public prosecutor is to perform his or her duties directly or through his or her deputies and that everyone in the prosecutor's office is subordinate to him or her, including his or her deputies. Deputy public prosecutors are required to perform all actions entrusted to them by public prosecutors and may also, without any specific authorisation, undertake any action public prosecutors are authorised to perform.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

19. The applicant complained that in the appeal proceedings before the Niš District Court his case had not been examined fairly by an impartial tribunal, having regard to the presence on the bench of Judge B.K., who had previously held the position of deputy municipal public prosecutor at the time of the first-instance criminal proceedings against the applicant. The applicant also submitted that, in exercising his duties as a tax inspector in 2005, he had reviewed the work of a particular company and proposed instigating misdemeanour proceedings against that company and a person in charge, V.K., who was the brother of Judge B.K. (see paragraph 14 above). This, in the applicant's view, amounted to a breach of the Convention requirement for his case to be determined by an "impartial tribunal", in breach of Article 6 § 1 of the Convention, which in so far as relevant reads as follows:

> "In the determination ...of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Complaint concerning the alleged partiality of Judge B.K. on the ground of his family relationship with V.K.

20. The Court considers it appropriate to first address the complaint of an alleged lack of impartiality on the basis of Judge B.K.'s family relationship with the above-mentioned V.K., against whom the applicant sought to initiate misdemeanour proceedings (see paragraph 14 above).

21. The Government emphasised that the applicant had failed to raise his allegations that he had made an application for the opening of misdemeanour proceedings against Judge B.K.'s brother before the domestic courts and in his application form before the Court, but had mentioned it for the first time in his observations submitted after notice of the present case had been given to the Government. They suggested that the applicant had abused the right of individual application within the meaning of Article 35 § 3 (a) of the Convention, in that his new argument before the Court had been concealed and misleading, as he had failed to raise it in a timely manner and at domestic level.

22. The Court points out that it has jurisdiction to review, in the light of the entirety of the Convention's requirements, the circumstances complained of by an applicant. Furthermore, an applicant can clarify or elaborate upon his or her initial submissions during the Convention proceedings. The Court has to take account not only of the original application but also of the additional documents intended to complete the latter by eliminating initial omissions or obscurities (see, for example, *Ringeisen v. Austria*, 16 July 1971, § 90, Series A no. 13, and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 121-122, 20 March 2018, with further references).

23. Turning to the present case, however, the Court observes that the complaint summarised in paragraph 20 above was not included in the initial application, in which the applicant raised a complaint under Article 6 of the Convention with regard only to the alleged dual function of Judge B.K. in the impugned criminal proceedings. The additional complaint was submitted after notice of the application had been given to the Government, in the applicant's final response of 17 March 2016 to the Government's objections as to the admissibility and merits of the application. This complaint is not an elaboration of the applicant's original complaint to the Court, notification of which was given to the Government. It was thus not raised or elaborated upon early enough to allow an exchange of observations between the parties (see, in various contexts and *mutatis mutandis*, *Nuray Şen v. Turkey (no. 2)*, no. 25354/94, § 200, 30 March 2004; *Skubenko v. Ukraine* (dec.), no. 41152/98, 6 April 2004; *Melnik v. Ukraine*, no. 72286/01, §§ 61-63, 28 March 2006; *Maznyak v. Ukraine*, no. 27640/02, § 22, 31 January 2008; *Kuncheva v. Bulgaria*, no. 9161/02, § 18, 3 July 2008; *Lisev v. Bulgaria*, no. 30380/03, § 33, 26 February 2009; and *Tsonyo Tsonev v. Bulgaria*, no. 33726/03, § 24, 1 October 2009).

24. Nevertheless, the Court does not have to decide whether it is appropriate to take this matter up separately at this stage in the proceedings, as the complaint is in any event inadmissible because the applicant failed to raise it, either in form or in substance, in his appeal before the Supreme Court (see paragraph 10 above) and has therefore failed to exhaust the available and effective domestic remedies (see *Schimanek v. Austria* (dec.),

no. 32307/96, 1 February 2000; *Salaman v. the United Kingdeom* (dec.), no. 43505/98, 15 June 2000; *Strømberg v. Denmark* (dec.), no. 57211/00, 20 June 2002; and *Andersen v. Denmark* (dec.), no. 57204/00, 5 September 2002).

25. Therefore, the Court considers that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Complaint concerning the alleged partiality of Judge B.K. on the ground of his dual function

1. Admissibility

26. The Government stated that the applicant had failed to make use of the constitutional avenue of redress and provided several decisions of the Constitutional Court in which it had found that the domestic courts had lacked impartiality and had ordered the reopening of the proceedings in issue, albeit on different grounds from the one at issue in the present case.

27. Given that the Court has already found that a constitutional complaint was not, in principle, an effective remedy for applications lodged before 8 August 2008 (see *Vinčić and Others v. Serbia*, nos. 44698/06 and 30 others, § 51, 1 December 2009), and that the issue of whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged (see *Cvetković v. Serbia*, no. 17271/04, § 41, 10 June 2008, and *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)) – that is, before 8 August 2008 in the present case (see paragraph 1 above) – the Court considers that the applicant had indeed exhausted all effective legal remedies and had no obligation to avail himself of a constitutional complaint. Accordingly, the Government's objection must be dismissed.

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

2. Merits

(a) The parties' submissions

i. The applicant

29. The applicant maintained that his right to a fair hearing by an impartial tribunal had been breached as the second-instance court had lacked impartiality. He stated that the judge, B.K., should have withdrawn because of the mutual incompatibility of the positions of judge and prosecutor. The applicant stated that Judge B.K. had been a deputy

municipal public prosecutor at the time of the first-instance proceedings against him and that it was irrelevant whether the judge had appeared as a prosecutor at the hearing or not. The applicant highlighted that, in any event, deputy public prosecutors represent public prosecutors in the exercise of their duties and referred to the principles of the unity, indivisibility and hierarchical structure of the public prosecutor's department (*princip inokosnosti funkcije javnog tužioca*; see paragraph 18 above). Therefore, the applicant contended that the role of Judge B.K. in the second-instance proceedings had cast doubt on the compliance with the objective test of the impartiality requirement of Article 6 § 1 of the Convention.

ii. The Government

30. The Government maintained that there had been no violation of Article 6 § 1 of the Convention. They firstly submitted that the mere fact that B.K. had once been a member of the Aleksinac Municipal Public Prosecutor's Office was not a reason to cast doubt on his impartiality in his subsequent role as a member of the court bench. In contrast with the *Piersack v. Belgium* case (1 October 1982, Series A no. 53), in the present case B.K. had in no way been superior to the deputy prosecutors, had neither had authority to review or correct submissions of other deputies nor authority to affect the activities of the deputies acting in the applicant's case in any way. According to the criminal investigation file (Ki no. 73/06), it was clear that B.K. had never been assigned to process the applicant's case in his role as deputy prosecutor and that he had not undertaken any action in the proceedings against the applicant.

31. Referring further to the case of *Walston v. Norway* ((dec.), no. 37372/97, 11 December 2001), and the time-frame in which Judge B.K. had been a deputy prosecutor, the Government submitted that Judge B.K. had been appointed as a judge of the Niš District Court on 15 August 2006 (see paragraph 9 above), before the municipal court had even held the first hearing in the applicant's case (see paragraph 7 above). In other words, Judge B.K. had not been a deputy public municipal prosecutor for over two months by the time that the first main hearing had been held, but instead had been a judge of the District Court. Therefore, he could not have appeared at any stage of the proceedings before the domestic courts as a deputy public prosecutor.

32. The Government further explained the domestic mechanisms for the elimination of any irregularities that might cast doubt on the independence and impartiality of the courts, including the possibility of recusal (see paragraph 17 above). They emphasised that the applicant had used one of these mechanisms, namely a request for protection of legality, by raising the particular issue in his case (see paragraph 10 above). However, the highest national court had not considered that the applicant's fears concerning the judge's impartiality had been objectively justified and had concluded that

the conditions for the judge's recusal had not been fulfilled as the judge had not undertaken any role in the criminal prosecution (see paragraph 11 above).

33. Finally, the Government referred again to the *Piersack* case (cited above, § 30 (b)) in concluding that "it would be going too far to the opposite extreme to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves".

(b) The Court's assessment

i. General principles

34. The Court notes that the relevant case-law is set out in *Morice v. France* ([GC] no. 29369/10, §§ 73-78, ECHR 2015; see also, in the criminal context, *Kyprianou v. Cyprus* [GC], no. 73797/01, §§ 118-21, 15 December 2005, and *Sigurður Einarsson and Others v. Iceland*, no. 39757/15, §§ 55-59, 4 June 2019). It can be summed up as follows.

35. Impartiality denotes the absence of prejudice or bias. Its existence or otherwise can be assessed under a subjective approach, that is trying to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether the judge concerned offered sufficient guarantees to exclude any legitimate doubt in that respect. As to the second test, it involves determining whether, quite apart from the personal conduct of an individual judge, there are ascertainable facts which may raise doubts as to a court's impartiality. The litigants' standpoint is important but not decisive; what is decisive is whether any fears in that respect can be held to be objectively justified (see *Micallef v. Malta* [GC], no. 17056/06, § 96, ECHR 2009). In that respect even appearances may be of a certain importance, or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). In order to satisfy the impartiality requirement, the national court must comply with both the subjective and objective tests (see, among many authorities, *Morice*, cited above, § 73).

36. The Court recalls that account must also be taken of questions of internal organisation (see *Piersack*, cited above, § 30 (d), and *A.K. v. Liechtenstein*, no. 38191/12, § 67, 9 July 2015) and that the existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is equally a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any

appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public (see *Micallef,* cited above, § 99, and *Mežnarić v. Croatia,* no. 71615/01, § 27, 15 July 2005). Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports of Judgments and Decisions* 1998-VIII).

37. According to the Court's case law, the fact that a judge has acted in different capacities in the same case may in certain circumstances compromise a tribunal's impartiality. In *Piersack* (cited above, §§ 30-31) the fact that a judge had presided over a criminal trial after having been the head of the public prosecutor's office in charge of the prosecution in the same case was capable of casting doubt on the tribunal's impartiality, in breach of Article 6 § 1 of the Convention. In *Wettstein v. Switzerland* (no. 33958/96, § 47, ECHR 2000-XII) there was an overlap of time between the two sets of proceedings in which one person had exercised both the function of a judge in one case, and that of the legal representative of the party opposing the applicant in the other. As a result, in that case the applicant had reason to be concerned that the judge in question would continue to see him as the opposing party. The Court concluded that this situation could have raised legitimate fears in the applicant that the judge would not approach the case with the requisite impartiality. Lastly, in *Mežnarić* (cited above, §§ 28-37), the judge played the dual roles of a judge at third instance and a lawyer for the applicant's opponents at an early stage of a single set of proceedings, a fact which was also reinforced by the involvement of the judge's daughter as the lawyer for the applicant's opponents during the proceedings. These elements were sufficient for the Court to conclude that there had been a violation of Article 6 § 1 of the Convention in that case.

ii. Application of those principles to the present case

38. Turning to the circumstances of the present case, the Court observes that the applicant was sentenced to six months' imprisonment for dangerous driving by the Aleksinac Municipal Court following his indictment by the Aleksinac Municipal Public Prosecutor's Office (see paragraphs 6 and 7 above). His appeal was dismissed by the bench of the Niš District Court at second-instance. The Court notes that the applicant's fear of a lack of impartiality in the instant case stemmed from the fact that Judge B.K. held the position of deputy municipal public prosecutor in the Aleksinac Municipal Public Prosecutor's Office at the time of the applicant's indictment for the offence in question by that same office, and later took part in the second-instance criminal proceedings against the applicant as the judge rapporteur (see paragraph 9 above).

39. The applicant raised this objection before the Supreme Court (see paragraph 10 above), using an available remedy – an appeal on points of

law (*zahtev za ispitivanje zakonitosti pravosnažne presude*). The Supreme Court upheld the reasoning of the lower court and dismissed the appeal concerning impartiality, finding that Judge B.K. had not taken part in the investigation or the applicant's indictment as a deputy prosecutor and had therefore not needed to be removed from the bench simply because he had held that prosecutor role in Aleksinac during the first-instance proceedings (see paragraph 11 above).

40. In the present case, the Court observes that Judge B.K. did not recuse himself, nor did the applicant request his recusal or submit an objection about his potential prejudice or his conduct during the court's session in the course of the appeal proceedings. The bench gave comprehensive reasons for its ruling and evinced no bias against the applicant in general (contrast *Kyprianou*, cited above, §§ 130-133, and, *mutatis mutandis*, the related case of *Panovits*, cited above, §§ 96-100). Thus, there is no indication that Judge B.K. was actually, or subjectively, biased against the applicant when sitting in the District Court in his case, nor did the applicant allege so.

41. The Court further recalls that the fact that a judge previously in his career has acted as a public prosecutor is not in itself a reason for fearing that he lacks impartiality (see *Piersack*, cited above, § 30(b), and *K. v. Denmark* (dec.), no. 19524/92, Commission decision of 5 May 1993), nor it is the case when a judge was once an officer of the public prosecutor's department in a case that has been examined initially by that department, when the judge in question had never had to deal with that case himself or herself (*Piersack*, ibid.). As regards the judge B.K.'s earlier position, the Court considers that in the present case Judge BK. did not in fact play a dual role in the single set of proceedings which forms the object of the present application. The information provided by the Government (see paragraph 30 above) confirms that Judge B.K. had not been actively or formally involved in the preparatory stages of the criminal proceedings or in the drafting of the indictment by the prosecutor's office. In contrast with *Piersack* (cited above), which concerned a judge who had previously performed the duties of senior deputy to the public prosecutor and had had the power to supervise the activities of the deputy prosecutors, in the present case Judge B.K. had in no way been hierarchically superior to the deputy prosecutors acting in the applicant's case, nor had he given them any instruction on how to act. He had neither authority to review or correct submissions of other deputies nor authority to affect the activities of the deputies acting in the applicant's case in any way. The Court concurs with the Government and recalls its finding in the *Piersack* case (cited above, § 30(b); see also *Jerino' v. Italy* (dec.), no. 27549/02, 2 September 2004):

> "It would be going too far to the opposite extreme to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never

> had to deal with the case themselves. So radical a solution, based on an inflexible and formalistic conception of the unity and indivisibility of the public prosecutor's department, would erect a virtually impenetrable barrier between that department and the bench. It would lead to an upheaval in the judicial system of several Contracting States where transfers from one of those offices to the other are a frequent occurrence. Above all, the mere fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality".

42. While the Court emphasises the importance of "appearances" in this context (see the case-law quote in paragraph 35 above), it finds that the judge's connection to the prosecution in the present case was remote and it is not persuaded that the mere fact that B.K. was a member of the prosecutor's office at the time that the applicant was indicted is sufficient to raise doubts as to the independence and impartiality of the second-instance court. In the light of the foregoing, the Court, like the Supreme Court, does not consider that the applicant's fears with regard to this Judge's impartiality were objectively justified.

43. Consequently, the Court considers that there has been no violation of Article 6 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Judge B.K.'s alleged dual function admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 3 December 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Jon Fridrik Kjølbro
Deputy Registrar	President