



REPUBLIKA E KOSOVËS
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Gjykata Kushtetuese / Ustavni sud / Constitutional Court
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Prishtina, date. 20 May 2010
Ref. No:RK/22/10

RESOLUTION ON INADMISSIBILITY

Case KI 22/09

Dedë Gecaj

vs.

Decision No. PKL-KZZ 76/08 of the Supreme Court of Kosovo
dated 6 April 2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

Applicant

1. The Applicant is Dedë Gecaj, represented in the proceedings before the Constitutional Court by Kolë Krasniqi, a practicing lawyer in Peja.

Challenged decision

2. In his Referral, the Applicant challenges Decision No. PKL-KZZ 76/08 of the Supreme Court of Kosovo dated 6 April 2009.

Subject Matter

3. The Applicant is wanted in Switzerland for allegedly having committed criminal offences in violation of applicable Swiss law. He, however, absconded, but was arrested in Serbia, where he was tried for some of the offences. Pending the decision of the Supreme Court of Serbia on his request for revision, he was released from custody. After the Supreme Court of Serbia confirmed his conviction on 22 March 2002, the Applicant did not turn himself in to serve the remainder of his sentence.

4. The Applicant was arrested in Kosovo in May 2006, but released pending the proceedings initiated by the Swiss authorities with the United Nations Mission in Kosovo to have him transferred to Switzerland. An Agreement to transfer him to Switzerland was entered into, but challenged in court by the Applicant. On 6 April 2009 the Supreme Court of Kosovo decided, in the last instance, that the Agreement was valid. The Applicant alleges that his transfer to Switzerland would expose him to treatment contrary to the Constitution and human rights instruments.

Legal basis

5. Article 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Law), and Section 54(b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of the proceedings before the Court

6. On 22 June 2009, the Applicant filed a Referral with the Constitutional Court, which, on 17 September 2009, he supplemented with a request for interim measures, specifically, the suspension of the procedure for his transfer to Switzerland. On 15 December 2009, the Court decided to reject the Applicant's request for interim measures.

Summary of facts

7. On 11 January 1999 the teacher of the Applicant's daughter was murdered in St. Gallen, Switzerland. According to the Swiss authorities, the teacher, who had become aware of the fact that the Applicant sexually abused his daughter, was killed by the latter in order to eliminate him as a witness. The Applicant absconded and is now being sought by the Swiss authorities for allegedly having committed the criminal offences of murder; possibly intentional homicide; multiple sexual acts with a child; infliction of multiple bodily injuries; multiple rape; multiple coercion; false accusation and/or incitement thereto; violence and threats against authorities and officers; and punishable preparatory act for intentional homicide or abduction.

8. On 25 February, 1999 the Applicant was arrested in Gjakova and kept in detention on remand awaiting his trial before the District Court of Peja. After Security Resolution 1244 had come into effect in 1999 and the United Nations Mission in Kosovo (UNMIK) had assumed, inter alia, the administration of justice, the Supreme Court of Serbia decided to entrust the case to the District Court in Leskovac, which, on 7 December 2000, convicted the Applicant for murder and sentenced him to 4 years imprisonment. The Applicant appealed from this decision to the Supreme Court of Serbia, which released him pending the appeal proceedings.

9. On 28 March 2002, the Supreme Court of Serbia confirmed the District Court's judgment. It further decided, on 28 May 2003, to reduce the Applicant's sentence to 3 years and 6 months and to take into account the period he already spent in detention on remand. The

Applicant did not turn himself in to serve the remainder of his sentence, but remained in hiding.

10. On 19 May 2003, the Swiss authorities issued an arrest warrant against the Applicant on the basis of the above criminal acts (see para. 7) and, on 22 February 2006, concluded an agreement with UNMIK for his transfer to Switzerland in the event that he were to be arrested. On 4 May 2006 he was re-arrested in Kosovo, but released by the trial judge in Peja the same day. On 7 May the Applicant's detention on remand was ordered by the District Court of Peja, but he was not re-arrested until 13 August 2007. He was released from detention on remand on 17 August 2007.

11. On 20 August 2007, a new Agreement for the Applicant's transfer to Switzerland was concluded between the Swiss authorities and UNMIK. By decision of 5 November 2007, the District Court in Peja confirmed the Applicant's transfer. On 28 March 2008, the Supreme Court of Kosovo upheld the Applicant's appeal against the District's Court's confirmation and rejected the request for his transfer to Switzerland as unfounded. The Public Prosecutor submitted a request for protection of legality against this ruling on 24 July 2008.

12. By decision of 6 April 2009, the Supreme Court granted the Public Prosecutor's request for protection of legality and ruled that the transfer of the Applicant to Switzerland on the basis of the Agreement concluded between the Swiss authorities and UNMIK on 20 August 2007 was still valid, pursuant to Article 145 (Continuity of International Agreements and Applicable Legislation) of the Kosovo Constitution.

13. Referring to the "procedural history", the Supreme Court held that the Applicant had been condemned for the crime of murder by a Serbian court and that "the decision cannot be taken into consideration in the perspective of the application of the principle of the *ne bis in idem*", since the transfer Agreement clearly establishes that the transfer will not be granted, if the Applicant "has been acquitted or convicted by final judgment of a Court in Kosovo of the criminal offence for which the transfer is sought (Art. 5.g of the said Agreement), with exclusion of judgments of non-domestic courts".

Applicant's allegations

14. The Applicant emphasizes that his criminal case was adjudicated in last instance by the Supreme Court of Serbia of 28 March 2002. Therefore, the decision of the Kosovo Supreme Court of 6 April 2009 violates:

- Basic principles of the ECHR, the Universal Declaration of HR, the Constitution of Kosovo, and public international law;
- European Convention on Extradition of 13 December 1957 and its protocols of 1975 and 1978;
- Principles of criminal procedural law;
- Articles 451.1, 452.3, and 457.2 of the Provisional Criminal Procedure Code of Kosovo (PCPCK).

15. Moreover, the decision of the Supreme Court of Kosovo of 6 April 2009 violates Article 517.9 PCPCK, which requires that the transfer of a person to a foreign jurisdiction is only allowed, if there is no real risk that the person, whose transfer is sought, will face inhuman or degrading treatment or punishment.

16. According to the Applicant, the Swiss authorities have "*proofed unlawful, discriminating, degrading and revengeful attitude, only because of his national background, respectively the hate against foreigners*".

Assessment of admissibility of the Referral

17. The Applicant complains of a violation of the principle "Ne Bis In Idem", as laid down in Article 34 of the Constitution, which provides that "No one shall be tried more than once for the same criminal act", a principle which, in the Court's opinion, is universal. However, the issue is not whether the Applicant would be retried by the Kosovo courts, but, as he himself clearly indicated, whether he would be retried in Switzerland for the same criminal acts as for which he had already been tried by the Supreme Court of Serbia in the last instance. In these circumstances, it is up to the Applicant to raise this issue with the Swiss authorities, when transferred to Switzerland, and request them to apply the above principle.

18. Moreover, the Agreement enabling the Applicant's transfer to Switzerland was concluded between the Swiss authorities and UNMIK on 20 August 2007. The validity of this Agreement was confirmed in last instance by the Supreme Court of Kosovo on 6 April 2009, ruling that the Applicant "has been condemned for the crime of murder by a Serbian Court" and that "the transfer will not be granted, if the resident has been acquitted or convicted by final judgment of a court in Kosovo of the criminal offence for which his transfer is sought (Article 5(g) of the Agreement)", with the exclusion of judgments of non-domestic courts".

19. The Court, therefore, finds that, since the criminal proceedings against the Applicant terminated with the final adjudication of his case by a non-domestic court, i.e. the Supreme Court of Serbia, the Agreement concerned cannot be considered to violate the above principle.

20. The Applicant also complains that the decision of the Kosovo Supreme Court of 6 April 2007, confirming his transfer to Switzerland, violates Article 517.9 of the Provisional Code of Criminal Procedure of Kosovo (PCPCK), which forbids a transfer to a foreign jurisdiction where the Applicant would risk to be exposed to inhuman or degrading treatment or punishment. In his opinion, the Swiss authorities have "*proofed unlawful, discriminating, degrading and revengeful position, only because of his national background, respectively the hate against foreigners*".

21. In this connection, the Court makes reference to the judgment of the European Court of Human Rights in the Soering Case (Soering v. United Kingdom, series A, No. 161, Appl. No. 14038/88), in which the ECtHR held that extradition might be refused in circumstances, where the applicant has suffered or risks suffering a flagrant denial of a fair trial in the requesting state.

22. However, the Court finds that the Applicant has not submitted any evidence whatsoever that his transfer to Switzerland would violate basic principles of human rights as guaranteed by the international instruments, mentioned by him, or that he would be submitted by the Swiss authorities to treatment contrary to Article 517.9 PCPCK, requiring that the transfer of a person to a foreign jurisdiction is only allowed, if there is a real risk that the person, whose transfer is sought, will face inhuman or degrading treatment or punishment.

23. It follows that the Applicant has not fulfilled the requirements for the submission of a Referral as laid down in Article 22.1 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law, and Section 54(b) of the Rules of Procedure, unanimously,

DECIDES

- I. TO REJECT the Referral as inadmissible.
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.
- III. This Decision is effective immediately.

Judge Rapporteur

Prof.Dr. Gjylieta Mushkolaj



President of the Constitutional Court

Prof. Dr. Enver Hasani