



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

SECOND SECTION

DECISION

Application no.18428/10
Jelena KRSTIĆ
against Serbia

The European Court of Human Rights (Second Section), sitting on 17 September 2013 as a Chamber composed of:

Guido Raimondi, *President*,
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Helen Keller, *judges*,

and Stanley Naismith, *Section Registrar*,

Having regard to the above application lodged on 15 March 2010,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Jelena Krstić, is a Serbian national, who was born in 1948 and lives in Belgrade. She was represented before the Court by Mr R. Subašić, a lawyer practising in the same city.

2. The Serbian Government (“the Government”) were represented by their Agent, Mr S. Carić.

A. The circumstances of the case

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

4. On 25 April 2007 the Municipal Court (*Opštinski sud*) in Niš found the applicant guilty of malfeasance (*zloupotreba službenog položaja*) and

forging official documents (*falsifikovanje službene isprave*) and sentenced her to eleven months in prison, suspended for a period of three years (*uslovna osuda*).

5. On 14 June 2007, within fifteen days as of the date of receipt of this judgment, the applicant personally filed an appeal on time with the District Court (*Okružni sud*) in Niš. This appeal referred to the legal grounds set out in Article 367 of the Code of Criminal Procedure (*Zakonik o krivičnom postupku*, see paragraph 21 below), but did not offer any reasoning. The applicant, however, noted that detailed reasoning would be provided subsequently since she had been ill and could not retain a lawyer earlier.

6. On 11 July 2007 a memorial containing such reasoning was submitted to the District Court. It was signed by the applicant's newly retained counsel and referred to the legal grounds relied on by the applicant in her appeal, but was particularly focused on factual issues.

7. On 26 March 2008 the District Court accepted a separate appeal filed by the Municipal Public Prosecutor (*Opštinski javni tužilac*) and, in so doing, amended the applicant's sentence to an effective prison term (*zatvor*) of eight months, placing particular emphasis on the applicant's multiple prior convictions for similar crimes. The applicant's original appeal of 14 June 2007 was examined pursuant to Article 380 § 1 of the Code of Criminal Procedure (see paragraph 23 below), but was ultimately dismissed as being without merit (*odbijena kao neosnovana*). The memorial of 11 July 2007 was considered as a separate appeal lodged by the applicant's counsel, and was rejected as belated (*odbačena kao neblagovremena*).

8. On 18 September 2008 the Supreme Court (*Vrhovni sud*) rejected the applicant's further appeal on points of law (*zahtev za ispitivanje zakonitosti pravosnažne presude*), dismissing, *inter alia*, the applicant's complaint about the District Court's improper refusal to consider her counsel's memorial of 11 July 2007.

9. In May 2008 the applicant lodged an appeal with the Constitutional Court (*podnela žalbu Ustavnom sudu*). She complained about the procedural fairness in general, the outcome of the criminal case against her, and District Court's refusal to consider the arguments contained in the memorial of 11 July 2007. In conclusion, the applicant requested that the District Court's decision be quashed and the proceedings reopened, as well as that, in the meantime, the enforcement of the criminal sanction imposed be stayed. The applicant, however, never sought compensation for any damage suffered.

10. On 22 December 2009 the Constitutional Court ruled that there had been a violation of the applicant's right to a fair hearing in breach of Article 32 § 1 of the Constitution (see paragraph 13 below). The remainder of the constitutional appeal was dismissed. In its reasoning, the Constitutional Court held, *inter alia*, that the District Court's decision of 26 March 2008 had misinterpreted the character of the memorial of 11 July

2007. It should, indeed, have been accepted for what it was, i.e. the substantiation of the earlier appeal lodged by the applicant personally. Simultaneously, however, the Constitutional Court ruled that the applicant's conviction had been well-founded, that the proceedings in general had been fair, and that the relevant factual circumstances had themselves been clarified during the investigation stage of the proceedings as well as subsequently in the course of the main hearing. There had, however, been no breach of the applicant's "right to an appeal or another legal remedy" within the meaning of Article 36 § 2 of the Constitution (see paragraph 14 below). Specifically, the District Court had not disregarded the applicant's appeal altogether, having considered it in accordance with Article 380 §1 of the Code of Criminal Procedure (see paragraph 23 below). Finally, the Constitutional Court rejected the applicant's request that the enforcement of the criminal sanction imposed upon her be stayed.

11. The Constitutional Court's decision was received by the applicant on 22 February 2010.

12. In the meantime, having been forcibly taken to the Požarevac Penitentiary (*Kazneno-poravni zavod u Požarevcu*), the applicant apparently attempted to commit suicide. Ultimately, however, she served the full sentence imposed by the courts. The applicant also complained in respect of her transfer to the Požarevac Penitentiary to various instances.

B. Relevant domestic law and practice

1. *The Constitution of the Republic of Serbia (Ustav Republike Srbije; published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/06)*

13. Article 32 § 1 provides that "[e]veryone shall have the right to ... [a fair hearing before a] ... tribunal ... [in the determination] ... of ... any criminal charges against him".

14. Article 36 § 2 provides that "everyone shall have the right to an appeal or another legal remedy against a decision concerning the determination of his rights, obligations or lawful interests".

15. Article 170 provides that a "constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed."

2. *The Constitutional Court Act (Zakon o Ustavnom sudu; published in OG RS no. 109/07)*

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

Article 7 § 1

“The decisions of the Constitutional Court shall be final, enforceable and binding.”

Article 82 § 1

“A constitutional appeal may be lodged against an individual decision or an action of a State body or an organisation exercising delegated public powers which violates or denies human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies have already been exhausted or have not been prescribed or where the right to their judicial protection has been excluded by law.”

Article 84 § 1

“A constitutional appeal may be lodged within thirty days of receipt of the individual decision or the date of commission of the actions ... [in question] ...”

Article 89 §§ 2 and 3

“When the Constitutional Court finds that an ... individual decision or action has violated or denied a human or minority right or a freedom guaranteed by the Constitution, it shall annul the ... decision in question or ban the continuation of such action or order the implementation of other specific measures as well as the removal of all adverse consequences within a specified period of time.

The decision of the Constitutional Court accepting a constitutional appeal shall constitute a legal basis for requesting compensation or the removal of other adverse consequences before a competent body, in accordance with the law.”

3. *The Code of Criminal Procedure (Zakonik o krivičnom postupku, published in the Official Gazette of the Federal Republic of Yugoslavia nos. 70/01 and 68/02, as well as in OG RS nos. 58/04, 85/05, 115/05, 46/06 and 49/07)*

17. Articles 184 and 185 § 1 provide, *inter alia*, that a party who has failed to lodge an appeal on time for “justified reasons” (*iz opravdanih razloga*) shall have the right to file a request for procedural reinstatement (*povraćaj u pređašnje stanje*) together with the belated appeal. The acceptance of the former by the President of the trial bench shall also lead to the examination of the latter at second instance. The request for procedural reinstatement must be filed within a period of eight days as of when the reasons for the defendant’s failure to lodge the appeal have ceased to exist. In any event, such a request may not be filed once three months have elapsed as of the original deadline for the submission of the appeal.

18. Article 363 § 1 provides that an appeal against a judgment rendered at first instance may be filed within a period of fifteen days as of its receipt.

19. Article 364 § 1 provides, *inter alia*, that such an appeal may be filed by the defendant as well as his legal counsel.

20. Article 366 § 2 provides, *inter alia*, that where an appeal has been filed by the defendant personally, but where its reasoning has not been submitted at the same time, the court shall invite the defendant to

supplement his appeal by a certain deadline. Should he fail to do so, his appeal shall nevertheless be considered by the appellate court unless the impugned decision itself cannot be identified.

21. Article 367 provides that an appeal may be filed on the grounds of: (a) significant procedural deficiencies; (b) misapplication of the relevant substantive legislation; (c) erroneously established facts of the case; and (d) any issues regarding the sentence imposed.

22. Article 366 § 4 provides, *inter alia*, that new facts and new evidence may be introduced in the appeal, but that the defendant must explain why this was not done earlier.

23. Article 380 § 1 provides, *inter alia*, that an appellate court shall examine the impugned judgment only in respect of the objections raised in the appeal. It shall nevertheless always consider, of its own motion, whether certain procedural rules were adhered to, as well as whether the relevant substantive legislation was misapplied to the detriment of the defendant.

COMPLAINTS

24. The applicant referred to Articles 5 and 6 of the Convention, as well as Article 2 of Protocol No. 7. In substance, however, she complained about: (a) the general fairness and outcome of the criminal proceedings brought against her; (b) the District Court's refusal to properly assess her appeal, as supplemented by the memorial of 11 July 2007; and (c) the respondent State's ultimate failure to adequately summon her for the purpose of serving the sentence imposed, which resulted in her being forcibly taken to the Požarevac Penitentiary.

THE LAW

25. It being the "master of the characterisation" to be given in law to the facts of any case before it (see, for example, *Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005), the Court considers that the applicant's complaints, as described under (a), (b) and (c) above, fall to be examined under Article 6 § 1 of the Convention, Article 2 § 1 of Protocol No. 7, and Article 5 § 1 (a) of the Convention respectively.

These provisions, in so far as relevant, read as follows:

Article 5 § 1 (a) of the Convention

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court ...”

Article 6 § 1 of the Convention

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

Article 2 of Protocol No. 7

“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.”

A. The parties’ submissions

26. The Government maintained that ever since the Constitutional Court had adopted its decision in the present case the applicant could not be considered as a “victim” within the meaning of Article 34 of the Convention. She had also failed to make use of the redress provided for in Article 184 of the Code of Criminal Procedure (see paragraph 17 above).

27. The applicant maintained that her application complied with the relevant admissibility requirements. Also, regarding the Constitutional Court’s decision, she argued that it had attempted to do the impossible: find a violation of her rights in respect of the rejection of her counsel’s memorial of 11 July 2007 and simultaneously rule that the proceedings as a whole were nevertheless adequate. All this in a situation where the factual issues raised in the said memorial were never considered on appeal.

B. The Court’s assessment

1. As regards the overall fairness and outcome of the proceedings brought against the applicant

28. In view of all the material in its possession, and to the extent that it is competent to examine the allegations made, the Court finds that the domestic courts carried out an independent assessment of all the circumstances of the case and the various evidence adduced by the parties and gave adequate reasons for their judgments. These judgments were given after adversarial proceedings during which the applicant had been able to present the observations and legal grounds which she deemed necessary, together with arguments in support of her position. It cannot therefore be said that the proceedings failed to meet the requirements of fairness under Article 6 § 1 of the Convention, particularly bearing in mind that the applicant’s case was considered at three instances, as well as the Constitutional Court thereafter which itself held, *inter alia*, that the applicant’s conviction had been well-founded, that the proceedings in general had been fair, and that the relevant facts had been sufficiently

clarified at first instance (see paragraph 10 above; see also paragraph 22 above in so far as Article 366 § 4 of the Code of Criminal Procedure implies that it is indeed primarily for the first instance courts to establish the relevant facts). The applicant, for her part, certainly offered no compelling arguments to the contrary.

29. It follows that this complaint is therefore manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. It is, lastly, understood that it is not the Court's task to act merely as a court of appeal or, as is sometimes stated, as a court of fourth, or in the present case fifth, instance in respect of the decisions taken by domestic courts (see, among many other authorities, *Vidal v. Belgium*, 22 April 1992, § 32, Series A no. 235-B and *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B).

2. *As regards the District Court's refusal to consider the applicant's memorial of 11 July 2007*

30. The Court recalls that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status of a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded appropriate and sufficient redress, for the breach of the Convention or Protocol complained of (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 180 and 193, ECHR 2006-V, as well as the authorities cited therein; see also *Kin-Stib and Majkić v. Serbia*, no. 12312/05, § 77, 20 April 2010).

31. Regarding the present case, it is noted that the Constitutional Court acknowledged the violation alleged by the applicant, albeit under Article 32 § 1 of the Constitution rather than Article 36 § 2 thereof (see paragraphs 10, 13 and 14 above). In particular, it held that the District Court's decision of 26 March 2008 had misinterpreted the character of the memorial of 11 July 2007 instead of accepting it as the substantiation of the earlier appeal lodged by the applicant personally. Further, the Court observes that the applicant had not sought any compensation in her constitutional appeal, which was why none was considered. Finally, in view of the Constitutional Court's justified holding to the effect that the impugned proceedings had been fair, considered in their entirety (see paragraph 28 above), it cannot either be held against it that no retrial was ordered.

32. It follows that this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

3. *As regards the applicant's allegation that she was unlawfully taken to the Požarevac Penitentiary in order to serve her sentence*

33. The Court recalls that, under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his or her Convention grievances. It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised at least in substance (see *Castells v. Spain*, 23 April 1992, § 32, Series A no. 236; and *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

34. Turning to the matter at hand, the Court recalls that it has already held that a constitutional appeal should, in principle, be deemed effective within the meaning of Article 35 § 1 of the Convention in respect of all applications introduced against Serbia as of 7 August 2008 (see *Vinčić and Others v. Serbia*, nos. 44698/06 and others, § 51, 1 December 2009). It sees no reason to hold otherwise in the present case which was introduced on 15 March 2010, but where there is no evidence in the case file indicating that the applicant had ever raised the complaint in question before the Constitutional Court.

35. In view of the foregoing, and even assuming that there had been no other effective redress at the applicant's disposal, 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 the constitutional appeal's avenue.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stanley Naismith
Registrar

Guido Raimondi
President