

PKL-KZZ 76/08  
06 April 2009

**THE SUPREME COURT OF KOSOVO**

Composed by the following judges

MARIA GIULIANA CIVININI	Presiding Judge	SC EULEX Judge
GUY VAN CRAEN	Member	SC EULEX Judge
EMILIO GATTI	Member	SC EULEX Judge
AGIM KRASNIQI	Member	SC JUDGE
AVDI DINAJ	Member	SC JUDGE

In the case against the accused:

D. G. (DOB [REDACTED] in [REDACTED]), of father M. and mother T. (maiden N.), from [REDACTED] Municipality, [REDACTED] Region, Kosovo.

For the criminal acts of Murder contrary to Article 112 of the Swiss Criminal Code (SCC); possibly Intentional Homicide, contrary to Article 111 SCC; Multiple Sexual Acts with a child, contrary to Article 187 SCC; Multiple Bodily Injuries, contrary to Article 123 SCC; Multiple Rape, contrary to Article 190 SCC; Multiple Coercion, contrary to Article 181 SCC; False Accusation and/or Incitement thereto, contrary to Articles 303 and 24 SCC; Violence and Threats against Authorities and Officers, contrary to Article 285 SCC; and Punishable Preparatory Act for Intentional Homicide or Abduction, contrary to Article 260 bis SCC.

Acting upon the request for protection of legality filed 24 July 2008 by the Public Prosecutor of Kosovo against the ruling of the Supreme Court of Kosovo, PN-KR 335/2007, dated 28 March 2008

The Request for Protection of Legality is confirmed as well-founded. The ruling of the second instance court dated 28 March 2008 violated the law in holding that the Constitutions no longer in force and not applicable at present in Kosovo barred D. G.'s transfer to Switzerland in compliance with Article 457 par. 2 of the CPCK.

## REASONING

### Procedural history

D. G. is sought by the Swiss authorities for allegedly committing the offences listed above.

The facts of the case, as alleged by the Swiss authorities, are that approximately between 1995/96 to January 1999, Mr. G. committed multiple acts of rape and sexual and physical abuse and violence against his daughter, B. born on [REDACTED] in [REDACTED]. Based on the reconstruction of the events made by the Swiss authorities, when B. teacher, Mr. P. S., became aware of the abuse against her, Mr. G. decided to eliminate the witness of his abuse. On 11 January 1999, Mr. G. shot and killed Mr. S. and shortly after fled Switzerland for Serbia and Montenegro without facing justice for this act. Before fleeing Switzerland, Mr. G. also committed the crimes of violence and threats against Swiss authorities and officers.

On 25 February 1999, the defendant was arrested in Kosovo and charged pursuant to Law on Criminal Proceedings of the Socialist Federal Republics of Yugoslavia of 1977. He appeared before the District Court of Pejë/Peć on 1 March 1999 and he remained in custody under the jurisdiction of the District Court of Pejë/Peć pursuant to a Court order for detention on remand.

After the UNSC Regulation 1244 was adopted and became effective, on 27 September 1999, the Supreme Court of the Republic of Serbia changed the venue of the case from Pejë/Peć to the District Court of Leskovać "[...] for the purpose of the

*process appropriateness” [...] “as it is obvious that the proceeding shall be conducted before the District Court of Leskovać in an easier manner”* in accordance with Article 35, paragraphs 1 and 3 of the mentioned law.

On 7 December 2000, the defendant was condemned by the Court of Leskovać to a prison term of four years for the crime of murder under article 47, par. 1, of the Criminal Code of Serbia. He was released from pre-trial detention on 7 December 2000, pending the final judgment by the Supreme Court of Serbia. The decision was confirmed by the Supreme Court of Serbia on 28 March 2002 and on 28 May 2003, in acceptance of a request for the extraordinary mitigation of the sentence, the penalty was reduced to three years and six months of imprisonment with credit for time served from 27 February 1999 to 7 December 2000.

On 19 May 2003 and later on 6 December 2005, Swiss authorities issued a warrant for defendant’s arrest for the criminal acts as specified above.

On 22 February 2006, Switzerland’s Director of the Federal Office of Justice confirmed the acceptance of the SRSg’s proposal to conclude an agreement regarding defendant’s extradition.

On 4 May 2006, the defendant was arrested in Kosovo and, the next day, the UNMIK pre-trial judge of Pejë/Peć ordered the defendant to appear at the police station at scheduled times. He was released the same day.

On 7 May 2006, acting upon an appeal of the PP, the UNMIK panel of the District Court of Pejë/Peć ordered the detention on remand against G [REDACTED] that was arrested only on 13 August 2007. The same day, the pre-trial judge ordered detention on remand against the defendant.

On 17 August 2007, acting upon appeal of the defense counsel, the UNMIK three judge panel of the District Court of Pejë/Peć terminated the detention with regard to the crimes of murder, false accusation and multiple coercion and confirmed the detention on remand for the criminal offences of multiple sexual acts with a child, multiple bodily injuries, multiple rape, violence and threats against authorities and officers, punishable preparatory act for international homicide or abduction.

On 20 August 2007, a new Proposal for the transfer of Mr. G [REDACTED] from the Special Representative of the Secretary-General (SRSg) Mr. Rucker dated 3 August 2007,

was accepted by the Swiss Federal Minister of Foreign Affairs Ms. Micheline Calmy-Rey.

On 3 September 2007 the UNMIK pre-trial judge of District Court of Pejë/Peć pursuant article 521, par. 2 PCPCK ruled that the prerequisites for transferring D [REDACTED] G [REDACTED] to Switzerland were met as to the criminal charges of: 1) multiple sexual acts with a child; 2) multiple bodily injures, 3) multiple rape, 4) violence and threats against authorities and officers, 5) punishable preparatory act for international homicide or abduction.

On 5 November 2007 the UNMIK three judge panel of the District Court of Pejë/Peć issued its ruling granting the petition for the transfer of the defendant to Switzerland for the criminal charges of: 1) Murder contrary to Article 112 of the Swiss Criminal Code (SCC); 2) possibly Intentional Homicide, contrary to Article 111 SCC; 3) Multiple Sexual Acts with a child, contrary to Article 187 SCC; 4) Multiple Bodily Injuries, contrary to Article 123 SCC; 5) Multiple Rape, contrary to Article 190 SCC; Multiple Coercion, contrary to Article 181 SCC; 5) False Accusation and/or Incitement thereto, contrary to Articles 303 and 24 SCC; 6) Violence and Threats against Authorities and Officers, contrary to Article 285 SCC; and 7) Punishable Preparatory Act for Intentional Homicide or Abduction, contrary to Article 260 bis SCC.

An appeal against this ruling was filed. The Supreme Court of Kosovo, with its ruling on 28 March 2008, decided that *"the ruling of the District Court of Pejë/Peć dated 5 November 2007 in Case PP No 469/06 (Sec. 15/06) is hereby modified and the petition for the transfer of D [REDACTED] G [REDACTED] to Switzerland is rejected as unfound pursuant to Article 434, Paragraph 3 of the PCPCK"*.

On 24 July 2008 a request for protection of legality against this Ruling asking the Supreme Court of Kosovo *"to, under the authority of PCPCK Article 457, paragraph 2, find that"* the request *"is well-founded and to determine that the 28 March 2008 ruling of the second instance court violated the law in holding that constitution no longer in force and not applicable at present in Kosovo barred D [REDACTED] G [REDACTED]'s transfer to Switzerland"*.

### Motivation

#### On the competence

The file, related to a case assigned on 21 August 2008 to international judges according to UNMIK Regulation No. 2000/64, has been handed over to the President of the Assembly of the EULEX Judges who has decided to maintain the case under the responsibility of EULEX Judges according to article 15.2 Law on Jurisdiction.

#### On the admissibility of the request for protection of legality

According to article 451 of the KCPC a request for protection of legality may be filed “against a final judicial decision or against judicial proceedings which preceded the rendering of that decision”.

The panel reckons that the ruling of the Supreme Court 28 March 2008 presents all the elements of a “final judicial decision”.

It is a “judicial decision” in the sense of art. 451 for the following reasons: 1) on the base of general principles, when the Law entrusts an affair to the responsibility of the judiciary, the consistent activity is jurisdictional and the taken decisions have the nature of judicial decisions; 2) in any case, the extradition procedure and the relevant decision have not administrative nature, not even in a substantial point of view; in fact, according to the discipline of article 521 and following of KCPC, 2a) the pre-trial judge has the power to order “other investigative actions” for ascertaining if the prerequisite fixed by article 517 n. 7 is existing; 2b) the final rejecting ruling doesn't leave to the competent political authority any space to opportunity evaluations (art. 522, par. 3: the final ruling by which transfer is rejected shall be transmitted via the competent public entity in the field of judicial affairs to the competent authority who shall notify the foreign country thereof.”); 2c) in case of ruling granting the transfer, the competent authority can only: - postpone the transfer for allowing the holding of an ongoing proceeding in front of a domestic court or the execution of a penalty; - refuse the transfer if the prerequisites ex art. 517 are not met or the crime for which the transfer is requested is punishable by up to 3 years of imprisonment or for which a foreign court had imposed a punishment of up to one year of imprisonment; 2d)

consequently the transfer can be refused only on the base of legality (or justice's administration related) reasons and not for opportunity ones (as it was possible under the Law on Criminal Proceeding of 1986, article 533); 2f) in conclusion, the procedure sets by the Code – characterized by: possibility of new investigations, a mandatory negative decision, the overcoming of legality criteria on opportunity criteria – is fully jurisdictional.

It is “final”, because no ordinary remedies are admissible.

It's useful to underline that, with its “judgment” 4 August 2005 (defendant Ridvan HALIMI), the Supreme Court of Kosovo decided on a request for protection of legality regarding extradition to Norwegian jurisdiction, considering the remedy implicitly admissible.

#### *On the extradition of a citizen of Kosovo*

In its ruling on 28 March 2008, the Supreme Court modified the ruling of the District Court of Pejë/Peć on 5 November 2007 and rejected the petition for the transfer of the defendant, arguing that: a) at the time of the alleged committed crimes, D. G. was a citizen of Serbia and, on the base of the principle of the most favorable law (article 2 KCC), he had the right not to be extradited from Yugoslavia granted by the former Yugoslavia and by the Serbian Constitutions; b) at that time no extradition agreement between Yugoslavia and Switzerland was in force.

The Public Prosecutor claims that the principle of the most favorable law applies to substantive criminal law and not to a transfer proceeding.

The Court observes that:

- The principle of the most favorable law is set by article 2,1 par. 2 of the KCC establishing that “in the event of a change in the law applicable to a given case prior to a final decision, the law more favorable to the perpetrator shall apply”.
- The principle is unequivocally referred to the application of the substantive criminal law and not of the procedural law as it is make clear by the combined reading of articles (principle of legality and sub-principle or non-retroactivity of the substantial criminal law) and 2, par 1 KCC.

- The rules on extradition (both procedural and executing extraditions) are procedural rules being evident that they are not included in the criminal law provision as elements of the typical crime.
- Procedural rules apply both to the ongoing and new-introduced proceedings and the time of the alleged committed crime is not relevant, (see art. 548 and following KCPC).
- When the extradition procedure for the transfer of the defendant started, the Constitutions of FRY and Republic of Serbia were no longer in force in Kosovo. At that time both have been superseded by the Constitution Framework for Provisional Self-Government (UNMIK Regulation 2001/9, not including any right of a national not to be extradited), UNMIK Regulation 2003/26, UNMIK Regulation 2003/34 and PCPCK, stating in article 533 that: “Notwithstanding Article 517 subparagraph 1 of the present Code, a resident of Kosovo may be transferred to a foreign jurisdiction if: 1) His or her transfer is permitted by an international agreement; and 2) All the prerequisites for transfer set forth in Article 517 of the present Code, except for subparagraph 1, are met.”

*On the existence of a valid international agreement*

On 22 February 2006 an international *ad hoc* agreement regarding defendant’s extradition/transfer was concluded between UNMIK and Switzerland; it was replaced on 20 August 2007 by a new *ad hoc* agreement signed by the Special Representative of the Secretary-General (SRSG) Mr. Rucker and the Swiss Federal Minister of Foreign Affairs Ms. Micheline Calmy-Rey.

The SRSG’s power legal base is UNMIK Regulation 2003/34, sections 2 and 3, that applies “to criminal offences committed prior to the date of entry into force of the present Regulation which would constitute criminal offences at the time of their commission” (it is the case of the criminal offences alleged committed by the defendant).

The agreement is still valid according to art. 145 of the Constitution of the Republic of Kosovo (“Continuity of international agreement and applicable legislation”).

On the application of the principle of the "ne bis in idem"

As stressed in the "procedural history", Do G has been condemned for the crime of murder by a Serbian Court.

The decision cannot be taken in consideration in the perspective of the application of the principle of the "ne bis in idem". In fact, the transfer agreement of 20 August 2007 clearly establishes that 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" ( art. 5 point g), with exclusion of judgments of not-domestic Courts.

Accordingly, the Supreme Court of Kosovo decides as in the enacting clause of this decision.

Prishtinë/Priština, 6 April 2009

Presiding Judge

Maria Giuliana Cirinini

Panel member

Guy Van Craen

Panel member

Avdi Dinaj

Delivered .....

Recording Clerk

Edita Kusari

Panel member

Emilio Gatti

Panel member

Agim Krasniqi