

Having regard to Article VI.3 b) of the Constitution of Bosnia and Herzegovina, Article 59 paragraph 2 item 2 and Article 61 paragraphs 1 and 3 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina - New Amended Text (Official Gazette of Bosnia and Herzegovina, No. 2/04), the Constitutional Court of Bosnia and Herzegovina, in Grand Chamber, in case **no. AP-105/03** and deliberating on the appeal of **A.P.**, in the following composition:

Mato Tadić, President,

Prof. Dr. Ćazim Sadiković, Vice-President,

Prof. Dr. Miodrag Simović, Vice-President,

Hatidža Hadžiosmanović, Judge,

Valerija Galić, Judge,

at the session held on 30 November 2004, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of **A. P.** against the Judgment of the Supreme Court of the Republika Srpska, no. Kvlp-50/02 of 10 February 2003, the Judgment of the County Court in Doboj, no. Kz-168/02 of 18 October 2002 and the Judgment of the Basic Court in Doboj, no. K-107/ 01 of 5 June 2002 is dismissed as ill-founded.

This Decision shall be published in the Official Gazette of Bosnia and Herzegovina, the Official Gazette of the Federation of Bosnia and Herzegovina and the Official Gazette of the Republika Srpska.

REASONS

I Introduction

1. On 7 April 2003 **A. P.** (hereinafter: the appellant) from Petrovo, represented by **D. R.**, a lawyer practicing in Doboj, filed an appeal with the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court) against the judgment of the Supreme Court of the Republika Srpska (hereinafter: the Supreme Court), no. Kvlp-50/02 of 10 February 2003, the judgment of the County Court in Doboj (hereinafter: the County Court), no. Kz-168/02 18 October 2002 and the judgment of the Basic Court in Doboj (hereinafter: the Basic Court), no. K-107/01 of 5 June 2002.

II Proceedings before the Constitutional Court

2. Having regard to Article 21 paragraph 1 of the Rules of Procedure of the Constitutional Court, on 29 October 2004 the Supreme Court and the Basic Court were requested to submit their responses to the appeal.

3. The Public County Prosecutor's Office in Doboj submitted its response to the appeal on 18 November 2004. The Supreme Court submitted its response to the appeal on 19 November 2004.

4. Having regard to Article 25 paragraph 2 of the Rules of Procedure of the Constitutional Court, on 22 November 2004 the responses of the Supreme Court and Public County Prosecutor's Office in Doboj were communicated to the appellant.

III Facts

5. The circumstances of the case, as they appear from the appellant's statements and the documents submitted to the Constitutional Court, can be summarized as follows.

6. By judgment no. K-107/01 of 5 June 2002 of the Basic Court, the appellant was found guilty of having committed the criminal offence of people-trafficking for the purpose of prostitution under Article 188 paragraph 1 and Article 188 paragraph 4 of the Criminal Code of the Republika Srpska (*Official Gazette of the Republika Srpska*, nos. 22/00, 33/00 and 37/01). According to the same judgment, the appellant was sentenced to two years' imprisonment and a security measure of prohibition of performance of independent catering business for a period of five years was imposed.

7. By judgment no. Kz-168/02 of 18 October 2002, the County Court partially granted the appellant's appeal, altered the first instance judgment in the part relating to the legal classification of the committed criminal offence in that it assessed the appellant's actions as constituting the criminal offence of people-trafficking for the purpose of prostitution under Article 188 paragraph 4 in conjunction with paragraph 1 of the Criminal Code of the Republika Srpska. As to the criminal sanction, the first instance judgment remained unaltered.

8. The appellant submitted to the Supreme Court a request for extraordinary review of the final and binding judgment. By judgment no. Kvlp-50/02 of 10 February 2003, the Supreme Court dismissed the request as ill-founded

IV Applicable laws

9. **Criminal Code of the Republika Srpska** (*Official Gazette of the Republika Srpska*, nos. 22/00, 33/00 and 37/01).

Article 188 paragraphs 1 and 4

(1) *Whoever for profit, induces, incites or lures other persons into offering sexual services,, or in some other way enables a person's transfer to another for the purpose of offering sexual services, or*

whoever takes part in any way in organizing or maintaining offering sexual services, shall be punished by imprisonment term ranging between six months and five years

(4) If the offense described under paragraphs above has been committed against a person under twenty one years of age, the perpetrator shall be punished by imprisonment term ranging between one and twelve years.

10. **Criminal Procedure Code of the Republika Srpska** (*Official Gazette of the SFRY*, nos. 4/77, 14/85, 74/87, 57/89, 3/90 and 27/90 and *Official Gazette of the Republika Srpska*, nos. 26/93, 14/94, 6/97 and 61/01).

Article 4 paragraph 2

(2) The accused must be given the opportunity to state his position concerning all facts and evidence against him and to present all facts and evidence in his favor.

Article 333 paragraph 1 item 1

(1) Aside from the cases specifically envisaged in this law the transcript or record of the testimony of witnesses, codefendants or participants already convicted of the crime and records or other documents concerning the findings and opinion of experts may be read by decision of the panel only in the following cases:

1) if the persons examined have died, have become mentally ill or cannot be found, or if their appearance before the court is impossible or very difficult because of age, illness or other important causes:...

V Appeal

a) Statements from the appeal

11. The appellant alleges that the challenged judgments violated his rights to a fair trial provided for in Article II.3 e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 3 item d) of the European Convention of the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention) and his right to prohibition of discrimination provided for in Article II.4 of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

12. The appellant sees the violation of the right to a fair trial in the following: a) the witnesses – girls who were foreign nationals – were heard in the preliminary criminal proceedings, after which their statements were read at the main hearing without their presence; b) despite the fact that one of the witnesses was an under-age girl, the court did not evaluate whether she had the capacity to be heard as witness according to the provisions of the Criminal Procedure Code; c) an interpreter of the International Police Forces for Bosnia and Herzegovina was used in the course of hearing the girls instead of an authorized court interpreter as provided for in Criminal Procedure Code; and d) the Supreme Court did not correctly apply the substantive law, and it should have found the appellant guilty under Article 188 paragraph 1 of the Criminal Procedure Code, which was a milder provision than that of Article 188 paragraph 4 in conjunction with paragraph 1 of the Criminal Code of the Republika Srpska which was applied by the lower instance courts.

13. As to the complaints about the violation of the right to prohibition of discrimination, the appellant alleges that the Supreme Court did not use the jurisprudence applicable in cases such as his. As an example he offers the case relating to judgment no. Kvlp-28/02 of 4 November by which the Supreme Court decided on the request for extraordinary review of a final and binding judgment. In that case, the accused was found guilty of having committed the criminal offence under Article 188 paragraph 4 of the Criminal Code of the Republika Srpska. However, after a violation of Article 6 paragraph 3 item d) of the European Convention was found because the statements made by the witnesses during the investigation proceedings were read at the main hearing at which they were not present, the Supreme Court annulled the lower instance judgments and referred the case for new proceedings.

b) Reply to the appeal

14. The Supreme Court alleges that the appeal is unfounded and proposes that it be dismissed. It further alleges that the appellant presented the same complaints of a violation of his constitutional rights in his request for extraordinary review of the final and binding judgment. The Supreme Court recalls that it pointed out in the decision dismissing the appellant's request that the lower instance judgments were not solely based on the statements made by the injured girls who were foreign nationals, but also on the statement made by Z. A. and other evidence.

15. The Public County Prosecutor's Office alleges that the appeal is unfounded and proposes that the appeal be dismissed pointing out that the statement set forth in the appeal was not the only evidence used in adoption of the challenged judgments.

VI Admissibility

16. According to Article VI.3 b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

17. According to Article 15 paragraph 3 of the Rules of Procedure of the Constitutional Court, the Court may examine an appeal only if all effective legal remedies which are available under the law against the judgment or decision challenged by the appeal have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

18. In the instant case, the appeal is directed against the judgment of the Supreme Court, no. Kvlp-50/02 of 10 February 2003 against which there are no further effective legal remedies available according to the law. The appeal was filed on 7 April 2003, i.e. within the time limit of 60 days as laid down in Article 15 paragraph 3 of the Rules of Procedure of the Constitutional Court. Finally, the appeal has met the requirements set out in Article 16 paragraph 2 of the Rules of Procedure of the Constitutional Court.

19. In view of the provisions of Article VI. 3. b) of the Constitution of Bosnia and Herzegovina, Article 15 paragraph 3 and Article 16 paragraph 2 of the Rules of Procedure of the Constitutional Court, the Constitutional Court established that the requirements with regard to the admissibility have been met in this case.

VII Merits

20. The appellant challenges the aforementioned judgments complaining about the violation of the right provided for in Article II.3 e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 3 item d) of the European Convention, and the rights provided for in Article II.4 of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

The right to a fair hearing

21. Article II.3 e) of the Constitution of Bosnia and Herzegovina reads as follows:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

- e. The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.*

Article 6 paragraph 3 item d) of the European Convention reads as follows:

(3) Everyone charged with a criminal offence has the following minimum rights:

- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
...

22. The Constitutional Court points out that Article 6 of the European Convention is applicable given the fact that the case concerned is a criminal case in which the appellant was found guilty of a criminal offence prescribed by law and sentenced accordingly. Hence, there is no doubt that the outcome of the proceedings in question was of a decisive importance for the determination of “any criminal charge against him” as laid down in the first sentence of Article 6 of the European Convention.

23. In the present case, the Constitutional Court should examine whether the challenged judgments violated the appellant’s right to examine witnesses against him under Article 6 paragraph 3(d) of the European Convention. Namely, it is pointed out in the appeal that the statements of witnesses – girls with foreign citizenship – on which the court based its judgment were read out at the main trial. In doing so, their presence was not secured at the main trial and the appellant was not able to pose questions to them.

24. First of all, the Constitutional Court points out that Article 6 paragraph 3(d) of the European Convention comprises two rights: 1) right of the accused to examine witnesses for the prosecution and 2) right to witnesses for the defence under the same conditions as witnesses for the prosecution. The said two rights are independent of one another (see European Court of Human Rights, *Unterpertinger vs. Austria*, Judgment of 24 November 1986, Series A-110).

25. In the present case, the allegations made in the appeal relate to the first part of Article 6 paragraph 3(d) of the European Convention. The Constitutional Court holds that the said provision requires putting the accused on an equal footing with the prosecutor regarding the summoning and examination of witnesses. However, the Constitutional Court points out that the said provision does not have absolute effect, i.e. the rights of the accused to summon and examine witnesses are not unlimited. For instance, there are cases when the law does not allow the accused to examine

witnesses directly, for example in cases in which the statements of the so-called “protected witnesses” are used. In addition, there are situations where objective circumstances prevent examination at the main trial of a witness who made a statement in the preliminary proceedings in the absence of the accused or his defence counsel.

26. If there was no appropriate and prescribed opportunity for the accused to examine a witness, a judgment cannot be based solely or mostly on the statement of that particular witness (see Judgments of the European Court of Human Rights: *Kostovski* of 20 November 1989, Series A-166; *Windisch* of 27 September 1990, Series A-186; *Artner* of 28 August 1992, Series A-242-A). The use of a statement that was made by a person in the preliminary stage of the proceedings as evidence, if this person, according to national law, refuses to offer that evidence in the courtroom at a subsequent point in time, may result in a judgment only if there is evidence that corroborates that particular statement (see, *mutatis mutandis*, European Court of Human Rights, *Unterpertinger vs. Austria*, Judgment of 24 November 1986, Series A-110). The same applies to the statement of a witness who disappeared and who cannot be summoned to appear before a court of law (see, *mutatis mutandis*, European Court of Human Rights, *Artner*, Judgment of 28 August 1992, Series A-242-A).

27. In addition to the case-law of the European Court of Human Rights, the Constitutional Court invokes its position taken when adopting decisions in such cases, reading as follows: “although, on one hand, the said statements were made both in the investigative proceedings and before the presiding judge, they were read out at the main trial. Accordingly, the appellant had an opportunity to express his position in respect of the statements made” (see Constitutional Court of Bosnia and Herzegovina, Decision U 101/03 of 17 May 2004, paragraph 26; *Official Gazette of Bosnia and Herzegovina*, no. 40/04).

28. The quoted case-law of the European Court of Human Rights and of the Constitutional Court of Bosnia and Herzegovina will be applied to the present case in which the appellant claims that the challenged judgments of ordinary courts violated his right under Article 6 paragraph 3(d) of the European Convention given the fact that was not given an opportunity during the main trial to examine witnesses who made statements in the preliminary proceedings.

29. Having examined the challenged judgments, the Constitutional Court confirmed that the statements of the girls who were witnesses were read out at the main trial. However, the court read out the said statements on the basis of powers under Article 333 paragraph 1 of the Criminal

Procedure Code. Moreover, the Basic Court supplied logical reasons relying on material evidence as to why the statements of the witnesses were read out instead of securing the presence of the witnesses at the main trial. The reason was that the witnesses – girls with foreign citizenship – no longer had residence in the Republika Srpska, which was confirmed by a communication of the competent police station. Furthermore, the Basic Court pointed out that the statements of the said witnesses were presented to the appellant so that he could make remarks relating thereto. The appellant challenged the statements at the main trial as part of his defence. It may be seen from reasons adduced for the judgment of the Basic Court that it was not based solely on the statements of the said witnesses but on the statement of Z. A. The said person stated at the main trial that he had engaged in sexual intercourse with one of the girls from the catering establishment owned by the appellant. He would pay for the sexual services provided and give money to the persons in charge of security of the establishment. Certain material evidence including a certificate of non-punishment, a certificate on seized items, photos, etc. was presented at the main trial. After ordinary and extraordinary remedies were used in the subsequent appellate proceedings, both the County Court and the Supreme Court reasoned that the judgment of the court of first instance was not based solely on the statements of the said girls but on other evidence as well and added that the said statements were read out on the basis of powers under the Criminal Procedure Code.

30. Having regard to those matters, the Constitutional Court concludes that, in the case at hand, the previous testimonies of witnesses were read at the main hearing, without their presence at the hearing in person in the capacity of witnesses. However, the regular courts had valid reasons for such procedure. Those reasons are: the testimonies were read on the basis of powers given under Article 333 paragraph 1 item 1 of the Law on Criminal Procedure, because: it was not possible to summon witnesses to the main hearing because their place of residence was not on the territory of the Republika Srpska any more; the judgment was not exclusively based on the stated testimonies, but on the statement of another witness and material evidence; and the appellant had an opportunity to give his statement in relation to the previously given testimonies of the disputed witnesses. The stated circumstances do come within the quoted case law of the Constitutional Court and the European Court of Human Rights as well, in deciding on cases where witnesses have not given their testimonies before, nor were present at, the main hearing.

31. In view of this, the Constitutional Court concludes that in the case at hand, there has been no violation of the right to fair trial in relation to hearing witnesses under Article II/3.e) of the

Constitution of Bosnia and Herzegovina and Article 6 paragraph 3 item d) of the European Convention.

Other allegations with regard to violation of the right to a fair trial

32. The Constitutional Court stresses that the appellant's objections concerning the hearing of one of the girls, who was under age, as a witness, using a translator employed with the International Police Forces, and wrong application of substantive law by the Supreme Court do not come under the scope of Article 6 paragraph 3 item d) of the European Convention, but under the general rule of Article 6 paragraph 1 of the European Convention. In addition to complaining that the testimonies were taken from an under age person, the translator was a member of the International Police Forces, and there was a wrong application of substantive law, the appellant claims that the Supreme Court should have applied a less serious legal classification to the offence, while deciding on the request for protection of legality, which would have been more favorable to him. Consequently, the Constitutional Court should examine whether the appellant's right to fair trial under Article 6 paragraph 1 of the European Convention has been violated by the contested judgments of the regular courts.

33. Article 6 paragraph 1 of the European Convention, in the relevant part, reads as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."

34. Considering that the appellant sees violation of the right to a fair trial under Article 6 paragraph 1 of the European Convention in the wrongly established factual background and wrong application of substantive law, the Constitutional Court recalls its position (see Decision no. U/6201 of 5 April 2002, published in the Official Gazette of Bosnia and Herzegovina, no 24/02), under which *'its jurisdiction in appeals proceedings is limited to "issues under this Constitution" and the Court is not competent to review the factual background or interpretation and application of laws by ordinary courts except in cases in which constitutional rights are violated by decisions of lower courts, or are neglected, and if application of laws was arbitrary and discriminatory, if procedural rights were violated (fair trial, access to court, effective remedies, etc.) or if the established factual background indicates violation of the Constitution'*.

35. The Constitutional Court holds that the stated position may also be applied in the case at hand. It cannot be concluded from the allegations under the appeal and submitted documentation that the appellant's constitutional rights have been violated or neglected by the contested judgments of regular courts. Nor can it be concluded that the application of laws was arbitrary or discriminatory, or that that procedural rights have been violated (for example, that the courts acted arbitrarily, or that the appellant was denied the right to access to a court or to an effective remedy). Even less can it be said that the established factual background indicates any violation of the Constitution of Bosnia and Herzegovina. In view of this, and of the previously adopted position of the Constitutional Court that *"the fairness of a trial shall be evaluated on the basis of the proceedings as a whole"* (see Decision of the Constitutional Court in case no. U 63/01 of 27 June 2003 paragraphs 18 and 19, Official Gazette of Bosnia and Herzegovina, no 38/03), the Constitutional Court holds that, on the whole, the criminal proceedings were fair and that they met standards of Article 6 paragraph 1 of the European Convention.

36. Taking all this into account, the Constitutional Court holds that there has been no violation of the right to a fair trial under Article II/3.e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

Right to prohibition of discrimination

37. The appellant holds that he has been discriminated against because the Supreme Court did not decide in his case differently in relation to the former identical case.

38. Article II/4 of the Constitution of BiH reads as follows:

"The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 14 of the European Convention reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

39. In the case at hand, the appellant complains of discrimination because the Supreme Court decided differently from its decision in an earlier case that was same as his (discrimination in

relation to a fair trial). The Constitutional Court refers to its case law in a decision relating to a situation similar to this one: *“However, a different application of the law in different cases is allowed if there is a reasonable and justified reason for it. This is the case, for example, where a challenged decision is legal and constitutional. If the decision is otherwise in accordance with the law and the Constitution, there is no legal basis for saying that discrimination has occurred, and the claim for equal treatment fails. Such an interpretation leads to the limitation of the principle of prohibition of unequal treatment in the sense of legal security, but it is in accordance with the principle of the rule of law provided for in Article I.2 of the Constitution of Bosnia and Herzegovina. In this situation, the principle of the rule of law prevails in such cases.”* (see Decision of the Constitutional Court no. U 49/02 of 28 November 2003, paragraph 55, Official Gazette of Bosnia and Herzegovina”, no 6/04).

40. Having regard to the previously presented position of the Constitutional Court, as well as to the Court’s conclusion in the earlier part of this decision that the contested judgments of the regular courts are legal and constitutional because they are adopted in accordance with all standards under Article 6 of the European Convention, the Constitutional Court does not need to give additional reasons for holding that the appellant has not been discriminated against because the Supreme Court did not decide as in one of its previous cases.

41. On this basis, the Constitutional Court concludes that, in the case at hand, there has been no violation of the right to prohibition of discrimination under Article II/4. of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention.

VIII. Conclusion

42. The Constitutional Court concludes that the appellant’s right to hear the witnesses for the prosecution under Article II/3.e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 item d) of the European Convention has not been violated, because, in the case at hand, the appellant was given an opportunity to give his statement on the previously taken testimonies of witnesses, because the contested judgments are not exclusively based on such testimonies, but on the testimony of another witness given at the main hearing, as well as on other material evidence, and because justified reasons existed for not securing the presence of the witnesses at the main hearing. Moreover, the Constitutional Court concludes that, if the contested judgment meets the criteria of legality and constitutionality, the legal basis for claiming discrimination in relation to a fair hearing merely because the court decided an earlier case differently in a similar situation is lost,

because the judgment was established to be constitutional and legal in accordance with the principle of rule of law under Article I/2 of the Constitution of Bosnia and Herzegovina, which shall prevail in such cases.

43. On the basis of Article 61 paragraphs 1 and 3 of the Constitutional Court's Rules of Procedure, the Constitutional Court, unanimously, decided as stated in the operative section of this Decision.

44. According to Article VI.4 of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Mato Tadić
President
of the Constitutional Court of Bosnia and Herzegovina