

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

SECOND SECTION

CASE OF KALČIĆEK v. CROATIA

(Application no. 22458/18)

JUDGMENT

STRASBOURG

25 June 2024

This judgment is final but it may be subject to editorial revision.



In the case of Kalčićek v. Croatia,

The European Court of Human Rights (Second Section), sitting as a Committee composed of:

Lorraine Schembri Orland*, President*,
Frédéric Krenc,
Davor Derenčinović*, judges*,
and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 22458/18) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 4 May 2018 by a Croatian national, Ms Štefica Kalčićek ("the applicant"), who was born in 1946 and lived in Zaprešić and who was represented by Mr K. Čurin, a lawyer practising in Zagreb;

the decision to give notice of the complaint concerning the lack of impartiality to the Croatian Government ("the Government"), represented by their Agent, Ms Š. Stažnik, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 4 June 2024,

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

SUBJECT MATTER OF THE CASE

1. The case concerns the alleged lack of impartiality of the Constitutional Court in the criminal proceedings against the applicant.

2. By a judgment of 14 September 2011, the first-instance court acquitted the applicant of charges of aiding her son, Mr Nenad Kalčićek, in the commission of the criminal offences of abuse of office and official authority and of tampering with evidence. Her son, who was a co-accused in the proceedings in question, was also acquitted.

3. Following an appeal by the State Attorney, by a decision of 9 July 2013, the Supreme Court quashed the first-instance judgment for incomplete facts and remitted the case for fresh examination. In particular, it held that the arguments which the applicant had put forward in her defence were illogical and not supported by evidence. Judge B.B. was one of the three members of the panel deciding the appeal.

4. In the resumed proceedings, the applicant and her son were found guilty as charged by a judgment of the Zagreb Municipal Criminal Court of 22 January 2015. By a decision of 22 September 2015, the Zagreb County Court quashed that judgment and, once again, remitted the case for fresh examination.

5. On 22 April 2016 the Novi Zagreb Municipal Court found the applicant and her son guilty as charged, sentenced her to nine months' imprisonment,

suspended for two years, and ordered that the proceeds of the crime be confiscated from her. In particular, it found the applicant's defence unconvincing, relying, *inter alia*, on the circumstances previously pointed out by the Supreme Court (see paragraph 3 above). By a judgment of 9 May 2017, the Zagreb County Court upheld the first-instance judgment.

6. The applicant then lodged a constitutional complaint challenging, *inter alia*, the domestic courts' findings as to the credibility of her defence. By a decision of 29 November 2017, served on the applicant's representative on 12 December 2017, the Constitutional Court examined her constitutional complaint on the merits, but formally declared it inadmissible finding that the case did not raise a constitutional issue. It had done so in a panel composed of three judges, one of whom was Judge B.B.

7. Before the Court the applicant complained, relying on Article 6 § 1 of the Convention, about the lack of impartiality of the Constitutional Court in the criminal proceedings against her. In particular, she complained that Judge B.B., who had been one of the judges who had declared inadmissible her constitutional complaint, had previously been a member of the second-instance panel which had overturned the judgment on her acquittal (see paragraph 3 above).

8. By a letter of 16 July 2019, the Government informed the Court that the applicant had died on 8 September 2018 and proposed that the application be struck out of the Court's list of cases. In response, the applicant's representative notified the Court on 14 August 2019 that the applicant's son (see paragraph 2 above), who had been declared her sole heir, wished to pursue the application in his late mother's stead. The applicant's representative also submitted an authority form whereby the applicant's son had authorised the applicant's representative to represent him before the Court.

THE COURT'S ASSESSMENT

I. PRELIMINARY ISSUE OF WHETHER THE APPLICANT'S SON CAN PURSUE THE APPLICATION IN HER STEAD

9. The Government objected to the applicant's son's request to pursue the application in his late mother's stead, arguing that he had not been personally affected by the violation complained of, for two reasons. Firstly, while the applicant's son had been a co-accused in the criminal proceedings against her (see paragraph 2 above), the alleged violation concerned the proceedings before the Constitutional Court to which he had not been a party. Secondly, the Government held that the relatives of the deceased person could not be considered victims of a violation of Article 6 of the Convention. Arguing that the applicant's son had not demonstrated any legitimate interest in pursuing the application and that respect for human rights did not require its further

examination, the Government proposed that the Court strike the application out of its list of cases.

10. In a number of cases in which the applicants had died in the course of Convention proceedings, such as in the present case, the Court took into account statements by the applicant's heirs or close family members expressing their wish to pursue the proceedings, rejecting thereby similar arguments as to their lack of legitimate interest (see, for instance, *Mile Novaković v. Croatia*, no. 73544/14, §§ 31-34, 17 December 2020; *Karastelev and Others v. Russia*, no. 16435/10, §§ 49-52, 6 October 2020; and *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, §§ 68-75, ECHR 2012 (extracts)). The Court sees no reason to hold otherwise in the present case and finds, accordingly, that the applicant's son has standing to continue these proceedings in the applicant's stead. The Government's strike-out request must therefore be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. Admissibility

11. The Government disputed the admissibility of this complaint, arguing that the applicant had failed to exhaust available domestic legal remedies. In particular, they contended that the applicant could have known, already when lodging her constitutional complaint, that Judge B.B. might take part in the Constitutional Court proceedings. She should thus have lodged a request for withdrawal of Judge B.B. with the Constitutional Court.

12. In the present case, the applicant claimed, and nothing in the facts of the case or the parties' submissions suggests otherwise, that she had learned of the composition of the Constitutional Court's panel only on 12 December 2017, when that court's decision was served on her representative (see paragraph 6 above). The Court has already held that in such circumstances applicants were not obliged to pre-emptively request the withdrawal of judges whose impartiality could be open to doubt (see *Croatian Golf Federation v. Croatia*, no. 66994/14, §§ 110-121, 17 December 2020), and sees no reason to hold otherwise in the present case.

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

B. Merits

14. The general principles concerning the impartiality of tribunals have been set out in *Micallef v. Malta* [GC], no. 17056/06, §§ 93-99, ECHR 2009, and *Morice v. France* [GC], no. 29369/10, §§ 73-78, ECHR 2015.

15. In the present case, the applicant did not call into question the personal impartiality of Judge B.B. Instead, she considered that her doubts as to the impartiality of the Constitutional Court had been objectively justified, as he had been a member of the second-instance panel that quashed the first-instance judgment acquitting her of the charges (see paragraph 3 above), and had subsequently decided on the constitutionality of the final judgment finding her guilty (see paragraph 6 above).

16. The Court notes that both in the proceedings before the Supreme Court and in the Constitutional Court proceedings one of the issues to be decided were related to the credibility of the applicant's defence, which required examination of the merits of the case. In particular, the Supreme Court was tasked with reviewing the first-instance court's assessment of evidence in that regard (see paragraph 3 above). The crux of the reasoning it had provided in support of its finding that the applicant's defence had not been sufficiently based on evidence was later maintained in the judgment of the Novi Zagreb Municipal Court (see paragraph 5 above). The constitutionality of the Zagreb County Court's judgment upholding the Novi Zagreb Municipal Court's judgment was examined by the Constitutional Court (see paragraph 6 above) in view of, *inter alia*, the applicant's arguments that the domestic courts had erred in finding her defence unconvincing.

17. Therefore, even if it could be considered, as the Government suggested, that the scope and the nature of the Supreme Court's decision differed from those of the Constitutional Court's decision, the issues examined by both courts concerned the merits of the case – more specifically, issues related to the credibility of the applicant's defence – and were thus intrinsically linked (see *Scerri v. Malta*, no. 36318/18, §§ 69-77, 7 July 2020; *Indra v. Slovakia*, no. 46845/99, §§ 48-55, 1 February 2005; and, *mutatis mutandis*, *Peruš v. Slovenia*, no. 35016/05, §§ 37-38, 27 September 2012; contrast *Warsicka v. Poland*, no. 2065/03, §§ 37-47, 16 January 2007).

18. The Government further argued that Judge B.B. had not adopted decisions against the applicant, either in the criminal or in the Constitutional Court proceedings, alone. Instead, on both occasions he had only been a member of a three-member panel (see paragraphs 3 and 6 above). Having regard to its case-law on the matter (see *Morice*, cited above, § 89), the Court does not consider this argument decisive when assessing the objective impartiality of the Constitutional Court.

19. The foregoing considerations are sufficient to enable the Court to conclude that the composition of the Constitutional Court was not such as to guarantee its impartiality and that it failed to meet the Convention standards under the objective test.

20. There has accordingly been a violation of Article 6 § 1 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

21. The applicant's son claimed 7,000 euros (EUR) in respect of non-pecuniary damage, EUR 673 in respect of the costs and expenses she had incurred in the Constitutional Court proceedings, and EUR 762 for the costs and expenses they incurred before the Court.

22. The Government contested these claims.

23. In view of the fact that any non-pecuniary damage was sustained by the applicant, and not her son who pursued the Convention proceedings in her stead, the Court holds that the finding of a violation constitutes in itself sufficient just satisfaction for that type of damage. It thus finds it appropriate not to make an award in that respect.

24. As to the costs and expenses incurred before the Constitutional Court, the Court notes that the violation complained of occurred in those proceedings. In other words, the applicant did not incur any extra costs and expenses before the Constitutional Court as a result of the violation of her right to a hearing before an impartial tribunal. Having regard to its case-law (see *Mežnarić v. Croatia*, no. 71615/01, § 48, 15 July 2005), the Court therefore rejects the claim for costs and expenses incurred before the Constitutional Court. Moreover, the Court considers it reasonable to award the applicant's son the sum of EUR 762 for the proceedings before the Court, plus any tax that may be chargeable to him on that amount.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Holds* that the applicant's son, Mr Nenad Kalčićek, has standing to pursue the application in the applicant's stead;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

5. *Holds*
   (a) that the respondent State is to pay the applicant's son, within three months, EUR 762 (seven hundred sixty-two euros), plus any tax that may be chargeable to him, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's son's claim for just satisfaction.

Done in English, and notified in writing on 25 June 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Lorraine Schembri Orland President