REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 11 February 2021
Ref.No:RK 1703/21

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI50/20

Applicant

Abdullah Bajra

Constitutional review of Judgment Pml.no.366/2019 of the Supreme Court, of 10 January 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Abdullah Bajra (hereinafter: the Applicant), residing in Gjilan, represented by the lawyer Shemsedin Pira.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment Pml.no.366/2019 of the Supreme Court, of 10 January 2020, in conjunction with Judgment PA1 no.789/2019 of the Court of Appeals, of 16 September 2019 and Judgment P.no.87/18 of the Basic Court in Gjilan-branch in Kamenica, of 19 April 2019.

3. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), the imposition of interim measures, suspending the execution of the service of sentence, pending the decision by the Court.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Judgment which as alleged by the Applicant has violated his fundamental rights and freedoms guaranteed by Articles 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 27 [Interim Measures] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 11 March 2020, the Applicant submitted the Referral to the Post Office of the Republic of Kosovo, which reached the Court on 13 March 2020.

7. On 19 May 2020, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

8. On 27 May 2020, the Court notified the Applicant about the registration of the Referral and requested from him to complete the form and attach the relevant documents. On the same day a copy of the Referral was sent to the Supreme Court, in accordance with the Law.

9. On 16 June 2020, the Applicant submitted the Referral form to the Court.

10. On 30 November 2020, the Court requested from the Applicant to submit the power of attorney signed by him, as a proof of his representation in Court by the lawyer Shemsedin Pira.

11. On 18 December 2020, the Applicant submitted the document requested by the Court.

12. On 20 January 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. On 14 May 2018, the Basic Prosecutor's Office in Gjilan, filed the indictment PP.II.no.607/2018, against the Applicant due to suspicion of having committed the criminal offences under Article 401, paragraph 1 of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK), concerning the non-compliance with the preliminary injunction issued by the Basic Court in Gjilan-branch in Kamenica by Decision C.no.54/18, of 18 April 2018 (for not obstructing the Air Energy Company in performance of works) and commission of a criminal offence under Article 365 paragraph 1, in conjunction with Article 28 of the CCRK.

14. On 19 April 2019, the Basic Court in Gjilan, branch in Kamenica, through Judgment P.nr.87/2018, acquits the Applicant of the charge concerning the criminal offence defined under Article 401.1 of the CCRK and pronounces him guilty of having committed the criminal offence defined by Article 365, paragraph 1, in conjunction with Article 28 of the CCRK, thus sentencing him to effective imprisonment of 90 (ninety) days, a sentence which he would have to serve once the said judgment would become final.

15. The Applicant, acting within the legal deadlines, through his defence counsel filed an appeal with the Court of Appeals against the Judgment [P.no.87/18] of the Basic Court in Gjilan, due to violations of the provisions of procedural law, violation of the provisions of criminal law, erroneous determination of factual situation and decision regarding the sentence. Also the Basic Prosecution in Gjilan filed an appeal against the Judgment in question, by proposing to impose a more severe punishment on the Applicant.

16. On 16 September 2019, the Court of Appeals, by Judgment PA.1 no.789/2019, rejected as ungrounded the Applicant's appeal and the appeal of the Basic Prosecution in Gjilan, confirming the Judgment of the Basic Court in Gjilan, P.no.87/18 of 19 April 2019, with the reasoning:

> *"The trial panel of this court, after having assessed the appealed judgment, the appeals, of the prosecution and of the defence counsel of the accused and other case file documents has concluded that the court of first instance has determined the factual situation in a fair and complete manner, that the appealed judgment does not contain essential violations of the provisions of criminal procedure, as well as violations of the*

criminal law, that the court of first instance, when imposing the sentence, has taken into account the circumstances from Articles 73 and 74 of the CCK; it has assessed all circumstances, by considering as a mitigating circumstance the fact that the accused has come in contradiction with the law for the first time, that there are no other criminal proceedings ongoing against him, and at the same time it took into account that the criminal offence was not finished off, it remained an attempt, while it found no aggravating circumstances in this criminal case. Further, no particularly aggravating circumstances were found in the appeal of the Basic Prosecution in Gjilan, as well as no particularly mitigating circumstances were found by the Court in the appeal of the defence counsel of the accused, therefore, in the presence of these circumstances, the trial panel of this court is convinced that by this type of punishment, the effect and the purpose of the punishment would be achieved,..."

17. On 19 November 2019, the Applicant filed a request for protection of legality with the Supreme Court, against the Judgment PA.1.no.789 / 2019 of the Court of Appeals, of 16 September 2019 and the Judgment P. no. 87/2018 of the Basic Court in Gjilan, of 19 April 2019, alleging a violation of Article 384 paragraph 1, subparagraph 12, of the CPCRK and a violation of Article 385, paragraph 1, subparagraph 1 of the CPCK.

18. On 10 January 2020, the Supreme Court, by Judgment PML.no.366/2019, partially approved the Applicant's request for protection of legality, thus amending the Judgment of the Basic Court in Gjilan, dated 19 April 2019, in the part which concerns the calculation of the effective imprisonment sentence, by adding to 90 (ninety) days the time spent in detention on remand from 26 April 2018 until 10 May 2018, whilst in relation to the other parts the request for protection of legality was rejected as unfounded.

19. The relevant part of the aforementioned judgment of the Supreme Court reads:

"According to the assessment of this court, the above allegations of the defence counsel are unclear because it is not possible to understand what they consist of, and although the defence counsel refers to the violation of criminal law, based on the content of the request referring to this matter it results that these allegations are related to essential violations of the provisions of the criminal procedure. According to the provision of Article 436 para.1 of the CPC when deciding on a request for protection of legality, the Supreme Court of Kosovo shall confine itself to examining those violations of law which the requesting party alleges in his or her request, but this court cannot assume what the requesting party has meant. However, this court after having reviewed the above allegations has found that they are unfounded.

It is evident that in the enacting clause of the judgment of the first instance, it is stated that the convict has caused a general danger to the life of people and property, but this Court considers that the enacting clause of the judgment cannot be looked into and assessed only on the basis of this sentence(wording), because based on the description of the

incriminating actions it is clearly indicated the manner, and the way in which the convict has acted and the fact why has the offence remained an attempt (the manner of the commission is also cited by the defence counsel in the request), while on the basis of the reasoning it is clear that the convict has attempted to ignite the fuel-gasoline using a lighter.

Whilst, the allegations that at no stage of the procedure was possible to prove that the content of the canister which the convict has poured around his excavator was fuel, were not subject to review because they relate to the factual situation which is a legal basis, based on which the request for protection of legality cannot be exercised."

Applicant's allegations

20. The Applicant alleges that the regular courts have violated his rights guaranteed by Articles 30 and 31 of the Constitution and Article 6 of the ECHR, because *"... the challenged Judgment does not contain substantial violations of the provisions of criminal procedure under sub-paragraph 1.12, paragraph 1, of Article 384 of the CPC. The enacting clause of the judgment of the first instance states that I, as a convict, have caused a general danger to the life of people and property, however, such an enacting clause of the judgment cannot be ascertained and assessed on the basis of this sentence, only, and such a wording is legally unstable and consequently makes the judgment completely incomprehensible, moreover at no stage of the proceedings was there corroborated that the content which I have poured from the canister near my excavator was fuel, as it could also be seen from the testimonies of the below mentioned witnesses heard in the Basic Court in Gjilan."*

21. Finally, the Applicant requests from the Court: to declare his Referral admissible, to declare the challenged Judgment PML.no.366/2019 of the Supreme Court, of 10 January 2020 unconstitutional; to order that the final decision P. no.87/2018 of the Basic Court in Gjilan, of 19 April 2019, be remanded for retrial to the court of the same instance, as well as to declare as admissible his request for interim measures, which concerns the prohibition of commencement of the service of sentence imposed by the Judgment P.no.87/ 2018, of 19 April 2019, pending the Court's decision in the case.

Assessment of the admissibility of Referral

22. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and Rules of Procedure.

23. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which provide:

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

[...]

24. In addition, the Court also refers to the admissibility requirements as further specified in the Law. In this respect, the Court first refers to Article 47[Individual Requests] , 48 [Accuracy of the Referral], and 49 [Deadlines] which provide:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his /her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."

25. As to the fulfillment of the admissibility criteria, as stated above, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, after having exhausted all legal remedies prescribed by law; he also has clarified all rights and freedoms which he claims to have been violated, in accordance with Article 48 of the Law and has submitted the Referral within the deadline provided for in Article 49 of the Law.

26. However, in addition, the Court examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria], sub-rule (2) of the Rules of Procedure which provides:

"The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

27. With regard to the violation of human rights and freedoms guaranteed by the Constitution, the Court first refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution by reiterating that: "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*".

28. With respect to the present case, the Court recalls that the Applicant alleges that the decisions of the regular courts have violated his rights guaranteed by Articles 30 and 31 of the Constitution and Article 6 of the ECHR, by linking the violations of his constitutional rights with the manner of determination of the factual situation and the interpretation and application of the provisions of the CPCRK, respectively sub-paragraph 12, paragraph 1, of Article 384 of the said Code.

29. In this regard, the Court considers that the Applicant has built his case on the basis of "legality" and not on the basis of "constitutionality". The Court has repeatedly stated that as a general rule, the allegations of erroneous interpretation of the law allegedly committed by the regular courts relate to the scope of legality and as such do not fall within the jurisdiction of the Court, and therefore, in principle, they cannot be considered by the Court (see the cases of Court: no. KI06/17, Applicant *LG and five others*, Resolution on Inadmissibility, of 25 October 2016, paragraph 36; KI122/16, Applicant *Riza Dembogaj*, Judgment of 30 May 2018, paragraph 56, and the case of Court KI154/17 and 05/18, Applicants, *Basri Deva, Aferdita Deva and the Limited Liability Company "Barbas"*, Resolution on Inadmissibility of 28 August 2019, paragraph 60).

30. The Court has consistently reiterated that it is not its duty to deal with errors of facts or law allegedly committed by the regular courts (*legality*), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (*constitutionality*). It cannot itself assess the law that lead a regular court to issue one decision rather than another. If it were different, the Court would act as a "fourth instance" court, which would result in exceeding the limits imposed on its jurisdiction. In fact, it is the role of regular courts to interpret and apply the pertinent rules of procedural and substantive law. (See the ECtHR case *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, inter alia, the cases of Court: KI06/17, cited above, paragraph 37; and KI122/16, cited above, paragraph 57; and KI154/17 and 05/18, cited above, paragraph 61).

31. This stance has been consistently held by the Court, on the basis of the ECtHR case-law which clearly maintains that it is not the role of this Court to review the conclusions of the regular courts in respect of the factual situation and application of the substantive law. (see the ECtHR case, *Pronina v. Russia*, Judgment of 30 June 2005, paragraph 24; and the cases of Court KI06/17, cited above, paragraph 38; KI122/16, cited above, paragraph 58 and KI154/17 and 05/18, cited above, paragraph 62)

32. However, the Court recalls that the case-law of the ECtHR also provides for the circumstances under which exceptions from this position must be made. The ECtHR reiterated that while it is primarily for the national authorities, to resolve problems of interpretation of domestic legislation, the role of the Court is to verify whether the effects of such interpretation are compatible with the ECHR. (See the ECtHR case, *Miragall Escolano and others v. Spain*, Judgment of 25 May 2000, paragraphs 33-39).

33. Therefore, even though the role of the Court is limited in terms of assessing the interpretation of the law, it must ensure and take measures where it observes that a court has *"applied the law manifestly erroneously"* in a particular case or so as to reach *"arbitrary conclusions"* or *"manifestly unreasoned"* for the Applicant (as regards the basic principles concerning the manifestly erroneous interpretation and application of the law, see, inter alia, the case of Courts KI154 / 17 and 05/18, cited above, paragraphs 60 to 65 and the references used therein).

34. In this regard, the Court must emphasize that the Applicant has failed to provide arguments before the Court on (i) the reasons which could support the allegation that in the circumstances of the present case, the relevant articles of the criminal and procedural law have been interpreted by the regular courts in a *"manifestly erroneous manner"*; and (ii) how has such an interpretation resulted in *"arbitrary conclusions"* or *"manifestly unreasoned"* for the Applicant.

35. From this view, the Court notes that the Applicant's allegations concerning the erroneous application of the CCRK and the CPCRK have been addressed and reasoned by the regular courts, in particular by the Supreme Court, which partially approved the request for protection of legality as regards the calculation of the criminal sanction, in favour of the Applicant, by also providing detailed reasons for the rejection as unfounded of the other allegations contained in the request for protection of legality (for more details, see the reasoning of the Supreme Court, in paragraph 18 of this document).

36. In this sense, the Court considers that there is nothing to indicate that the regular courts have *"applied the law in a manifestly erroneous manner"*, an application which could result in *"arbitrary conclusions"* or *"manifestly unreasoned"* for the Applicant.

37. Further, the Court recalls that, in principle the *"fairness"* required by Article 31 of the Constitution in conjunction with Article 6 of the ECHR is not *"substantial"* fairness, but *"procedural"* fairness. In practical terms, and in principle, this is expressed in the adversarial proceedings, in which submissions are heard from the parties and they are placed on an equal footing before the court. (See, in this context, the case of Court No. KI42/16, Applicant *Valdet Sutaj*, Resolution on Inadmissibility, of 7 November 2016, paragraph 41 and other references mentioned therein; KI118/18, Applicant *Eco Construction sh.p.k*, Resolution on Inadmissibility, of 10 September 2019, paragraph 48; and KI49/19, Applicant *Limak Kosovo International Airport J.S.C. "Adem Jashari"*, Resolution on Inadmissibility of 8 January 2020, paragraph 55).

38. This means that the parties should be enabled to have the proceedings conducted based on the adversarial principle; they must be given the opportunity to adduce the arguments and evidence they consider relevant to the case at the various stages of those proceedings; that all the arguments, relevant to the resolution of his case, viewed objectively, have been duly heard and reviewed by the courts; that the factual and legal reasons against the challenged decisions were examined and reasoned in detail and that, according to the circumstances of the case, the proceedings, viewed in their entirety, were fair (see, inter alia, the case of Court KI118/17, Applicant *Şani Kervan and others,* Resolution on Inadmissibility, of 16 February 2018, paragraph 35; see also, *mutatis mutandis*, the case *Garcia Ruiz v. Spain*, cited above, paragraph 29). The Court considers that in the circumstances of the present case, the Applicant has not argued that this was not done.

39. Further and finally, the Court emphasizes that Article 6 of the ECHR does not guarantee anyone a favourable outcome in the course of a judicial proceeding, where often one of the parties wins and the other loses (see, in this context, the cases of Court KI118/17, *Şani Kervan and others*, Resolution on Inadmissibility, paragraph 36; and KI142/15, Applicant *Habib Makiqi*, Resolution on Inadmissibility, of 1 November 2016, paragraph 43).

40. On the basis of the foregoing, the Court finds that the regular courts have complied with the requirements of Article 6 of the ECHR, which include the rights of the accused, giving of the opportunity to the Applicant to present his objections regarding the evidence and charges brought against him, at any stage of the conduction of proceedings. Moreover, all the arguments, that were relevant to the resolution of his case, viewed objectively, have been duly heard and examined by the courts; that the factual and legal reasons against the challenged decisions were examined and reasoned in detail and that the proceedings, viewed in their entirety, were not unfair.

41. In this respect, the Court states that the Applicant is simply dissatisfied with the outcome of the proceedings. However, his dissatisfaction cannot of itself raise arguable allegations for a violation of the fundamental rights and freedoms guaranteed by the Constitution (see, the ECtHR case *Mezotur-Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).

42. Therefore, in these circumstances, on the basis of the foregoing and taking into account the allegations raised by the Applicant and the facts presented by him, the Court having relied on the standards established in its case law in similar cases and on the case law of the ECtHR, finds that the Applicant has not sufficiently proved and substantiated his allegation for a violation of his fundamental rights and freedoms guaranteed by the abovementioned articles of the Constitution.

43. Consequently, the Applicant's Referral is manifestly ill-founded on constitutional bases, and therefore must be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

Request for interim measures

44. The Court recalls that the Applicant has also requested the imposition of interim measures, seeking the suspension of the execution of the effective sentence of imprisonment, pending the final decision of the Court. The Court has just concluded that his Referral should be declared inadmissible within the meaning of Rule 39 (2) of the Rules of Procedure.

45. Therefore, in accordance with Article 27 (1) of the Law and Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for interim measures must be rejected, as it can no longer be subject of review, given that the Referral was declared inadmissible, on constitutional basis (see the cases of Court KI159/18, Applicant: *Azem Duraku*, Resolution of 3 April 2019, paragraph 91; KI13/19 Applicant: *Fevzi Hajdari*, Resolution of 12 April 2019, paragraph 75, and the most recently joined cases KI19/19 and KI20/19, where the applicants were the applicants themselves, Resolution of 29 July 2019, paragraphs 53-55).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 39 (2), 57 (4) (a) and 59 (b) of the Rules of Procedure, on 20 January 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT, the request for imposition of interim measures;

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;

V. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Bajram Ljatifi

Arta Rama-Hajrizi

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