REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 12 December 2024
Ref. no.: MK 2585/24

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CONCURRING OPINION

of Judge

RADOMIR LABAN

in

case no. KI139/24

Applicant

Avdylvehab Bytyqi

Constitutional review of Judgment PAKR. no. 43/2024 of 12.03.2024 of the Court of Appeals

At the outset, I agree with the opinion of the majority of the judges that the concrete case is inadmissible.

However, as an individual judge, I have a concurring opinion regarding the reason for the inadmissibility of this case and I do not agree with the opinion of the majority that this case is inadmissible because the Applicant has not exhausted all legal remedies available. I consider that the case is inadmissible as *"manifestly ill-founded"*.

In the light of the above, and in accordance with Rule 57 of the Rules of Procedure of the Constitutional Court, I will briefly submit my concurring opinion.

As a judge, I fully agree with the factual situation as stated and presented in the resolution and I accept the same factual situation as correct. I also agree with the way in which the Applicant's claims were submitted and presented in the resolution and I accept the same as correct.

I also agree with the majority's conclusion that the case is inadmissible, but I consider that the Applicant has exhausted the legal remedies because the Applicant contests the final judgment PAKR no. 43/2024 of 12.03.2024 of the Court of Appeals, and the Applicant has exhausted all regular legal remedies.

In this regard, I recall the Criminal Procedure Code 08/L-032, which in Article 419 clearly emphasizes the extraordinary legal remedies and among other things states the following:

Article 419
Extraordinary legal remedies

1. Criminal proceedings terminated by a final ruling or a final judgment may be reopened upon the request of authorized persons only in instances and under conditions provided for by the present Code. The request for the reopening of the criminal proceedings is filed with the Basic Court that rendered the decision.
2. A party may request the extraordinary mitigation of punishment at any time during the period being served in imprisonment. The party files the request with the Basic Court where the first, instance judgement was issued, which transmits all case files to the Supreme Court.
3. A party may request protection of legality within three (3) months from the day of filing the final judgment or final ruling against which protection of legality is sought. The party files the request with the Basic Court where the first instance decision was issued which transmits all case files to the Supreme Court.
4. Articles 375, 376, 377, 378 and 379 of the present Code applies to all requests made under this Article.

From the clear text of this article of law, it is seen that extraordinary legal remedies are allowed only against final decisions and final judgments of the Court of Appeals and enumerates three legal remedies, namely

1) *Request for the reopening of the criminal proceedings*
2) *Request for extraordinary mitigation of punishment* and
3) *Request for protection of legality*.

Also, the Law clearly defines the reasons for which each of these extraordinary legal remedies can be filed and the time limits when any of these extraordinary legal remedies can be filed.

Precisely for this reason, I consider that the Applicants should not exhaust any extraordinary legal remedies to address the Constitutional Court, otherwise they would have to exhaust each of the extraordinary legal remedies, which would make it even more difficult for the Applicants to address the Constitutional Court.

I also refer to the ECtHR case law which states the following: *"Discretionary or extraordinary remedies need not be used, for example requesting a court to review its decision (Çınar v. Turkey (decision); Prystavska v. Ukraine (decision))"*.

Assessment of admissibility of the Referral

1. In view of the above, I consider that the Applicant has fulfilled the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.

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

Article 113
[Jurisdiction and Authorized Parties]

"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".
[...]

3. I further consider whether the Applicant has fulfilled the admissibility requirements established by the Law, namely Articles 47, 48 and 49 of the Law, 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced..."

4. Regarding the fulfillment of the abovementioned criteria, I consider that the Applicant is an authorized party, in accordance with Article 113.7 of the Constitution; The Applicant challenges the constitutionality of the act of the public authority, namely the judgment [PAKR. no. 43/2024] of 12 March 2024 of the Court of Appeals, after having exhausted all available ordinary legal remedies, based on Article 113.7 of the Constitution and Article 47.2 of the Law; specified the rights guaranteed by the Constitution, for which he claims to have been violated, in accordance with the

requirements of Article 48 of the Law; and submitted the referral within the legal deadline of 4 (four) months, established by Article 49 of the Law.

5. I further consider whether the Applicant has fulfilled the criteria established in Rule 34 (2) (Admissibility Criteria) of the Rules of Procedure, which provides:

Rule 34
(Admissibility Criteria)

2) „The Court may consider a referral as inadmissible if the referral is intrinsically unreliable when the applicant has not sufficiently proved and substantiated his/her allegations."

6. Based on the case law of the ECtHR, but also of the Court, a referral may be declared inadmissible as *"manifestly ill-founded*" in its entirety or only with respect to any specific claim that a referral may contain. In this respect, it is more accurate to refer to them as "*manifestly ill-founded claims*". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that are categorized as "*fourth instance*" claims; (ii) claims that are categorized as "*clear or apparent absence of a violation*"; (iii) "*unsupported or unreasoned*" claims, when one of the two sub-criteria is met, namely: (a) when the applicant merely cites one or more provisions of the Convention or the Constitution, without explaining in what way they have been breached, unless from the facts of the case the violation of the Constitution is is obvious th(see, in the case of ECtHR *Trofimchuk v. Ukraine*, no. 4241/03, decision of 31 May 2005; see also *Baillard v. France*, no. 6032/04, decision of 25 September 2008); and b) when the applicant omits or refuses to produce documentary evidence in support of his allegations (in particular, decisions of the courts or other domestic authorities), unless there are exceptional circumstances beyond his control which prevent him from doing so (for instance, if the prison authorities refuse to forward documents from a prisoner's case file to the Court) or unless the Court itself determines otherwise (see, the case of the Court KI166/20, Applicant, *Ministry of Labour and Social Welfare*, Resolution on Inadmissibility, of 5 January 2021, paragraph 43), and finally, (iv) "*confused or far-fetched*" claims (see, cases of the ECtHR, Kemmache *v. France*, no. 17621/91, Judgment of 24 November 1994, category (i), *Juta Mentzen v. Lithuania*, no. 71074/01, decision of 7 December 2004, category (ii) and *Trofimchuk v. Ukraine*), application no. 4241/03).

7. I emphasize that the Applicant alleged a violation of Articles 23, 24, 26, 31 and 53 of the Constitution, in conjunction with Article 6 of the ECHR. However, I note that the statements in his referral refer to Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, respectively the violation of the provisions of the CPCRK; and Article 32 of the Constitution, in conjunction with Article 13 of the ECHR, respectively the use of legal remedies, and the Court will address these allegations within the framework of these articles.

Allegation for violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR

8. The Applicant alleges that the decisions of the regular courts are contrary to the right to a fair trial, because despite his request, he was not summoned to participate in the hearing at the Court of Appeals; and was not heard by the Basic Prosecution in the investigative phase, when he could have filed an objection regarding the evidence presented.

9. I further note that the Constitutional Court is not a "*fourth instance*" court in relation to the decisions of the regular courts. The role of the latter is to interpret and apply the relevant provisions of substantive and procedural law (see the case of the ECtHR, *Garcia Ruiz v. Spain*, no. 30544/96, Judgment of 21 January 1999). The Court has consistently reiterated that it is not its duty to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution and the ECHR (see case of the ECtHR, *Lupeni Greek Catholic Parish v. Rumania*, judgment of 29 November 2016 and case of the Court, KI70/11, applicant *Faik Hima, Magbule Hima, Bestar Hima*, resolution of 12 December 2011, paragraph 29).

10. I recall that Article 31 of the Constitution does not guarantee anyone a favorable result in a trial. The dissatisfaction of the Applicant with the outcome of the regular court proceedings cannot of itself raise an arguable claim of 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; case KI96/21, Applicant *Xhelal Zherka*, resolution of 10 September 2021, paragraph 53).

11. In this regard, I note that the Applicant was found guilty by the Basic Court by Judgment [2022: 234101] of 7 December 2023 of the criminal offense of "Rape" under Article 227, paragraph 4, subparagraph 4.4. in conjunction with paragraph 1 of the CCRK and was sentenced to six (6) years imprisonment. The Basic Court reasoned that the Applicant in his car, using his physical strength and under the threat of a knife, forced the victim to have sexual intercourse without her consent. The Basic Court presented and relied on a significant amount of evidence, including the injured party's statement, witness statements, police and investigative reports, and medical reports.

12. The Court of Appeals rejected the Applicant's appeal, claiming that there had been a violation of the provisions of the criminal procedure and the criminal law and erroneous determination of factual situation. The Court of Appeals considered that the Basic Court has correctly determined the factual situation by describing the manner and place of committing the criminal offense. The Court of Appeals also considered that the reasoning of the Basic Court was in accordance with the factual situation of the case and with the evidence presented during the court hearing.

13. With regard to the Applicant's allegation that he was not summoned to the hearing before the Court of Appeals, contrary to paragraph 1 of Article 390 of the CPCRK, I note that the hearing was held at the Court of Appeals on 12 March 2024, where the Applicant and his lawyer were duly invited. The Applicant did not attend the hearing because he was in detention on remand, while his lawyer stated that the hearing could

continue. Furthermore, the Court of Appeals reasoned that according to paragraph 4 of Article 390 of the CPCRK, the hearing can be held even without the presence of the parties when they are duly summoned.

14. With regard to the Applicant's allegation that he was not heard by the Basic Prosecution during the investigation procedure, I note that the Applicant gave his statement to the Basic Prosecution on 12 December 2022, in the presence of his defense counsel. During the court hearing in the Basic Court, the Applicant gave his testimony and supported the legal arguments presented by his counsel.

15. I emphasize that the Basic Court and the Court of Appeals decided on the basis of the evidence presented during the trial and that the Applicant had every opportunity to present his arguments and objections regarding the presentation of evidence. The Applicant had the opportunity to testify during the trial in the Basic Court and was duly summoned by the Court of Appeals to attend the hearing held on 12 March 2024. The regular courts did not deny the Applicant the constitutional rights, but decided within their jurisdiction and it is not about an arbitrary or unreasonable decision.

16. Therefore, I find that the Applicant's allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR pertain to category of (ii) claims characterized by "*clear or apparent absence of violation*"; and the latter should be declared as manifestly ill-founded.

Allegation for violation of Article 32 of the Constitution, in conjunction with Article 13 of the ECHR

17. The Applicant emphasizes that there were no regular legal remedies available against the judgment of the Court of Appeals. According to him, the Basic Court and the Court of Appeals have not considered his appeals and thereby violated his fundamental rights and freedoms guaranteed by the Constitution.

18. I reiterate that every person has the right to pursue legal remedies against judicial and administrative decisions, which deny his rights or interests, in the manner provided by law. Based on Article 32 of the Constitution, in conjunction with Article 13 of the ECHR, legal systems must provide effective legal remedies to address the essence of claims of violations of the Constitution and the ECHR (see Court cases, KI193/18, Applicant *Agron Vula*, Judgment of 22 April 2020, paragraphs 129-132).

19. In the present case, the Basic Court, by Judgment [2022: 234101] of 7 December 2023, found the Applicant guilty of the criminal offense of "*Rape*" and sentenced him to six (6) years imprisonment. Against this judgment, the Applicant filed an appeal with the Court of Appeals, on the grounds of violation of the provisions of the criminal procedure, violation of the criminal law, erroneous determination of factual situation and the decision on criminal sanction. His appealing allegations were dismissed as ungrounded by the Court of Appeals, which considered that the judgment of the Basic Court was fair and in accordance with legal provisions.

20. I emphasize that the Applicant has used the legal remedies provided by the law and that the Court of Appeals has addressed his appealing allegations, although it has declared them as ungrounded. The Applicant is not satisfied with the outcome of the trial, because his appeal was rejected by the Court of Appeals as ungrounded. The Court reiterates once again that the effectiveness of the legal remedy does not depend on the outcome of the judicial process, but on whether the Applicant has had the opportunity to formally use the legal remedy and whether his claims have been substantially addressed by the regular courts (see Court's case KI92/23, Applicant *Mimoza Pajaziti*, Resolution on Inadmissibility of 31 January 2024, paragraph 67).

21. Therefore, I find that the Applicant's allegations regarding the denial of the right to use the legal remedy, of violation of Article 32 of the Constitution in conjunction with Article 13 of the ECHR, pertain to category of (ii) claims characterized by "*clear or apparent absence of violation*"; and the latter should be declared as manifestly ill-founded.

Applicant's allegations of violation of Articles 23 [Human Dignity], 24 [Equality Before the Law], 26 [Right to Personal Integrity] and 53 [Interpretation of Human Rights Provisions] of the Constitution

22. In the present case, the Applicant only mentions the violation of Articles 23, 24, 26 and 53 of the Constitution, but does not reason or explain how the violation of these Articles occurred.

23. Therefore, in relation to these claims of the Applicant for the violation of the rights guaranteed by Articles 23, 24, 26 and 53 of the Constitution, I conclude that this part of the Referral should be declared inadmissible as manifestly ill-founded because these claims qualify as claims that fall into the category of (iii) "*unsupported or unreasoned*" claims because the Applicant merely stated one or more provisions of the Convention or the Constitution, without explaining how they have been violated. Therefore, they are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

In view of the above, I conclude that the Applicant's allegations should be rejected in their entirety as manifestly ill-founded.

The concurring opinion was presented by Judge:

Radomir Laban, Judge

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On 6 November 2024 in Prishtina

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