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

Prishtina, on 26 February 2014
No. ref.:RK 560/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI14/14

Applicant

Abdyl Islami

Constitutional Review of the Judgment of the Supreme Court, Pml. No. 225/2013, of 18 December 2013

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

The Applicant

1. The Applicant is Mr. Abdyl Islami (hereinafter: the Applicant), residing in Prishtina.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court, Pml. No. 225/2013, of 18 December 2013, which was served on the Applicant on 10 January 2014.

Subject matter

3. The subject matter is the request for constitutional review of the Judgment of the Supreme Court, Pml. No. 225/2013, of 18 December 2013, and the Judgments of the Municipal Court in Prishtina (P. No. 1823/2012, of 16 July 2012), and the Court of Appeals (PA1. No. 1081/2012, of 12 September 2013). The above-mentioned judgment of the Supreme Court is related to rejection of the request of the Applicant for protection of legality as ungrounded, while by judgments of the lower instance courts the Applicant was found guilty of having committed the criminal offence of serious offence against traffic safety, and for the same was sentenced to imprisonment.

4. Apart from the foregoing, the Applicant requires from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure until a decision is rendered by the Court, namely to suspend the execution of the Judgment of the Kosovo Court of Appeals (PA1. No. 1081/2012, of 12 September 2013), which adjudicated the Applicant to imprisonment for a period of one (1) year.

Legal basis

5. The Referral is based on Article 113. 7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 27 and 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 54, 55, and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 28 January 2014, the Applicant filed a referral with the Court.

7. On 31 January 2014, the President, by Decision GJR. KI14/14, appointed Judge Arta Rama-Hajrizi as Judge Rapporteur. On the same date, the President, by Decision KSH. KI14/14, appointed the Review Panel composed of judges: Altay Suroy (Presiding), Snezhana Botusharova and Kadri Kryeziu.

8. On 31 January 2014, the Constitutional Court notified the Applicant of the registration of the referral. On the same date, the Court also notified the Supreme Court of the referral.

9. On 7 February 2014, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court to declare the Referral as inadmissible and to reject the request for interim measures.

Facts of the case

10. On 24 January 2003, the Applicant, while driving a vehicle in traffic, hit a pedestrian, and, due to injuries suffered from the impact of the vehicle, the pedestrian died one hour later in hospital.

11. From 24 January 2003 to 6 February 2003, the Applicant was held in detention.

12. On 25 March 2003, the Municipal Public Prosecution in Prishtina filed an indictment against the Applicant, based on the criminal offence of serious offence against traffic safety, as per Article 171 paragraph 5, in conjunction with Article 165 paragraph 3, in conjunction with paragraph 1 of the Criminal Law of Kosovo.

13. On 14 February 2011, the Municipal Court in Prishtina (Judgment P. No. 497/2003) found the Applicant guilty, thereby sentencing him to imprisonment for a period of two (2) years.

14. Following the Applicant's appeal, on 21 June 2011, the District Court in Prishtina (Ruling AP. No. 78/2011) approved as grounded the complaint of the Applicant, thereby annulling the Judgment of the Municipal Court (Judgment P. No. 497/2003, of 14 February 2011), and remanded the case for retrial.

15. The Applicant has not filed with the Court the Judgment of the Municipal Court in Prishtina (P. No. 497/2003, of 14 February 2011) and the Ruling of the District Court in Prishtina (AP. No. 78/2011, of 28 June 2011).

16. After the case was remanded for retrial, the Municipal Court in Prishtina ordered a super-expertise.

17. On 16 July 2012, the Municipal Court in Prishtina, upon holding court hearings, hearing of the parties and after taking expert opinions, by Judgment P. no. 1823/2012, found the Applicant guilty of a serious criminal offence against traffic safety, as per Article 171 paragraph 5, in conjunction with Article 165 paragraph 3, in conjunction with paragraph 1 of the Criminal Law of Kosovo, and sentenced him to imprisonment for a period of two (2) years, thereby counting also the time spent in detention.

18. The Municipal Court in Prishtina had reached the conclusion:

[...]

"Upon determining the punishment the court took into consideration all the circumstances that impact the type and severity of the punishment. The court took into consideration the mitigating circumstances for the accused Avdyl Islami, that he is a family man, father of one child, that he has not been sentenced before, that there is no other criminal procedure being conducted against him, whereas the court considered as aggravating circumstances the motive and the location where the criminal offense was perpetrated and the same for the criminal offense as stated in the indictment was imposed the imprisonment of 2 (two) years duration as it is

convinced that the effect of the punishment will be achieved with this punishment."

"From the facts confirmed above the court found that the actions of the accused Avdyl Islami include all substantial elements of the criminal offense Aggravated offense against traffic safety pursuant to Article 171, paragraph 5 in conjunction to Article 165, paragraph 3 in conjunction to paragraph 1 of the LPK, and the court found the accused guilty of this criminal offense, after previously finding that he is criminally responsible."

19. The Applicant filed an appeal against the Judgment of the Municipal Court in Prishtina, claiming that the aforementioned Judgment contained substantial violations of the criminal procedure provisions, alleging that the enacting clause of the Judgment was unclear and incomprehensible, and had not provided sufficient reasoning on relevant facts. The Applicant also complained of an erroneous and incomplete determination of the factual situation.

20. On 12 September 2013, the Kosovo Court of Appeals, by Judgment PA1. No. 1081/2012, decided to partially approve the complaint of the Applicant, and to amend the Judgment of the Municipal Court in Prishtina (P. No. 1823/2011, of 18 July 2012), regarding the part of decision on the sentence of imprisonment, thereby imposing on the Applicant an imprisonment sentence of one (1) year.

21. Upon reviewing the allegations raised by the Applicant, the Kosovo Court of Appeals found that:

[...]

"The Criminal Panel of the Appeal Court, by considering the appealed judgment pursuant to Article 394 para. 1 item 1.1. of CPCK, noticed ex-officio and came to conclusion that the appealed judgment does not contain essential violations of the criminal procedure provisions from Article 384 para.1 item 1.12 of CPCK, because the enacting clause of the challenged judgment is clear, comprehensible and as such in consistency with itself and with the presented reasons. In the enacting clause of the appealed judgment, in the factual description, are provided all reasons regarding the decisive facts and the circumstances that constitute essential elements of the criminal offence, the serious offence against the traffic safety from Article 171 para.5 in conjunction with Article 165 para.3 in conjunction with para. 1 of the CLK, applied pursuant to UNMIK Regulation 24/1999, which elements are determined during the main court hearing and after the end of the same, the accused was found guilty."

[...]

"the appealed judgment does not contain violations, alleged by the defence of the accused, because the first instance court assessed correctly all evidence that was presented during the holding of the court hearing, such as the statement of the accused, the statements of the witnesses, the material evidence from the case file has been assessed, therefore the first instance court concluded that the accused on the critical day has committed

the serious criminal offence against the traffic safety from Article 171 para. 5 in conjunction with Article 165, para. 3, in conjunction with para. I, of the CLK."

[...]

22. Considering the above, the Court of Appeals concluded as the following:

[...]

"Since by the appeal of the defence of the accused, the judgment is appealed regarding the decision on punishment, alleging that by the first instance court were overestimated the aggravating circumstances, without assessing the mitigating circumstances, such as relative long time from the commission of the criminal offence and until now, that the accused is family person, the panel of the Court of Appeals, after the assessment of the case file and these circumstances, came to conclusion that by partly approving the appeal of the defence counsel of the accused is modified the decision on punishment, so that the accused was imposed the punishment of imprisonment in duration of 1 (one) year, being convinced that by the imposed punishment will be achieved the effect and the purposes of the punishment, provided by Article 41 (the old one 34) of the CCK."

23. On 5 December 2013, the Applicant, claiming erroneous application of substantive law in the Judgment of the Municipal Court in Prishtina (P. No. 1823/11, of 18 July 2012) as amended by the Judgment of the Court of Appeals, filed a request for protection of legality with the Supreme Court.

24. In his request for protection of legality, the Applicant claimed [...] *"Only over speeding, without other unlawful and dangerous actions for other participants in traffic, in no case does imply that the person committed the criminal offence from Article 171 in conjunction with Article 165 of CLK. In the present case moving with the speed of over 40km/h can only be qualified as a traffic offence but not as a criminal offence."* The applicant concludes his request by stating the following: *"The actions of the convicted in the present case do not consist of elements of the criminal offence, hence the challenged judgments must be altered or quashed as proposed above, since they deal with violation of the criminal law to the detriment of the convicted, by applying the criminal law without being able to determine a violation of provisions Article 171 and 165 of the CLK."*

25. On 18 December 2013, the Supreme Court rendered the Judgment (Pml. No. 225/2013), thereby rejecting as ungrounded the request for protection of legality.

26. In its judgment, the Supreme Court found the following:

[...]

"From the case files and the factual description of the criminal offence it results that the actions of the defendant meet the elements set by provisions

of Article 165 paragraph 1 of the CLK, while these actions resulted with the death of a person, the offence was qualified in compliance with provisions of Article 171 paragraph 5 of the CLK, therefore qualifying it as a criminal offence can't be put in doubt by anything.

From the above mentioned reasons, the Supreme Court of Kosovo didn't approve the allegations of the referral for protection of legality that in this case we only deal with a traffic offence, because as it was mentioned above, as a result of disregarding the provisions that govern the road traffic - excessive speeding, caused the death of pedestrian Xhemajl Lluzha, therefore we are not presented with a misdemeanor, but with a criminal offence as it was correctly determined by the first and second instance Courts, which is also confirmed by this Court."

Applicant's allegations

27. The Applicant alleges that the Judgment of the Supreme Court, and the judgments of the Court of Appeals and the Municipal Court in Prishtina, have violated his rights guaranteed by the Constitution, namely Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to Due Process] of the European Convention for Human Rights (hereinafter: ECHR).

28. In this regard, the Applicant alleges the following:

[...]

"The judgment of Municipal Court in Prishtina, p.no.1823/2012, the judgment of Court of Appeals in Prishtina, PA 1.no.1081/2012, and the judgment of Supreme Court of Kosovo, Pml.no.225/2013, in no moment take into consideration any of the requests of the defense in order to provide a fair trial and for the equality of parties in the procedure. In fact all these judgments by being focused allegedly only on the determination of the factual situation and the implementation of criminal law, they are not even based on giving the evaluations of proposals and requests of defense counsel of the now applicant-convict."

[...]

"The court in no moment made efforts to provide a complete expertise, which should be based on all circumstances in relation to causing of accident, from scene of event, and circumstances in the field as well as technical conditions of the vehicle."

29. The Applicant addresses the Court the following request:

"- that the request is declared admissible
- to be determined that there were violations of Article 31 of the Constitution of Kosovo (the right to fair and impartial trial) and Article 6 of European Convention for Human Rights (the right to duly process).
- to be pronounced invalid the judgment of Supreme Court of Kosovo, Pml.no.225/2013 of 18 December 2013, judgment of Court of Appeals in

Prishtina, PA1.no. 1081/2012 and Judgment of Municipal Court in Prishtina, P.no.1823/2012,
- to remand the case for retrial".

Admissibility of the Referral

30. In order to be able to adjudicate the Applicant's Referral, the Court must first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.

31. In this regard, Article 113 paragraph 7 of the Constitution, provides that:

> *"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."*

32. Apart from the foregoing, Article 49 of the Law provides that *"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."*

33. In this concrete case, the Court notes that the Applicant has exhausted all legal remedies available by law. The Court also notes that he was served the Judgment of the Supreme Court of Kosovo, Pml. No. 225/2013, on 10 January 2014, and that he filed his Referral with the Court on 28 January 2014.

34. Therefore, the Court considers that the Applicant is an authorized party, and that he has exhausted all legal remedies available according to applicable law, and that the referral was filed within the timeline of four months.

35. However, the Court also takes into account Rule 36 of the Rules of Procedure, which provides:

> *"(1) The Court may only deal with Referrals if: (c) the Referral is not manifestly ill-founded."*
> *(2) The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:"*
> *[...], or*
> *b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights;*
>
> *[...], or*
>
> *d) when the Applicant does not sufficiently substantiate his claim."*

36. The Applicant alleges that the Judgment of the Supreme Court, Pml. No. 225/2013, and the judgments of lower instance courts, have violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to Due Process] of the ECHR.

37. In relation to the proceedings before the regular courts, the Applicant alleges that: *"The court in no moment made efforts to provide a complete expertise, which should be based on all circumstances in relation to causing of accident, from scene of event, and circumstances in the field as well as technical conditions of the vehicle."*

38. In relation to the allegations made by the Applicant before the regular courts, the Court notes that the Municipal Court, upon remand of the case for retrial by the District Court in Prishtina (Decision AP. No. 78/2011, of 21 June 2011), ordered a super-expertise. As a result of this, and upon holding court hearings, hearing of parties, and upon assessment of the experts, this Court, by Judgment (P. No. 1823/2012, of 16 July 2012), found the Applicant guilty of the criminal offence.

39. In its Judgment, the Municipal Court concluded:

> *"From the facts confirmed above the court found that the actions of the accused Avdyl Islami include all substantial elements of the criminal offense Aggravated offense against traffic safety pursuant to Article 171, paragraph 5 in conjunction to Article 165, paragraph 3 in conjunction to paragraph 1 of the LPK, and the court found the accused guilty of this criminal offense, after previously finding that he is criminally responsible."*

40. In this regard, the Constitutional Court reiterates that in accordance with the Constitution, it is not its duty to act as a fourth-instance court when considering the decisions taken by regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See *mutatis mutandis*, García Ruiz v. Spain, No. 30544/96, ECtHR, Judgment of 21 January 1999; see also case KI70/11, Applicants Faik Hima, Magbule Hima and Bestar Hima, Inadmissibility Resolution of 16 December 2011).

41. The Constitutional Court can only consider whether the evidence is presented in the right way and whether the proceedings in general, viewed in their entirety, were held in such a way that the Applicant has had a fair trial (See *inter alia,* case Edwards v. United Kingdom, No. 13071/87, Report of the European Commission for Human Rights, adopted on 10 July 1991).

42. Based on the case files, the Court notes that the reasoning provided by the Judgment of the Supreme Court is clear, and after reviewing all of the proceedings, the Court also found that the regular court proceedings were in no way unfair or arbitrary (See *mutatis mutandis,* Shub v. Lithuania, No. 17064/06, ECtHR decision of 30 June 2009).

43. Furthermore, the Supreme Court in its judgment finds, that [...]*"From the case files and the factual description of the criminal offence it results that the actions of the defendant meet the elements set by provisions of Article 165 paragraph 1 of CLK, while these actions resulted with the death of a person, the offence was qualified in compliance with provisions of Article 171 paragraph 5 of the CLK, therefore qualifying it as a criminal offence can't be put in doubt by anything."*

44. For the foregoing reasons, the Court considers that the facts presented by the Applicant have in no way justified the allegation of violation of constitutional rights, and that the Applicant has failed to sufficiently prove such allegations, on how and why the mentioned judgments have violated his rights guaranteed by the Constitution.

Request for interim measure

45. The Applicant requires from the Court *"to render a decision TO ALLOW the interim measure until the time of retrial, so that the applicant will not be based on beginning of serving the sentence"*

46. In relation to such a request for interim measure, the Applicant claims that: [...] *"The request for allowance of an interim measure is reasonable and based on the fact that now after the finalization of all procedures before the regular courts, it is expected that very soon the applicant starts serving the sentence."*

47. In order that the Court allow an interim measure, in accordance with Rule 55 (4) of the Rules of Procedure, it needs to determine that:

> *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
> *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted.*
>
> *(...)*
>
> *If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application".*

48. As concluded above, the Referral is inadmissible, and therefore, there is no *prima facie* case for imposing an interim measure and for these reasons, the request for an interim measure is manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 27 of the Law, and Rules 36 (2), b) and d), and 55 (4) of the Rules of Procedure, on 26 February 2014 , unanimously:

DECIDES

I. TO DECLARE the Referral as Inadmissible;

II. TO REJECT the Request for 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. TO DECLARE this Decision effective immediately

Judge Rapporteur **President of the Constitutional Court**

Arta Rama-Hajrizi Prof. Dr. Enver Hasani