



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

Pristina, 12 December 2011
Ref. No.: RK174/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 80/11

Applicant

Lutfi Dervishi

Constitutional Review of the Decisions of the District Court of Pristina:

Kp. no. 196/2009, dated 8 June 2009,

**PPS. no. 02/2009, P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA.
no. 309/10, dated 1 March 2011,**

**P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10, dated 27
April 2011.**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Lutfi Dervishi, represented by Mr. Linn Slattengren a practicing lawyer from Pristina.

Challenged decisions

2. The Applicant challenges the following Decisions of the District Court in Pristina:
 - a. Kp. no. 196/2009, of 8 June 2009, which allegedly was never served upon the Applicant;
 - b. PPS. no. 02/2009, P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10, of 1 March 2011, which allegedly was picked up by the representative of the Applicant on 1 March 2011; and
 - c. P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10, of 27 April 2011, which allegedly was picked up by the representative of the Applicant on 27 April 2011.

Subject matter

3. The Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter, the "Court") to assess the constitutionality of the Decisions of the District Court in Pristina, whereby his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 [Right to fair trial] and Article 5 [Right to liberty and security] of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the "ECHR") have allegedly been violated.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 9 June 2011, the Applicant submitted the Referral to the Court.
6. On 17 August 2011, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Enver Hasani and Altay Suroy.
7. On 15 September 2011, the Applicant, informing the Court that "the Prishtina District Court has set the case for trial starting 4 October 2011", requested information on "the status of proceedings" and whether the Court "expects to take any action before the trial date".
8. On 19 September 2011, the Court informed the Applicant that the Case has been registered and is being reviewed by the Court. On the same date, the Court communicated the Referral to the District Court of Pristina.
9. On 11 October 2011, the Court communicated the Referral to the EULEX Prosecutor in Pristina.
10. On 22 November 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 12 November 2008, the Prosecutor started Investigations against the Applicant for the criminal offences of Articles 139.1 and 23 of the Criminal Code of Kosovo (hereinafter, the "CCK"), for an initial period of six months.
12. On 22 May 2009, the Prosecutor filed a request with the District Court of Pristina to extend the investigations for a further six months.
13. On 31 May 2009, the pre-trial judge of the District Court of Pristina rejected the request to extend the investigation for further six months (GJPP 361/08). It reasoned that *"In the present case, the investigations have started on the 12th of November 2008, thus the initial investigation term of six (6) months has expired on 12 May 2009. The application of the Public Prosecutor to extend the investigations for further six (6) months has been filed with the District Court of Prishtine/Pristina on the 22nd of May 2009, with a delay of ten (10) days. Thus, the investigation, being already expired at the time when the application for the extension has been filed by the Public Prosecutor (22nd of May 2009), cannot be further extended"*, pursuant to Articles 94, 95 and 225 of CCK.
14. In June 2011, the Prosecutor filed an appeal against this decision to the Appellate Panel of the District Court of Pristina.
15. On 8 June 2009, the Appellate Panel of the District Court of Pristina approved the appeal of the Prosecutor and granted him/her the request for extension of investigation (Kp. no. 196/2009), taking into account that *"Article 225 of CCK does not state expressively that the application for extension of investigations should be filed in a timely continuance with the development of the until then investigations."* Against this decision, pursuant to Article 431 (2) of CCK no appeal is permitted.
16. On 9 November 2009, the pre-trial judge approved another extension for more six months.
17. On 11 January 2010, the pre-trial judge approved another extension for more six months.
18. On 12 May 2010, the Supreme Court approved an extraordinary extension of investigations for additional six months.
19. On 15 October 2010, an indictment was filed with the District Court of Pristina (PPS 41/09).
20. On 20 October 2010, indictment (PPS. No. 107/10) was filed with the District Court of Pristina.
21. On 29 November 2010, the indictments of 15 and 20 October 2010 were joined.
22. On 14 December 2010 and 6 January 2011, the confirming Judge held a confirmation hearing concerning the joined indictments.
23. On 31 January 2011, the District Court of Pristina rendered a decision on admissibility of evidence, ruling that some of the evidence seized was done in violation of the law and rights of the Applicant (PPS. No. 02/2009).

24. On 8 February 2011, the Prosecutor filed an appeal against this decision to the three judge panel of the District Court of Pristina. In addition, on 22 February 2011, the Applicant filed a response to the appeal of the Prosecutor.
25. On 1 March 2011, the three panel judge of the District Court of Pristina granted the appeal of the Prosecutor and annulled the decision of 31 January 2010, reasoning that "it is not possible during the confirmation hearing for the judge to hear live evidence or, in the opinion of the Panel, to make a final determination of the facts that led to the seizure of evidence. This is the exclusive province of the trial panel" Hence the case was returned to the confirming Judge to issue a ruling on the indictment only pursuant to Article 316 of CCK (PPS. no. 02/2009, P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10).
26. On 2 March 2011, the confirming Judge confirmed partially the indictment against the Applicant (KA 278/10, P 309/10, KA 309/10, P 340/10).
27. The Prosecutor appealed against this decision to the three judge panel of the District Court of Pristina. The Applicant also filed a response to the appeal of the Prosecutor.
28. On 27 April 2011, the three judges' panel of the District Court of Pristina granted the appeal of the Prosecutor and modified the ruling of the confirming Judge of 2 March 2011 in that all charges were confirmed (P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10).

Applicant's allegations

29. The Applicant alleges what follows.
 - (i) Violation of the right to fair and impartial hearing
 - a. The Applicant was never informed of the court ruling on extension of the investigation and this ruling was never served on him. Therefore, the Applicant could not appear or appeal this clearly unjust and illegal ruling (on extension of the investigation). Hence, he was denied the right to public hearing.
 - b. The Applicant claims that the investigation was ongoing during two years without him being given a public hearing. Hence, he was also denied a fair and impartial public hearing as to the criminal charges within a reasonable time..
 - c. The Applicant was not informed about the ruling on the extension of the investigation. Hence, he was denied an impartial public hearing as to the criminal charges.
 - (ii) Violation of the equality of arms principle
 - d. The Applicant claims that an unwarranted "search" was conducted at the Medicus clinic and no inventory of the "search" has been provided to him. He further claims that, on 31 January 2011, the confirming Judge [...] issued a ruling suppressing the evidence seized [...]. Subsequently, the Prosecutor filed a secret appeal against the ruling of the confirming Judge. The defense was never served with this appeal. The Prosecutor, as a matter of comity, informed the Applicant of the appeal. Counsel filed a response with the appellate panel [...]. Hence, he was denied the equality of arms and a fair and impartial trial.

(iii) Violation of due process

e. The Applicant claims that, on 2 March 2011, the confirming Judge issued a ruling confirming the indictment against him [...]. [...] the Prosecutor filed a secret appeal against the ruling of the confirming Judge. The defense was never served with this appeal either. The Prosecutor again informed the undersigned of the fact of the appeal. Counsel filed a response with the appellate panel [...]. Hence, he was denied fundamental due process as to the criminal charges.

30. In sum, the Applicant is alleging mainly a violation of the right to fair and impartial hearing, violation of the principle of equality of arms and violation of due process.
31. All the violations have been allegedly committed during the investigation, the pre-trial stage of the criminal proceedings which are still pending.
32. Almost all the contested decisions were subject to Appeal, where it was decided, namely, that “the issue of admissibility of evidence should properly be determined by the trial panel”.
33. The Applicant basis his allegations mainly on Article 6 [Right to Fair Trial] and Article 5 [Right to Liberty and Security] of the ECHR.
34. Article 5 (4) and Article 6 (1) of the ECHR pursue different purposes [right to liberty and security; and right to fair and impartial trial]. Consequently, the criminal head of Article 6 does not apply to proceedings for the review of the lawfulness of detention falling within the scope of Article 5 (4), which is the *lex specialis* in relation to Article 6. (See *Reinprecht v. Austria*, §§ 36, 39, 48 and 55).
35. In general, Article 5 has to do with the right to be informed about the charges, while Article 6 deals with the right to challenge and discuss the charges.
36. It is up to the trial Judge, and if necessary up to the main trial, to consider the alleged violations and determine on the criminal charges. The trial Judge must then apply the Code of Criminal Procedure in a way consistent with the Constitution and the European Convention case-law.

Assessment of the admissibility of the Referral

37. The Court emphasizes that it can only decide on the admissibility of a Referral, if the Applicant shows that he/she has exhausted all effective legal remedies available under applicable law.

Article 113.7 of the Constitution establishes 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.*”

On the other side, Article 47.2 of the Law provides that “*The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.*”

38. The principle of subsidiary requires that the Applicant exhausts all procedural possibilities in the regular proceedings in order to prevent the violation of the constitution or, if any, to remedy such violation of a fundamental right.

39. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo, KI-41/09, of 21 January 2010, and see mutatis mutandis, ECHR, Selmouni vs. France, no. 25803/94, Decision of 28 July 1999).
40. In fact, as a general rule, the Constitutional Court will only intervene where there are infringements of the interpretation of the Constitution or the laws do not comply with the Constitution, but only after exhaustion of all legal remedies provided by law.
41. In the present case, the Court notes that the case is still pending before the regular court, where the Applicant will still be able to raise his complaints before the trial Judge about the alleged violation of his rights during the pretrial period. Thus, the Court considers that there is no final decision yet to be challenged before this Court.
42. Therefore, the Applicant has not exhausted all legal remedies, including the last instance, available under applicable law, as required by Article 113.7 of the Constitution and Article 47(2) of the Law.
43. For all the foregoing, the Referral is inadmissible

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 (2) of the Law, and Rule 56 (2) of the Rules of Procedure, on 22 November 2011, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law;
- III. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Almiro Rodrigues



Prof. Dr. Enver Hasani

