



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE

УСТАВНИ СУД

CONSTITUTIONAL COURT

Prishtina, 29 December 2015
Ref. no.:RK879/15

RESOLUTION ON INADMISSIBILITY

in

Case No. KI134/14

Applicant

Sadik Thaqi

Complaint regarding the lack of investigation of the death his son

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge, and
Bekim Sejdiu, Judge

The Applicant

1. The Referral is submitted by Mr. Sadik Thaqi, with residence in Prishtina (hereinafter, the Applicant).

Challenged Decision

2. The Applicant does not expressly refer to a specific decision of a public authority to be challenged.
3. He complains mainly about the failure of public authorities to determine whether “*someone should be held responsible for the violent death*” of his son.

Subject Matter

4. The subject matter is the assessment of the Applicant’s Referral on the lack of a criminal investigation of the death of his son. The Applicant considers that his rights, as guaranteed under Article 25 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution) and Article 2 of the European Convention on Human Rights were violated (hereinafter, the ECHR).

Legal Basis

5. The Referral is based on Article 113 (7) of the Constitution and Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law).

Proceedings before the Constitutional Court

6. On 1 September 2014, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On 5 September 2014, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova (presiding), Kadri Kryeziu and Arta Rama-Hajrizi.
8. On 12 September 2014, the Court informed the Applicant of the registration of the Referral.
9. On 29 June 2015, by Decision No. KSH.KI134/14, the President of the Court appointed Judge Ivan Čukalović as a member to the Review Panel replacing Judge Kadri Kryeziu whose mandate in the Constitutional Court ended on 26 June 2015.
10. On 14 October 2015, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the admissibility of the Referral.

The Facts of the Case

11. According to the Applicant, and as it appears from the submitted documents, the facts of the case may be summarized as follows.
12. On 4 September 2003 a number of inmates in Dubrava Prison attacked the unarmed prison guards and took control of Pavilion 2 of the Dubrava Prison.

The inmates barricaded the entrance to the cell block using mattresses and thereafter requested, *inter alia*, improved living conditions from the prison management.

13. On the same date, an intervention team started to remove mattresses which had been used by the inmates as a barricade. In response, prisoners set fire to the mattresses and, as a consequence, 5 (five) inmates died from the inhalation of toxic fumes and injuries sustained in the ensuing fire. The Applicant's son, Ardian Thaqi, was one of the prisoners that died in the riot in the Dubrava Prison.
14. On 5 September 2003 the United Nations Interim Administration in Kosovo (hereinafter: UNMIK) prosecutor requested examination and autopsies of the bodies of the five deceased inmates.
15. On 7 September 2003 the UNMIK Central Criminal Investigation Unit (hereinafter, the CCIU) published a report on the preliminary investigation on the incident
16. On 10 September 2003 UNMIK established a special commission, called "the Dubrava Commission" in order to, *inter alia*, establish the events of 4 September 2003 and the facts and circumstances that had led up to them.
17. The Dubrava Commission reviewed the manner in which the incident had been addressed by the authorities, the prisoners' complaints and then reasons for the incident; the contingency plan for addressing prison unrest; previous prison incidents; inmate conditions as well as management and prison training.
18. On 22 September 2003 the UNMIK Police Component initiated criminal investigation into the incident entitled "Causing General Danger through Fire being Grave Acts against General Security and Resulting in Murder."
19. On 4 November 2003 the Dubrava Commission completed its review and published a report in which it made thirty-nine (39) recommendations in order to establish good prison management standards in prison.
20. On 10 August 2004 the UNMIK prosecutor requested that the UNMIK investigators expand the scope of investigation and to include possible criminal conduct or criminal negligence by the Panel Management Division or other UNMIK employees. However, this recommendation was ignored by UNMIK authorities.
21. On 9 December 2008 European Union Rule of Law Mission in Kosovo (hereinafter: EULEX) took over responsibility from UNMIK for pending legal cases and police investigations, and the documentation related to the Applicant's case was officially handed over to EULEX on 23 December 2008, in accordance with Article 15.10 of the Law No. 03/L052 on the Special Prosecution Office of the Republic of Kosovo (hereinafter Law on the Special Prosecution Office).

22. On 16 July 2010 the EULEX Prosecutor terminated the proceedings against the prisoners, finding that there was no justified suspicion that the defendants had committed criminal offences.
23. The Applicant was informed of this decision by a letter dated 16 July 2010. He had the option of either submitting a written application for an extension of the investigation to a pre-trial judge or filing an indictment against the defendants before the competent District Court within eight (8) days of the receipt of the notification of the termination of the investigation in accordance with Article 15.12 of the Law on the Special Prosecution Office and Articles 62 and 224 of Provisional Criminal Procedure Code of Kosovo, which was in force at that time. Apparently, the Applicant did not exercise either option.
24. On 6 September 2010 the Applicant registered a complaint with the Human Rights Review Panel (hereinafter, the Panel).
25. With regard to the complaint against UNMIK, the Panel observed that it lacked jurisdiction to examine the actions or omissions by UNMIK and therefore declared it inadmissible.
26. With regard to the complaint against prison authorities, the Panel observed that it is incompatible *ratione temporis* with its jurisdiction and thus found it inadmissible.
27. With regard to the complaint against the prisoners, the Panel observed that the prosecution of prisoners was admissible under its mandate. However, the Panel found that EULEX discharged its responsibilities with regard to this investigation and consequently held that was no violation of Article 2 of the ECHR.
28. During the year 2013, the Applicant contacted the numerous organs requesting the investigation of his son's death, including the Ministry of Justice, the Supreme Court of the Republic of Kosovo, the Office of the Chief State Prosecutor, the Office of the Chief Prosecutor of EULEX, and the European Court of Human Rights.
29. In a letter dated 19 March 2013 the Supreme Court of the Republic of Kosovo notified the Applicant that it is not within its mandate to conduct investigations and that the issue of investigation in this case is within the competence of other organs.
30. In a letter dated 3 May 2013 the State Prosecutor directed the Applicant to contact the Prosecution of EULEX since the Applicant's case was conducted from the beginning by UNMIK and later handed to EULEX and was not handled by the State Prosecutor.
31. In a letter dated 15 July 2013 the Deputy Prime Minister and the Minister of Justice informed the Applicant that he should pursue this legal course with the competent authorities.

32. In a letter dated 07 June 2013 the Office of the Chief Prosecutor of EULEX informed the Applicant that an investigation may be re-opened only if new evidence is available that was not previously administered and considered.

Applicant's Allegation

33. As stated above, it is understood from the facts of the case that the Applicant alleges violations of Article 25 [Right to life] of the Constitution and Article 2 [Right to life] of the ECHR on both, substantive and procedural grounds. The substantive aspect is related to the responsibility of the authorities for the death of the Applicant's son, while the procedural aspect is related to the obligation of the State to investigate the cause of his son's death.

Relevant Law

34. The Court notes the time of these events and during the time that these investigations were undertaken, the applicable law and respective provisions relevant to the case were as follows:

Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation 2003/26 of 6 July 2003

Article 62

(1) Except in the cases provided for under Articles 226 and 227 of the present Code, when the public prosecutor finds that there are no grounds to undertake an investigation or prosecution of a criminal offence which is prosecuted *ex officio* or by means of a motion or when he or she finds that there are no grounds to prosecute any of the reported accomplices, or when he or she is deemed by the present Code to have withdrawn from prosecution, the public prosecutor must notify the injured party of this within a period of eight days and instruct him or her that he or she may undertake prosecution as a subsidiary prosecutor. The same procedure shall also be followed by a court if the public prosecutor has withdrawn from prosecution, before the beginning of the main trial.

(2) The injured party has the right to undertake or to continue prosecution within eight days of the date of receipt of the notification under paragraph 1 of the present article.

(3) If the public prosecutor has withdrawn the indictment, the injured party may, in undertaking prosecution, abide by the indictment already filed or file a new one.

(4) An injured party who has not been notified that the public prosecutor did not undertake prosecution or withdrew from prosecution may make his or her statement that proceedings are being continued before the competent court within three months of the date on which the public prosecutor rejected the report or the date on which the ruling to terminate proceedings was rendered.

[...]

Article 224

(1) The public prosecutor shall terminate the investigation if at any time it is evident from the evidence collected that:

- 1) There is no reasonable suspicion that a specific person has committed the indicated criminal offence;
- 2) The act reported is not a criminal offence which is prosecuted *ex officio*;
- 3) The period of statutory limitation for criminal prosecution has expired;
- 4) The criminal offence is covered by an amnesty or pardon; or
- 5) There are other circumstances that preclude prosecution.

(2) The public prosecutor shall within eight days of the termination of the investigation notify the injured party of this fact and the reasons for this (Article 62 of the present Code) The public prosecutor shall immediately inform the pre-trial judge about the termination of the investigation.

Law No. 03/L-052 on the Special Prosecution Office of the Republic of Kosovo

Article 15 – Transitional Provisions

[...]

15.10 Upon the entry into force of this law, all files, information, archives and data, in electronic and hard copies related to cases currently investigated, prosecuted or dismissed by UNMIK International prosecutors and held by the United Nations Mission in Kosovo (UNMIK) Department of Justice will be handed over to the Chief EULEX Prosecutor, pursuant to the modalities as established in Arrangements between UNMIK and the EULEX Kosovo.

Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo

Article 7 - General authority of EULEX prosecutors

7.1 EULEX prosecutors will have the authority and responsibility to perform the functions of his or her office, including the authority to conduct criminal investigations and take responsibility for new and pending criminal investigations or proceedings, within the SPRK or within the prosecution offices to which he or she is assigned to by the Chief EULEX Prosecutor and according to the modalities as established by the present Law and by the Assembly of the EULEX Prosecutors.

7.2 EULEX prosecutors will cooperate with the Kosovo Public Prosecutors working within the different prosecution offices to which he or she is assigned to, in accordance with the modalities as established by the present law and by the Assembly of the EULEX Prosecutors.

7.3 Besides exercising their investigating and prosecutorial functions pursuant to the provisions of Article 8 of this law, the EULEX prosecutors will monitor, mentor and advise the Kosovo Public Prosecutors in the respect of the principle of autonomy of prosecutors and in accordance with the modalities as established by the present law and by the Assembly of the EULEX Prosecutors. Their role as monitors, mentors and advisors will not be limited to the cases for which the EULEX prosecutors can exercise their competences.

7.4 EULEX prosecutors will discharge their functions in compliance with the applicable law. They will be under the exclusive authority of the Chief EULEX Prosecutor and will not be subject to the authority of any Kosovo institution.

Article 8 - Competences of EULEX prosecutors in Kosovo

8.1 The EULEX prosecutors will be competent to investigate and prosecute the crimes, that fall under the exclusive competence of the SPRK in accordance with the law that establishes the SPRK, and the crimes, including the attempt and the various form of collaboration to the crimes, listed in all items of paragraph 3 of Article 3 of this law.

Assessment of the Admissibility of the Referral

35. First, the Court examines whether the Applicant has fulfilled the admissibility requirements set out in the Constitution, and as further specified in the Law and the Rules of Procedure.

36. In this respect, the Court refers to Article 113 (7) of the Constitution, which establishes:

“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.”

37. The Court takes into account Article 47 of the Law on the Constitutional Court which provides that:

“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”.

38. In connection with this, the Court reviews whether the Applicant meets all requirements to be an authorized party, in compliance with respective constitutional and legal provisions.

39. For this purpose, the Court refers to its case law. In this regard, the Constitutional Court has recognized as an authorized party the parents of the deceased (see *Gëzim and Makfire Kastrati v. Municipal Court in Prishtina and Kosovo Judicial Council*, KI41/12, Judgment of 26 February 2013).

40. In addition, the Court emphasizes that also the European Court of Human Rights (hereinafter: the ECtHR) in similar cases received individual requests from persons that are considered as indirect victims, where there is a personal and specific connection between the victim and the Applicant. Furthermore, the ECtHR has recognized as an authorized party the spouse of the deceased (see *McCann and Others v. United Kingdom*, no. 18984/91, Judgment dated 27 September 1995), while in another case the nephew of the deceased was recognized as an authorized party (see *Yaşa v. Turkey*, no. 631997/847/1054, Judgment dated 2 September 1998).
41. Consequently, taking into account that the Applicant is the parent of the deceased, the Court concludes that the Applicant may be considered an authorized party pursuant to Article 113 (7) and Article 47.1 of the Law.

As to the substantive aspect

42. As to the Applicant's Referral regarding the responsibility of authorities in the events which led to death of his son, the Court refers to Rule 36 (3) (g) of the Rules of Procedure, which reads as follows:

"A Referral may also be deemed inadmissible in any of the following cases:

(g) the Referral is incompatible ratione temporis with the Constitution."

43. In order to establish the Court's temporal jurisdiction, it is essential to identify, in each specific case, the exact time of alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of constitutional right alleged to have been violated (see, *mutatis mutandis*, European Court of Human Rights Chamber Judgment in *Case of Blečić v. Croatia*, Application no.59532/0, dated 8 March 2006, para. 82).
44. In this respect, the Court reiterates that the death and alleged murder of the Applicant's son occurred on 4 September 2003.
45. This means that the alleged interference with the Applicant's right guaranteed by the Constitution occurred prior to 15 June 2008, which is the date of entry into force of the Constitution and from which date the Court has temporal jurisdiction.
46. The Court emphasizes that the jurisprudence of the Constitutional Court is in conformity with the case law of the ECtHR while deciding that the events occurred before the entry into force of the Constitution on 15 June 2008 are incompatible *ratione temporis* with the Constitution and thus do not fall under its temporal jurisdiction. (See, among others, Constitutional Court Resolutions in Case No. KI152/11, Applicant *Bekim Murati*; Case No. KIO7/11, Applicant *Vehbi Klaiqi*; Case NO. KI128/11, Applicant *Ismet Boshnjaku*).

As to the procedural aspect

47. As to the Applicant's complaint for the lack of investigation by responsible authorities, the Court notes that the Applicant, did not exercise his option under the applicable law at the time of either submitting a written application for an extension of the investigation or filing an indictment against the defendants before the District Court in a timely fashion in accordance with Article 62 of the Provisional Criminal Procedure Code of Kosovo. Thus, it appears that the forfeited the right to complain.
48. The Applicant has not established what additional investigation could be done by the prosecutor in this case, and he has not established whether there was any evidence that would justify an indictment now being filed against anyone with respect to the tragic death of his son.
49. In addition the Court refers to case-law of the ECtHR where it was called to address a similar issue. Namely in case *Hugh Jordan v UK*, the ECtHR held that the obligation to investigate "*is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eyewitnesses' testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.*" (See *Hugh Jordan v the United Kingdom*, no. 24746/94, Judgment dated 4 May 2001)
50. Therefore, in this regard, the Court considers that the Applicant's Referral does not meet the procedural admissibility requirements, as provided by Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) of the Rules of Procedure, due to the fact he failed to substantiate his complaints.
51. It follows that the Applicant's Referral is incompatible "*ratione temporis*" with the provisions of the Constitution regarding the responsibility of Kosovo authorities in relation to the events which led to the death of the Applicant's son. As to the complaint related to the lack of investigation, the Applicant's Referral is manifestly ill-founded because there is no evidence that the public prosecutor did not conduct a proper investigation when he took the decision that there was no person who could be indicted for the incident that caused his son's death

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 paragraph 7 of the Constitution, Article 20 and 48 of the Law and Rule 36 (1) (d) and 63 (3) (g) of the Rules of Procedure, on 28 December 2015, unanimously:

DECIDES

- I. TO DECLARE the Referral as Inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 paragraph 4 of the Law;
- IV. TO DECLARE this Decision effective immediately.

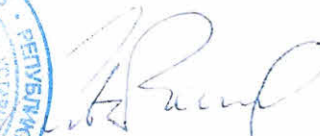
Judge Rapporteur



Robert Carolan



President of the Constitutional Court



Arta Rama-Hajrizi