



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

Pristina, 20 March 2012
Ref. No.: RK213 /12

RESOLUTION ON INADMISSIBILITY

in

Cases No. KI 106/11, KI 110/11, KI 115/11 and KI 116/11

Applicants

Neki Myha and Nijazi Xharavina

**Constitutional Review of the Decisions of the District Court of Peja, PN.
No. 81/11 and PN. No. 83/11, dated 1 July 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

Applicants

1. The Applicants are Mr. Neki Myha, represented by Mr. Avdi Rizvanolli, a practicing lawyer in Pristina, and Mr. Nijazi Xharavina, represented by Mr. Teki Bokshi, a practicing lawyer in Gjakova.

Challenged decisions

2. The Applicant, Mr. Neki Myha, challenge the Decisions of the District Court of Peja, PN. no. 81/11 and Pn. no. 83/11, both of them dated 1 July 2011, which were served on him on 14 July 2011.
3. The Applicant, Mr. Nijazi Xharavina, also challenge the Decisions of the District Court of Peja, PN. no. 81/11 and Pn. no. 83/11, both of them dated 1 July 2011, which were served on him on 14 July 2011.

Subject matter

4. The subject matter of the Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") of the constitutionality of the Decisions of the District Court in Peja, by which, allegedly, the rights of both of the Applicants as guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 53 [Interpretation of Human Rights Provisions] and 102 [General Principles of the Judicial System], and the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (hereinafter: "ECHR"), Article 6 [Right to a fair trial] in conjunction with Article 13 [Right to an effective remedy] have been violated.

Legal basis

5. 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

6. On 8 August 2011, the Applicant, Mr. Neki Myha, submitted a Referral to the Court, which was registered under Case No. KI 106/11.

7. On 10 August 2011, the Applicant, Mr. Nijazi Xharavina, submitted a Referral to the Court, which was registered under Case No. KI 110/11.
8. On 17 August 2011, the first Applicant submitted a further Referral to the Court, which was registered under Case No. KI 115/11.
9. On the same day, the second Applicant also submitted a further Referral to the Court, which was registered under Case No. KI 116/11.
10. The Referrals submitted by the Applicant, Mr. Neki Myha, Case No. KI 106/11 and KI 115/11 relates to the same subject matter and directed against the same act of the public authority, however, the Applicant insisted that the case should be registered separately.
11. The Referrals submitted by the Applicant, Mr. Nijazi Xharavina, Case No. KI 110/11 and KI 116/11 relates also to the same subject matter and directed against the same act of the public authority, however, also in this case the Applicant insisted that the case should be registered separately.
12. On 23 August 2011, the President, by Decision No. GJR. KI 106/11, KI 110/11, KI 115/11 and KI 116/11 appointed Judge Snezhana Botusharova as Judge and, by Decision No. KSH. KI 106/11, KI 110/11, KI 115/11 and KI 116/11, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Iliriana Islami.
13. On 23 August 2011, the President, by Order No. KI 106/11, KI 110/11, KI 115/11 and KI 116/11 ordered the joinder of the Referrals, Case No. KI106/11, KI 110/11, KI 115/11 and KI 116/11, pursuant to Rule 37 (1) of the Rules of Procedure, which provides:

“The Secretariat shall provide notice to the President and the Judge Rapporteur that the referral may be related in subject matter to another referral before the Court and directed against the same act of a public authority. The President, upon the recommendation of the Judge Rapporteur may order the joinder of those separate referrals.”

14. On 26 October 2011, the Court notified the Applicants about the joinder of their Referrals.

15. On 26 October 2011, the Court communicated the Referral to the District Court of Peja and to the Municipal Public Prosecutor of Peja.
16. On 20 March 2012, 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

17. On 3 March 2011, the Municipal Court of Gjakova, by Decision P. no. 108/10, confirmed the indictment filed by the Municipal Public Prosecutor of Peja against the Applicants for having committed the criminal act of Article 339 (2) in conjunction with Article 343(1) and Article 23 of the Provisional Criminal Code of Kosovo (hereinafter: "PCCK"). The Municipal Court ascertained that there were sufficient grounds to confirm the indictment and to ascertain the culpability or innocence of the accused at the main trial. The legal advice contained in the decisions was that no appeal was allowed against these rulings.
18. On 3 March 2011, the Municipal Court of Gjakova, by Decision P. no. 53/2010, confirmed the indictment filed by the Municipal Public Prosecutor of Peja against Mr. G.Z. for having committed the criminal act of Articles 332 (3.1), 334 (1) and 344 (1) of Provisional Criminal Code of Kosovo (hereinafter: "PCCK") and the Applicants for having committed the criminal act of Article 339 (2) in conjunction with Article 343 (1) and Article 23 of PCCK. The Municipal Court ascertained that there were sufficient grounds to confirm the indictment and to ascertain the culpability or innocence of the accused at the main trial. The legal advice contained in the decisions was that no appeal was allowed against these rulings.
19. On 28 March 2011, the Applicants appealed to the three-judge Panel of the Municipal Court of Gjakova (hereinafter: the "Panel") against the ruling of the Municipal Court, P. no. 53/2010.
20. On 30 March 2011, the Panel rejected the Applicants' appeal as inadmissible (Decision P. no. 53/10). The Panel concluded that an appeal against the court ruling on the confirmation of the indictment would only be allowed, if the indictment was dismissed, pursuant to Article 317(2) of the Provisional Code of Criminal Procedure (hereinafter: "PCCP"), providing that *"The ruling of the judge to dismiss the indictment can be appealed by the prosecutor and the injured party to the three-judge panel"*. The Applicants, however, appealed against this decision to the District Court of Peja.

21. On 4 April 2011, the first Applicant appealed against Decision, P. no. 108/10 of 3 March 2011 of the Municipal Court of Gjakova to the Panel of that court, while the second Applicant did so on 8 April 2011.
22. On 2 June 2011, by Decision P. no. 108/2010, the Panel rejected the Applicants' appeal as inadmissible and concluded that an appeal against a court ruling on the confirmation of the indictment would only be allowed, if the indictment was dismissed, pursuant to Article 317(2) of the PCCP.
23. On 8 June 2011, the Applicants appealed the decision of 2 June 2011 to the Panel.
24. On 13 June 2011, the Panel rejected the Applicants' appeal as inadmissible (Decision P. no. 108/10), stating that *"The ruling of the judge to dismiss the indictment can be appealed by the prosecutor and the injured party to the three-judge panel"*. Thereupon the Applicants appealed against this decision to the District Court of Peja.
25. On 1 July 2011, by Decision Pn. No. 81/11, the District Court of Peja rejected the Applicants' appeal as unfounded and concluded that an appeal against the court ruling on the confirmation of the indictment would only be allowed, if the indictment was dismissed, pursuant to Article 317(2) of the PCCP.
26. On 1 July 2011, by Decision Pn. No. 83/11, the District Court of Peja rejected the Applicants' appeal against the decision of the Municipal Court in Peja, P. no. 53/10 of 30 March 2011 as unfounded and concluded that an appeal against the court ruling on the confirmation of the indictment would only be allowed, if the indictment was dismissed, pursuant to Article 317(2) of the PCCP.

Applicant's allegations

27. The Applicants allege that:
 - a. their right to appeal and their right to access to a court have been violated for the reason that they could not appeal the ruling of the judge on the confirmation of the indictment of 3 March 2011;
 - b. the principle of equality of arms between the parties in the proceedings has equally been violated also due to the fact that they could not appeal the ruling of the judge on the confirmation of the indictment while the prosecutor has the possibility pursuant to Article 317 (2) of PCCP to appeal if the judge dismiss the confirmation of indictment.

- c. the Municipal Court and the District Court had wrongly applied and interpreted Article 317(2), because, according to their opinion, there exist a right to appeal under the PCCP.

Assessment of the admissibility of the Referral

28. The Applicants allege that their rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 53 [Interpretation of Human Rights Provisions] and 102 [General Principles of the Judicial System] of the Constitution and Article 6 [Right to a fair trial] ECHR in conjunction with Article 13 [Right to an effective remedy] ECHR have been violated.
29. As to the Applicants' complaints, the Court first observes that, in order to be able to adjudicate their complaints, it is necessary to first examine whether they have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.
30. In this respect, the Court emphasizes that, under the Constitution, it is not to act as a court of fourth instance, when considering the decisions taken by ordinary courts. It is the role of ordinary courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, Garcia v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights [ECHR] 1999-I).
31. The Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicants has had a fair trial (see among other authorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).
32. In the present case, the Applicants allege that there is a violation of their rights as guaranteed by the Constitution since they are not allowed to appeal a decision of a judge confirming the indictment.
33. In this respect, the Court refers to Article 102.5 of the Constitution, which provides: "*The right to appeal a judicial decision is guaranteed unless otherwise provided by law.*". Article 317 (2) of the PCCP does not provide a right to the Applicants to appeal the confirmation of indictment. Notwithstanding, this the Panel of the Municipal Court and the District Court took into consideration the complaint of the Applicants but ruled that no appeal

is possible against the confirmation of indictment pursuant to Article 317 (2) of PCCP, which provides:

“The ruling of the judge to dismiss the indictment can be appealed by the prosecutor and the injured party to the three-judge panel.”

34. Furthermore, the Court notes that the confirmation of indictment do not prejudice the adjudication of the matter during the main trial pursuant to Article 317 (1) of PCCP, which provides:

“All rulings rendered by the judge in connection with the confirmation of the indictment shall be supported by reasoning but in such a way as not to prejudice the adjudication of the matters which will be considered in the main trial.”

35. Having examined the proceedings before these courts as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).
36. It follows that the Referral is manifestly ill-founded pursuant to Rule 36 (1.c) of the Rules of Procedure which provides: *“The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded.”*
37. If this Court takes into consideration that the Applicants raise the question of compatibility of laws, i.e. the PCCP, with the Constitution, the Court notes that only authorized parties under Article 113.2 of the Constitution are entitled to submit this question. Therefore, the Applicants are not an authorized party under Article 113.2 of the Constitution. However, the Applicants could raise the issue of compatibility of laws with the Constitution before the regular courts who is authorized under Article 113.8 of the Constitution to cease the Constitutional Court.
38. Accordingly, the Referrals must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.2 of the Constitution, Rule 36 (1.c) and Rule 56 (2) of the Rules of Procedure, on 20 March 2012, 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

Snezhana Botusharova



President of the Constitutional Court

Prof. Dr. Enver Hasani

