



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

Pristina, 21 March 2011
Ref. No.: RK96/11

RESOLUTION ON INADMISSIBILITY

in

Case No. 02/10

Applicant

Roland Bartetzko

**Constitutional review of the Decision of the Supreme Court of Kosovo,
AP-KZ 181/2002 of 12 November 2002**

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

The Applicant

1. The Applicant is Mr. Roland Bartetzko. He is a German national. He is serving a sentence in Dubrava Prison near Istog, Kosovo. He is represented by Dr. Kolë Krasniqi from Peja.

The Challenged Decision

2. The decision of the Supreme Court of Kosovo, S.C. AP-KZ 181/2002 of 12 November 2002.

Subject Matter

3. The Applicant argues that his rights guaranteed by Articles 30 (rights of the accused), 32 (right to legal remedies), and 102.5 (right to appeal) of the Constitution of the Republic of Kosovo, and his rights under the European Convention of Human Rights, and the Universal Declaration on Human Rights have been violated. He argues that he was deprived of his fundamental right to appeal because his defence counsel erroneously informed him that he did not have the right to appeal his conviction.
4. He has also requested that the Court impose a temporary interim measure to reinstate the legal timeline of his appeal against Judgment Ap. Nr. 181-2002 of the Supreme Court of Kosovo, which became final over six years before the Constitution of Kosovo entered into force.

Legal Basis

5. Article 113.7 of the Constitution, Article 22 of the Law and Rule 36 of the Rules.

Summary the facts

6. On 10 May 2002, the District Court of Pristina found the Applicant guilty of, among other things, a criminal act of terrorism under Article 125 in relation to Article 129 paragraph 2 in connection with paragraph 1 (amended on 16 June 1993, Official Gazette of the FRY-No. 37-193) of the Criminal Code of Yugoslavia. The Court found that on 18 April 2001 the Applicant placed explosive material outside the offices of the Centre for Peace and Tolerance, where representatives of the Former Yugoslavia worked. The explosion caused the death of a senior representative of the Serbian government there. It also injured four staff members of the Centre. The Court sentenced Mr. Bartetzko to 23 years in prison. (D.C.P. Nr. 1722-2001).
7. On 12 November 2002, the Supreme Court of Kosovo modified the verdict of the District Court. The Court partially adopted the Applicant's appeal and found that he was guilty of a criminal act of terrorism under Article 125 in relation to Article 139 paragraph 2 of the Criminal Code of Yugoslavia. The Court amended his sentence to 20 years imprisonment, including time spent in detention from 20 April 2001. (S.C. Ap.Nr. 181-2002).
8. According to the Applicant, his attorney Tome Gashi, did not appeal the decision of the Kosovo Supreme Court, nor did he inform him of his right to appeal. Instead, he told the Applicant that he had no right to appeal. After the fifteen day deadline for filing an appeal expired, the decision became final.
9. On 31 December 2002, the Applicant received a copy of the judgment of the Supreme Court of Kosovo.
10. After the deadline expired, Mr. Gashi asked the Supreme Court to modify the decision. He argued that the parties should have the right to appeal because the decision did not contain a legal remedy.
11. On 15 June 2003, the Applicant withdrew Mr. Gashi's power of attorney.

12. On 8 July 2003, the Supreme Court with regards to the request for the right of appeal stated the following: "Copies of the decisions against which an appeal is permitted shall be delivered along with instructions as to the right to appeal." It was also stated "The court's omission to deliver to the party, together with the decision, the required instructions on the right to appeal does not represent the circumstance which under the law could be taken as a grounded reason for the untimely submitted appeal to be considered as timely." (*See the Supreme Court letter addressed to the applicant's legal representative dated 8 July 2003*). Furthermore, the Supreme Court informed the Applicant that it could not accept his request because it was filed more than half a year from the date of receipt of the verdict.
13. On 8 August 2003, the Applicant requested through his attorney, Fazli Balaj, that the District Court of Pristina restore the legal timeline of the appeal. On 6 January 2004, the District Court of Pristina dismissed the Applicant's request because it was filed after the statutory period prescribed by Article 92, paragraphs 1 and 2, of the Criminal Code of Yugoslavia.
14. On 10 November 2009, the State Prosecutor of Kosovo informed the Applicant that his request to the Supreme Court of Kosovo was dismissed because it lacked a legal basis.

Proceedings before the Court

15. On 7 December 2009 the Applicant filed his Referral with the Constitutional Court. On 5 January 2010, the Applicants supplemented the Referral with further arguments requesting the Court to issue Interim Measures ordering "reinstatement of the legal deadline for the appeal".
16. On 13 May 2010 the Review Panel, considered the Report of Judge Suroy and recommended that the full Court deny the request for an interim measure.
17. On 16 August 2010 the Constitutional Court issued a Decision denying the request for an interim measure.

The Applicant's Complaints

18. The Applicant complains that his right to appeal guaranteed by Article 102 of the Constitution and Article 394 (1) of the Provisional Criminal Procedure Code of Kosovo has been violated. According to him, Article 30 of the Constitution that guaranties rights of the accused has been also violated.
19. The Applicant argues that he was denied his ability to exercise these fundamental rights. The decision of the Supreme Court of Kosovo of 12 November 2002 did not include legal instructions regarding his right to appeal, nor did the presiding judge give him any verbal instructions. Furthermore, his attorney told him that he did not have a right to appeal. The decision against him only became final because (1) his attorney gave him incorrect advice; and (2) he did not knowledge of the official language of the applicable law in Kosovo. Thus, he was unable to exercise his right to appeal.
20. Finally the Applicant argues that this violates the Provisional Criminal Procedure of Kosovo and the Provisional Criminal Code of Kosovo, as well as the Constitution of Kosovo, the law of the European Union, the European Convention of Human Rights, and the Universal Declaration on Human Rights. In order to remedy this violation, the legal timeline of his appeal should be reinstated.

Assessment of the Admissibility of the referral

21. In order to be able to adjudicate the Applicants' Referral, the Court need first to examine whether the Applicant has fulfilled the admissibility requirements, laid down in the Constitution, the Law and the Rules of Procedure.
22. The Applicant can complain only if the regular courts have committed errors of fact or law, unless and in so far as they may have infringed rights and freedoms protected by the Constitution.
23. In this connection, the Constitutional Court is not a court of fourth instance, when considering the decisions taken by the regular courts. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, Resolution on Inadmissibility in Case No. KI 13/09, *Sevdail Avdyli*, of 17 June 2010 and *mutatis mutandis*, *García Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).
24. The Constitutional 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 Applicant has had a fair trial (see, *mutatis mutandis*, Report of the Eur. Commission on Human Rights in the case *Edwards v. United Kingdom*, App. No. 13071/87 adopted on 10 July 1991).
25. As to the present case the Applicant has failed to prove that the Supreme Court has violated Article 6 of the European Convention on Human Rights and Article 30 of the Constitution.
26. According to the European Court on Human Rights case law "a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes or chosen by the accused" (see *the Kamasinski v. Austria ECHR judgment of 19 December 1989, A no. 168*).
27. Indeed, according to European Court on Human Rights "A lawyer, even if he or she is officially appointed to represent an accused in criminal proceedings, can not be considered as an organ of a State. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed, and, as such, cannot, other than in special circumstances, incur the State's liability under the Convention (see, *mutatis mutandis*, the *Artico v. Italy* judgment of 30 May 1980, Series A no. 37, p. 18, para 36; the *Daud v. Portugal* judgment of 21 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 749, para. 38; Eur. Com. H.R., no. 9022/80, Dec. 13.7.1983, D.R. 33, p. 21; no. 27266/95, Dec. 21.10.1996, D.R. 87-B, p. 100; *Tuziński v. Poland* (dec), no. 40140/98, 30.03.1999).
28. Under Article 6 para. 3 (c) the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention (see *Imbrioscia v Switzerland ECHR judgment of 24 November 1993, A no. 13972/88*.)
29. It should be recalled that the Supreme Court addressed the Applicant's complaint and found that "The court's omission to deliver to the party, together with the decision, the required instructions on the right to appeal does not represent the circumstance which under the law could be taken as a grounded reason for the untimely submitted appeal to be considered as timely."

30. On the whole, the Court considers that there is no indication that the applicant's defense was ineffective.

31. For these reasons, the Court finds that the Applicant's Referral is manifestly ill-founded, and, therefore, rejects it as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure, unanimously,


DECIDES

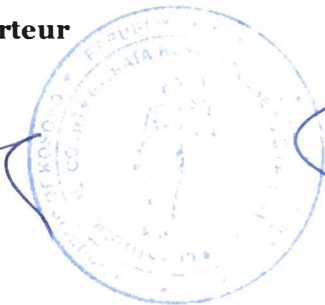
I. TO REJECT the Referral as Inadmissible.

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 on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur


Altay Surroy



President of the Constitutional Court


Prof. Dr. Enver Hasani