



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

Pristine, 31 October 2012

Ref. No.:RK319/12

RESOLUTION ON INADMISSIBILITY

in

Case No. KI03/12

Applicant

Kastriot Gerbeshi

**Constitutional Review of the Judgment of the Supreme Court of Kosovo,
PKL.No. 88/2011, dated 21 September 2011**

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 Kastriot Gerbeshi from Pristina, Kosovo.

Challenged Decisions

2. The Applicant maintains that his trial and conviction in the Municipal Court of Pristina on for aggravated theft violated on the basis that his trial panel was wrongly constituted and that his appeal was wrongly decided and that the final request for protection of legality which was rejected by the Supreme Court constitutes a breach of Criminal Procedure Code of Kosovo (article 452 paragraph 3).

Legal Basis

3. The Referral is based on Art. 113.7 of the Constitution; Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as “the Law”), and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Rules of Procedure).

Procedure before the court

4. On 20 January 2012 the Applicants filed a Referral with the Constitutional Court.
5. On 7 February 2012 the President of the Constitutional Court appointed Judge Robert Carolan as Judge Rapporteur. On the same date the President appointed a Review Panel composed of Judges Altay Suroy (presiding), Gjyljeta Mushkolaj and Iliriana Islami.
6. On 17 April 2012 the Court wrote to the Applicant seeking clarification of the date of the making of an appeal from his conviction and whether he or his legal representatives contested the composition of the trial panel at any time prior to his conviction in the Municipal Court.
7. On 22 May 2012 the Court again wrote to the Applicant advising him of the case reference number of the Referral in the Constitutional Court.
8. On 19 September 2012, the President by Decision No.KSH.03/12 appointed the new Review Panel consisting of judges Altay Suroy (presiding), Snezhana Botusharova and Enver Hasani, after the term of office of Judges Gjyljeta Mushkolaj and Iliriana Islami as Judges of the Court had ended.
9. On 17 October 2012, the Review Panel considered the Preliminary Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

The facts of the case as alleged by the documents furnished by the Applicant

10. The Applicant was convicted by a juvenile panel of the Municipal Court in Pristina of the offence of aggravated theft, P. no. 660/2008, dated 30 May 2008. At the time of the commission of the offences for which he was ultimately convicted the Applicant was a minor, having been born on 12 February 1990. However, at the time of the trial he was of full age. He was tried with other co-Defendants all of whom were juveniles according to the Juvenile Justice Code. He was sentenced to one year and six months imprisonment. Time spent in detention on remand was to be calculated.
11. The main complaint of the Applicant was that the trial panel in the Municipal Court did not comprise a panel of mixed gender lay judges as required by statute and that the verdict was not supported by the evidence or well-reasoned.

12. He appealed the conviction to the District Court in Pristina, Ap. No. 416/2008, dated 29 April 2011, which found that the time for making the appeal had expired. From the case files the District Court found that the appeal should have been filed on 26 June 2008 whereas it was filed on 27 June 2008. The District Court also stated that even if the appeal was on time it was not allowed because it did not reason the grounds on which the Judgment may be challenged.
13. Against this the Applicant submitted a request for protection of legality which was rejected by the Supreme Court of Kosovo Pkl. No. 88/2011, dated 21 September 2011, served on the Applicant on 4 October 2011. The Supreme Court rejected the request for legality as unfounded.

Alleged violations of the Constitution

14. The Applicant, apart from alleging breaches of the Criminal Code of Procedure, alleges that Article 31 [Right to a Fair and Impartial Trial], Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms – Right to a fair trial, and the Convention on the Rights of the Child (without specifying any particular Article) have been breached.

The Law

15. Article 49 of the Juvenile Code of Kosovo, which entered into force on 20 April 2004 provides for the composition of criminal trial panels for cases involving juvenile Defendants in the following terms:

Chapter XI

Composition of Juvenile Panels

Article 49

(1) A juvenile panel in the court of first instance and the juvenile panel in the court of second instance, except for panels in the Supreme Court of Kosovo, shall be composed of a juvenile judge and two lay judges. The juvenile judge shall be the presiding judge of the panel.

(2) A juvenile panel in the Supreme Court of Kosovo shall be composed of three judges, including at least one juvenile judge. When a juvenile panel adjudicates at a main trial, it shall be composed of two juvenile judges and three lay judges.

(3) The lay judges in a juvenile panel shall be selected from among professors, teachers, educators, social workers, psychologists and other persons who have experience in the upbringing of minors.

(4) Lay judges participating in a juvenile panel shall be of different

16. Furthermore, although the Applicant was an adult of full age at the time of his trial and conviction, on 22 May 2008, Article 3 of the Juvenile Code provides:

Article 3

(1) The provisions of the present Code shall apply to any person charged with a criminal offence committed as a minor, regardless of his or her age at the time when proceedings are instituted.

(2) When provided by the present Code, the provisions of the present Code shall apply to any person charged with a criminal offence committed as a young adult.

(3) When an adult is charged with a criminal offence committed as a minor, Articles 41 and 45 of the present Code shall not apply.

Assessment of the admissibility of the referral

17. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, further specified in the Law on the Constitutional Court and the Rules of Procedure.
18. Article 113 Section 1 and 7 of the Constitution establish the general legal frame required for admissibility. It provides:

*"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
(...)
7. 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."*
19. Furthermore, Article 48 of the Law states:

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."
20. Finally, Rule 36 of the Rules of Procedure states:

*"1. The Court may only deal with Referrals if:
c) the Referral is not manifestly ill-founded.

2. The Court may reject a Referral as being manifestly ill-founded when it is satisfied that:
a) the Referral is not prima facie justified, or
b) when the presented facts do not in any way justify the allegation of the violation of constitutional rights, or
c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or
d) when the Applicant does not sufficiently substantiate the claim;"*
21. The Applicant's appeal to the Municipal Court was adjudged by the District Court to be out of time. The Constitutional Court requested the Applicant to provide evidence that the appeal was lodged in a timely manner and it afforded the Applicant an opportunity to point out how the Municipal Court had erred in its finding. There was no response from the Applicant.
22. In the instant case, the Court notes that the Applicant failed to respond to the conclusion by the national court that he failed to file an appeal in a timely manner. Therefore, it is understood he waived his right to appeal. He thereby failed to exhaust all of his legal remedies available to him by the applicable law in Kosovo.
23. Furthermore the Applicant was asked to provide information as to when he or his legal representatives first made raised an objection to the composition of the Municipal Court hearing his case. There has been no response to that request.
24. It seems therefore that there is a lack of evidence on which the Constitutional Court can find that there has been a violation of the constitutional rights of the Applicant. On that

basis it appears that that the Applicant has failed to substantiate his Referral to this Court.

25. Therefore, the Court finds that, pursuant to Article 113.7 of the Constitution, Articles 48 and 56 of the Law and Rule 36.2.a), d) of the Rules, the Referral is inadmissible as manifestly ill-founded because it has not been *prima facie* justified or sufficiently substantiated.

FOR THESE REASONS

The Court, following deliberations on 17 October 2012, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 56.2 of the Rules, 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; and
- III. The Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court



Robert Carolan



Prof. Dr. Enver Hasani