



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

Pristine, 27 June 2012
Ref. No.: AGJ262/12

JUDGMENT

in

Case No. KI 06/12

Applicant

Bajrush Gashi

**Constitutional Review of the Decision of the Supreme Court, Pzd. no. 67/2011,
dated 12 December 2011.**

THE CONSTITUTIONAL

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. **Bajrush Gashi**, residing in the village, Hoqa e Vogël, Rahovec.

Challenged decision

2. The Applicant challenges the Supreme Court Decision, Pzd. no. 67/2011, of 12 December 2011, which was served on the Applicant on an unspecified date.

Subject matter

3. The Applicant submitted a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the "Court") on 27 January 2012 requesting review of the constitutionality of the Supreme Court Decision, Pzd. no. 67/2011.
4. The Applicant claims that the challenged decision has violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter, the "Constitution") and Article 6 [Right to a fair trial] of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the "ECHR").

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 (1) 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 27 January 2012, the Applicant submitted a Referral to the Court.
7. On 30 January 2012, the President, by Decision No. GJR. 06/12, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date the President, by Decision, No. KSH. 06/12, appointed the Review Panel consisting of Judges Robert Carolan (Presiding), Enver Hasani and Kadri Kryeziu.
8. On 6 March 2012, the Court communicated the Referral to the Supreme Court and asked it to submit its comments with respect to the Referral.
9. On 21 March 2012, the Court requested the Supreme Court to submit the case file of case Pzd. no. 67/2011 of 12 December 2011, and additional comments.
10. On 22 March 2012, the Supreme Court replied submitting its comments in respect to the Referral, but did not submit the case file.
11. The Supreme Court, in its reply of 22 March 2012, informed this Court that:

"...

The case files show that the sentenced person Bajrush Gashi claims that his right to a fair and right trial was violated, as in the judicial panel of the Supreme Court, when reviewing his request for extraordinary mitigation of the sentence, allegedly has participated a member of the panel who also participated in the same case against him in the first instance.

It is true that in the procedure of reviewing the request for extraordinary mitigation of sentence before this Court a member of the panel was also the

Presiding of the panel in the Court of first instance, but this circumstance poses no legal obstacle for the following reasons:

In the procedure for the extraordinary mitigation of the sentence may participate the judge that was the presiding judge or a member of the Court panel in the first instance procedure. The request for extraordinary mitigation of sentence is presented to the Court of First Instance, to the presiding judge who has presided the panel in the first instance or who has acted as the single judge (Article 450 of PCPCK), who will take some procedural actions and then the case, with a reasoned proposal, refers it to the Supreme Court, which decides on the request for extraordinary mitigation of sentence and there is no legal obstacle for any member or all members to participate in panels who have as well previously participated on judicial panels on the same issue.

The request for extraordinary mitigation may occur several times (from the same sentenced person), whenever he considers there is a new circumstance that he considers impact on the mitigation of sentence. However, if all the members who have been involved in any stage of the proceedings would be expelled, then, the Supreme Court would have no judges to rule on the request, so that the requests would remain not reviewed.

This extraordinary legal instrument concerns new circumstances, for which the judge, even though he may have been part of it in the previous panel, he could not be able to generate prejudice, (because this circumstance is reviewed for the first time).

To be clearer, I am sending you a part of the comment about this situation that clearly states that the judge, who has participated in making of the Decision, may also participate when the Decision on the request for extraordinary mitigation of the sentence is taken.

In the extraordinary mitigation of the punishment, the judges that participated in the decision making can participate also in the procedure of the first instance court (Article 414 – refusal of the application, investigation and proposal) and in the final decision before the competent court. The situation is similar with the one that repeats the criminal procedure, it deals with the new material, or the new circumstances in respect of which the judge cannot have the preconceived notions and such the solution should be.

...”

12. On 30 March 2012, the Court notified the Applicant about the submitted comments by the Supreme Court and requested his comments, if any, in respect to the reply of the Supreme Court. So far, no reply has been received.
13. On 9 May 2012, the Court deliberated and voted on the case.

Summary of facts

14. On 19 May 2009, the District Court of Prizren found the Applicant guilty of having committed the criminal act of Article 138.6 in conjunction with 138.1 and Article 328.2 of the Provisional Criminal Code of Kosovo (hereinafter: “PCCK”), and sentenced him to 4 years and 4 months of imprisonment (Judgment P. no. 26/09). The Applicant complained against this judgment to the Supreme Court because of “essential violation of the criminal procedure provisions, erroneous and incomplete confirmation of

factual situation, violation of criminal law and decision for punishment by the proposal that the judgment is amended, so that the defendant is free of indictment or to annul the matter and return for retrial.”. The Public Prosecutor complained against this Judgment as regards the part that had to do with the co-defendant G.M.

15. On 8 December 2010, the Supreme Court rejected as unfounded the Applicant's and the Public Prosecutor's appeal and confirmed the District Court Judgment (Judgment Ap. no. 259/2009). The Supreme Court found that the District Court Judgment is based on the factual situation and the first instance court confirmed the factual situation in a fair and complete manner and the first instance court has also provided legal reasons for the crucial facts. Furthermore, the Supreme Court concluded that the District Court judgment did not contain essential violations of criminal procedure provisions, as claimed by the Applicant.
16. On 12 December 2011, the Supreme Court rejected the Applicant's request for extraordinary mitigation of the sentence as unfounded (Judgment Pzd. no. 67/2011). The Supreme Court taking into consideration the opinion of the District Court, the District Public Prosecutor and the State Prosecutor, that the request for extra ordinary mitigations of the sentence was unfounded, ruled that the Applicant's reasons for the request for extraordinary mitigation of the sentence were not of such nature that they would justify the extraordinary mitigation of the Applicant's sentence.

Applicant's allegations

17. The Applicant alleges that the Judge who was the presiding judge of the District Court in Prizren and decided his case also took part in the decision of the Supreme Court on his request for extraordinary mitigation of the sentence (the judge in question).
18. Furthermore, the Applicant claims that the judge in question had to inform the Supreme Court that the judge in question was Presiding Judge in District Court in Prizren and was to be disqualified to participate in the Supreme Court panel.
19. The Applicant, therefore, considers that the Supreme Court Judge has violated Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to fair trial] ECHR.

Applicable legal provisions regarding the procedures for extra ordinary mitigation of the sentence

Provisional Criminal Procedure Code of Kosovo (UNMIK Regulation 2003/26) of 6 July 2003

20. The procedure for extra ordinary mitigation of the sentence is regulated by the Provisional Criminal Procedure Code of Kosovo (hereinafter, the "PCPCK").

Disqualification of the Judge

21. Article 40

“...

(1) A judge or a lay judge shall be excluded from the exercise of the judicial functions in a particular case:

5) *If in the same case he or she has taken part in rendering a decision of a lower court or if in the same court he or she has taken part in rendering a decision which is being challenged by an appeal.*

...”

22. Article 41

“...

(1) *As soon as he or she discovers a ground for disqualification under Article 40 paragraph 1 or 2 of the present Code, a judge or lay judge shall discontinue all the activity on the case and report such ground to the president of the court who, in accordance with the procedures governing the internal court rules, shall appoint a substitute. In the case of disqualification of a president of a court, he or she shall ask the president of the immediately superior court to appoint a substitute.*

(2) *If a judge or a lay judge considers that there are other circumstances which would justify his or her disqualification (Article 40 paragraph 3 of the present Code), he or she shall inform the president of the court about such circumstances. Until a decision on disqualification is rendered, the judge or the lay judge may only conduct actions that are absolutely necessary to prevent postponement or impermissible delay of the case.*

...”

Extraordinary mitigation of the sentence

23. Article 448

“An extraordinary mitigation of a finally imposed punishment is permissible where, after the judgment has become final, circumstances occur which did not exist when the judgment was rendered or, although they existed, were unknown to the court at that time, and such circumstances obviously would have led to a less severe punishment.”

24. Article 449

“...

(1) *An extraordinary mitigation of punishment may be requested by the public prosecutor, if proceedings were initiated at his or her request, by the convicted person or by his or her defense counsel.*

(2) *A request for an extraordinary mitigation of punishment shall not stay the execution of the punishment.*

...”

25. Article 450

“...

(1) *A request for an extraordinary mitigation of punishment shall be decided by the Supreme Court of Kosovo.*

(2) A request for an extraordinary mitigation of punishment shall be filed at the court which pronounced the judgment in first instance.

(3) The presiding judge of the court of first instance shall dismiss requests filed by persons not entitled thereto.

(4) The court of first instance shall examine whether there are grounds for an extraordinary mitigation of punishment and, after hearing the opinion of the public prosecutor, if proceedings were conducted at his or her request, and the convicted person or his or her defense counsel, it shall refer the files together with its reasoned recommendation to the Supreme Court of Kosovo.

(5) If the criminal offence involved was prosecuted on request of the public prosecutor, the Supreme Court of Kosovo shall, before deciding on a request for an extraordinary mitigation of punishment, send the files to the Public Prosecutor for Kosovo who may file a written motion to the court. The defense shall have access to those files.

(6) The Supreme Court of Kosovo shall reject the request if it finds that there are no legal grounds for an extraordinary mitigation of punishment. When approving the request, the court shall modify by a ruling the final judgment in respect of the decision on punishment.

...”

Assessment of admissibility of the Referral

26. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution, the Law and the Rules of Procedure.
27. The Court needs to determine first whether the Applicant is an authorized party within the meaning of Article 113.7 of the Constitution, stating 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.”* In this respect, the Referral was submitted with the Court by an individual. Therefore, the Applicant is an authorized party, entitled to refer this case to the Court under Article 113.7 of the Constitution.
28. Furthermore, an Applicant, in accordance with Article 49 of the Law, must submit the Referral within 4 months after the final court decision. On 12 December 2011, the Supreme Court took the Decision Pzd. no. 67/2011, whereas the Applicant received the Decision on an unspecified date. The Applicant submitted the Referral to the Court on 27 January 2012. Therefore, the Applicant has met the necessary deadline for filing a referral to the Constitutional Court.
29. In addition, pursuant to Article 450.1 of the PCPCK, the Supreme Court is considered *“as a last instance court to adjudicate the extra ordinary mitigation of the sentence”*. As a result, the Court also determines that the Applicant has exhausted all the legal remedies available to him under Kosovo law.
30. Finally, Article 48 of the Law establishes: *“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.”* In this respect, the Court

notes that the Applicant challenges the Supreme Court Decision, Pzd. no. 67/2011, whereby, allegedly, his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR have been violated. Therefore, the Applicant has also fulfilled that requirement.

31. Since the Applicant is an authorized party, has met the necessary deadlines to file a referral with the Court, has exhausted all the legal remedies, and accurately clarified the allegedly violated rights and freedoms, including the decision subject to challenge, the Court determines that the Applicant has complied with all requirements of admissibility.

Constitutional Assessment of the Referral

32. Since the Applicant has fulfilled the procedural requirements for admissibility, the Court needs to examine the merits of the Applicant's complaint.
33. The Court observes that the Applicant contest the Supreme Court Decision, Pzd. no. 67/2011 of 12 December 2011, by which his request for extraordinary mitigation of the sentence was rejected as unfounded.
34. In fact, the Supreme Court, taking into consideration the opinion of the District Court, the District Public Prosecutor and the State Prosecutor, ruled that the Applicant's reasons for the request for extraordinary mitigation of the sentence were not of such nature that they would justify the extraordinary mitigation of the Applicant's sentence and rejected the request as unfounded.
35. However, the Constitutional Court notes that the Judge, who presided the Panel in the District Court of Prizren where the Applicant was sentenced to a penalty of imprisonment, was also taking part in the Supreme Court decision on the Applicant's request of mitigation of his sentence delivered by the District Court of Prizren.
36. The Court recalls that the procedure dealing with extraordinary mitigation of sentence does not foresee public proceedings where the Applicant can take part. The procedure is only based on written submissions. Hence, the Applicant could not have known that the presiding Judge of the Panel in the District Court of Prizren was also taking part in the Supreme Court decision on his request for extraordinary mitigation of sentence. He only found out about it, when he received the decision rejecting his request.
37. The Court notes that Article 40.1 (5) of the PCPCK provides: *"A judge or a lay judge shall be excluded from the exercise of the judicial functions in a particular case: If in the same case he or she has taken part in rendering a decision of a lower court or if in the same court he or she has taken part in rendering a decision which is being challenged by an appeal."*
38. Further, pursuant to Article 41 of the PCPCK, if a judge *"discovers a ground for disqualification under Article 40 paragraph 1 or 2 of the present Code, a judge or lay judge shall discontinue all the activity on the case and report such ground to the president of the court who, in accordance with the procedures governing the internal court rules, shall appoint a substitute."* The same applies *"If a judge or a lay judge considers that there are other circumstances which would justify his or her disqualification (Article 40 paragraph 3 of the present Code), he or she shall inform the president of the court about such circumstances."*
39. Further, the Supreme Court, in its reply to the Court, confirmed that a member of the Supreme Court panel, in the procedure of reviewing the request for extraordinary

mitigation of sentence, was also the Presiding of the panel in the Court of first instance, where the same sentence was delivered. The Supreme Court further said that this did not pose any obstacle, because in any event the request for extraordinary mitigation of sentence was first presented to the Court of first instance, to the presiding judge, who had presided the panel in the first instance or who had acted as the single judge, who had taken some procedural actions and then the case, with a reasoned proposal, had been referred to the Supreme Court. Furthermore, the Supreme Court argued if all the members who have been involved in any stage of the proceedings would be excluded, then, the Supreme Court would have no judges to rule on the request.

40. The Applicant, however, alleges that he has not received a “fair hearing” by an “impartial tribunal established by law” within the meaning of Article 31 [Right to Fair and Impartial Trial] of the Constitution which, as far as relevant, provides:

“2. Everyone is entitled to a fair and impartial public hearing ... as to any criminal charges ... by an independent and impartial tribunal established by law.”

and Article 6 [Right to fair trial] ECHR which, as far as relevant, provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law ...”

41. The Applicant makes that allegation because the judge in question, allegedly, should have informed the Supreme Court about having been Presiding Judge in the District Court in Prizren and that, therefore, has to be disqualified to participate in the Supreme Court Panel. The judge in question could have been disqualified ex officio by the Supreme Court, since the fact of having been Presiding Judge in the District Court in Prizren was official information contained in the subject matter of the file case.
42. The Applicant further complained that, since he was unaware that the judge in question participated in the proceedings to review his request, as these proceedings were held in his absence, he did not know who was participating in these proceedings.
43. The Court must now consider whether a judge involved as the Presiding Judge of the District Court in a person’s sentencing could later as a Supreme Court judge, sit in the Panel dealing with the request for extraordinary mitigation of sentence of the same sentenced person.
44. In this regard, the Court considers that the impartiality of a tribunal under Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to fair trial] of ECHR must be determined according to a subjective test, that is on the basis of the personal conviction and behaviour of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see among other authorities, the Hauschildt v. Denmark, judgment of 24 May 1989, Series A no. 154, p. 21, para. 46 and the Thomann v. Switzerland, judgment of 10 June 1996, Reports of Judgments and Decisions 1996-III, p. 815, para. 30).
45. As to the subjective test, neither the Applicant nor the attorney, due to the written nature of the procedure, could have been aware, until they received the Supreme Court decision, that the same judge that presided in the panel in the District Court in Prizren also participated in the Panel of the Supreme Court deciding on his request for mitigation of the sentence. Thus, it cannot be concluded that the Applicant had waived

the right to have his rights determined by an “impartial tribunal” (see, *mutatis mutandis*, *Oberschlick v. Austria*, no. 11662/85, judgment of 23 May 1991).

46. In this respect, the Supreme Court should have had the Judge in question, in accordance with Article 41 of PCPCK, withdraw or have been withdrawn *ex officio* from the proceedings to review the sentence.
47. As to the objective test, the Court notes that it must be determined whether, there are ascertainable facts which may raise doubts as to whether an individual judge can be fair and impartial in a specific case. In this respect, appearances are of importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear lack of impartiality must withdraw (see among other authorities, the *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, para. 46).
48. The Court notes that in the instant case the fear of lack of impartiality derives from the fact that the Judge in question, as the Presiding Judge in the District Court of Prizren, sentenced the Applicant to a penalty of imprisonment. This same judge was also a member of the Supreme Court Panel, when it ruled that the request of the Applicant for extraordinary mitigation of the sentence was unfounded.
49. The Court notes that Article 40 and 41 of PCPCK manifest the legislature’s concern to remove all reasonable doubts as to the impartiality of the Court. Accordingly, the failure of the Supreme Court to abide by this rule means that the Applicant’s request for mitigation of the sentence was heard by a tribunal whose impartiality was recognised by the PCPCK to be open to doubt (see, *mutatis mutandis*, *Oberschlick v. Austria*, no. 11662/85, judgment of 23 May 1991).
50. The Court is therefore of the view that in the circumstances of the case the impartiality of the Supreme Court is capable of appearing to be open to doubt and that the Applicant’s fears in this respect can be considered subjectively and objectively justified.
51. The Supreme Court argued that, if all the members who have been involved in any stage of the proceedings would be expelled, then the Supreme Court would have no judges to rule on the request. The Court considers that the issue of whether or not there are enough judges to decide on requests for mitigation of sentence is a matter entirely within the jurisdiction of and for discussion, if appropriate, between the judiciary and the Government. The primary responsibility for the proper administration of Justice is the Government and organizational issues cannot be used as an excuse for not adhering to the Constitution (see Case No. KO 4/11, Supreme Court of Kosovo requesting Constitutional Review of Articles 35, 36, 37 and 38 of the Law on Expropriation of Immovable Property, No. 03/L-139, Judgment of 1 March 2012).
52. In these circumstances, the Court holds that the right to a fair and impartial trial by an independent tribunal, as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to fair trial] of ECHR of the ECHR has been violated.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law, and Rule 56 (1) of the Rules of Procedure, decides unanimously, at its session held on 9 May 2012, to

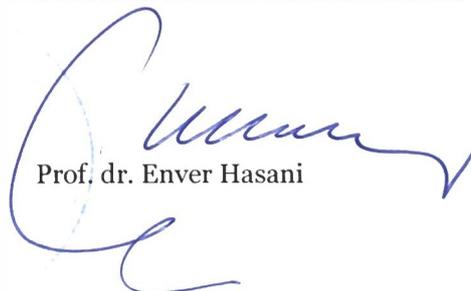
- I. DECLARE the Referral Admissible;
- II. DECLARE invalid the Decision, Pzd. no. 67/2011, of the Supreme Court of 12 December 2011, which violates Article 31 of the Constitution and Article 6 of ECHR;
- III. REMAND the Decision, Pzd. no. 67/2011, of the Supreme Court of 12 December 2011 to the Supreme Court for reconsideration in conformity with the Judgment of this Court, pursuant to Rule 74 (1) of the Rules of Procedure;
- IV. Pursuant to Rule 63 (5) of the Rules of Procedure, the Supreme Court shall submit information to the Constitutional Court about the measures taken to enforce this Judgment of the Constitutional Court;
- V. 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;
- VI. This Decision is effective immediately.

Judge Rapporteur



Snezhana Botusharova

President of the Constitutional Court



Prof. dr. Enver Hasani