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

Prishtina, on 5 December 2016
Ref. No.:RK1011/16

RESOLUTION ON INAMDISSIBILITY

in

Case no. KI07/15

Applicant

Shefki Zogiani

Constitutional review of
Decision PAKR. no. 499/2013 of the Court of Appeal of Kosovo,
of 6 January 2014

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Shefki Zogiani (hereinafter: the Applicant), represented by Visar Vehapi, a lawyer hired by the Centre for Survivors of Torture in Prishtina.

Challenged decision

2. The Applicant challenges Decision PAKR. no. 499/2013 of the Court of Appeal of Kosovo, of 6 January 2014, in conjunction with Judgment P. no. 134/2008 of the District Court in Prishtina, of 2 April 2009, Decision Ap. no. 359/2009 of the Supreme Court, of 16 June 2010, and Judgment P. no. 208/10 of the Basic Court in Prishtina, of 12 July 2013.

3. The Decision of the Court of Appeal was served on the Applicant on 27 January 2014.

Subject matter

4. The subject matter is the constitutional review of the challenged decisions, which allegedly violated Article 5 (3) (Right to liberty and security) and Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the Convention), and the right to a court decision within a reasonable time under Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the Convention.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121, on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 21 January 2015, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 9 February 2015, the President of the Court appointed Judge Arta Rama-Hajrizi as Judge Rapporteur and the Review Panel, composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Kadri Kryeziu (Judges).

8. On 28 April 2015, the Applicant was informed about the registration of the Referral.

9. On 26 June, 2015, the mandate of Judges Enver Hasani and Kadri Kryeziu ended. On 1 July 2015, Judge Altay Suroy was appointed as Judge Rapporteur replacing Judge Arta Rama-Hajrizi, and Judge Ivan Čukalović was appointed a member of the Review Panel replacing Judge Kadri Kryeziu.

10. On 18 January 2016, a copy of the Referral was sent to the Basic Court in Prishtina, Court of Appeal of Kosovo and to the Supreme Court of Kosovo.

11. On 15 February 2016, the Court requested the Applicant and the Basic Court in Prishtina to submit the evidence of the date of receipt of the Decision of the Court of Appeal of Kosovo.

12. On 1 March, 2016, the Basic Court in Prishtina submitted evidence (a copy of the letter of the receipt) of the date of receipt of the Decision of the Court of Appeal of Kosovo by the Applicant.

13. On 14 March 2016, the Applicant informed the Court that on 6 April 2016 was scheduled the date of holding the court hearing in the Basic Court in Prishtina.

14. On 17 March 2016, the Court requested the information from the Basic Court in Prishtina about the case of the Applicant, namely whether a court hearing was held.

15. On 21 March 2016, the Basic Court in Prishtina informed the Court that the Applicant's case is ongoing and that the next hearing was scheduled to be held on 6 April 2016.

16. On 13 September 2016, 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 14 February 2008, the District Public Prosecutor's Office in Prishtina filed an indictment against the Applicant, accusing him of commission of the criminal offense of Incitement to commit Aggravated Murder sanctioned by the Kosovo criminal law applicable at the time.

18. On 2 April 2009, the District Court in Prishtina (Judgment P. no. 134/2008) found the Applicant guilty of having committed the criminal offense of aggravated murder under the charges that due to "unscrupulous revenge" he encouraged his nephew K. Z. to deprive of life the third party B.O. The Applicant was sentenced to long term imprisonment of ten (10) years based on Articles 147.9 and 24 of the Criminal Code of Kosovo, including the time spent in detention on remand from 5 February 2008 and onwards.

19. The Applicant filed an appeal with the Supreme Court of Kosovo on the grounds of substantial violation of the criminal procedure provisions, erroneous and incomplete determination of factual situation, violation of the criminal law and the decision on punishment.

20. On 16 June 2010, the Supreme Court (Decision Ap. no. 359/2009) approved the Applicant's appeal and annulled the Judgment of the District Court, remanded the case for retrial and decided to extend to Applicant the detention on remand.

21. On 27 October 2011, the Applicant addressed the District Court in Prishtina with the request to accelerate the criminal proceedings and he complained for the extension of his detention on remand in the Detention Center in Lipjan. The Applicant also complained that the court proceedings in the District Court had not yet started and it was delayed for various reasons for more than a year since the Supreme Court had remanded the case for retrial.

22. The Applicant also requested in two occasions that his case be transferred to the jurisdiction of EULEX judges where, among other things, he also complained about the composition of the trial panel in the District Court in Prishtina. EULEX rejected the Applicant's request that his case be transferred to its jurisdiction, but they expressed their concern about the composition of the trial panel in the District Court in Prishtina.

23. In 2012, the Applicant addressed several requests to the President of the District Court in Prishtina to change the composition of the trial panel. The Applicant's request was approved and the new panel began trial on 12 July 2013.

24. On 1 January 2013, the Law on Courts No. 03/L-199 entered into force. Article 15. 1 of the Law on Courts provides: *"The Serious Crimes Department of the Basic Court shall adjudicate the following criminal offenses as provided in the Criminal Code of Kosovo."*

25. On 12 July 2013, the Basic Court in Prishtina (Judgment P. no. 208/10) found the Applicant guilty of committing the criminal offense of Incitement to commit aggravated murder under Article 147.9 in conjunction with Article 24 of the Criminal Code of Kosovo. The Applicant was sentenced to long term imprisonment for a period of ten (10) years, including the time spent in detention on remand since 5 February 2008.

26. On 25 August 2013, the Applicant filed an appeal with the Court of Appeal of Kosovo on the grounds of substantial violation of criminal procedure provisions, erroneous and incomplete determination of factual situation, violation of the criminal law and decision on punishment

27. On 26 November 2013, the Applicant was informed that the Basic Court - according to the Applicant's complaint - had not yet forwarded his case to the Court of Appeal of Kosovo.

28. On 29 November 2013, the Applicant addressed the Basic Court, requesting that (i) the Basic Court - upon the Applicant's appeal – forwards the case to the Court of Appeal, (ii) to accelerate and finalize his case and (iii) that he is in detention on remand for 6 years, beyond any reasonable period of time. The Applicant expressly complained that keeping him in detention on remand and the delay of the criminal proceedings violate his right to a fair trial within a reasonable time and is contrary to the Constitution, laws and international conventions applicable in Kosovo.

29. On 6 January 2014, the Court of Appeal of Kosovo (Decision PAKR. no. 499/2013) annulled the Judgment of the Basic Court and remanded the case for retrial and reconsideration, and ordered the termination of the Applicant's detention on remand.

30. Regarding the contradictions of the Judgment of the Basic Court, the relevant part of the Decision of the Court of Appeal states:

"In one part is stated that he demanded explanations from BO, which is quite normal under the created circumstances, while afterwards he spoke about intentional and permanent influence on the accused K. The enacting clause is in contradiction with the reasoning and content of the case file. While in the enacting clause it is stated that Shefki (the Applicant) "intentionally and permanently influenced on the accused K" in the case file and in the testimony of the witnesses, and anywhere else such a conclusion cannot be found and this makes the judgment unclear and contradictory and this constitutes substantial violations of the criminal procedure provisions under Article 384 par.1 item 12 in conjunction with Article 370 of CCK."

31. As to the disregard of the recommendations of the Supreme Court by the Basic Court, the relevant part of the Decision of the Court of Appeal states:

"The first instance court when annulling Judgment P. no. 134/2008 of 02.04.2009 by the Supreme Court of Kosovo, by Decision Ap. No. 359/2009 of 16.06.2010 did not comply with the recommendations of this court, by not giving again the reasons on decisive facts based on which is determined the intent of the accused Shefki (the Applicant) to commit the criminal offence. This Court also considers that the given reasons regarding the accused Shefki and his contribution to influence on the accused K to commit the criminal offence are completely unclear."

32. Regarding the detention on remand of the Applicant, the Court of Appeal held:

"Regarding the detention on remand, the criminal panel of this court acting pursuant to Article 402. par. 4 of CPCK decided to terminate the detention on remand to the accused Shefki Zogiani, as it considers that there are no conditions and circumstances for which it was imposed."

33. On 21 March 2016, the Basic Court in Prishtina submitted to the Court additional information about the Applicant's case noting that:

"The case PKR no. 31/14 was remanded for retrial-reconsideration, according to the Decision of the Court of Appeal of Kosovo, and regarding this case on 03.03.2016 was held a court hearing, while the next hearing was scheduled on 06.04.2016. So far, no decision that you request to submit to you, was rendered because the question-procedure is ongoing."

Applicant's allegations

34. As to the delay of the criminal proceedings, the Applicant alleges: *"Pursuant to Article 285, para. 2 of the Criminal Procedure of Kosovo, the main hearing shall commence within one (1) month [...] from the last order issued under Article 254 paragraph 5 of the present Code. The provisions of the court hearing apply mutatis mutandis also for retrial. In the present criminal matter, the retrial has not commenced even one year after the case was remanded for retrial. The Applicant cannot challenge the delays of the procedure through any legal remedy and as a consequence of the delay of the*

proceedings, he is limited in the possibility of challenging the legality and constitutionality of the detention on remand for six (6) years."

35. Regarding the unlawfulness of detention on remand, the Applicant alleges: *"Regarding the fact that, formally, the criminal proceedings is ongoing despite the fact that the retrial has not yet started, it does not constitute the obstacle for the Constitutional Court to not assess the length of the detention on remand and the delay of the criminal proceedings, beyond the legal deadlines in terms of violation of the constitutional provisions to a fair trial within reasonable time limit."*

36. As regards the violation of Article 5 (3) of the Convention, the Applicant states: *"The European Court of Human Rights has decided that "even if the relevant and sufficient basis" continue to justify the deprivation of liberty during the pre-trial period, Article 5 (3) of ECHR may again be violated if the deprivation of freedom is prolonged beyond "reasonable time" as the procedure was not conducted with due expedition (see Tomas vs. France, 27 August 1992, 99 and 102).* In the ECHR case law is important the case *W. Vs. Switzerland, ECHR,* 26 January 1993, 42, where the court found *"the duration of deprivation of liberty in the preliminary stage depends substantially on extraordinary complexity of the case and on the conduct of the defendant."*

37. As to the exhaustion of legal remedies, the Applicant alleges: *"The Applicant did everything that could be reasonably expected from him to exhaust the legal remedies in the regular proceeding by continuously requesting the courts to accelerate the proceedings and to schedule the retrial in order to avoid delays. The regular courts did not provide necessary information about the delays or any satisfactory justification, which leads to the conclusion that every request in regular criminal proceedings would be in vain and inefficient."*

38. The Applicant requests the Court: *"to assess the legality and constitutionality of the* detention *on remand and the delay of the criminal proceedings in terms of fair trial within reasonable time limit, which is guaranteed by the Constitution and which in principle the regular courts are obliged to do, but failed in this criminal proceedings. Not wanting to prejudice the epilogue when the matter is pending retrial, however, when the Applicant was sentenced to 10 years of imprisonment in the first two trials, he remained in detention on remand for six (6) years."*

Assessment of admissibility

39. The Court first examines whether the Referral meets the admissibility requirements laid down in the Constitution and as further specified in the Law and Rules of Procedure.

40. In this respect, the Court refers to Article 113.7 of the Constitution which provides:

"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."

41. The Court also refers to Articles 47 and 49 of the Law, which provide:

Article 47
Individual Requests

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.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.

Article 49
Deadlines

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision."

42. The Court further takes into account Rule 36 (1) (b) and (c) of the Rules of Procedure, which specifies:

"Rule 36
Admissibility Criteria

The Court may consider a referral if:

(...)

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted

(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant."

43. The Court also refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which establishes:

"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

44. The Court reiterates that the Applicant raises two key allegations: (i) alleged violation of Article 5 (3) of the Convention because he is in detention on remand for a period of 6 years without a final decision on his guilt or innocence and (ii) the allegation of violation of paragraph 1 of Article 6 of the Convention

for delay of criminal proceedings for a period of 8 years that is still continuing without a final decision on his guilt or innocence.

45. The Court notes that Article 5 (3) of the Convention and Article 31 of the Constitution in conjunction with Article 6 (1) provide various procedural guarantees at different stages of the criminal proceedings, so both allegations will be considered independently.

As to the alleged violation of Article 5 (3) of the Convention

46. In order that the allegation of violation of Article 5 (3) is reviewed on merits, it must first be determined whether such an allegations is filed within the legal deadline of four (4) months as required by Article 49 of the Law and further specified by Rule 36 (1) (c) of the Rules of Procedure.

47. The Court notes that the legal deadline of four (4) months shall be counted only from the moment of termination of the last period of detention on remand. (See, for example, Case *Solmaz v. Turkey*, ECtHR, Application no. 27561/02, Judgment of 16 April 2007, paragraph 36).

48. In this regard, the Court notes that the Court of Appeal released the Applicant from detention on remand on 6 January 2014, and the decision on his release from detention, was served on him on 27 January 2014, what constitutes for the Court the end of the last period of detention on remand.

49. The Court also notes that referral - as regards the allegation of violation of Article 5 (3) of the Convention - was filed on 21 January 2015 which means that it was submitted eight (8) months after the expiry of the four-month deadline provided by Article 49 of the Law and further specified in Rule 36 (1) (c) of the Rules of Procedure.

50. Accordingly, the Court considers that it is impossible to consider the allegation of violation of Article 5 (3) of the Convention because it is out of time, namely it was not filed in accordance with Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure. (See Case *Idalov v. Russia* [GC], application no. 5826/03, judgment of 22 May 2012, paragraph 116).

51. The Court recalls that the purpose of the four-month legal time limit under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure is to promote legal certainty, to ensure that cases raising constitutional issues are dealt with within a reasonable time and that previously rendered decisions are not endlessly open to challenging. (See case of *O' Loughlin and Others v. the United Kingdom* no. 23274/04, ECtHR Decision of 25 August 2005 and *mutatis mutandis* see case no. KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 3 March 2014).

52. Moreover, the Court notes that it is the duty of the applicants or of their representatives to act with *'due diligence'* to ensure that their claims for protection of rights and fundamental freedoms are filed within the legal deadline of four (4) months provided for in Article 49 of the Law and further specified in Rule 36 (1) (c) of the Rules of Procedure. (See Case *Mocanu and*

Others v. Romania [GC], Application no. 10865/09, 45886/07 and 32431/08, Judgment of 17 September, 2014, paragraphs 263-267).

Whether there was violation of Article 31 of the Constitution in conjunction with Article 6 (1) of the Convention to a fair and impartial trial within a reasonable time limit

53. To hold whether the length of the criminal proceedings was justified, the Court must take into account the factors such as the complexity of the case, the Applicant's conduct and the conduct of the relevant administrative and judicial authorities. (See Case *Konig v. Germany*, ECtHR, Application no. 6232/73, Judgment of 28 June 1978, paragraph 99).

54. The complexity of the case may arise, for example, from the number of claims, the number of parties involved in the proceedings, such as the defendants and witnesses, or even the international dimension of the case. (See Case *Neumeister v Austria*, ECtHR, application no. 1936/63, judgment of 27 June 1968, paragraph 20).

55. Article 31 of the Constitution and Article 6 (1) of the Convention do not oblige the Applicants to actively cooperate with the judicial authorities. They also cannot be blamed for making full use of the remedies available to them under the applicable law. However, their conduct constitutes an objective fact that cannot be attributed to public authorities and when determining whether the proceedings continued longer than a reasonable period specified in Article 6 (1) of the Convention should be taken into account. (See Case *Eckle v. Germany* ECtHR, Application no. 8130/78, Judgment of 15 July 1982, paragraph 82).

56. Article 31 of the Constitution and Article 6 (1) of the Convention oblige the competent authorities to organize the judicial system in such a way that the courts meet all the criteria set out in Article concerned. (See Case *Abdoella v. the Netherlands*, ECtHR, Application no. 12728/87, Judgment of 25 November 1992, paragraph 24).

57. Although the cases may be complex, the Court still considers as *"reasonable"* the periods of the lack of the court's activity. (See case *Adiletta v. Italy*, application no. 20/1990/211/271-273, ECHR, Judgment of 24 January 1991, paragraph 17).

58. In fact, the Court further considers that all instances of the regular courts have been active, even though for a long period where several hearings at all instances levels were held.

59. However, the Court emphasizes that, although the regular courts have not remained passive, it is their constitutional and legal obligation to finalize, particularly in the criminal matters, within a reasonable time. In order not to cause confusion and uncertainty, the regular courts cannot allow that the case is transferred endlessly from one court instance to another. Otherwise, public confidence in the entire legal system is undermined.

60. Moreover, the Court notes that the proceedings are still going on and there is no final decision which constitutionality would be challenged. Thus, the Court considers that the Referral is premature.

61. In this respect, the Court wishes to emphasize that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order shall provide an effective legal remedy for the violation of the constitutional rights (See *mutatis mutandis* ECHR *Selmouni vs France*, No. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the rule of exhaustion of legal remedies is satisfied (see, *mutatis mutandis*, ECHR, *Azinas v. Cyprus*, no. 56679100, decision of 28 April 2004).

62. Therefore, the Applicant has not exhausted yet all legal remedies and his Referral is declared inadmissible, as established by Article 113.7 of the Constitution, provided by Articles 47 and 49 of the Law and foreseen by Rules 36 (1) (b) and (c) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 47 and 49 of the Law, and Rules 36 (1) (b) and (c) of the Rules of Procedure, on 13 September 2016, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Altay Suroy Arta Rama-Hajrizi