



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

Prishtina, 16 February 2015
Ref. no.:RK773/15

RESOLUTION ON INADMISSIBILITY

in

Case No. KI137/14

Applicant

Shpejtim Ademaj

**Constitutional Review of the Judgment P.m.l. nr. 194/2013
of the Supreme Court of Kosovo of 2 April 2014**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalovič, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge, and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Shpejtim Ademaj, with residence in village Jabllanica, Municipality of Gjakova, currently serving his sentence in Dubrava prison (hereinafter, the Applicant). He is represented by Mr. Gafur Elshani, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the Judgment, P.m.l. nr. 194/2013 of the Supreme Court of Kosovo dated on 2 April 2014, which was served on the Applicant on 23 May 2014, based on the information received from the Basic Court in Prishtina.

Subject matter

3. The subject matter is the request for constitutional review of the Judgment, P.m.l. nr. 194/2013 of the Supreme Court of Kosovo dated on 2 April 2014. The Applicant claims that the Supreme Court by rejecting the request for protection of legality as ungrounded has violated his rights to equality before the law, fair and impartial trial, prohibition of discrimination and legal remedies as guaranteed by the Constitution of the Republic of Kosovo (hereafter: the Constitution) and the European Convention on Human Rights (hereafter: ECHR).

Legal basis

4. 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 56 of the Rules of Procedure of Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 12 September 2014 the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 18 September 2014 the Applicant, on his own initiative, submitted additional documents to the Court.
7. On 7 October 2014 the President of the Court by Decision, GJR. KI137/14 appointed Judge Snezhana Botusharova as Judge Rapporteur and by Decision, KSH. KI137/14 appointed the Review Panel composed of Judges, Robert Carolan (presiding), Almiro Rodrigues and Enver Hasani.
8. On 27 October 2014 the Court informed the Applicant of the registration of the Referral and requested that he files the power of attorney in compliance with Article 21 of the Law and Rule 29.2 (c) of the Rules of Procedure. On the same date the Court informed the Basic Court in Prishtina of the registration of the Referral and requested that they provide a copy of the letter of receipt indicating the date when the Applicant or his representatives have received the challenged Judgment. Lastly, on the same date the Court sent a copy of the Referral to the Supreme Court.
9. On 3 November 2014 the Applicant submitted the power of attorney, as requested by the Court.

10. On 4 November 2014 the Basic Court in Prishtina submitted the requested document to the Court, which proves that the Applicant received the challenged Judgment on 23 May 2014.
11. On 21 January 2015 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

12. During the night between 14 and 15 October 2009, a group of 18 (eighteen) citizens from Kosovo has crossed the border between Serbia and Hungary by a boat sailing in river Tisa, near the city of Subotica. The boat was drowned on its way and 15 (fifteen) citizens of Kosovo lost their lives, while 3 (three) of them survived.
13. On 7 October 2010 the Special Prosecution Office of the Republic of Kosovo (hereinafter: SPRK) based on the act PPS. No. 422/09, filed an indictment against the Applicant and six (6) other persons, charging them with the criminal offence of the organized crime under Article 274, paragraph 4, in conjunction with Article 23 of the Criminal Code of Kosovo (hereinafter: CCK), and the criminal offence of Smuggling of migrants under Article 138, paragraph 6 of the same Code.
14. On 17 June 2011 the District Court in Prishtina adopted Judgment P. no. 244/10, which found the Applicant *“guilty for both criminal offences and sentenced him, for the first offence, with imprisonment of fourteen (14) years and €200.000, while for the second offence with imprisonment of two (2) years for each migrant, namely the aggregate sentence in duration of seventeen (17) years of imprisonment and fine of €200.000. “*
15. On 30 October 2011 the Applicant filed an appeal with the Supreme Court against the Judgment of the District Court P. no. 244/10, in which he admitted the responsibility for the criminal offence of Smuggling of migrants under Article 138 of the CCK, but rejected the charges for organized crime. Thus the Applicant requested from the Supreme Court to return the case to District Court for a retrial or to adopt a new decision which would only find him responsible for smuggling of migrants, but not for organized crime.
16. On the same date the lawyer of the Applicant filed an additional appeal with the Supreme Court against the Judgment of the District Court P. no. 244/10 due to *“substantial violations of the provisions of criminal procedure, violations of criminal code provisions, erroneous and incomplete ascertainment of the factual situation and with regard to the decision about the criminal sentence”*.
17. On 2 October 2012 Supreme Court adopted Judgment AP-Kz nr. 61/2012, which rejected the appeal of the Applicant as ungrounded and held that:

“[...] the trial panel of the district court has verified the relevant factual situation entirely for all the defendants. For this purpose, the Supreme Court of Kosovo refers to the reasoning of the judgment dealing with the

verification of facts and the responsibility of each defendant. There is no indication that the District Court did not explore in an honest manner the circumstances of the case and the whole procedure was conducted correctly and it was objective. Supreme Court agrees that there are some formulations used by the trial panel may seem vague. However the findings of the trial panel are not based on assumptions. In fact, the first instance court has reasoned extensively the assessment of evidence, including the credibility of the witnesses [...]. and [...] and the importance of their statements, in order to decide about the culpability of defendants [...].

18. On 8 December 2012 the Applicant submitted a request for protection of legality to the Supreme Court, based on Article 451, paragraph 1 and Article 452, paragraphs 1 and 3 of the Criminal Procedure Code of Kosovo (hereinafter, CPCK), challenging the judgments: P. no. 244/10 of District Court in Prishtina and AP-Kz nr. 61/2012 of the Supreme Court, claiming that these judgments contain “*essential violations of provisions of CPCK [...] other violations of provisions of CCK, which have influenced the legality of the court decision [...].*”
19. On 2 April 2014 the Supreme Court adopted Judgment P.m.l. nr. 194/2013, which rejected the Applicant’s request for protection of legality as ill-founded, and held that:

“The Supreme Court firstly refers to Article 432 of the CCP (Article 451 paragraph 2 of the PCCK), which provides that request for protection of legality may not be filed on the ground of an erroneous or incomplete situation. Therefore, the dispute of the factual situation in this phase is inadmissible, and the court will only limit itself in assessment of eventual violations in interpretation or application of the law [...]

Under Article 436 of the CCP (Article 451 of the KPCC that), shall confine itself to examining those violations of law which the requesting party alleges in his or her request [...]

in this respect, in its assessment the Supreme Court has not found any procedural violation in the contested judgments, and did not find any other violation, which should be considered ex officio.”

Applicant’s allegations

20. The Applicant alleges that Judgment, P.m.l. nr. 194/2013 of the Supreme Court of 2 April 2014 by rejecting his request for protection of legality has violated his rights guaranteed by the Constitution, namely Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial], Article 33 [The Principle of Legality and Proportionality in Criminal Cases], Article 34 [Right not to be Tried Twice for the Same Criminal Act], his right to a fair trial guaranteed by Article 6 of the ECHR and Article 10 of Universal Declaration of Human Rights (hereinafter: UDHR).
21. With regards to the alleged violation of his rights under Article 31 of the Constitution and Article 6 ECHR the Applicant claims that: “*By decision cited*

above, the Applicant considers that his rights to fair and impartial trial has been violated, since during the trial it has not been determined that the Applicant by his actions or inactions, was a part of the organized crime, or he has collaborated in co-perpetration of the criminal offence, as provided by Articles 274, para. 4, in conjunction with Article 23 of CCK and in the appeal procedure has plead guilty and the punishment for the criminal offence of Smuggling with migrants, while by challenged judgments was found guilty for the criminal offence of the organized crime.”

22. With regards to violations of other constitutional provisions, namely Article 24, Article 33 and Article 34, the Applicant only lists them as alleged violations, but does not provide any arguments or evidence in support of his claims.
23. Finally the Applicant requests from the Court to find that:

“[...] that Judgment of the District Court in Prishtina P. no. 244/2010, of 17 June 2011, and the judgments of the higher instance authorities that have upheld the imposed punishments even, by regular and extraordinary remedies, there is violation of the Constitution and the applicable law, of the right to fair and impartial trial, and there is disproportion in the severity of the punishment with the criminal offense, to the detriment of the appellant, and also for the offence he is charged with, the organized crime, it has not been proven by evidence that the Applicant was a member of the criminal organization by any of his individual action or inaction.

The same judgments should be annulled as regards to organized crime under Article 274, paragraph 4, in conjunction with Article 23 of the Criminal Code of Kosovo, and the case should be adjudicated in impartial manner and in accordance with the evidence.”

Admissibility of the Referral

24. The Court first examines whether the Applicant is an authorized party to submit a referral with the Court, in accordance with requirements of Article 113.7 of the Constitution.

Article 113, paragraph 7 of the Constitution 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.”

25. In addition, Article 49 of the Law provides that *“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”*.
26. In the instant case, the Court notes that the Applicant started judicial proceedings before the regular courts, namely the District Court and later before the Supreme Court of Kosovo. The Court also notes that the Applicant was served with the last Supreme Court Judgment on 23 May 2014 and filed his Referral with the Court on 12 September 2014.

27. Thus, the Court considers that the Applicant is an authorized party and has exhausted all legal remedies afforded to him by the applicable law and the Referral was submitted within the four months time limit.

“In his/her referral, the claimant should accurately clarify what rights

28. In addition, the Court refers to Rules 36 (1) d) and 36 (2) b) and d) of the Rules of Procedure, which provide that:

“(1) The Court may only deal with Referrals if:

(d) the referral is prima facie justified or not manifestly ill-founded.

(2) The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

[...]

b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights,

[...]

d) when the Applicant does not sufficiently substantiate his claim”.

A. As to the allegations under Article 31 of the Constitution and Article 6 of ECHR

29. As mentioned above, the Applicant had the possibility to confront the charges in all instances of regular courts, which he did exercise his right to present his defence and used the right to regular and extraordinary legal remedies. In addition, the Court considers that the justification provided by the Supreme Court, in answering the allegations made by the Applicant with regards to the sanctioning decision, is clear, reasoned and fair.
30. With regards to the Applicant’s claims related to the assessment of evidence and questioning the witnesses, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
31. The Constitutional Court also reiterates that it does not act as a court of fourth instance, in respect of 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, *mutatis mutandis*, *García Ruiz v. Spain*, No. 30544/96, ECtHR, Judgment of 21 January 1999, para. 28. See also Constitutional Court case No. KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
32. The Constitutional Court can only consider whether the regular courts’ proceedings in general and viewed in its entirety have been conducted in such a way that the Applicants had a fair trial (See, *inter alia*, *Edwards v. United Kingdom*, No. 13071/87, Report of European Commission of Human Rights of 10 July 1991).

33. The Court considers that the proceedings before the regular courts, including before the Supreme Court, have been fair and reasoned (See *Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).

B. As to allegations under Article 24, 33 and 34 of the Constitution

34. The Court notes that the Applicant only listed and described the content of the constitutional provisions guaranteeing Equality before the Law, The Principle of Legality and Proportionality in Criminal Cases and Right not to be Tried Twice for the Same Criminal Act. However, the Applicant does not clearly present how and why has been treated differently, how was the principle of legality and proportionality has been violated or why does he consider that he has been tried twice for a same criminal act.
35. In this respect, the court reiterates that dissatisfaction with the decision or merely the mentioning of articles and provisions of the Constitution does not suffice for the Applicant to raise an allegation of constitutional violation. When alleging Constitutional violations, the Applicant must present convincing and indisputable arguments to support the allegations, for the referral to be grounded (See Constitutional Court case No. KI198/13 Applicant *Privatization Agency of Kosovo*, Resolution on Inadmissibility of 13 March 2014).
36. In this context, the Applicant has not filed any convincing argument to establish that the alleged violations mentioned in the Referral represent constitutional violations (see, *Vanek v. Republic of Slovakia*, ECtHR Admissibility Resolution, no. 53363/99, of 31 May 2005) and did not specify how the referred articles of the Constitution, ECHR and UDHR support his claim, as required by Article 113.7 of the Constitution and Article 48 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 48 of the Law and Rules 36 (1) d), 36 (2) b) and d) of the Rules of Procedure, on 21 January 2015, unanimously

DECIDES

- I. TO DECLARE the Referral:
 - a. With regards to allegations under point A), inadmissible because the facts presented by the Applicant do not in any way justify the alleged violation of his constitutional rights;
 - b. With regards to allegations under point B), inadmissible because the Applicant has not sufficiently substantiated his claim.
- II. TO NOTIFY the Parties of this Decision;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Snezhana Botusharova

Prof. Dr. Enver Hasani

