



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

Prishtina, on 13 February 2015
Ref. No.RK 772/15

RESOLUTION ON INADMISSIBILITY

in

Case No. KI162/14

Applicant

Shefki Hyseni

**Constitutional review of the Decision Pml. no. 165/14, of the Supreme
Court of the Republic of Kosovo, of 27 August 2014**

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

Applicant

1. The Applicant is Mr. Shefki Hyseni, with permanent residence in Mitrovica.

Challenged decision

2. The Applicant challenges the Decision Pml. no. 165/14, of the Supreme Court of the Republic of Kosovo, of 27 August 2014 (hereinafter: the Supreme Court).

Subject matter

3. The subject matter is the constitutional review of the Decision Pml. no. 165/14, of the Supreme Court, of 27 August 2014, which, according to the Applicant's allegations, violated rights guaranteed by the Constitution.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 22 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law).

Proceedings before the Constitutional Court

5. On 30 October 2014, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 6 November 2014, the President of the Court, by Decision GJR. KI162/14/14, appointed Judge Robert Carolan as Judge Rapporteur and on the same date, by Decision KSH. KI162/14/14, appointed the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.
7. On 6 November, 2014, the Court notified the Applicant of registration of the Referral and requested from him to complete the Referral with relevant documentation. On the same date, the Supreme Court was also notified and a copy of the Referral was sent to it.
8. On 8 December 2014, the Applicant submitted the completed Referral form and attached to it the Decision Pml. no. 165/14, of the Supreme Court, of 27 August 2014.
9. On 22 January 2015, the Review Panel considered the report of the Judge Rapportuer and made a recommendation to the Court on the Inadmissibility of the Referral.

Summary of facts

10. On 18 March 2009, the Municipal Court in Ferizaj (Judgment, P. no. 798/2006) found the Applicant guilty of the criminal offense of Fraud under Article 261 paragraph 1 of the Criminal Code of Kosovo (CCK), by imposing on him the sentence of 20 months of imprisonment.
11. On 23 October 2012, the District Court in Prishtina (Judgment, Ac. no. 285/2009) modified the Judgment of the Municipal Court of Ferizaj regarding

the measure of punishment of the Applicant, by reducing the imprisonment sentence from 20 months to one (1) year.

12. On 20 July 2014, the Applicant filed a request for protection of legality with the Supreme Court, alleging that there was a substantial violation of the provisions of the criminal procedure law.
13. On 27 August 2014, the Supreme Court (Decision PML. no. 165/14), rejected, as inadmissible, the Applicant's request for protection of legality, because, according to said court, the procedural admissibility requirements, provided by applicable law, had not been met.
14. Furthermore, the Supreme Court reasoned:

[...]

“From the content of the request for protection of legality, it does not result that by this legal remedy was challenged any court decision, because there was not specified what decision was challenged or what court proceedings was conducted prior to rendering of such a decision.

On the contrary, in the request is mentioned only the fact that the judgment of the second instance court has not been served on the convict and, in this way, the law has been violated because he was not given the opportunity to use any legal remedy against the decision of the second instance court.

The fact that in the present case the Judgment of the second instance court was not served on the convict, is grounded, since, as it results from the case file- the return paper, dated 4.3.2013- it was attempted to submit the document to the convict, but in the return paper it was found that the party was unknown. However, the Supreme Court assesses that in the present case, the convict's request for protection of legality is premature because in such a situation the convict should have addressed the first instance court with a request for service of the judgment of the second instance court in a regular manner, from which date the time limit starts to run, and then, by respecting this time limit, he should have used this legal remedy”.

[...]

Applicant's allegations

15. The Applicant alleges that the Supreme Court violated his rights guaranteed by the Constitution, due to the fact that the said court rejected the request for protection of legality as inadmissible, because according to the Applicant, this court did not take into account the fact that Judgment Ac. nr. 285/2009, of the District Court of Prishtina, of 23 October 2012, was not served on the Applicant.

Admissibility of the Referral

16. The Court first examines whether the Applicant has fulfilled admissibility requirements laid down in the Constitution and further specified in the Law and Rules of Procedure.
17. In the present case, the Court refers to Article 113.7, which provides 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”.

18. In addition, Article 47. 2 of the Law provides:

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

19. The Court also refers to the Rule 36 (1) b) of the Rules of Procedure, which provides:

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.

[...]

20. From the case file, the Court notes that the Applicant challenges Decision Pml. No. 165/14, of the Supreme Court, of 27 August 2014, regarding alleged violations of rights guaranteed by the Constitution. In fact, the Applicant has not specified which specific provision of the Constitution has been violated. However, the Court *inter alia* has understood that it is about the rights deriving from Article 31 of the Constitution and Article 6 of the ECHR, such as the right to have the decision of the court, so that the party or the parties be given an opportunity to contest an unfavorable court decision and prepare an adequate defense for exhausting his legal remedies in the higher instance courts.
21. However, it is clear in this case that the Applicant was provided the opportunity by the Supreme Court to request and receive the Judgment of the District Court of Prishtina from the Basic Court in Prishtina, and that after having it, he could then begin the calculation of legal time limit for seeking his request for Protection of Legality. There is no evidence that the Applicant then requested to receive the Judgment of the District Court of Prishtina.
22. In the present case, the Court cannot conclude that because the Applicant has not asked for the Judgment of the District Court of Prishtina and, therefore, has apparently not received the Judgment of the District Court of Prishtina, that the Applicant was denied the right to exhaust legal remedies against this judgment or that his rights guaranteed by the Constitution were violated.
23. Even from the reasoning of the Decision of the Supreme Court, it is clear that the Applicant's request for protection of legality was rejected as inadmissible, because it was considered as premature. The said court advised the Applicant to address the Basic Court in Prishtina, to ask for the Judgment Ac. no. 285/2009, of 23 October 2014, and after having this judgment would begin the calculation of legal time limit and the possibility of exercising the remedy to the higher instance.

24. Therefore, in this respect, the Court considers that the Applicant's Referral does not meet the procedural admissibility requirements, as required by Article 113.7 of the Constitution, due to the fact that he failed to prove that he had used the opportunities provided by the Supreme Court.
25. The Court reiterates that the principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution, if any, or to remedy such violation of the fundamental human rights. Otherwise, the Applicant is liable to have its case declared inadmissible by the Constitutional Court, when failing to avail itself of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. The rule is based on the assumption that the legal order of Kosovo shall provide an effective remedy for the violation of constitutional rights. (See Resolution on Inadmissibility KI41/09, of 21 January 2010, *AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo*, and see *mutatis mutandis*, ECHR, *Selmouni vs. France*, no. 25803/94, Decision of 28 July 1999).
26. For all the aforementioned reasons, the Court concludes that the Referral does not meet the procedural admissibility requirements, provided by Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 36 (1) b) of the Rules of Procedure, due to non-exhaustion of legal remedies.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47.2 of the Law and Rules 36 (1) b) and 56 (2) of the Rules of Procedure, on 22 January 2015, unanimously:

DECIDES

- I. TO DECLARE the Referral as 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; and
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Robert Carolan



President of the Constitutional Court



Prof. Dr. Enver Hasani