



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

Pristine, 24 September 2012
Ref. No.: RK302/12

RESOLUTION ON INADMISSIBILITY

in

Case No. KI163/11

Applicant

Predrag Đorđević

**Constitutional Review of the Supreme Court Judgment Pkl-Kzz-91/10 of 23
August 2011**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge and
Ivan Čukalović, Judge

Applicant

1. The Applicant is Predrag Đorđević born in Zemun, Republic of Serbia, currently serving the prison sentence in the detention centre Mitrovica. In the proceedings before the Constitutional Court ("the Court") the Applicant is represented by Miodrag Brkljač and Ljubomir Pantović lawyers from Mitrovica.

Challenged decision

2. The challenged decision is the Judgment Pkl-Kzz-91/10, issued by the Supreme Court of Kosovo on 23 August 2011 served on the Applicant on 12 September 2011. By that judgment the Applicant's request for Protection of Legality was dismissed as inadmissible.

Subject matter

3. The subject matter of the Referral is the assessment by the Constitutional Court of the constitutionality of the Judgment Pkl-Kzz-91/10 issued by the Supreme Court of Kosovo on 23 August 2011, by which, allegedly the Applicant's rights as guaranteed by the Constitution of the Republic of Kosovo ("the Constitution") have been violated.
4. The Applicant in particular alleges violation of Article 24 [Equality before the Law] and Article 31 [Right to fair and Impartial Trial] of the Constitution. The Applicant also states that his rights guaranteed by Article 7 [Equality before the Law] and 10 [Right to fair trial] of the Universal Declaration on Human Rights have been also violated.
5. Finally the Applicant asserts that his rights guaranteed by Article 6.1. of the European Convention on Human Rights ("the Convention") have been violated.

Legal Basis

6. The Referral is based on Art. 113.7 of the Constitution; Articles 46, 47, 48 and 49 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).

Proceedings before the Court

7. On 20 December 2011, the Applicant submitted a referral with the Constitutional Court.
8. On 17 January 2012, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and a Review Panel composed of Judges Altay Suroy (Presiding), Gjyljeta Mushkolaj and Iliriana Islami.
9. On 18 January 2012, the Court notified the Applicant's representatives and the Supreme Court with the referral.
10. On 2 February 2012, the Court notified the Kosovo Special Prosecution Office with the referral.
11. On the same date the Court asked the Applicant's representatives to provide the Court with copies of all judgments adopted in the criminal proceedings against the Applicant as well as other relevant documents such as criminal charges and other documents issued by the Special Prosecutor.
12. On 16 February 2012, the Court received from the Applicant's representatives the additional documents related to the Referral.
13. On 13 July 2012 the President of the Court appointed a Review Panel composed of Judges Snezhana Botusharova (Presiding), Enver Hasani and Ivan Čukalović.

Summary of Facts

14. The facts of the case may be summarized as follows:
15. On 19 November 2009, District Court in Mitrovica issued a judgment K.no 134/2008 and found the Applicant guilty of the following offences: (a) inciting national, racial, religious, or ethnic hatred, discord, and intolerance contrary to Article 115.3 in conjunction with paragraph 1 of the Criminal Code of Kosovo (CCK) (b) attempted aggravated murder, contrary to Articles 146 and 147 in conjunction with Article 20 of the CCK. As a result, the Applicant was sentenced to 6 years and 6 months in imprisonment, starting from 14 June 2008.
16. During the proceedings before the District Court, after releasing the verdict, the presiding judge instructed the parties regarding the obligation to announce the appeal within the legally stipulated interval of eight days from pronouncement of the verdict.
17. The aforementioned judgment also contains the following instruction for a legal remedy "The authorized person can file a written appeal against this judgment through the District Court in Mitrovica, for the Supreme Court of Kosovo, in a deadline of 15 days from the day of the receipt of the copy of the judgment."
18. Unsatisfied with the District Court's judgment and length of sentence, on 26 November 2009, an appeal was announced by the Applicant to the Supreme Court of Kosovo. The appeal was submitted on 31 December 2009.
19. On 27 January 2010, injured parties E.P. and A.H. , submitted an appeal against the judgment of the District Court because of the length of sentence.
20. On 30 March 2010, the Office of the Kosovo Public Prosecutor submitted a request to the Supreme Court with a proposal to reject appeals of the Applicant and the injured parties and to confirm the Judgment of the District Court of 19 November 2009.
21. The Supreme Court then scheduled a session in the Applicant's case. At that session the Applicant's representative emphasized that it was not clear if the injured parties had announced their appeal pursuant to Article 400 of the CCK. The Applicant's representative argued that their omission to announce the appeal denied them the right to submit an appeal. Consequently, the Applicant's representative asked the Supreme Court to dismiss their appeal.
22. On 4 May 2010, the Supreme Court of Kosovo issued a judgment K.ž No. 24/2010 following the appeals of the Applicant and the injured parties in the above case. The Supreme Court decided that: (a) the appeal of the Applicant was rejected (b) the appeal of injured party, A.H., was dismissed as belated and (c) the appeal of injured party, E.P. was granted.
23. The Supreme Court ruled that the judgment of the District Court in Mitrovica should be partially modified because of several aggravating circumstances such as the bullet fired from the assault weapon still being lodged in the body of the victim and the mental state of the accused. Therefore, the Applicant was sentenced to 12 years of imprisonment, resulting in an aggregated punishment of 12 years and 3 months of imprisonment.
24. Following the judgment to amend his sentence, the Applicant submitted a request for the protection of legality to the Supreme Court of Kosovo through the District Court of Mitrovica, on 1 September 2010. The Applicant's defense argued that this was because

of substantial violations of criminal procedure and criminal law. As such, they proposed that the Supreme Court to modify the judgment K z No. 24/2010 of 4 May 2010 and dismiss the appeal of injured party EP as inadmissible or the case be returned to the panel of second instance of Supreme Court of Kosovo.

25. In his request for protection of legality the Applicant's representatives argued that the Court had erroneously interpreted Article 400 of the CCK with respect to whether the injured party EP could appeal in the case at the issue. They also argued that in the Applicant's case the basic principle *in dubio pro reo* has been violated.
26. On 5 July 2011, in their additional written submission to the Supreme Court, the Applicant's representatives also argued that "the Supreme Court, in the panel session held on 28 June 2011 for the case of the defendant of R.V. AP-Kz No 238/2010 has undertaken legal sentence that the appeal of the injured party was not admissible because it was not previously announced, for which reason the appeal of injured S.D. was rejected and was not reviewed". Consequently the Applicant's representatives reiterated their belief that the panel should decide in the Applicant's case following the example of panel in the case Ap. (Kzh) no 238/2010.
27. Notwithstanding the above, on 23 August 2011 the Supreme Court issued the challenged judgment in the Applicant's case under no. Pkl-K 91/10 and dismissed the Applicant's request for protection of legality.
28. In the reasoning the Supreme Court stated in particular: "The panel acknowledges that the provision of Article 400 of the KCCP may be subject of clarification. The confusion additionally concerns, because there are discrepancies between the English and Albanian versions of Article 400. While paragraph 4 in its English version states "if the accused is punished by imprisonment and the appeal has not been announced", the Albanian version states "and the accused does not announce the appeal."
29. The Supreme Court further mentioned that: ".....authentic version of the Law, the version in English language will prevail. This version does not specify which person does not specify which person has the right to announce. The lack of specification of the law should be interpreted in a manner to ensure fair treatment of the parties in the proceedings."
30. Furthermore the Supreme Court stated that "regarding the implementation of the principle *In Dubio pro Reo*, in this case the Supreme Court wants to clarify that Article 3, paragraph 2 of the KCCP applies only in the case if doubt about existence of facts that are relevant to the case or in relation to implementation of certain provisions of the criminal law. This is not a particular case as it relates to the interpretation of the law on the procedure."

Applicants Allegations

31. The Applicant's alleges violation Article 24 [Equality before the Law] and Article 31 [Right to fair and Impartial Trial] of the Constitution. In that respect the Applicant argues that the challenged judgment of the Supreme Court should be quashed.

Applicable Law

Article 400

(1) Persons entitled to appeal (Article 399 of the present Code) shall be obliged to announce an appeal. They may announce an appeal immediately after the announcement of the judgment or after the instruction on the right to appeal

(Article 394 paragraph 1 of the present Code), but no later than eight days after the date of the announcement of the judgment.

(2) If a person entitled to appeal fails within the legally stipulated interval to announce an appeal, he or she shall be deemed to have waived the right to appeal, except in instances from paragraph 4 of the present article.

(3) If none of the persons entitled to appeal (Article 399 of the present Code) announces an appeal, the final written judgment need not contain a statement of grounds. In such instances, transcription of the audio-record of the main trial is also not necessary.

(4) If the accused has been punished by imprisonment and no appeal has been announced, the written judgment shall nevertheless contain a statement of the grounds and the audio record of the main trial shall be transcribed.

(5) Until the court of second instance renders its judgment, the appellant may withdraw the appeal that has been filed. The withdrawal of an appeal may not be revoked.

Article 399 of the CCPK reads as follows:

(1) An appeal may be filed by the parties, the defence counsel, the legal representative of the accused and the injured party.

(2) The public prosecutor may file an appeal either to the detriment or to the benefit of the accused.

(3) An injured party may challenge a judgment only with respect to the court's decision on the punitive sanctions for criminal offences committed against life or body, against sexual integrity or against the security of public traffic and on the costs of criminal proceedings, but if the public prosecutor has taken the prosecution over from the subsidiary prosecutor (Article 65 paragraph 2 of the present Code), the injured party may file an appeal on all the grounds on which the judgment may be appealed (Article 402 of the present Code).

Assessment of the Admissibility of the Referral

32. In order to be able to adjudicate the Applicant's 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.
33. The Court notes that the Applicant in the present case complained about violation of his right to equal treatment and the fair trial before the Supreme Court.
34. The Court notes that the Applicant exhausted all available remedies and submitted his referral in the time limit prescribed by Article 49 of the Law.
35. The Court concludes that this referral is manifestly ill-founded within the meaning of Article 36 of the Rules.
36. The Applicant alleges that because the Supreme Court of Kosovo issued what appeared to be a different judgment in a case that he argues was similar to his that he was denied the right to equal treatment pursuant to Article 24 of the Constitution and Article 7 of the Universal Declaration of Human Rights. He also argues that he was denied the

right to a fair trial pursuant to Article 31 (1) and (2) of the Constitution, Article 6(1) of the European Convention on Human Rights, and Article 10 of the Universal Declaration of Human Rights.

37. Article 24 (2) of the Constitution provides:

2. "No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social conditions, sexual orientation, birth, disability, or other personal status."

38. Article 24(3) of the Constitution provides:

"Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions."

39. Article 31(2) provides that everyone is entitled to "...a fair and impartial public hearing....."

40. The Applicant simply alleges that because the Supreme Court interpreted the application of a procedural law in another case differently than it did in his case that his constitutional right to equal treatment was violated and that he did not receive a fair trial. The Applicant has not proven that because of his status he was not treated equally with other citizens.

41. The Applicant has failed to prove that his case was factually or legally identical to the other Supreme Court case where it appears that the Supreme Court made a different legal conclusion of the same procedural law applied in his case.

42. The Applicant has failed to prove that he did not receive a fair trial or hearing.

43. To establish a constitutional violation an Applicant must prove more than that a regular court may have made more than two or more inconsistent legal or factual conclusions.

44. As stated by the Constitutional Court in Case No. KI. 06/09, Applicant X vs. Supreme Court Judgment Nr. 215/2006, District Court Judgment Nr. 741/2005, Municipal Court Judgment Nr. 217/2004:

"... the Court would like to underline that it is not a court of appeal for other courts in Kosovo and it cannot intervene on the basis that such courts have issued a wrong decision or have erroneously assessed the facts. The role of the Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot therefore act as a "fourth instance" court (see, mutatis mutandis, i.a., Akdivar v. Turkey, 16 September 1996, R.J.D, 1996-IV, para. 65)."

45. As further stated by the Constitutional Court in Case No. KIO6/09, Applicant X vs. Supreme Court Judgment Nr. 215/2006, District Court Judgment Nr. 741/2005, Municipal Court Judgment Nr. 217/2004:

"The mere fact that the Applicant is dissatisfied with the outcome of the case cannot of itself raise an arguable claim of a breach of Article 31 of the Constitution"

(see mutatis mutandis Judgment ECHR Appl. No. 5503/02, Meztur Tiszazugi Tarsulat v. Hungary, Judgment of 26 July 2005)."

46. In this referral the Applicant has merely suggested that the Supreme Court of Kosovo has been inconsistent in its legal interpretation of a criminal procedural law. Such an allegation, without more evidence, renders this referral as manifestly ill-founded.

FOR THESE REASONS

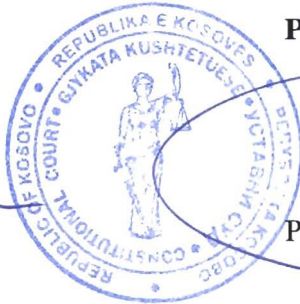
Pursuant to Article 113.7 of the Constitution, Articles 48 and 56 of the Law and Rule 36 of the Rules of Procedure of the Constitutional Court the Constitutional Court, in session held on 13 July 2012 unanimously:

DECIDES

- I. TO DECLARE the Referral 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. This Decision is effective immediately.

Judge Rapporteur


Robert Carolan



President of the Constitutional Court


Prof. dr. Enver Hasani