



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

Prishtina, 10 August 2015
Ref. no.: RK 818/15

RESOLUTION ON INADMISSIBILITY

in

Case no. KI55/14

Applicant

Baton Morina

**Constitutional Review of Notification, KMLP. I. no. 1/14, of the Office
of the Chief State Prosecutor of 7 March 2014**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge

Applicant

1. The Referral is submitted by Mr. Baton Morina from Gjakova (hereinafter: the Applicant), represented by Mr. Teki Bokshi, a lawyer from Gjakova.

Challenged decision

2. The Applicant challenges the Notification (KMLP. I. no. 1/14, of 7 March 2014) of the Office of the Chief State Prosecutor, by which his request for protection of legality regarding the reopening of criminal proceedings in his case was rejected.

Subject matter

3. The subject matter is the Applicant's request for constitutional review of the challenged decisions, which allegedly violated his rights, guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), namely *"Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial], paragraph 1."*

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 26 March 2014, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 3 April 2014, the President, by Decision no. GJR. KI55/14, appointed Judge Kadri Kryeziu as Judge Rapporteur. On the same date, the President, by Decision no. KSH. KI55/14, appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Ivan Čukalović.
7. On 28 April 2014, the Court notified the Applicant of the registration of the Referral and requested that he submits a power of attorney for Mr. Teki Bokshi. On the same date, the Court sent a copy of the Referral to the Court of Appeal.
8. On 4 June 2014, the Applicant submitted the power of attorney to the Court.
9. On 24 September 2014, the Court requested from the Applicant to specify the challenged decisions and to submit to the Court the copies of the decisions related to the case.
10. On 9 October 2014 the Applicant responded to the Court's request by providing some additional clarifications regarding the Referral submitted to the Court, but he did not submit the copies of the challenged decisions.
11. On 20 January 2015, the Court sent another letter to the Applicant, requesting specifically that he submits to the Court both decisions referred by him in the Referral, which he had not yet submitted to the Court, namely:

- a) Decision (PK. no. 198/13 of 20 November 2013) of the Basic Court in Peja;
and
b) Decision (PN. no. 736/13, of 10 December 2013) of the Court of Appeal.
12. On 2 February 2015, the Applicant addressed the Court with the following request: *"I request the honorable Court to have understanding and as soon as I have obtained the documents, I will immediately submit them to the Court"*.
 13. On 18 February 2015, the Court sent a copy of the Referral to the Office of the Chief State Prosecutor.
 14. On 20 February 2015, the Court sent another letter to the Applicant, informing him that the Court will proceed with the deliberation of the Referral based on available information and documents, in case he would not submit the documents requested by the Court within a time limit of 7 (seven) days, from the day of the receipt of this letter.
 15. On 5 March 2015, the Applicant submitted the requested documents to the Court.
 16. On 26 June 2015, the President of the Court, by Decision no. GJR. KI69/14, appointed Judge Ivan Čukalović as Judge Rapporteur, replacing Judge Kadri Kryeziu whose mandate as Constitutional Court Judge ended on 26 June 2015. On the same date, the President of the Court, by Decision no. KSH. KI69/14, appointed herself as a member of the Review Panel, replacing Judge Ivan Čukalović.
 17. On 2 July 2015, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of Facts

18. On 23 June 2006, the District Court in Peja (Judgment P. no. 80/2006) found the Applicant guilty of having committed two criminal offences. The Applicant was sentenced to imprisonment of 4 (four) years.
19. The Applicant filed an appeal against the abovementioned Judgment with the Supreme Court, requesting *"to annul the appealed Judgment and to remand the case to the first instance court for retrial."* The District Public Prosecutor in Peja also filed an appeal against the same Judgment, with the request *"that the sentence of 4 (four) years imprisonment be replaced by a more severe sentence."*
20. On 19 April 2007, the Supreme Court (Judgment Ap. no. 582/06) rejected the appeal of the Applicant and accepted the appeal of the District Public Prosecutor. On that occasion, the Supreme Court modified the Judgment of the District Court in Peja only in relation to the decision on the sentence, and sentenced the Applicant from 4 (four) years to 12 (twelve) years imprisonment.

21. On 31 December 2007, the Supreme Court (Judgment Pkl no. 78/2007) rejected the Applicant's request for protection of legality, by assessing that *"the first and second instance have correctly determined the facts, that there were no substantial violations of the provisions of the criminal procedure and that the provisions of the criminal law were correctly applied."*

Applicant's first request for reopening of criminal proceedings before the regular courts

22. On 29 January 2011, the Applicant filed his first request for reopening of criminal proceedings with the District Court in Peja, alleging that *"in the procedure of adjudication regarding my appeal to the Supreme Court [...] the prosecutor of the case should have been disqualified due to his lack of impartiality and his subjectivity."*
23. On 13 September 2011, the District Court in Peja (Decision P. no. 80/06) rejected the Applicant's request for reopening of criminal proceedings, by reasoning that *"[...] the legal basis for reopening of criminal proceedings was not presented, as provided by Article 444 para. 2 of PCPCK [Provisional Criminal Procedure Code] [...]."*
24. The Applicant, against the Judgment of the District Court in Peja, filed an appeal with the Supreme Court.
25. On 13 October 2011, the Supreme Court (Judgment Pn. no. 530/2011) rejected the Applicant's appeal as ungrounded, reasoning it as follows:

"[...] the first instance court has correctly acted, when it rejected the request for reopening of criminal proceedings [...]. [...] from the minutes of the main hearing it cannot be seen that a request for disqualification of the prosecutor or of any of the participants in the conducted proceedings in this criminal matter was filed and that there are no indications that regarding the said prosecutor has been initiated any disciplinary or criminal procedure, related to the present case. In order to consider a legal basis for the reopening of criminal proceedings, pursuant to Article 442 par. 1, item 1 of PCPCK and under par. 2 of the same Article, it must be proven that the judgment ensued from a criminal offence committed by a person who undertook investigative actions or the prosecutor".

Proceedings before the Constitutional Court in Case No. KI159/11

26. On 9 November 2011, the Applicant filed a Referral with the Constitutional Court [See, Case no. KI159/11, *Baton Morina*, Resolution on Inadmissibility of 16 July 2012] and requested a constitutional review of the Judgment (Pn. no. 530/2011, of 13 October 2011) of the Supreme Court.
27. The Applicant alleged before the Court violations of the right to a fair and impartial trial, the right to legal remedies as well as the right to respect the principle of legality and proportionality in criminal cases. The Applicant claimed, among others, that the actions of the District Public Prosecutor in Peja

"have had an essential impact on the case which was adjudicated to the detriment of the accused" and that the District Public Prosecutor "had misused his official position" in the criminal proceedings initiated against him.

28. On 16 July 2012, the Court decided on Case no. KI159/11, by rejecting the Applicant's Referral for constitutional review of the said Judgment, as manifestly ill-founded. *Inter alia*, the Court reasoned that "[...] it is not the jurisdiction of the Constitutional Court to assess the legality and accuracy of the evidence of the decisions issued by the regular courts [...]" and that it "does not have jurisdiction to repeat court proceedings or in any way to replace the Judgment of the Supreme Court by its own findings".

Applicant's second request for reopening of criminal proceedings before the regular courts

29. After the rendering of the abovementioned Resolution by this Court in Case no. KI159/11, the Applicant submitted a second request for reopening of criminal proceedings, this time to the Basic Court in Peja.
30. The Applicant justified his second request, by presenting the same allegations on the lack of impartiality of the District Public Prosecutor in Peja. He also claimed that "[...] new facts which are likely to justify the innocence of the convict [the Applicant] have been discovered or for his conviction to be considered under a more lenient criminal provision, and for this purpose the statement of the witness should be considered as new evidence [...]".
31. On 20 November 2013, the Basic Court in Peja (Decision PK. No. 198/13) rejected the Applicant's second request for reopening of criminal proceedings as ungrounded by reasoning that:

"[...] in the present case the legal requirements for the reopening of the criminal proceedings in the case of convict Baton Morina have not been met [...], even if the abovementioned witness was heard earlier, and, even if he is heard now, that would not change the course of the criminal procedure against the convict [...]. Regarding the allegations [...] that the request for disqualification of the prosecutor of the case has not been decided upon, the review panel of this court, based on the case file and specifically on the minutes of the main hearing, it can be seen that no request for disqualification of the prosecutor or of any of the participants in the conducted proceedings of this criminal-legal matter was filed and that there are no indications that regarding the said prosecutor any disciplinary or criminal procedure, related to the present case, has been initiated; therefore, it is considered that there exists a legal basis for the reopening of the criminal proceedings, pursuant to Article 442 par. 1, item 1 of PCPCK, par. 2 of the same Article, when it is proven that the judgment ensued from a criminal offence committed by a person who undertook investigative actions or the prosecutor" [...] and in the present case this evidence is missing."

32. On 10 December 2013 the Court of Appeal (Decision PN. no. 736/13) rejected the Applicant's appeal against the Decision of the Basic Court in Peja and reasoned as follows:

"[...] the first instance court correctly assessed that the request of the convict's defence counsel for the reopening of the criminal proceedings is ungrounded, as, in the present case, the legal requirements for the reopening of the criminal proceedings, provided by Article 423 par.1 item 1.3, have not been met [...].

"[...] the witness' testimony does not bring any new evidence, unknown so far, and which would be the legal reason for granting the reopening of the criminal proceedings, and which would prove the innocence of the convict".

33. On 7 March 2014, the Office of the State Prosecutor (Notification KMLP. I. no. 1/14) rejected the Applicant's request for protection of legality, filed against the Decision of the Court of Appeal and the Decision of the Basic Court in Peja, with the reasoning that there was no legal ground for filing a request for protection of legality.

Applicant's allegations

34. The Applicant alleges that the regular courts violated his rights guaranteed by the Constitution, namely Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] paragraph 1.
35. Regarding these allegations, the Applicant states that *"[...] he was discriminated against, because he was defended by lawyer S.D."* and the State Prosecutor had *"personal issues"* with him.
36. The Applicant further alleges that: *"[...] due to the appeal of the Public Prosecutor the judgment of the first instance was modified to the detriment of the accused, since his imprisonment was increased from 4 to 12 years, [...] from which it can be understood that the prosecutor [...] through exercising the authority of the prosecutor in all instances had influence that the accused Baton Morina is punished with the most severe sentence"*.
37. In conclusion, the Applicant addresses the Court with the following request: *"The annulment of Decision PK. no. 198/13 of the Basic Court in Peja of 20.11.2013, Decision PN. no. 736/13 of the Court of Appeal of Kosovo of 10.12.2013 and of Notification KMLP. I. nr. 1/14 of the State Prosecution of Kosovo of 7.03.2014"*.

Assessment of the admissibility of the Referral

38. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedures of the Court.

As to the Applicant's allegations regarding his first request for reopening of the criminal proceedings

39. As mentioned above, the Applicant alleges that his rights guaranteed by Articles 21, 22, 24 and 31 of the Constitution have been violated, because, according to him, the District Public Prosecutor in Peja exceeded his authority and did not act in an impartial manner during the criminal proceedings in his case.
40. In relation to this, the Court notes that the Applicant, as he did in his first Referral (Case no. KI159/11) filed with the Court, refers to the same arguments regarding the lack of impartiality of the District Public Prosecutor in Peja.
41. The Court also notes that the Applicant, although he formally challenges the Notification (KMLP. I. No. 1/14, of 7 March 2014) of the State Prosecutor, in substance, he challenges the constitutionality of previous decisions of the regular courts, namely, the Judgment (P. No. 80/06 of 23 June 2006) of the District Court in Peja and Judgments (App. No. 582/06 of 19 April 2007; Pkl. No. 78/2007 of 31 December 2007; Pn. No. 530/2011, of 13 October 2011) of the Supreme Court.
42. In this regard, the Court considers that the Applicant's allegations are the same as the ones filed in his first Referral submitted to the Constitutional Court and are addressed against the same decisions, the constitutionality of which this Court has already assessed when rendering the Resolution on Inadmissibility in Case no. KI159/11.
43. Therefore, in regards to these repeated allegations of the Applicant, the Court refers to Rule 36 (3) (d) of the Rules of Procedure which provides:

"A referral may also be deemed inadmissible in any of the following cases:

[...]

(d) the Court has already issued a Decision on the matter concerned and the Referral does not provide sufficient grounds for a new Decision;

[...]."

44. As mentioned above, the Court notes that it has already dealt with these allegations of the Applicant in Case no. KI159/11 and rejected them as manifestly ill-founded. On that occasion, the Court, after the constitutional review of the Judgment (Pn. no. 530/2011 of 13 October 2011) of the Supreme Court, found that there were no convincing arguments and evidence that may lead to the conclusion that this Judgment or other decisions were evidently rendered in an unfair or arbitrary manner.
45. Consequently, based on Rule 36 (3) (d) of the Rules of Procedure, the Court concludes that it has already issues a Decision on the matter concerned and that this part of the Referral does not provide sufficient grounds for a new Decision.

As to the Applicant's allegations regarding his second request for reopening of criminal proceedings

46. With regard to the Applicant's allegations of a violation of his rights guaranteed by the Constitution by the State Prosecutor's Office's (Notification KMLP. I. No. 1/14, of 7 March 2014) the Court refers to Article 48 of the Law and Rule 36 (2) (d) of the Rules of Procedure, which provide:

Article 48 of the Law:

"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 a public authority is subject to challenge".

Rule 36 (2) (d) of the Rules of Procedure:

"(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

[...], or

(d) the Applicant does not sufficiently substantiate his claim.

[...]."

47. In this respect, the Court notes that the Applicant, in his second request for the reopening of the criminal proceedings, again alleged that the Public Prosecutor of the District Court in Peja should have been disqualified and as a result of his non-disqualification a serious violation of the criminal procedure provisions and Article 31 of the Constitution had occurred. In addition, the Applicant justified his second request for reopening of the criminal proceedings by stating that the questioning of new witnesses would have changed the factual situation, and that, therefore, his request to that effect should have been approved.
48. In addition, the Court notes that, when rejecting the Applicant's second request for reopening of the criminal proceedings, the regular court have addressed these allegations and responded to Applicant's requests.
49. More specifically, the Court notes that the Basic Court in Peja, when rejecting the Applicant's second request for reopening of the criminal proceedings, reasoned its decision by referring to the provisions of applicable law and responded to the Applicant's allegations.
50. In its decision, the Basic Court in Peja concluded that *"[...] even if the abovementioned witness was heard earlier and even if he is heard now, that would not change the course of the criminal procedure against the sentenced person [...].* In addition, the Municipal Court stated that the Applicant did not file *"any request for disqualification of the prosecutor"* and that, consequently, there was no *"legal ground for reopening of the criminal proceedings, pursuant to Article 442, par 1. item 1, PCPCK"*.
51. In addition, the Court notes that the Court of Appeal, when rejecting the Applicant's appeal, filed against the Decision of the Basic Court in Peja, reasoned its decision by referring to the provisions of applicable law and to the Applicant's submissions in appeal. The Court of Appeal fully supported the Decision of the Basic Court finding that *"the first instance court, correctly assessed that the request of the convict's defence counsel for reopening of*

criminal proceedings is ungrounded, as, in the present case, the legal requirements for reopening of criminal proceedings, provided by Article 423 par.1 item 1.3, have not been met.”

52. The Court further notes that the Office of the Chief State Prosecutor rejected the Applicant's request for protection of legality by reasoning that there was no legal ground for such a request.
53. Moreover, the Court notes that nor has the Applicant explained exactly how and why the challenged decisions, by which his second request for reopening of the criminal proceedings was rejected, constitute a violation of his rights and individual freedoms guaranteed by the Constitution, neither has he presented any evidence which would justify the allegation of such a violation.
54. In respect to this, the Court emphasizes that it is not its task to deal with errors of fact or law (legality) allegedly committed by the Court of Appeal or by the Office of the State Prosecutor, unless and in so far as they may have infringed upon rights and freedoms protected by the Constitution (constitutionality).
55. The Constitutional Court reiterates that it is not a court of fourth instance in respect of the decisions taken by the regular courts or by other public authorities. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, *Garcia Ruiz vs. Spain*, No. 30544/96, ECHR Judgment of 21 January 1999, paragraph 28; see, also the Constitutional Court in case KI70/11 of Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
56. The Constitutional Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, *inter alia*, Report of the European Commission of Human Rights in the case *Edwards v. United Kingdom*, App. No. 13071/87, adopted on 10 July 1991).
57. The Court considers that the proceedings before the Basic Court and the Court of Appeal as well as the rejection of the Applicant's request for protection of legality by the Office of the Chief State Prosecutor have been fair and reasoned (See case *Shub us. Lithuania*, no. 17064/06, ECHR, Decision of 30 June 2009).
58. Therefore, the Court finds that this part of the Referral is to be declared as manifestly ill-founded since the Applicant has not sufficiently substantiated his allegations.
59. In sum, the Court concludes that in accordance with Rules 36 (2) (d) and 36 (3) (d) of the Rules of Procedure the Referral is inadmissible.

FOR THESE REASONS

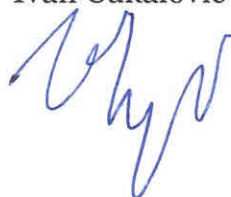
The Constitutional Court, pursuant to Rules 36 (2) (d) and 36 (3) (d) of the Rules of Procedure, on 10 August 2015, unanimously

DECIDES

- I. TO REJECT 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;
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Arta Rama-Hajrizi

