



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

Pristine, 19 September 2012
Ref. No.: RK298/12

RESOLUTION ON INADMISSIBILITY

in

Case no. KI 56/12

Applicant

**Shkelqim Devolli
Blerim Devolli
Ismet Bojku**

**Constitutional Review of the Decision of the District Court of Pristina,
Ka. no. 417/11, dated 23 March 2012**

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 Referral was submitted by Mr. Shkelqim Devolli, Mr. Blerim Devolli and Mr. Ismet Bojku (the Applicants). Mr. Shkelqim Devolli is represented by Mr. Gani Tigani and Mr. Andrew Friedman, attorneys at law, and Mr. Blerim Devolli is represented by Mr. Virtyt Ibrahimaga and Mr. Benjamin Chew, attorneys at law, while Mr. Ismet Bojku is represented by Mrs. Iliriana Osmani-Serreqi, attorney at law.

Challenged decision

2. The Applicants challenge the Decision of the District Court in Pristina, Ka. no. 417/11, of 23 March 2012, which was served on them on 30 March 2012.

Subject matter

3. The Applicants allege that the abovementioned decision violated their rights as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the "ECHR"), namely Article 6 (Right to fair trial).
4. Furthermore, the Applicants request the Court to impose interim measures, for the reason that *"It is obvious that the Claimants cannot be sentenced of any alleged criminal offence on the basis of the presented evidences. The main trial would be unreasonable and would result with further damage reputation of the Clamant and the impossibility to continue the successful business operation. This damage would be irreparable for the Claimants."*

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter, the "Law") and Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the "Rules of Procedure").

Proceedings before the Court

6. On 23 May 2012, the Applicants submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the "Court").

7. On 5 July 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Enver Hasani and Kadri Kryeziu.
8. On 17 July 2012, the Court requested the Applicants to submit to the Court the Decision of the District Court in Pristina, Ka. no. 417/11, dated 22 March 2012.
9. On 19 July 2012, the Court communicated the Referral to the District Court of Pristina and the Special Prosecution Office.
10. On 20 July 2012, the Applicant furnished the Court with the Decision of the District Court in Pristina, Ka. no. 417/11, dated 22 March 2012.
11. On 19 September 2012, 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. On 8 June 2011, the special prosecutor filed with the District Court of Pristina the indictment (PPS no.376109).
13. On 25 November 2011, the confirming Judge confirmed partially the indictment against the Applicants (Ka. no. 417/11). The Applicants appealed against the ruling on admissibility of evidence and the ruling on confirmation of the indictment to the three judge panel of the District Court of Pristina.
14. On 22 March 2012, the three judges' panel of the District Court of Pristina rejected as ungrounded the Applicant's appeal (Ka. no. 417/11). The District Court of Pristina held that "it will be for the main trial to assess potential implications of Art. 157 (1) KCCP, and ensure that proceedings are fair."

Applicant's allegations

15. The Applicant alleges what follows.
 - (i) Violation of the right to confront the witnesses, Article 6 (3) d) of ECHR

- The Applicants claims that: *“The Prosecutor's office has based its decision for filing the indictment (and the court based its confirmation decision as well, in part) on the basis of the letters sent by the legal representative of Mr. Adrian Shatku or, in one case, Mr. Shatku himself. The prosecution has not included Mr. Shatku in the list of the possible Witnesses for the main trial although his alleged letters are the main evidences on which the Prosecutors' Office has grounded the indictment. The request of the Prosecutor's Office to oblige Mr. Shatku to respond to the invitation for integration by the Authorities has been refused by the State Department of the United States of America, so there is effectively no possibility that Mr. Shatku will participate in a Main Trial as a witness. The prosecution has no other evidence of Mr. Shatku's beliefs or point of view except for the letters in question. The decision to file the indictment without the proofs, knowing that Mr. Shatku would not be a main trial witness and that the defense would never have an opportunity to challenge Mr. Shatku at a trial, is in clear violation against the Article 6 para. 3, point d.”*
- (ii) Violation against the principle of presumption of innocence, Article 6 (2) of ECHR
- The Applicant claims that *“The Claimant has provided the prosecution with the evidence that Mr. Shatku has no claim against the Claimant. In addition, the Claimant has provided the Prosecution with the evidence that the 50,000.00 EUR has been paid by the Claimant therefore, the allegation that the company Dardafon LLC was harmed is not true. The Prosecution Office has not assessed those evidences. Furthermore, it has not included key evidence provided by the defendants in the prosecution file in order to mislead the Pre-Trial judge into believing that the indictment is well grounded.”*
- (iii) Public prosecution
- The Applicant claims that *“The procedure is closely followed by the Press. The Prosecutors' office has contributed to the public campaign against the Claimant. The name of the reputable Company "Devolli Group Shpk (a production and trade company) in which the Claimant is the shareholder was involved in the case, although this company does not have anything to do with the case. This massive involvement of the publicity of the case has created the basement for public justice will be seriously Impeded and prejudiced.”*

Assessment of the admissibility of the Referral

16. The Court emphasizes that it can only decide on the admissibility of a Referral, if the Applicant shows that he/she has exhausted all effective legal remedies available under applicable law.
17. Article 113.7 of the Constitution establishes 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. On the other side, Article 47.2 of the Law provides that “*The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.*”
19. 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 or, if any, to remedy such violation of a fundamental right.
20. 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 legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo, KI-41/09, of 21 January 2010, and see mutatis mutandis, ECHR, Selmouni vs. France, no. 25803/94, Decision of 28 July 1999).
21. In fact, as a general rule, the Constitutional Court will only intervene where there are infringements of the interpretation of the Constitution or the laws do not comply with the Constitution, but only after exhaustion of all legal remedies provided by law.
22. In this respect, the Applicants allege that violations have been committed during the criminal investigation, the pre-trial stage of the criminal proceedings which are still pending.
23. As said above, the Applicant alleges: (1) violation of the right to confront the witnesses, Article 6 (3) d) of ECHR, (2) violation of the principle of

presumption of innocence, Article 6 para. 2 of the ECHR and (3) public prosecution.

(1) Violation of the right to confront the witnesses, Article 6 (3) d) of ECHR

24. Article 6 (3) d) of ECHR establishes that

“Everyone charged with a criminal offence has the following minimum rights: d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

25. The Constitutional Court considers that the allegation of the Applicant on a violation of Article 6 of the ECHR is inappropriate and premature.

26. In fact, Article 6 of the ECHR has to do with the right to a fair trial. The criminal proceedings are still at the preliminary stage, where the discussion on grounded suspicion of having committed a criminal offense is focused on Article 5 of the ECHR, which has to do with the right to liberty and security of the person.

27. Therefore, an allegation on the basis of Article 6 should be related with the trial, which is still to come, and made during the trial and when appealing the verdict.

(2) Violation of the principle of presumption of innocence, Article 6 (2) of ECHR

28. The Applicant claims that the Prosecution *“has not included key evidence provided by the defendants [the Applicant] in the prosecution file in order to mislead the Pre-Trial judge into believing that the indictment is well grounded”.*

29. Thus, the Applicant concludes that there was a violation of Article 6 (2) of ECHR, which establishes that

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

30. It is up to the trial Panel to assess not only the evidence which basis the grounded suspicion but also the testimony of other witnesses and material evidence presented by the parties during the trial.

31. Therefore, the argument that some evidence provided by the Applicant was not correctly assessed or submitted by the Prosecutor is just for now premature.
32. In the present case, the Court notes that the case is still pending before the regular court, where the Applicant will still be able to raise his complaints before the trial Judge about the alleged violation of his rights during the pretrial period. Thus, the Court considers that there is no final decision yet to be challenged before this Court (see Lutfi Dervishi, Constitutional Review of the Decisions of the District Court of Pristina: Kp. no. 196/2009, dated 8 June 2009, PPS. no. 02/2009, P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10, dated 1 March 2011, P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10, dated 27 April 2011, Resolution on Inadmissibility of 12 December 2011).
33. Therefore, the Applicant has not exhausted all legal remedies, including the last instance, available under applicable law, as required by Article 113.7 of the Constitution and Article 47(2) of the Law.

(3) Public prosecution

34. The Applicant claims that *“The procedure is closely followed by the Press. (...). This massive involvement of the publicity of the case has created the basement for public justice will be seriously Impeded and prejudiced”*.
35. The Court recalls Article 48 of the Law that establish that *“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 public authority is subject to challenge”*.
36. In addition, Rule 36 (2) d) provides that *“the Court shall reject a Referral as being manifestly ill-founded when it is satisfied that the Applicant does not sufficiently substantiate his claim”*.
37. In the case, the Applicant does not explain how and why, and what rights have been violated.
38. Therefore, the Referral is manifestly ill-founded and as such should be rejected.

Assessment of the request for Interim Measures

39. The Applicants also requested interim measures to be imposed, because *“the main trial would be unreasonable and would result with further damage reputation of the Claimant and the impossibility to continue the successful business operation. This damage would be irreparable for the Claimants”*.
40. The Law establish that *“the Constitutional Court (...) may temporarily decide upon interim measures in a case that is a subject of a proceeding (...)”*.
41. On the other side, Rule 54 (1) of the Rules provides that *“at any time when a referral is pending before the Court (...), a party may request interim measures”*.
42. The Court concludes that the referral is inadmissible and thus the request for interim measures is without object and must be rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 47.2 of the Law and Rules 36 (2), 54 (1) and 56 (2) of the Rules of Procedure, on 19 September 2012, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. TO REJECT the Request for Interim Measures;
- III. 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
- IV. This Decision is effective immediately.

Judge Rapporteur



Almiro Rodrigues

President of the Constitutional Court



Prof. Dr. Enver Hasani