



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

Prishtina, 25 January 2013
Ref. No.:RK376/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI113/12

Applicant

Haki Gjocaj

**Constitutional Review of the Supreme Court Decision P.no.791/2012 dated 5
October 2012, Supreme Court Judgment Pkl.no.175/12 dated 6 November
2012**

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 Haki Gjocaj represented by Hilmi Zhitija, a practicing lawyer in Prishtina.

Challenged decisions

2. The Applicant challenges the Supreme Court decision P.no.791/2012 dated 5 October 2012, and Supreme Court Judgment Pkl.no.175/12 dated 6 November 2012.

Subject matter

3. The subject matter of the Referral is the request of the Applicant to be released from the psychiatric ward of detention institution and to be placed in a civil health care institution.
4. The Applicant also proposes imposition of interim measures for his release from the psychiatric ward of detention institution and to be placed in a civil health care institution where he can be cured in accordance with the provisions of the Law on Health, as provided for by Article 9.4 of the UNMIK Regulation 34/2004.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution; Articles 20 and 27 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law), and Rule 56.2 of the Rules of Procedure of the Constitutional Court of Kosovo (hereinafter: the Rules of Procedure).

Procedure before the Court

6. On 8 November 2012, the Applicant submitted a referral to the Constitutional Court of Kosovo (hereinafter: the Court).
7. On 5 December 2012, the Applicant attached additional documents to the Referral.
8. On 6 December 2012, the President appointed Judge Snezhana Botusharova as Judge Rapporteur and a Review Panel composed of Judges Robert Carolan, presiding, Altay Suroy and Ivan Čukalović.
9. On 28 December 2012, the Court notified the Applicant and the Supreme Court of Kosovo about the registration of the Referral.
10. On 18 and 25 January 2013, 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 the facts as evidenced by the documents furnished by the Applicant

11. On 16 February 2011, the Public Prosecutor in Peja filed indictment PP.no.283/10, against the Applicant, to the District Court in Peja, thereby proposing pronouncement of mandatory psychiatric treatment in a health care institution based on suspicion of the criminal act – murder from article 147 item 4 in conjunction with article 24 and unauthorized ownership, control, possession or use of weapons of the Provisional Criminal Code of Kosovo (hereinafter: the PCCK).
12. On 21 November 2011, the Prosecutor, before the beginning of the trial, changed the indictment against the Applicant, accusing him for the criminal act – murder from article 147 item 4 in conjunction with article 24 and unauthorized ownership, control, possession or use of weapons of the PCCK, thereby proposing that the Applicant is found guilty and sentenced in accordance with the law. The change of the indictment

was allegedly made after psychiatric expertise made in the regional hospital in Peja dated 14 October 2011.

13. On 9 July 2012, the District Court in Peja issues Decision P.no.137/11, thereby dismissing the criminal proceedings.

14. The District Court in Peja held:

"That the accused Haki Gjocaj is not able to be subject to court hearing in the criminal case P.no.137/11"

"In compliance with Article 9 paragraph 1 of Regulation 34/2004 dated 24.08.2004 on criminal procedure whereby are involved perpetrators with mental disorders due to inability of the accused to be subject to trial due to his permanent disease IS CEASED THE CRIMINAL PROCEDURE against the accused Haki Gjocaj"

"The procedure against the same reopens with the request of authorized claimant as long as the reasons to make this ruling are ceased"

15. The District Court in Peja in Decision P.no.137/11, further reasoned:

"District Public Prosecutor in Peja, in this court has filed an indictment PP no.283/10 dated 16.02.2011 against the accused FD due to criminal offence: Inducement to commit criminal offence of grave murder pursuant to Article 147 item 4 in conjunction with Article 24 of CCK, FD and FGJ, since as co-perpetrators have committed the criminal offence : Attempted murder pursuant to Article 146 in conjunction with Article 20 and 23 of CCK, and against the accused Haki Gjocaj due to criminal offences: Grave murder pursuant to Article 147 item 4 of CCK and criminal offence of unauthorized ownership, control, possession or use of weapons pursuant to Article 328 paragraph 2 of CCK".

"By order of this court DPP no.86/10 dated 11.10.2011 pursuant to Article 6 paragraph 1, item a and b of UNMIK Regulation 2004/34 dated 24.08.2004 and which has to do with criminal procedure whereby are included perpetrators with mental disorders, was ordered by KUCC in the Clinic of Psychiatry the Forensic Ward to be made the clinical and psychiatric examination and observation of the accused Haki Gjocaj".

16. Following the proposal of the District Prosecutor in Peja, on 28 September 2012, the District Court in Peja, by Decision P. no. 297/12, extended the detention of the Applicant in the psychiatric ward of the detention institution.

17. The District Court in Peja in Decision P.no.297/12, further reasoned:

"District Court in Peja, by the ruling P.no.297/2012 dated 28.09.2012, the accused Haki Gjocaj, due to criminal offence of grave murder pursuant to Article 147, item 4 of CCK as well as criminal offence of unauthorized ownership, control, possession or use of weapons pursuant to Article 328, paragraph 2 of CCK, in compliance with Article 286, paragraph 3 in conjunction with Article 7, paragraph 7.1, item a,b,c, paragraph 7.2, 7.3, 7.4, 7.5 and 7.6 of Regulation no.34/2004 dated 24.08.2004 on criminal procedure whereby perpetrators with mental disorders are involved, it was extended the detention to the accused Haki Gjocaj for two (2) more months, so that according to this ruling the detention will be extended up to 28.11.2012, and since the accused currently is in condition with

mental disorder, was ordered that the detention is served in the Institution of Health Care”.

The Law

The invoked provisions of UNMIK Regulation 34/2004 (District Court Decision P.no.297/12 dated 28 September 2012)

Section 7

Detention on remand of persons with a mental disorder

7.1 Apart from cases in Article 281 of the Provisional Criminal Procedure Code where detention on remand may be ordered, the court may order detention on remand against a person if:

(a) There is a grounded suspicion that such person has committed a criminal offence;

(b) According to a psychiatric examination ordered under section 6.1, the person was in a state of mental incompetence or diminished mental capacity at the time of the commission of the criminal offence; and

(c) The person currently has a mental disorder and as a result, there are grounds to believe that he or she will endanger the life or health of another person.

7.2 Detention on remand pursuant to paragraph 1 of the present section may be ordered only if the public prosecutor has submitted a motion referred to in section 10 of the present Regulation. Such detention on remand shall be served in a health care institution and may last for as long as the defendant is dangerous but shall not exceed the prescribed periods of time for detention on remand set forth in Article 284 of the Provisional Criminal Procedure Code.

7.3 If the defendant is already in detention on remand and is subsequently determined to have been in a state of mental incompetence at the time of the commission of the criminal offence, the court shall order the defendant to serve the detention on remand in a health care institution if he or she currently has a mental disorder.

7.4 The court shall render a ruling pursuant to paragraph 1 or 3 of the present section only after hearing the public prosecutor, the defense counsel and the defendant, if his or her condition permits, and after reviewing the opinion of an expert. Such ruling shall be served on the public prosecutor, defendant and his or her defense counsel, the health care institution and the detention facility. The appeal shall not stay the execution of the order.

7.5 The health care institution shall decide upon measures to ensure public safety and security and the security and safety of the defendant after consultation with the competent detaining authority, taking into account both security and therapeutic needs.

7.6 Provisions under the Provisional Criminal Procedure Code on detention on remand shall apply mutatis mutandis to detention on remand served in a health care institution.

The invoked provisions of UNMIK Regulation 34/2004 (District Court in Peja in Decision P.no.137/11, dated 9 July 2012) Section 9 Dismissal or suspension of proceedings due to ruling on incompetence to stand trial

9.1 If the court rules that a defendant is incompetent to stand trial during the course of proceedings due to a permanent mental disorder, it shall issue a decision to dismiss the proceedings.

9.4 If the court rules that a defendant is incompetent to stand trial pursuant to the present section, it may request the initiation of proceedings for his or her committal to a health care institution pursuant to the applicable Law on Non-Contentious Proceedings.

In such case, the court may rule that the defendant be detained in a health care institution for a maximum period of 72 hours pending the initiation of proceedings for committal to a health care institution under the applicable Law on Non-Contentious Proceedings, if as a result of the person's mental disorder there are grounds to believe that he or she will endanger the life or health of another person.

18. The Applicant appealed against the decision of the District Court, and on 5 October 2012, the Supreme Court of Kosovo issued decision P.no. 791/2012, thereby ruling:

"It is rejected as ungrounded the appeal of the defense counsel of the accused Haki Gjocaj, filed against the ruling of District Court in Peja, P.no.297/2012 dated 28.09.2012".

19. The Applicant filed a request for protection of legality, and on 6 November 2012, the Supreme Court of Kosovo by Judgment Pkl.no.175/12 partially approved the Applicant's request, thereby ruling:

"By the approval of the request for protection of legality of the defense of the defendant Haki Gjocaj are annulled the ruling of the District Court in Peja P.no. 297/2012 dated 28.09.2012 and the ruling of the Supreme Court of Kosovo in Prishtina P.n. no. 791/2012 and the matter is returned to the first instance court for reconsideration".

"The defendant remains in detention until new decision is made".

20. The Supreme Court further reasoned:

"...Public Prosecutor presented the proposal for the measure of obligatory psychiatric treatment, even though the expert had declared that the defendant Haki Gjocaj at the time of commission of the criminal offense was considered ACCOUNTABLE, but with reduced mental ability. After the remarks of the Supreme Court that towards accountable person cannot be imposed the measure of obligatory psychiatric treatment, the public prosecutor amends the charge from the proposal into indictment and goes on with the proceedings against defendant Haki Gjocaj based on the provisions of PCPCK, until the moment when the psychiatrist declares that the defendant is not able to follow the trial. Afterwards, the trial panel of the District Court in Peja on 09.07.2012 issued the ruling with number P. no. 137/2011, by which has decided to stay the procedure towards the defendant Haki Gjocaj, pursuant to Article 7 of the Regulation 2004/34 on the criminal procedure where are included perpetrators with mental disorder, which will begin again when the reasons for making such a decision stop to exist".

...to get out of this situation the first instance court must order a psychiatric examination of the defendant (Applicant) in order to ascertain his liability or lack of it during the time the criminal act was committed and his current state in order to clarify the type of procedure to be applied...the regular procedure or the special one as provided by the Regulation 2004/34". It should be stressed that for the time being, the defendant is treated as a mentally incapable person without an opinion from a competent expert because the conclusion that the defendant is not in condition to follow the trial has not solved the matter whether he was accountable at the moment of committing the criminal offence and there is no answer whether this incapability is temporary or permanent.

21. The medical reports are only mentioned in the reasoning of decisions of the regular courts; the Applicant did not attach them with the Referral. There is a mention of several contradictory medical reports in relation to the Applicant's mental condition.

Applicant's allegations

22. The Applicant alleges violation of Articles 29 [Right to Liberty and Security], 31 paragraph 1 [Right to Fair and Impartial Trial], 51 paragraph 2 [Health and Social Protection], and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution.
23. The Applicant also considers that there is a violation of the Universal Declaration of Human Rights and of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.
24. The Applicant claims that the afore-mentioned violations have occurred because there is a final court decision to dismiss the criminal proceedings due to his permanent mental illness, and yet he still is in the psychiatric ward of the detention institution.
25. The Applicant claims that based on article 4 paragraph 1 of the Provisional Criminal Procedure Code of Kosovo when proceedings are dismissed by a final judicial decision there can be no criminal prosecution. The Applicant also claims a violation of several other PCCK articles by the regular courts.
26. The Applicant maintains that the regular courts should have applied article 9.4 of the Regulation 34/2004 which envisages that the court initiates a procedure to send a person with mental disorder to a health care institution based on provisions on non-contested procedure in order for him to be treated in accordance with the Law on Health. The Applicant also claims that he has been in the psychiatric ward of the detention institution since 23 August 2010 and that his mental health will only deteriorate while he is there.
27. Furthermore, the Applicant requests the Court to conclude the abovementioned violations of provisions of the Constitution and to annul the ruling of first instance P.no.297/12 dated 28 September 2012, and ruling of the Supreme Court of Kosovo Pn.no.791 dated 05 October 2012 and to release him from the detention, so that the Court initiates non-contested procedure in order to place him in a health care institution as is provided by Article 9.4 of UNMIK Regulation 34/2004.

Assessment of admissibility

28. 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, the Law and the Rules of Procedure.

29. The Court refers to Article 113.7 of the Constitution, which 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 remedies provided by law”

30. In the instant case, the Court notes that the Supreme Court of Kosovo (Judgment Pkl.no.175/12, dated 6 November 2012), following the Applicant's request for protection of legality, ordered that the courts of lower instances must act in accordance with the instructions of the Supreme Court and determine whether the PCKK or UNMIK Regulation 34/2004 is applicable in the Applicant's case.
31. The Court notes, that the Supreme Court of Kosovo, reviewed the Applicant's request for protection of legality and determined that there has been a situation of legal vagueness and it referred the case back to the lower court for retrial, thereby also holding that the Applicant's remains in the psychiatric ward of the detention institution until there is a decision on the matter.
32. The Court notes, that the Applicant's referral is premature because the Supreme Court of Kosovo has referred the case back for retrial which means that the Applicant's case is still ongoing in a regular judicial procedure.
33. Furthermore, the Court reiterates that the Supreme Court of Kosovo as well as other regular courts are independent in exercise of their judicial power and it is their constitutional duty and prerogative to construe questions of fact and questions of law pertinent to the cases brought before them.
34. 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: AABRIINVEST 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*).
35. Furthermore, the Court notes that the Applicant has not brought any *prima facie* evidence nor has he substantiated his request to impose interim measures in accordance with Article 27 of the Law. The Applicant did not show *how* and *why* the imposition of interim measures would prevent a situation of unrecoverable damage nor did he in any way show that it is in the public interest to do so.
36. Bearing all the foregoing in mind, the Court rejects the Applicant's request to impose interim measures.
37. It follows that the Referral does not meet the requirements laid down in Article 113.7 of the Constitution and Articles 27 and 47 of the Law on Constitutional Court and must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, Pursuant to Article 113.7 of the Constitution; Articles 20 and 27 of the Law and in compliance with the Rule 36 (1) a) of the Rules of Procedure, on 25 January 2013, 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

Snezhana Botusharova



President of the Constitutional Court

Prof. Dr. Enver Hasani