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

Prishtina, 29 January 2013
Ref. No.: RK370/13

DECISION ON THE REQUEST FOR INTERIM MEASURES AND THE RESOLUTION ON INADMISSIBILITY

Case No. KI139/12

Applicant

Besnik Asllani

Constitutional Review of the Judgment of the Supreme Court of the Republic of Kosovo PKL. no. 111/2012, dated 30 November 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
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Mr. Besnik Asllani residing in Prishtina, represented by Mr. Bejtush Isufi, lawyer.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court of the Republic of Kosovo PKL. no. 111/2012, dated 30 November 2012 and served on the Applicant on 18 December 2012.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, by which the Applicant alleges that his right to a fair and impartial trial has been violated.

4. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter, the Court) to impose interim measure, suspending the execution of the Judgment of District Court in Prishtina P.no.433/2009, dated 7 September 2010.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: "the Constitution"), Article 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo, dated 15 January 2009 (hereinafter: the Law) and the Rule 28 and 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules).

Proceeding before the Court

6. On 31 December 2012, the Applicant submitted his Referral to the Court.

7. On 17 January 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of judges Robert Carolan (Presiding), Altay Suroy and Ivan Čukalović.

8. On 22 January 2013, the Court notified the representative of the Applicant and informed the Supreme Court that the Referral was registered under the no. KI 139/12.

9. On 29 January 2013, the Review Panel after having considered the report of the Judge Rapporteur, made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 5 October 2009, the Prosecutor filed an indictment (PP. no. 668-6/2009) in the District Court in Prishtina, accusing the Applicant of having committed a criminal offence of attempted extortion.

11. On 7 September 2010, the District Court in Prishtina rendered a Judgment (P.no.433/2009), whereby the Applicant was found guilty of the criminal offence of attempted extortion and sentenced to imprisonment of 1 (one) year and 6 (six) months.

12. On 7 March 2011, the Prosecutor filed an appeal against that Judgment, requesting more severe punishment for the then accused.

13. On 11 January 2012, the Supreme Court of Kosovo rendered a Judgment (Ap.nr.155/11), whereby it modified the Judgment of the District Court (P.nr.433/2009 dated 7 September 2010), regarding the legal qualification of the criminal offence and

partially approved the appeal of the prosecutor. Therefore, the abovementioned judgment was modified only with respect to the decision on imposition of punishment, imposing the punishment of imprisonment of four (4) years and also applying the fine at the amount of 1000 (thousand) euro.

14. On 8 March 2012, the Applicant filed with the Supreme Court a request for protection of legality, alleging that the court of first instance has erroneously determined the factual situation and applied the law, and proposing the court to modify the judgment of the District Court in Prishtina (P.no.433/2009) and the Judgment of the Supreme Court (Ap.no.155/11), and to acquit the Applicant of charges or return the matter for retrial.

15. On 30 November 2012, the Supreme Court of Kosovo rejected (PKL. no. 111/2012) the request as ungrounded, upholding the judgment of the Supreme Court (Ap.no.155/11, dated 11 January 2012). The Supreme Court concluded that the issues raised by the Applicant's defense cannot be the subject matter of the request for protection of legality.

Applicant's allegations

16. The Applicant alleges that the Judgment of the Supreme Court violated his constitutional rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 33 [Principle of legality and Proportionality in Criminal Cases] as well as violation of Article 6, in conjunction with Article 13 of ECHR.

17. The Applicant requested the Constitutional Court to annul the judgment of the District Court and two judgments of the Supreme Court and to return the case to retrial in the District Court in Prishtina according to instructions regarding the use of the standard of the proof beyond any reasonable doubt, as well as the interpretation of the criminal law in accordance with the principle of presumption of innocence.

18. More precisely, the Applicant "request from the Constitutional Court of Kosovo to respond to three questions:

a) Has the standard of proof "beyond any reasonable doubt" was used to determine the guilt of Besnik Asllani by the District Court in Prishtina and by Supreme Court of Kosovo (acting as the court of second instance)?

b) Has the principle of legality been violated in this case by three instances?

c) Has the Applicant had a fair trial due to lack of adequate reasoning by the Supreme Court of Kosovo acting upon the request for protection of legality?"

The request for interim measure

19. The Applicant also requests the Court to impose interim measures, suspending "the execution of the punishment provided by the Judgment of the District Court in Prishtina [P.no.433/2009, of 7 September 2010] upheld by the Supreme Court of Kosovo [Ap.nr.155/11, of 11 January 2012] until this issue ended in the Constitutional Court of Kosovo".

20. The Applicant alleges that:

> *"In the present case, in case of non-approval of the request for interim security measure, the Applicant will suffer irreparable damage. This is so due to the fact*

that despite the guilt was not proved by any evidence, he will be deprived of fundamental human right-freedom and should go to serve the sentence of imprisonment soon. The referral of the Applicant is also grounded prima facie, because it can be clearly seen that he was punished being based only on a doubt, which was never proved and that the legal system failed to offer him necessary legal assistance."

21. In this respect, the Court refers to Article 116 (2) [Legal Effect of Decisions] of the Constitution that establishes:

"2. While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages."

22. The Court also takes into account Article 27 of the Law that provides:

"The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest."

23. In addition, Rule 54 (1) of the Rules of Procedure foresees that

At any time when a referral is pending before the Court and the merits of the referral have not been adjudicated by the Court, a party may request interim measures..

24. Finally, Rule 55 (1) of the Rules of Procedure foresees that

"A request for interim measures shall be given expedited consideration by the Court and shall have priority over all other referrals".

25. Furthermore, in order to the Court impose interim measure it should, pursuant to Rule 55 (4) of the Rules of Procedure, find that:

"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;

(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and

(c) the interim measures are in the public interest.

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application".

Admissibility of the Referral

26. On that subject, the Court refers to Article 113. paragrph 1 and 7 [Jurisdiction and Authorized Parties] which establishes that

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

7. 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.

27. Article 47 (2) of the Law on Court also establishes that:

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

28. The Court also recalls Article 48 of the Law which provides 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."

29. In addition, Rule 36 (1) a) and c) of the Rules provides that

1. The Court may only deal with Referrals if:

a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted, or

b) the Referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or

c) the Referral is not manifestly ill-founded.

30. The Court considers that the Applicant complied with the prescribed deadline of four months counted from the day upon he has been served with the judgment of the Supreme Court; justified the referral with the relevant facts and a clear reference to the supposedly alleged violations; expressly challenges the Judgment of the Supreme Court as being the concrete act of public authority subject to the review; clearly points out the relief sought; and attaches the different decisions and other supporting information and documents.

31. As said above, the Applicant alleges mainly that the Judgment of the Supreme Court violated his constitutional right guaranteed by Article 31 [Right to Fair and Impartial Trial].

32. The Applicant claims that "the Supreme Court of Kosovo acting upon the request for protection of legality, submitted by the Applicant, rendered the judgment that is quite formal. This decision of the court does not provide any adequate reasoning regarding the allegations filed by the defence".

33. The Court notes that the District Court Judgment (P.no.433/2009) reads:

The accused Besnik Asllani, in his defense, did not admit the criminal offense in the item I of the enacting clause of the indictment of the attempted extortion from Article 267 par.2 in conjunction with par. 1 in conjunction with Article 20 of the CCK, while he pleaded guilty for the criminal offense from the Article 328 paragraph 2 of the CCK" (unauthorized ownership, possession, control or use of weapons).

34. The District Court Judgment (P.no.433/2009) further reads:

"Such a factual situation, besides the administered evidence and analyzed above, the Court determined also from the certificates on taking of items, confiscation of weapons and bullets, telephones, the ballistic examination report, the report on email examination, report on examination of telephone devices, report on interception of telephone conversation between the accused and the injured party, different reports on application of covert technical measures according to the court orders, entry-exits and SMS between the accused and the injured as well as photo documentation of investigations".

35. The Applicant appealed the District Court Judgment to the Supreme Court *"due to substantial violation of the provisions of the criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on criminal sanction with the proposal that the appealed judgment is annulled or modified so that the accused is acquitted of charge for the criminal offence of extortion, while more lenient punishment to be imposed for the criminal offence of unauthorized ownership, possession, control or use of weapons from Article 328, par.2 of PCCK".*

36. The Supreme Court (Ap.no.155/2011, of 11 January 2012), after thoroughly having analyzed the grounds of appeal, found that *"the appealed allegations above are not grounded".*

37. The Applicant submitted the request for protection of legality against the judgment of the Supreme Court, *"due to substantial violations of criminal procedure provisions pursuant to Article 403 paragraph 1 item 12 of CCPK, violation of criminal law and other violations of criminal procedure, which have impacted on legality of court decision, by proposal that the Supreme Court annuls judgment of first instance and that of second instance and to return the case for retrial and reconsideration of the Court of first instance, or to acquit the convict of charge".*

38. The Supreme Court (Pkl.no.111/2012, of 30.11.2012), after reviewing the claim in the request for protection of legality found that the request was ungrounded.

39. The Constitutional Court notes that the grounds of appeal to the Supreme Court, either on second instance or on protection of legality, consist of allegations related with substantial violation of the provisions of the criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on criminal sanction.

40. The Constitutional Court considers that those allegations may be of the domain of legality.

41. The Constitutional Court further notes that before the District and Supreme Courts no allegation was made by the Applicant on the basis of constitutionality, either implicitly or in substance raising an alleged violation of his fundamental freedoms and human rights guaranteed by the Constitution.

42. In that respect, the European Court (see Case of Fressoz and Roire v. France (Application no. 29183/95), Judgment of 21 January 1999) reiterated, *mutatis mutandis*, that "the purpose of the rule [rule on exhaustion] referred to above is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. That rule must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that the complaints intended to be made subsequently in Strasbourg should have been raised, "at least in substance and in

compliance with the formal requirements and time-limits laid down in domestic law", before the national authorities (see the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 19, § 27, and the Akdivar and Others v. Turkey judgment of 16 September 1996, Reports 1996-IV, pp. 1210-11, §§ 65-69)".

43. In accordance with the principle of subsidiarity, the Applicant is under the obligation to exhaust all legal remedies provided by law, as stipulated by Article 113 (7) and the other legal provisions, as mentioned above.

44. In fact, the purpose of the exhaustion rule is, in the case, allowing to the District and Supreme Courts the opportunity of settling an alleged violation of the Constitution. The exhaustion rule is operatively intertwined with the subsidiary character of the constitutional justice procedural frame work. (See, *mutatis mutandis, Selmouni v. France [GC], § 74; Kudła v. Poland [GC], § 152; Andrášik and Others v. Slovakia (dec.).*

45. Thus the principle of subsidiarity requires that the Applicant exhaust 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. 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. That failure shall be understood as a giving up of the right to further object the violation and complain. (See *Resolution, in Case No. KI. 07/09, Demë KURBOGAJ and Besnik KURBOGAJ, Review of Supreme Court Judgment Pkl.nr. 61/07 of 24 November 2008, paragraph 18*).

46. Whenever a judicial decision is challenged on the basis of some legal position that is unacceptable from the viewpoint of human rights and fundamental freedoms, the regular courts that delivered the decision must be afforded with the opportunity to reconsider the challenged decision. That means that, every time a human rights violation is alleged, such an allegation cannot as a rule arrive to the Constitutional court without being considered firstly by the regular courts.

47. In the instant case, the Applicant should have implicitly or in substance complained before the District and Supreme Courts against the alleged violation of its right to fair trial, as those Courts also "shall adjudicate based on the Constitution and the law" (Article 102 (3) of the Constitution).

48. In practice, nothing prevented the Applicant of having complained before the District and Supreme Courts about the alleged violation of his right to fair trial. If those Courts would consider the violation and would fix it, it would be over; if they either did not fix the violation or did not consider it, the Applicant would have met the requirement of having exhausted all remedies, in the sense that those Courts were allowed the opportunity of settling the alleged violation.

49. In fact, that analysis is in conformity with the European Court jurisprudence which establishes that applicants are only obliged to exhaust domestic remedies that are available in theory and in practice at the relevant time, that is to say, that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success (*Sejdović v. Italy* [GC], no. 56581/00, ECHR 2006-II § 46). It must be examined whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (*D.H. and Others v. the Czech Republic* [GC], §§ 116-22).

50. The Constitutional Court also applied this same reasoning when it issued the resolutions on inadmissibility on the grounds of non exhaustion of remedies (See: on 04 December 2012, in the Case No. KI 120/11, Ministry of Health v. Constitutional Review of the Decision of the Supreme Court A.No.551; on 27 January 2010, in the Case No. KI41/09, AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo; and on 23 March 2010, in its Decision in the Case No. KI. 73/09, Mimoza Kusari Lila vs. the Central Election Commission).

51. As a matter of principle and of fact, the Applicant cannot as a rule complain directly before the Constitutional Court about an alleged violation of his human rights and fundamental freedoms violation, without having raised implicitly or in substance such an alleged violation before the District and Supreme Courts.

52. However, the Constitutional Court considers that the facts of the case do not allow a compelling conclusion on that the grounds of appeal *"substantial violation of the of the provisions of the criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on criminal sanction"*, alleged before the Supreme Court, meet the test of the European Court. Therefore, there is no need to further consider the matter in the circumstances of the case.

53. Moreover, the Court considers that the Applicant has not substantiated and supported with evidence the alleged violation of his rights by the Supreme Court.

54. In fact, the Applicant's allegation for violation of constitutional rights do not present *prima facie* sufficient ground for filing the case in the court; the Applicant's unsatisfaction with the decision of the Supreme Court cannot be a constitutional ground to complain before the Constitutional Court.

55. Furthermore, the Court notes that, for a prima facie case on meeting of requirements for admissibility of the Referral, the Applicant must show that the proceedings in the Supreme Court, viewed in their entirety, have not been conducted in such a way that the Applicant has had a fair trial or other violations of the constitutional rights might have been committed by the Supreme Court during trial.

56. In this respect, the Court recalls Rule 36 (1.c) of the Rules of Procedure which provides that *'The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded"*.

57. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

58. Thus, the Court is not to act as a court of third instance, in the present case, when considering the decisions taken by regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

59. Moreover, the Applicant alleges that the Supreme Court, when deciding on his request for protection of legality, did not provide clear reason regarding the rejection of the submitted request and the he also complains that the Supreme Court was not committed to deal with the case in a right manner.

60. However, the Applicant does not explain why and how his rights were violated, he does not substantiate a prima facie claim on constitutional grounds and did not provide evidence showing that his rights and freedoms have been violated by Supreme Court and so his right to impartial and fair trial guaranteed by Article 31 of Constitution and Article 6 of the ECHR has been violated.

61. Thus, the Constitutional Court cannot consider that the relevant proceedings in the Supreme Court were in any way unfair or arbitrary (see mutatis mutandis, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

62. In fact, the Applicant did not show prima facie why and how the Supreme Court violated his rights as guaranteed by Articles 31 [Right to Fair and Impartial Trial] and Article 33 [Principle of Legality and Proportionality in Criminal Cases] as well as violation of Article 6 in conjunction with Article 13 of ECHR.

63. Therefore, the Court concludes that the Applicant has neither built nor shown a prima facie case either on the merits or on the admissibility of the Referral.

64. In all, the Court concludes that the Referral is inadmissible as manifestly ill-founded.

65. The Court further concludes that, the referral being inadmissible, the request for interim measures is without object and thus must be rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 116 (2) of the Constitution, Articles 27 and 48 of the Law, and in accordance with Rules 36.1 (c), 55 and 56 (2) of the Rules, on 29 January, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the request for interim measures;

III. TO NOTIFY this Decision to the Parties; and

IV. TO PUBLISH this Decision in accordance with Article 20(4) of the Law.

V. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Almiro Rodrigues Prof. Dr. Enver Hasani