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

Prishtina, on 12 March 2013
Ref.No.:RK389 /13

DECISION ON THE INTERIM MEASURES AND THE RESOLUTION ON INADMISSIBILITY

in

Case No. KI19/13

Applicant

Mark Duhanaj

Constitutional review of the Judgment of the District Court in Peja P.no.274/2008, of 2 May 2012, Resolutions of the Supreme Court of Republic of Kosovo, AP. no. 316/2012, of 23 August 2012, and Pkl.no.184/2012, of 17 December 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.

The Applicant

1. The Applicant is Mr. Mark Duhanaj, residing in Radulloc, Klina Municipality, represented by Mr. Gjergj Skeli and Zeqir Berdynaj, lawyers.

Challenged decisions

2. The challenged court decisions are: Judgment of the District Court in Peja P.no.274/2008, of 2 May 2012, and resolutions of the Supreme Court of Republic of Kosovo, AP. no. 316/2012, of 23 August 2012, and Pkl.no.184/2012, of 17 December 2012.

The subject matter

3. The subject matter of the Referral is the constitutional review of the above-mentioned Judgments, 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, postponing the serving of the sentence, until the Court makes decision on the merits of the issue.

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 Rule 28 and 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules).

Proceedings before the Court

6. On 21 February 2013, the Applicant submitted his Referral to the Court.

7. On 26 February 2013, the President appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

8. On 22 February 2013, the Court notified the representative of the Applicant and informed the Supreme Court and the Court of Appeal in Prishtina on registration of the Referral under number KI19/13.

9. On 12 March 2013, the Review Panel after having considered the report of Judge Rapporteur recommended to the full Court the inadmissibility of the Referral.

Summary of facts

10. On 30 January 2006, the Carabinieri searched the house of the Applicant's father (Zef Duhanaj), whereby they seized five (5) different weapons in rooms of the house.

11. On 3 February 2006, the District Public Prosecution in Peja, filed indictment against the Applicant for possessing and holding unlicensed weapons, seized by Carabinieri.

12. On 29 January 2007, the District Court in Peja rendered the Judgment P.no.111/2006, whereby the Applicant and his father were found guilty of a criminal offence which they were charged with, since the same pleaded guilty in all phases of the criminal proceedings. Based on the evidence supporting the indictment, the mentioned court found that guilty plea was made in accordance with the law.

13. The Applicant used his right to appeal this Judgment P.no.111/2006, due to essential violations of provisions of the criminal procedure and the decision on conviction.

14. On 5 August 2007, the Supreme Court rejected Applicant's appeal as ungrounded and upheld the Judgment of the District Court in Peja.

15. On 25 February 2008, the Applicant filed a request for reopening of the criminal procedure due to the emergence of the new facts.

16. On 12 June 2008, the District Court in Peja by Resolution P.no.116/2006 approved Applicant's request on reopening of the criminal proceedings regarding the final Judgment P.no.111/2006, due to the fact that Applicant's brothers had stated that the seized weapons in their joint home, except from a pistol, the rest belonged to them and not to the Applicant, as established in the final Judgment. With statements of these witnesses the District Court in Peja, concluded that all the requirements for a reopening of the criminal procedure were met. This court had postponed the decision on execution of the sentence, until the reopened criminal procedure was finalized.

17. On 2 May 2012, the District Court in Peja rendered the Judgment P.no.278/2008 and found the Applicant guilty, for unauthorized possession, control, or use of weapon from Article 328 paragraph 2 PCK and sentenced him with a year of imprisonment, a sentence that would be served after the Judgment would become final. Among others in the reasoning of the Judgment is said:

> *"Based on the evidence the court has established undoubtedly that the defense of the accused that weapons were his brothers', except pistol "TT", is only a delayed effort to avoid criminal responsibility, since during the entire procedure he had the opportunity to propose the hearing of these witnesses, who are his brothers and from the first moment could have stated that weapons were theirs, if it was so as the accused and witnesses Jozë and Mihill Duhani claim. He even told the place and the way of purchasing some of these weapons. The reasons presented by the accused that he has plead guilty in order to protect his sisters in law (wives of his brothers) from potential arrest and then not to incriminate his brothers, since they lived and worked abroad and criminal prosecution of them would have resulted with deportation of them from countries where they were living and working, are illogical and do not stand."*
> *[...]*
> *"Based on the above-mentioned reasons, the court held beyond any reasonable doubt that the accused had unauthorized ownership, possession and control of all the weapons described in the enacting clause of the*

judgment and in this way realized all objective and subjective elements of criminal offence pursuant to Article 328 paragraph 2 of CCPK"

18. The Applicant filed an appeal to the Supreme Court against the Judgment P.no.278/2008 of 2 May 2012.

19. On 23 August 2012, the Supreme Court of Kosovo (Judgment Ap. no. 316/2012) rejected as ungrounded Applicant's appeal. The Supreme Court after having heard allegations of the Applicant's authorized representative and Applicant's statement, and after having reviewed the whole documentation of this criminal-legal matter held that the appeal was ungrounded due to the fact that the appealed Judgment did not contain any essential violation of the provisions of criminal procedure, as alleged in the appeal.

20. On 8 March 2012, the Applicant filed a request for protection of legality to the Supreme Court, due to substantial violations of provisions of the CPCK and erroneous application of the provisions of the PCC, with the proposal that the request for protection of legality is approved as grounded, that the challenged judgments (PKL. no. 184/2012 of 17 December 2012 and Ap. no. 316/2012 of 23 August 2012) are annulled and the case is remanded for retrial.

21. On 17 December 2012, the Supreme Court (Judgment PKL. no. 184/2012) rejected as ungrounded the request for protection of legality, filed by the Applicant against the Judgment of the District Court in Peja P.no.278/2008 of 2 May 2012, and Judgment of the Supreme Court Ap. no. 316/2012i of 23 August 2012. The Supreme Court concluded that the raised issues in the request for protection of legality by the authorized representative of the Applicant for violation of the law to the detriment of the convict were not grounded.

Applicant's allegations

22. The Applicant alleges that Judgments of the regular courts have violated Article 31 (The right to a fair and impartial trial) of the Constitution, as well as Article 6 and Article 13 of the ECHR.

The request for interim measure

23. The Applicant also requests from the Court to impose interim measure suspending the execution of the sentence, by Judgment of the District Court in Peja (P. no. 278/2008 of 2 May 2012) upheld by the Supreme Court of Kosovo (Ap. no. 316/2012, of 21 August 2012), until this matter is finalized before the Constitutional Court of Kosovo.

24. 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."

25. 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".*

26. 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."

27. 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".*

28. 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

29. In this case, the Court refers to Article 113 [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.*

30. 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".*

31. The Court also refers to the 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."

32. In addition, Rule 36 (1) a), b) 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.

33. The Court considers that the Applicant has met the four months deadline requirement, counting from the day the Supreme Court Judgment was served on him; that he has supported his request with relevant facts and clear reference of alleged offences; the Applicant in particular challenges the Judgment of the District Court in Peja and the Judgments of the Supreme Court as acts of the public authority; that he has clearly stated the requested legal protection and that he has attached various decisions, and supporting information and documents.

34. The Applicant mainly alleges that the Judgment of the first instance and the Judgments of the second instance violated his rights guaranteed by Article 31 of the Constitution (The right to a fair and impartial trial) as well as the rights guaranteed by the European Convention on Human Rights and Freedoms, respectively Article 6 and Article 13 of the ECHR.

35. The Applicant appealed the Judgment of the District Court in Peja 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 and remand the case to the first instance court for retrial, or modify so that the accused is imposed a suspended sentence".*

36. The Supreme Court after thoroughly having analyzed the grounds of appeal found that *"the above appeal's allegations are ungrounded".*

37. The Applicant submitted the request for protection of legality against the judgment of the Supreme Court, *"due to substantial violations of provisions of the CPCK and erroneous application of the provisions of the PCC, with the proposal that the request for protection of legality is approved as grounded, that the challenged judgments are annulled and the case is remanded for retrial.* The Supreme Court (PKL. no. 184/2012 of 17 December 2012) after reviewing the request for protection of legality, found the request as ungrounded.

38. The Court notes that the Judgment of the District Court in Peja(P.no.278/2008 of 2 May 2012) was reasoned, and that this Court has not observed that during the trial was any procedural violation that would result in violation of fundamental rights of the Applicant, guaranteed by the Constitution and European Convention on Human Rights and Freedoms. The Applicant's request for witness hearing was approved, his authorized representative was heard, and he was given all the opportunities for defense throughout the case trial.

39. The Constitutional Court notes that the grounds of appeal to the District and Supreme Courts, 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 were 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 vs. 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. This 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 vs. Spain judgment of 23 April 1992, Series A no. 236, p. 19, § 27, and the Akdivar and Others vs. 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 the legal remedies provided by law, as stipulated by Article 113 (7) and other legal provisions, as mentioned above.

44. In fact, the purpose of the exhaustion rule is, in this 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 vs. France [GC], § 74; Kudła vs. Poland [GC], § 152; Andrášik and Others vs. Slovakia (dec.).*

45. Thus, the principle of subsidiarity requires that the Applicant exhausts all procedural opportunities 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 his/her case declared inadmissible by the Constitutional Court, when failing to avail him/herself 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 are 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 (*Sejdoviæ vs. 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 legal remedies, on 4 December 2012, in Case No. KI 120/11, Ministry of Health - Constitutional Review of the Decision of the Supreme Court A.No.551; on 27 January 2010, in Case No. KI41/09, AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo; and on 23 March 2010, Decision in 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 regular 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 District Court and the Supreme Court.

54. In fact, the Applicant's allegation for violation of constitutional rights do not present *prima facie* sufficient ground for filing a case with the Court; the Applicant's unsatisfaction with decisions of the regular courts 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 District Court and 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 regular courts during the 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 of Human Rights [ECHR] 1999-I).

59. 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 regular courts and so his right guaranteed by Article 31 of Constitution and Article 6 in conjunction with Article 13 of the ECHR has been violated.

60. Thus, the Constitutional Court cannot consider that the relevant proceedings in the District Court and 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).

61. In fact, the Applicant did not show *prima facie* why and how the District Court and the Supreme Court violated his rights as guaranteed by Articles 31 [Right to Fair and Impartial Trial] and Article 6 in conjunction with Article 13 of ECHR.

62. 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.

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

64. The Court further concludes that, the referral being inadmissible, the request for interim measure is moot 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 12 March 2013, 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**

Ivan Čukalović Prof. Dr. Enver Hasani