



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

Prishtina, 10 June 2013
Ref. No:RK422/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI22/13

Applicant

Sokol Mushkolaj

**Constitutional review of Supreme Court Judgment Pkl.no.164/2012
dated 5 December 2012, Decision Ap.no. 4/12 of District Court of
Prishtina dated 28 September 2012, Judgment P.no.601/08 of Municipal
Court in Prishtina dated 3 October 2011, and Decision P.no.601/08 of
Municipal Court in Prishtina dated 20 December 2011**

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 Sokol Mushkolaj a practicing lawyer with residence in Fushë-Kosovë.

Challenged decisions

2. The Applicant challenges Supreme Court Judgment Pkl.no.164/2012 dated 5 December 2012; Decision Ap.no. 4/12 of District Court of Prishtina dated 28 September 2012; Judgment P.no.601/08 of Municipal Court in Prishtina dated 3 October 2011; and Decision P.no.601/08 of Municipal Court in Prishtina dated 20 December 2011.

Legal basis

3. Articles 113.7 and 116.2 of the Constitution, Articles 20, 22.7, 22.8 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 (hereinafter: the "Rules of Procedure").

Subject matter

4. The subject matter of the Referral is the Applicant's complaint that the regular courts sentenced him to six months of imprisonment by erroneous application of article 90.6 of the Provisional Criminal Code of Kosovo (hereinafter: PCCK) pertinent to absolute prescription of criminal prosecution, as well as articles 124, 125 and 126 of the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK) pertinent to the service of judicial documents.
5. The Applicant also asks the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), based on Article 116.2 of the Constitution, to impose interim measures and suspend Judgment P.no.601/2008 of the Municipal Court in Prishtina dated 3 October 2011, and to suspend the execution of the prison sentence until final conclusion of this criminal legal matter.
6. Furthermore, the Applicant asks the Court not to disclose his identity.

Procedure before the Court

7. On 25 February 2013, the Applicant submitted a referral with the Court.
8. On 28 February 2013, The President appointed Judge Robert Carolan as Judge Rapporteur and a Review Panel composed of Judges Snezhana Botusharova (presiding), Kadri Kryeziu and Arta Rama-Hajrizi.
9. On 12 March 2013, the Court notified the Applicant and the Supreme Court of Kosovo about the registration of the Referral.
10. On 13 March 2013, the Court required additional documents from the Municipal Court in Prishtina and from the Applicant.

11. On 19 and 21 March 2013, the Applicant and the Municipal Court in Prishtina replied.
12. On 29 April 2013, the President appointed Judge Ivan Čukalovič as Judge Rapporteur and a Review Panel composed of Judges Snezhana Botusharova (presiding), Kadri Kryeziu and Enver Hasani.
13. On 13 May 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

14. On 3 October 2011, the Municipal Court in Prishtina by Judgment P.no.601/08 found that the Applicant had committed the criminal act of fraud from article 261 paragraph 1 of the PCCK, thereby pronouncing six months prison sentence which the Applicant will serve once the judgment is final.
15. The enacting clause of Judgment P.no.601/08 of the Municipal Court in Prishtina stipulated:

JUDGMENT

The defendant, Sokol Mushkolaj father's name H, mother's name B of maiden name H, born on 19.12.1952 in Deçan, street "Deshmoret e Kombit" No. 86, where he currently lives, has completed law faculty, profession lawyer in Deçan, married, father of a child, economic status medium, no prior convictions, against him there is no other ongoing proceeding for any other criminal offense.

IS GUILTY

That in order to obtain unlawful material benefits, concealing the facts, the defendant Sokol Mushkolaj on 23.11.2006 in Prishtinë, in his office from the injured NH and NH has received an amount of money from 500 euro, and subsequently on 25.11.2006 from the same has received the amount of 2.000 Euros, where the defendant Sokol Mushkolaj, mistaking them by fact and promising them that he would influence the on the decision of the District Court in Prizren and on Kosovo Supreme Court, a Court that had imposed a 20 years prison term, telling them that he will reduce the sentence to 10 or 13 years of imprisonment, and again in April of 2007 in a restaurant in Pejë from the injured NH and NH, the defendant giving the same promise as aforesaid has received from the injured NH and NH the amount of 3.000 euros, and since that day the above-mentioned injured did not get the money back.

As such he committed the criminal offense of fraud under Article 261 par. 1 of CCK.

Therefore the Court pursuant to Article 3, 34, 38, 64 and Article 261 par. 1 of the CCK, as well as Article 391 of the CCK,

ADJUDICATED

A prison term of 6 (six) months that he will serve after the judgment becomes final.

16. On 20 December 2011, the Municipal Court in Prishtina by Decision P.no.601/08 rejected the complaint of the Applicant against the Judgment P.no.601/08 of the Municipal Court in Prishtina, as out of time.
17. On 28 September 2012, the District Court in Prishtina by Decision Ap.no.4/12 rejected as ungrounded the appeal of the Applicant against the Decision P.no.601/08 of the Municipal Court in Prishtina dated 20 December 2011.
18. On 5 December 2012, the Supreme Court of Kosovo by Judgment Pkl.no.164/2012 rejected as ungrounded the Applicant's request for protection of legality filed against the Municipal Court of Prishtina Decision P.no.601/08 dated 20 December 2011, and the District Court in Prishtina Decision Ap.no. 4/12 dated 28 September 2012.

Applicant's allegations

19. The Applicant alleges that the criminal prosecution instituted against him should have been terminated due to statute of limitations as provided by article 90.6 of the PCCK. The regular courts have allegedly erroneously applied article 90.6 of the PCCK to his detriment.
20. The Applicant alleges that the regular courts did not serve the decision upon him in person, as provided by articles 124, 125 and 126 of the PCCK. The regular courts have allegedly acted in breach of articles 124, 125 and 126 of the PCCK to his detriment.
21. The Applicant claims a violation of articles 31[Right to Fair and Impartial Trial] and 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in connection with article 6 [Right to a fair trial] of the European Convention on Human Rights.
22. The Applicant proposes imposition of interim measures for the temporary suspension of the execution of Judgment P.no. 601/08 of the Municipal Court in Prishtina dated 3 October 2011, based on article 116.2 of the Constitution.

The Law

Fraud
Article 261

- (1) Whoever, with the intent to obtain a material benefit for himself, herself or another person, deceives another person or keeps such person in deception by means of a false representation or by concealing facts and*

thereby induces such person to do or abstain from doing an act to the detriment of his or her property or another person's property shall be punished by a fine or by imprisonment of up to three years.

Statutory Limitation on Criminal Prosecution
Article 90

(1) Unless otherwise provided for by the present Code, criminal prosecution may not be commenced after the following periods have elapsed:

...;

6) Two years from the commission of a criminal offence punishable by imprisonment for up to one year or punishment of a fine.

Assessment of admissibility

23. 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.
24. In the concrete case, the Court notes that the Applicant was found guilty of fraud and sentenced to six months imprisonment by the Municipal Court in Prishtina. The sentence was subsequently upheld by the same court, the District Court in Prishtina and the Supreme Court of the Republic of Kosovo.
25. The Court notes that the regular courts chose to pronounce a lesser penalty on the Applicant, than the one provided by law, because they argued that the Applicant's relatively old age, the fact that he was not sentenced before and other factors served as the mitigating circumstances in his favor.
26. As to the Applicant's allegations that he was tried beyond the statutory limitations, or that he was not served with the decision in person; the Court notes that there is nothing in the Referral suggesting that the regular courts had tried the Applicant or served the decision upon him in an unlawful manner.
27. The Court notes that the Applicant only claims that his right to a fair and impartial trial was violated, without providing any *prima facie* evidence to back up his claims.
28. Furthermore, the Court observes that there is a distinction between a fair trial and a perfect one; the Court is cognizant of the fact that during the course of regular judicial proceedings, be it criminal or civil, procedural errors may occur. However that does not automatically imply that the prospective Applicant's right to a fair and impartial trial was compromised; it merely implies that the prospective Applicants were denied the right to a perfect trial which is not tantamount to a violation of fundamental rights per se.
29. The Constitutional Court is not a fact finding Court. The Constitutional Court reiterates that the determination of complete and right factual situation is a full jurisdiction of regular courts that that its role is to provide the compliance with

the rights, guaranteed by the Constitution and other legal instruments and therefore it cannot act as a "court of fourth instance", (*see, mutatis mutandis, i.a., Akdivar against Turkey, 16 September 1996, R.J.D, 1996-IV, para.65*).

30. The Court considers that the Referral does not indicate *how and why* the regular courts have acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to replace its determination of facts with those of the regular courts, as a general rule, it is the task of these courts to assess the evidence before them. The task of the Constitutional Court is to verify whether the procedures in the regular courts were fair in their entirety, including the way the evidence was taken, (*see ECtHR Judgment App. No 13071/87 Edwards against United Kingdom, paragraph 3, dated 10 July 1991*).
31. The fact that the Applicants are unsatisfied with the outcome of the case, cannot serve them as a ground to file an arguable Referral for violation of the Article 31 [Right to Fair and Impartial Trial] of the Constitution (*see mutatis mutandis ECtHR Judgment Appl. no. 5503/02, MezoturTiszazugi Tarsulat against Hungary, Judgment dated 26 July 2005*).
32. As to the Applicant's request for imposition of interim measures, the Court considers that such a request does not meet the criteria established in Article 116.2 of the Constitution, Article 27 of the Law and Article 54 of the Rules of Procedure which would prompt the Court to impose interim measures; therefore the request to impose interim measures is rejected.
33. As to the Applicant's request not to disclose his identity, the Court considers that the Applicant has not backed up the granting of such a request by evidence, nor did he reason it; therefore the Court rejects the Applicant's request not to disclose his identity.
34. It follows that the referral is manifestly ill-founded and as such must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113.7 and 116.2 of the Constitution and Articles 20 and 27 of the Law and in compliance with Rules 36 (1) c and 54 of the Rules of Procedure, on 10 June 2013, unanimously:

DECIDES

- I. TO REJECT the Referral as inadmissible;
- II. TO REJECT the request for interim measures;
- III. TO REJECT the request not to disclose identity;
- IV. 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
- V. This Decision is effective immediately.

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Prof. dr. Enver Hasani

