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

Prishtina, 30 June 2014
Ref. no.:RK661/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI33/14

Applicant

Kamer Hajdini

Constitutional review of Judgment Pml. no. 111/2013 of the Supreme Court of Kosovo dated 24 September 2013

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. Kamer Hajdini who is currently serving an imprisonment sentence in the Correctional Center in Smrekovnica, municipality of Vushtrri. The Applicant has authorized his son Mr. Avni Hajdini to represent him before the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

Challenged decisions

2. The Applicant challenges Judgment Pml. no. 111/2013 of the Supreme Court of Kosovo dated 24 September 2013, served upon the Applicant on 21 October 2013, in connection with Judgment P. no. 248/2012 of the District Court in Prishtina dated 3 September 2012, Judgment PAKR. no. 1327/12 of the Court of Appeal of Kosovo dated 3 April 2013, Decision ED. no. 201/13 of the Basic Court in Prishtina dated 25 June 2013, Decision P. no. 568/13 of the Court of Appeal of Kosovo dated 20 August 2013, Decision P. no. 16/2014 of the Court of Appeal of Kosovo dated 21 January 2014.

Subject matter

3. The subject matter is the constitutional review of the challenged judgments and decisions of the regular courts which allegedly violate Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter, the Convention) and Article 10 of Universal Declaration of Human Rights.

Legal basis

4. The Referral is based on Articles 113.7 and 116.2 of the Constitution, Articles 27 and 47 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law), and Rule 54 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Court

5. On 21 February 2014, the Applicant submitted the Referral with the Court.

6. On 27 February 2014, the Court notified about the Applicant about registration of the Referral. On the same date, the Supreme Court of Kosovo, the Court of Appeal of Kosovo, and the State Prosecutor were notified of the Referral.

7. On 28 February 2014, the President of the Constitutional Court, by Decision No. GJR. KI33/14, appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President of the Constitutional Court, by Decision No. KSH. KI33/14, appointed the Review Panel composed of Judges Altay Suroy (presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

8. On 31 March 2014, after having considered the report of the Judge Rapporteur, the Review Panel made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of facts

9. On 5 March 2012, the District Public Prosecutor in Prishtina filed indictment (PP. no. 565-1/2009) with the District Court in Prishtina against the Applicant

under accusation that he has committed the criminal offences of attempted murder and unauthorized ownership, control, possession or use of weapons as provided by the Provisional Criminal Code of Kosovo (hereinafter, the PCCK).

10. On 20 April 2012, the District Court in Prishtina by Decision KA. no. 205/12 confirmed the indictment of the Public Prosecutor filed against the Applicant.

11. On 3 September 2012, the District Court in Prishtina by Judgment P.no.248/2012 found the Applicant guilty for commission of the criminal offences of attempted murder and unauthorized ownership, control, possession or use of weapons as provided by Article 146 in conjunction with Article 20 and Article 328 paragraph 2 of the PCCK. The District Court in Prishtina pronounced an imprisonment sentence of 2 (two) years and 6 (six) months to the Applicant, which the Applicant would serve once the judgment became final.

12. In the aforementioned Judgment, the District Court in Prishtina reasoned:

"The District Prosecution in Prishtina, by indictment PP.no.956-10/11 of 05.03.2012, had charged Kamer Hajdini (the Applicant) with committing the criminal offence of Attempted Murder, as per Article 146, in conjunction with Article 20 of the CCK, and the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapon, as provided by Article 328, paragraph 2 of the CCK. On this case, the Court concluded the main court hearing on 03.09.2012, during which it initially heard the injured LG, witnesses DH and RM. It also reviewed other submissions proposed as evidence, during the evidentiary hearing: Report on crime scene of 16.12.2011; Crime Investigation Sketch; photographic documentation; Kosovo Police Lab Expert Report, of 26.01.2012; forensic expert report of 17.02.2012, discharge report and history; Certificate on confiscation of firearm and ammunition, and other case files, all in an effort of truth-seeking.

... the Court reviewed all statements and other pieces of evidence singularly, and all comprehensively, all in due care, and upon statement of the injured, upon having analyzed carefully the statements of witnesses proposed by the accused, it was clear that apart from their statements, the statement of the defendant (Applicant) was fair, and as such, also credible, and to some extent, also convincing, having in mind the past relations of the parties, the defendant and his former son-in-law, LG, according to their statements, which were rather bad, and especially after the separation of the injured LG and his former wife DH. This was further confirmed in trial.

... the Court did carefully analyze the actions of the defendant, and ultimately found that the defendant did intend to commit the offence charged upon him, and found him guilty.

... based on all the above, the court ascertained the factual condition, beyond reasonable doubt, as described in enacting clauses of the indictment, based on evidence assessed in trial, and in its free conviction, thereby finding that the accused Kamer Hajdini (Applicant) is criminally

liable for the offences as per enacting clause of this judgment, and found elements of criminal offence as described in enacting clauses of the present judgment, and found that his actions fully confirm the figure of the criminal offences charged upon him, and therefore, found him guilty, upon having found that at the time of committing criminal offences, he was criminally responsible for the offences, and sentenced him to a single imprisonment period of two (2) years and six (6) months, to be served upon final form of the present judgment, and obviously upon calculation of time spent in detention, from 16.12.2011, until 04.09.2011, in his service of the sentence".

13. On 4 September 2012, the District Court in Prishtina by Decision P. no. 248/2012, released the Applicant from detention until Judgment P. no. 248/2012 of the same court, dated 3 September 2012, becomes final.

14. In an unspecified date the District Public Prosecutor in Prishtina and the injured party LG filed complaints with the Appeal Court of Kosovo thereby asking for a more severe imprisonment sentence for the Applicant.

15. On 3 April 2013, the Appeal Court of Kosovo by Judgment PAKR. no. 1327/12 upheld Judgment P. no. 248/2012 of the District Court in Prishtina and rejected the complaints of the District Public Prosecutor and of the injured party LG as ungrounded.

16. On 20 May 2013, the Applicant filed a request for protection of legality with the Supreme Court of Kosovo against Judgments and P. no. 248/2012 and PAKR. no. 1327/12 of the District Court in Prishtina respectively of the Appeal Court of Kosovo. The Applicant also filed a request for the delay of enforcement of the imprisonment sentence.

17. On 27 May 2013, the Applicant filed a request with the Basic Court in Prishtina thereby requesting review of criminal procedure P. no. 248/2012 and proposing delay of enforcement of Judgment P. no. 248/2012 of the District Court in Prishtina.

18. On 25 June 2013, the Basic Court in Prishtina by Decision ED. no. 201/13 rejected the request of the Applicant for the delay of imprisonment sentence as ungrounded.

19. On 9 July 2013, the Basic Court in Prishtina by Decision Kp. no. 240/13 rejected the request of the Applicant for the review of the criminal procedure against Judgment P. no. 248/2012 of the District Court in Prishtina as ungrounded.

20. On 20 August 2013, the Appeal Court of Kosovo by Decision PN. no. 568/13 rejected the complaint of the Applicant against Decision ED. no. 201/13 of the Basic Court in Prishtina as ungrounded.

21. On 26 August 2013, the Applicant was sent to serve the imprisonment sentence.

22. On 24 September 2013, the Supreme Court of Kosovo by Judgment Pml. nr. 111/2013 rejected the request for protection of legality filed by the Applicant

against Judgment P. no. 248/2012 of the District Court in Prishtina dated 3 September 2012, and Judgment PAKR. no. 1327/2012 of the Appeal Court of Kosovo dated 3 April 2013, as ungrounded.

23. In the abovementioned judgment, the Supreme Court of Kosovo reasoned:

In the request it is claimed that the violations that justify the request are: falsification of the minutes (it is not specified which) by the presiding Judge of the panel, withholding not servicing the minutes to the attorney during the appeal stage, failure to decide on the request for the disqualification of the presiding Judge and the members of the panel, and the rejection of the proposals he made during the first instance procedure for administering evidences, which impacted in the erroneous finding of relevant facts in this criminal matter. The proposals for administering evidences which are specified in the request are visit of the site of the event, hearing the forensic expert but experts of other fields as well (i.e. thoracic surgery), administering as evidence the police report, reading SMS messages sent by LG to DH telephone etc.

The court found this claim as not grounded. The fact that the presiding Judge of the panel has falsified or has abused his position by not providing for reviewing the minutes, could provide the ground for revising the criminal procedure if the other conditions for this extraordinary legal remedy have been met but they constitute no ground for the request for the protection of the legality.

The request for disqualifying the presiding Judge and the members of the panel was presented in the closing statement of the convict's defense counsel, whereas pursuant to Article 42, paragraph 2 of the CPCK applicable at the time (now Article 41, paragraph 2 of the CPCK) the request for the disqualification of a Judge or lay Judge pursuant to Article 40, paragraph 3 of this Code will be submitted prior to the commencement of the judicial hearing. Therefore, failure to decide on this request had no impact in rendering a just decision by the first instance court.

On the other hand, the proposals that are mentioned in the request which the court did not approve, not only because they are related to the finding of the factual situation, do not constitute the ground to permit the request for the protection of the legality pursuant to Article 432, paragraph 2 of the CPCK, but they were taken into consideration by the first instance court.

So, from the minutes of the hearing session of date 26.07.2012 it is found that the convict's defense counsel presented all these proposals during the court hearing and the adjudicating panel in the same panel rendered the Ruling that rejected the proposals, with the reasoning that the court has administered sufficient evidences to clarify the matter whereas the proposed evidences would only repeat the existing evidences and the criminal procedure would be protracted. Therefore the court took the proposals into consideration and provided the legal reasoning for rejecting them, thus the Supreme Court finds that the claims in the request that they

have been neglected and the provisions of the criminal procedure have been violated are not grounded.

For these reasons the request for the protection of the legality was considered as not grounded and pursuant to Article 437 of the CPCK it was decided as in the enacting clause of this Judgment".

24. On 21 January 2014, the Appeal Court of Kosovo by Decision PN. no. 16/2014 rejected the complaint of the Applicant lodged against Decision Kp. no. 240/2013 of the Basic Court in Prishtina, as ungrounded.

Applicant's allegations

25. The Applicant claims a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, Article 6 (Right to a fair trial) of the Convention and Article 10 of Universal Declaration of Human Rights, by reasoning that:

- the principle of equality of arms was not observed, because the regular courts have approved the proposals of the accusatory body for adducing and administration of evidence, whereas the Applicant was allegedly arbitrarily denied of this right;

- by allegedly refusing to adduce evidence proposed by the Applicant, the regular courts have infringed the presumption of innocence, have prejudged his culpability, and have limited and incapacitated Applicant's right to defend himself from the charges.

26. The Applicant claims that his proposal to hear as witnesses the medical personnel, who took the injured party in the site of occurrence was important, since it would have verified:

- if the injured party had in his waist a fire gun or cold weapon or any other mean, inside his coat, since the Applicant was fearful;

- the statement of the injured party LG that FD (son of Applicant) had thrown stones at him, after he was wounded by the Applicant;

- demeanor of the Applicant after his actions and it is known that he wanted to commit suicide;

- actions of the Applicant's family members especially of FH and DH, injured party, witness and especially the instantaneous remorse of the Applicant.

27. The Applicant claims that hearing of forensic expert was needed due to the fact that forensic expert FB made the expertise without seeing at all the injured party LG, and that the hearing of expert was necessary because: *the expertise does not offer a complete description of injuries, and therein it is stated that in relation to permanent consequences from these injuries it is necessary to wait until completion of medical treatment".*

28. In this regard, the Applicant requests from the Court to:

a. *Impose interim measures until the Court renders a ruling on the admissibility of the referral.*

b. *Suspend immediately the enforcement of Judgment Pml.nr.111/2013 of the Supreme Court of Kosovo dated 24 September 2013, and Decision ED. nr. 201/13 for the enforcement of sentence of Judgment P. nr. 248/12 of the District Court in Prishtina dated 3 September 2012 as well as the Judgment PAKR. nr. 1327/12 of the Court of Appeal of Kosovo dated 3 April 2013.*

c. *Declare the Referral admissible.*

d. *Hold a hearing in accordance with Rule 39 of the Rules of Procedure of the Court.*

e. *Declare invalid Judgment Pml. nr. 111/2013 of the Supreme Court of Kosovo dated 24 September 2013, Judgment P. nr. 248/2012 of the District Court in Prishtina dated 3 September 2012, as well as Judgment PAKR. nr. 1327/12 of the Court of Appeal of Kosovo dated 3 April 2013.*

29. Finally, the Applicant has stated that in similar cases the Court has rendered admissible rulings and has invoked the case-law of the Court, most notably case KI78/12, Applicant *Bajrush Xhemajli,* Judgment of 24 January 2013.

Assessment of admissibility

30. The Court observes that, in order to be able to adjudicate the Applicant's complaint, it is necessary first to examine whether he has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

31. In this regard, 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 legal remedies provided by law".

32. The Court also refers to Article 49 of the Law, which provides:

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force".

33. In the concrete case, the Court considers that the Applicant is an authorized person, he has exhausted all legal remedies as prescribed by Article 113.7 of the

Constitution, and the referral is filed within the four months legal deadline in compliance with Article 49 of the Law.

34. The Court also takes into account Rule 36 (1) c) of the Rules of Procedure, which provides:

"(1) The Court may only deal with Referrals if
...
(c) the Referral is not manifestly ill-founded".

35. The Court notes that in the case at issue, the Applicant has raised many questions about the proceedings before the trial and appellate courts; however the Applicant has also asked the Court to compare his referral with case KI78/12, Applicant *Bajrush Xhemajli*, Judgment rendered by this Court on 24 January 2013 (hereinafter, "Xhemajli case").

36. The Court notes that there are several key aspects in which the present referral differs from the Xhemajli case. In the case at issue, the Court notes that: i) the Applicant did not prove that hearing certain witnesses and assessing certain evidence was absolutely necessary in order to ascertain the truth, ii) the Applicant did not prove that the failure to hear certain witnesses prejudiced the rights of the defense and fairness of the proceeding as a whole, iii) the Applicant did not prove that the report of expert witness was absolutely necessary because it forms the predominant foundation for the Applicant's conviction, and iv) the Applicant did not prove that the experts involved in the Applicant's case had agreed that they did not evaluate all the factors involved.

37. As to the presentation of certain evidence and hearing of certain witnesses as proposed by the Applicant, the Court considers that the District Court gave a lengthy reply and a good account to almost all of the questions raised by the Applicant followed by the Supreme Court which endorsed the reasons given by the District Court.

38. The Court notes that in the Applicant's case, the regular courts have assessed all the evidence adduced before them (indictment of the prosecutor, sketches, photographs, ballistic and medical reports, testimonies from eye witnesses, etcetera) and furthermore the Applicant was allowed to comment on all evidence and was given the opportunity to defend his case before the regular courts.

39. Considering the proceedings before the regular courts, the Court considers the requirement of a fair trial as enshrined in Article 6 of the Convention is that it covers the proceedings as a whole, and the question whether a person has had a fair trial is looked at by way of cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result defects at one level may be put right at a later stage (see case *Monnell and Morris v. the United Kingdom,* No. 9562/81; 9818/82, ECtHR, Judgment of 2 March 1987 para. 55).

40. Furthermore, the Court notes that the regular courts, in addition to appraisal of all evidence adduced before it and in the interest of justice, had taken into account mitigating circumstances such as Applicant's health, relative old age,

repentance and the fact that the he is not a serial transgressor of the law before pronouncing the imprisonment sentence.

41. The Constitutional Court recalls that it is not a fact finding Court, the Constitutional Court wishes to reiterate that the correct and complete determination of the factual situation is a full jurisdiction of regular courts, and that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court" (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

42. Moreover, the Referral does not indicate that the regular courts acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to substitute its own assessment of the facts with that of the regular courts and, as a general rule, it is the duty of these courts to assess the evidence made available to them. The Constitutional Court's task is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way in which evidence were taken (See case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991).

43. The fact that the Applicant disagrees with the outcome of the case cannot of itself raise an arguable claim of a breach of Articles 31 [Right to Fair and Impartial Trial], of the Constitution and Article 6 (right to fair trial) of the Convention (See case *Mezotur-Tiszazugi Tarsulat us. Hungary*, No. 5503/02, ECtHR, Judgment of 26 July 2005).

44. In these circumstances, the Applicant has not substantiated his allegation for violation of Articles 31 [Right to Fair and Impartial Trial], of the Constitution and Article 6 (right to fair trial) of the Convention because the facts presented by him do not show in any way that the regular courts had denied him the rights guaranteed by the Constitution and the Convention.

45. Consequently, the Referral is manifestly ill-founded and must be declared inadmissible pursuant to Rule 36 (1) c) of the Rules of Procedure.

46. As to the Applicant's request to hold an oral hearing, the Court refers to Rule 39 (1) of the Rules of Procedure:

> *"Only referrals determined to be admissible may be granted a hearing before the Court..."*

47. Therefore, the Applicant's request to hold an oral hearing is rejected.

Assessment of the Request for Interim Measure

48. As to the Applicant's request for imposition of interim measures, the Court refers to Article 116.2 of the Constitution, which provides:

"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".

49. The Court also refers to Article 27 of the Law, which 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".

50. 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 which would prompt the Court to impose interim measures; therefore the request to impose interim measures is rejected.

FOR THESE REASONS

The Constitutional Court in accordance with Articles 113.7 and 116.1 of the Constitution, Articles 47 and 27 of the Law, and Rules 54 and 56 of the Rules of Procedure, on 31 March 2014, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request of interim measures;

III. TO REJECT the request to hold oral hearing;

IV. TO NOTIFY this Decision to the Parties;

V. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law;

VI. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Prof. Dr. Ivan Čukalović Prof. Dr. Enver Hasani