



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

Pristine, 22 January 2013
Ref. No.:RK352/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 35/12

Applicant

Agron Prenaj

**Constitutional Review of the Supreme Court Judgment PKL. 11/2012, dated 6
February 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 Agron Prenaj, residing in village of Novesellë- Municipality of Gjakova, represented by Mustafë Kastrati, a practicing lawyer from Peja.

Challenged decision

- 2 The challenged decision is the Judgment of the Supreme Court of Kosovo PKL. 11/2012, adopted on the 6th of February, 2012.

Subject matter

- 3 The Applicant has been convicted of abusing the right to vote pursuant to Article 178 (1) of the Criminal Code of Kosovo (CCK).

Legal Basis

- 4 The Referral is based on Article 113.7 of the Constitution and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceedings before the Constitutional Court

- 5 On the 2nd of April 2012, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: "the Court").
- 6 By the Decision of the President (No. GJR. 35/12 of the 11th of April 2012) Robert Carolan was appointed as Judge Rapporteur.
- 7 On the same day, by decision No. KSH. 35/12, the President appointed the Review Panel composed of Judges: Altay Suroy (Presiding), Gjyljeta Mushkolaj and Iliriana Islami.
- 8 On the 7th of June 2012, the Constitutional Court through a letter informed the Applicant's Lawyer that the Referral had been registered.
- 9 On 8th of June 2012, the Constitutional Court, through a letter, informed the Supreme Court that the Applicant had applied to take a review of the decision Pkl. 11/2012, of 6 February 2011 and enclosed a copy of the Referral.
- 10 On 2 July 2012, the President, by Decision GJR. 35/12 reappointed the new Review Panel composed of judges: Altay Suroy (presiding), Mr.Sc. Kadri Kryeziu, is appointed to replace Judge Gjyljeta Mushkolaj, since her terms of office as judge of the Constitutional Court had expired on 26 June 2012, and Ivan Čukalović, is appointed to replace Judge Iliriana Islami because her term of office on the Court had expired on 26 June 2012.
- 11 On 17 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

- 12 On 12.12.2010, the Applicant was tasked to be food supplier and registered Observer for the political entity, the Alliance for the Future of Kosovo (AAK) in Polling Centre no. 0210 C, in the polling station 04 D, in the Primary School "Shtjefën Kurti" in the village of "Novesellë e Epërme", the Municipality of Gjakova.
- 13 At about 13:00 he aided his mother to vote and about 15:00 he also voted .
- 14 After this, he left to get lunch in a neighboring town and returned between 17:30 and 18:00.
- 15 Whereupon, he entered the balloting room and is reported to have attempted to vote for a second time. He told observers and commissioners "I will vote and you cannot stop me" but was stopped by them. The applicant claimed this was a joke, which the Municipal Court rejected.
- 16 The chairperson of the polling station, MM, stated that in line with his duties, he notified him that he could only vote once to which the Applicant asserted that he was only an escort.
- 17 The possibility that the Applicant had a knife in his hand when advancing towards the balloting box was put to the court in the statement of P.Q., which the Applicant defended as in fact being a set of car keys.
- 18 The Municipal Court in Gjakova in its judgment P. no. 7/2011 of the 13th of April, 2011, found the Applicant guilty of abusing the right to vote under Article 178(1) of the CCK. His conviction entailed a fine of 250 Euros.
- 19 The District Public Prosecutor in Peja appealed this judgment on grounds that the punishment was too lenient. The District Court of Peja (AP. No. 52/11 of the 31st of December, 2011) approved the prosecutor's appeal that the social danger and the consequences of the criminal offence committed did not correspond to the punishment.
- 20 The District Court of Peja found that the Municipal Court had only considered the mitigating circumstances and not the aggravating ones, such as the fact that as an observer the Applicant should have had more responsibility to avoid the abuse of the vote, not less. In addition to the fine, the Applicant received a three month prison sentence.
- 21 The Applicant, represented by defense counsel, appealed to the Supreme Court, against the District Court Judgment AP. No. 52/11 of the 31 December 2012.
- 22 The defense counsel filed a request for the protection of the legality due to the proposed violations of the provisions of the CCK (Article 1 (3), Article 7 and Article 14), the CCPK (Article 404 (1.2), Article 157 (1) and Article 322(3)) and provisions of the Law on Elections (Article 51.1 and Article 84.2).
- 23 The State Prosecutor's submission, KMLP. 11. 9/2012 of 24.01.2012, proposed the request for the protection of legality be rejected as unfounded.

- 24 Concerning Articles 1 (3), 7 and 14 of the CCK, in conjunction with Article 404 (1.2) of the CCPK, the defense counsel claimed that the District Court did not prove the subjective element of premeditation of the act as they assert that his intention was to joke with those at the polling station, not to commit the criminal act, and especially that his act was not so severe as to fall under the criminal offense envisaged by Article 7.
- 25 The Supreme Court Judgment Pkl. No. 11/2012, in declaring the allegations unfounded, reasoned that the defense counsel did not understand these legal provisions and invoked a wrong legal basis, because paragraph 3 of Article 1 of the CCK concerns the preventing of analogy and the present case deals with a criminal offence, set forth pursuant to the principle of legality in a clear manner. Article 14 of the CCK concerns the casual link between the action and the consequences, in the present there was no doubt as to the correlation (Article 178 of the CCK dictates that the action is considered committed in the mere attempt to vote).
- 26 The defense counsel claimed the court violated Articles 157(1) and 322 (3) of the CCPK as they sentenced the accused based solely on the testimony of P.Q., an observer of the NGO BIRN (Balkan Investigation Reporting Network) and did not compel two other witnesses who ignored the court's invitation to testify. But the Applicant made no showing of what critical evidence was not received by the regular court so that his constitutional right to a fair trial was violated.
- 27 They also alleged that Article 51.1 of the Law on Election was violated as the complaint should have been addressed to the Election Complaint and Appeal Commission (ECAC) and the court did not provide this evidence. A similar violation of Article 84.2 is alleged as the Poll Book was not introduced as evidence and the immediate assistance of the Police was not requested.
- 28 The Supreme Court deemed that the CCK (Article 451) specifically determines the legal bases for the protection of legality and a violation of the Law on Elections is not one that qualifies.
- 29 The Supreme Court stressed that it is not a fact finding court and that the defense counsel's probes to readdress -for example- the witness availability and weight put in their statements was not (re)examinable by the court.
- 30 The Supreme Court reviewed the case file pursuant to Article 454 (1) in conjunction with Article 355 (1) of the CCPK and declared the request for the protection of legality to be unfounded.

Applicant's Allegations

- 31 The Applicant puts forward that in sentencing the accused on account of the alleged joke, his dignity was violated pursuant to Article 23 of the Constitution in conjunction with Article 31 (4) of same.
- 32 In addition, the Applicant contends that certain facts and situations were not clarified by the courts, such as whether keys or a knife were in fact in his hands, whether he in fact voted with his mother the first time and exactly what capacity he participated in, as a food supplier or an observer. As such, he argues that the conviction was made from mere presumptions, not evidence.

- 33 In filing the referral to this Court, the applicant wishes to achieve a fair and impartial trial.
- 34 The Applicant claims that he has been sentenced based solely on the testimony of the witness to the incident, P.Q., an observer of the NGO BIRN.

Preliminary assessment of admissibility of the Referral

- 35 Although the Applicant has exhausted all legal remedies in order to exercise his alleged right to a fair trial, as provided in Article 113.7 of the Constitution, he has not presented any evidence or relevant facts to support his conclusion that “Administrative or judicial authorities have made any violation of his rights guaranteed by the Constitution” (see Vanek against the Slovak Republic, the ECHR’s Decision on admissibility in case no. 53363 of 31 May 2005).
- 36 The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or court of fourth instance, in respect of the decisions taken by ordinary courts. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, Garcia Ruiz v. Spain (GC) no. 30544/96, para. 28 ECHR 1999-I).
- 37 The Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general viewed, in their entirety, have been conducted in such a way that the Applicant had a fair trial (see, Report of the European Commission on Human Rights in the case Edwards v. United Kingdom App. No 13071/87 adopted on 10 July 1991).
- 38 However, having reviewing the documents submitted by the Applicant, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, referral no. 53363/99, Vanek v. Slovak Republic, ECHR Decision of 31 May 2005).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 46 of the Law, and Rule 56 (2) of the Rules of Procedure, on 17 January 2013, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. 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;
- III. This Decision is effective immediately

Judge Rapporteur


Robert Carolan

President of the Constitutional Court


Prof. Dr. Enver Hasani

