



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

Pristina, 8 July 2013
Ref.No.:RK450/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI39/13

Applicant

Bardhyl Krasniqi

**Constitutional Review of the Decision of former District Court
in Prizren KA. no. 31/2012, dated 14 March 2012, and of the Decision
KA.no.31/2012, dated 20 March 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 and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Bardhyl Krasniqi, from the village of Dejnë, municipality of Rahovec.

Challenged Decision

2. The challenged court decision is the Decision of the former District Court in Prizren (KA. no. 31/2012), dated 14 March 2012, and the Decision (KA. No. 31/2012) dated 20 March 2012, which, according to the Applicant, were served on him on 13 April 2012.

Subject Matter

3. The subject matter of this Referral is the constitutional review of the Resolution of the former District Court in Prizren (KA. No. 31/2012) dated 14 March 2012 and the Resolution (KA. No. 31/2012) dated 20 March 2012. The Applicant alleges that these Decisions violated his right to a fair and impartial trial.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 47.1 of the Law on the Constitutional Court of Republic of Kosovo, No. 03/L-121 of 15 January 2009 (hereinafter: the "Law"), and Rule 28 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules").

Proceedings before the Court

5. On 14 March 2013, the Applicant submitted his Referral to the Constitutional Court.
6. On 25 March 2013, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues (member) and Prof. Dr. Enver Hasani (member).
7. On 3 April 2013, the Court notified the Applicant about the registration of the Referral and requested him to provide the necessary documents to complete the Referral.
8. On 12 April 2013, the Constitutional Court requested the Basic Court in Prizren to provide the complete case file of the Applicant, including the indictment of the District Public Prosecutor (PP.no.239/2011) dated 20 February 2002, and the decisions of all court instances.
9. On 23 April 2013, the Court received the document I.GJA.no.1/13-61, dated 18 April 2013, from the Basic Court in Prizren, which notified the Constitutional Court that the Applicant's case file (P.nr.61/12) had been transferred to the Basic Court in Gjakova, according to subject matter jurisdiction.
10. On 13 May 2013, the Basic Court in Gjakova, submitted the complete case file of the Applicant, in compliance with the Court's request.

11. On 19 June 2013, the Review Panel reviewed the report of the Judge Rapporteur, and recommended to the Court that the Referral be declared inadmissible.

Summary of facts

12. On 20 February 2012, the District Public Prosecutor of Prizren filed an indictment (PP.no.239/2011) against the Applicant and his brother, Mr. Halil Krasniqi, charging them with murder and assistance in the commission of murder, under article 146. in conjunction with article 25 of the Provisional Criminal Code of Kosovo (PCK).
13. On 14 March 2012, the former District Court of Prizren (KA. no.31/12) confirmed the indictment against the Applicant and Mr. Halil Krasniqi. The Applicant and Mr. Halil Krasniqi pleaded not-guilty to these criminal charges. In the conclusion part of the Resolution regarding the confirmation of the indictment the court stated:

“Since the judge for confirmation of indictment reached the conclusion that the circumstances do not exist for dismissing the indictment and terminating the criminal proceedings against the defendants for the criminal offences of which they are charged, as provided for by Article 316, paragraph 1-3 of the Provisional Criminal Procedure Code of Kosovo (PCPCK), and the indictment contains in itself sufficient evidence, which justifies the reasonable suspicion that the defendants have committed the criminal offences for which they are charged, therefore confirmed the same. Therefore, the court decided as per the enacting clause of this resolution in compliance with Article 316, paragraph 4 and Article 318, paragraph 1 item 1 and paragraph 2 of PCPCK.”

14. On 20 March 2012, the former District Court of Prizren rendered Decision KA. no.31/12, amending its previous Decision (KA. 31/12), dated 14 March 2012., in the introductory part, deleting the criminal offence of murder, provided by Article 146 of PCK and of assistance in the commission of the criminal offence of murder under Article 146 in conjunction with Article 25 of PCK, and replacing these with the criminal offence of co-perpetration of Aggravated Murder under Article 147 paragraph 1 item 4, in conjunction with Article 23 of the PCK. The court, justified this modification of the resolution as follows:

“By the decision of this court KA.no.31/2012, dated 14.03.2012, the indictment was confirmed against the accused Halil Krasniqi and Bardhyl Krasniqi [...] because in co-perpetration they have committed the criminal offence of aggravated murder as provided for by Article 147, paragraph 1, item 4, in conjunction with Article 23 of the PCK. The judge for confirmation of indictment concluded that during the preparation of the ruling an omission was made and that, in the introductory part, enacting clause and reasoning whereby instead of criminal offences of murder as provided for by Article 146 of PCK and assistance in commission of criminal offence of murder as provided for by Article 146 in conjunction with Article 25 of PCK, should stand only the criminal offence of commission in co-perpetration of aggravated murder as provided for by

Article 147, paragraph 1, item 4, in conjunction with Article 23 of the PCKK.”

15. On 20 April 2012, the defense counsel of the Applicant filed an appeal in the Supreme Court of the Republic of Kosovo (hereinafter: Supreme Court) against the Decision of the former District Court (P.no.61/12) dated 20 April 2012, regarding the extension of detention on remand/confirmation and amendment of the indictment against the Applicant and his brother Mr. Halil Krasniqi.
16. On 23 April 2012, the former District Court of Prizren, submitted to the Supreme Court the case file P. nr.61/12, with respect to the accused.
17. On 19 December 2012, the Supreme Court, by Decision P.no.300/2012, rejected as ungrounded the appeal of the defense counsel filed against the resolution of the former District Court of Prizren (P.no.61/2012) dated 20 April 2012.
18. On 19 December 2012, the former District Court in Prizren (Decision, P.no.61/2012) rendered a decision on extension of detention on remand, as it is stated in the Resolution, for 2 (two) more months until 21 February 2013.
19. On 14 February 2013, the State Prosecutor, respectively the Serious Crimes Department pursuant to Article 193, paragraph 1, of the Criminal Procedure Code of Kosovo (CPC) and Article 187, paragraph 1, sub-paragraphs 1.1, 1.2, item 1.2.1, 1.2.3, of the CPC, filed a request for extension of detention on remand against the Applicant and his brother Mr. Halil Krasniqi.
20. On 19 February 2013, the Basic Court in Gjakova, by Decision P.no. 61/12 PZ1, dated 19 April 2013, extended the detention on remand from 21 February 2013 until 21 April 2013 for the accused Halil Krasniqi and the Applicant.
21. On 19 April 2013, the Basic Court in Gjakova, by Decision P.no. 61/12 PZ1 dated 19 April 2013, extended detention on remand from 21 April 2013 until 21 June 2013 against the Applicant and the accused Halil Krasniqi.
22. It appears that the main hearing in the criminal case against the Applicant has not yet commenced.

Applicant's allegations

23. The Applicant alleges that the former District Court in Prizren, by Decision KA.nr.31/2012 dated 14 March 2012, and as amended on 20 March 2012, violated his constitutional rights, guaranteed by Article 31 [Right to Fair and Impartial Trial].
24. The Applicant alleges that the judicial authority, by the abovementioned Decisions, committed a violation of criminal law and violation of his fundamental rights, by accusing and keeping him unfairly in the detention on remand for the criminal offence of “aggravated murder in co-perpetration” under Article 147 paragraph 1 item 4 e of PCKK. He claims that the court is not impartial, because of family ties between the Prosecutor and the Forensic Doctor with the victim of the alleged murder.

Admissibility of the Referral

25. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and the Rules of Procedure.
26. In the present case, the Court refers to Article 113, paragraph 1 [*Jurisdiction and Authorized Parties*] which provides 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 Constitutional Court also provides:
- "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 refers to Article 48 of the Law on Court, 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. Furthermore, Rule 36 (1) (a) and (c) of the Rules of Procedure 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. From the case file, the Court notes that the Applicant challenges the decisions of the former District Court in Prizren, by which he alleges that his constitutional rights, guaranteed by Article 31 [Right to Fair and Impartial Trial] were violated. He further claims that the former District Court in Prizren, by Resolution KA. No. 31/12 dated 20 March 2012 committed violation of criminal law and his fundamental rights, by accusing and keeping him unfairly in detention on remand for the criminal offence of "aggravated murder in co-perpetration" under Article 147 paragraph 1 item 4 e of PCKK. He claims that the court is not impartial.

Regarding the pre-trial proceedings

31. The Constitutional Court notes that the Applicant does not show by any evidence, how and why the former District Court in Prizren violated his rights and fundamental freedoms guaranteed by the Constitution.
32. As regards to the allegation for violation of the criminal law by former District Court in Prizren, the Court considers that those allegations may be of the scope of legality. It is the jurisdiction of the regular courts to apply relevant provisions of the law, in compliance with the circumstances of the case, in the present case, with the weight of the charged criminal offence.
33. In this regard, the Court refers to 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.”*

34. The Constitutional Court would like to recall that it is not the task of the Constitutional Court to deal with errors of fact or the law (legality) allegedly committed by regular courts unless they may have infringed upon the rights and freedoms protected by the Constitution (constitutionality).
35. Therefore, the Court should not act as a court of fourth instance, when considering the decisions rendered by the regular 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, no. 30544/96, § 28, European Court on Human Rights [ECHR] 1999-1).
36. The Constitutional Court did not find that the pertinent proceedings of the former District Court were in any way unfair or arbitrary (see *mutatis mutandis*, Shub v. Lithuania, ECtHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).
37. Nevertheless, the Applicant does not explain why and how his rights were violated, he does not substantiate a *prima facie* allegation on constitutional grounds and did not provide evidence that show that his rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 of ECHR have been violated by former District Court in Prizren. The Applicant has not substantiated his claim that the prosecutor and the forensic doctor have family relationships with the victim of the crime of which he is accused, nor has the Applicant demonstrated how these alleged family relationships may have affected the judgment of the former District Court of Prizren.

Regarding the main hearing of the case

38. The Court observes that the challenged Decision of the former District Court in Prizren (KA. No. 31/2012) dated 20 March 2012 was served on the Applicant on 12 April 2012. The Constitutional Court received the Applicant's case file on 27 April 2013, on which occasion it realized that the Applicant's detention on

remand had been extended several times, initially by the former District Court in Prizren and later by the Basic Court in Gjakova (Decision, P.no. 61/12 PZ1 dated 19 April 2013), from 21 April 2013 until 21 June 2013.

39. After 13 May 2013, the Constitutional Court does not possess any information regarding the main trial of the case. Therefore, since the Applicant's case is still within the pre-trial phase of proceedings, and the Applicant will still have ample opportunity to present his claims of judicial bias within the main trial proceedings, from this point of view, the Court considers that the Referral is premature. As such, the question arises whether the Applicant has exhausted all available legal remedies.
40. In accordance with the principle of subsidiarity, the Court considers that the Applicant is obliged to exhaust all legal remedies provided by law, as stipulated by Article 113 (7) of Constitution and the other legal provisions, as mentioned above.
41. In fact, the purpose of the exhaustion rule is to allow to the regular 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; Kudla v. Poland [GC], § 152; Andrasik and Others v. Slovakia (dec.)).
42. Thus the principle of subsidiarity requires that the Applicant exhausts 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 use 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 to the alleged violation. (See, Resolution in Case No. Kl. 07/09, Deme KURBOGAJ and Besnik KURBOGAJ, Review of Supreme Court Judgment Pkl.nr. 61/07 of 24 November 2008, paragraph 18).
43. 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 rendered the decision must be afforded the opportunity to reconsider the challenged decision. That means that, every time 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.
44. Therefore, the Court finds that the Applicant has neither built, nor shown, a *prima facie* case, either on merits or on the admissibility of the Referral.
45. From the reasons above, the Court concludes that the Applicant's Referral with respect to the pre-trial proceedings of the confirmation of indictment, pursuant to Rule 36.1 item (c) of the Rules of Procedure, is considered as manifestly ill-founded.
46. In all, the Court concludes that the Applicant's Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Rule 36.1 (c) and Rule 56 (2) of the Rules, on 8 July 2013, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in accordance with Article 20.4 of the Law; and
- IV. This Decision is effective immediately.

Judge Rapporteur

Snezhana Botusharova

President of the Constitutional Court

Prof. Dr. Enver Hasani

