



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Pristine, 15 January 2013
Ref. No.: RK339/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI81/12

Applicants

Hazër Susuri and Baki Hoxha

**Constitutional Review of the Resolution of the Supreme Court of Kosovo
Pkl.no.88/2012 dated 18 June 2012**

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

Applicants

1. Applicants are Mr. Hazër Susuri and Mr. Baki Hoxha with residence in Prizren.

Challenged decision

2. Resolution of the Supreme Court of Kosovo Pkl.no.88/2012 dated 18 June 2012

Legal basis

3. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 20, 22.7 and 22.8 of the Law Nr.03/L-121 on Constitutional Court of the Republic of Kosovo, dated 15 January 2009, (hereinafter: the Law), and Rule 56.2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Subject matter

4. Subject matter has to do with the right of the Applicants as subsidiary plaintiffs in using extraordinary legal remedies, respectively the request for protection of legality.

Proceedings before the Court

5. On 5 September 2012, the Applicants submitted the Referral in the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 5 October 2012, the President, by Decision No. GJR.KI-81/12, appointed Judge Arta Rama-Hajrizi as Judge Rapporteur. On the same day, the President, by Decision No.KSH.KI-81/12, appointed the Review Panel composed of judges Almiro Rodrigues (Presiding), Mr.sc. Kadri Kryeziu and Prof. Dr. Enver Hasani.
7. On 1 November 2012, the Applicants were notified about the registration of the Referral. On the same day, the Referral was communicated to the Municipal Court in Gjilan and to the Supreme Court of the Republic of Kosovo.
8. On 6 December 2012, 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 facts as submitted by the Applicants

9. On 29 November 2011, Municipal Court in Gjilan by the Resolution Ka.no.111/2010 in the preliminary procedure rejected the indictment of the subsidiary plaintiffs (Applicants), by which is alleged that the accused X (now the judge of the Supreme Court), has committed the criminal offence of issuing unlawful judicial decisions, by violating Article 346 of Criminal Code of Kosovo, because it has terminated the criminal procedure, with a justification that there is no sufficient evidence to support the grounded suspicion for committing criminal offence by the Accused.
10. On 19 January 2012, the Criminal Panel of the Municipal Court in Gjilan rejected as ungrounded the appeal of the Applicants and determined that there was no sufficient evidence, which support the grounded suspicion that the defendant has committed criminal offence, unlawful issuance of judicial decisions from Article 346 of PCCK, and that the judge for confirmation of preliminary procedure has rightly rejected the indictment of subsidiary plaintiffs (Applicants).
11. On 18 June 2012, the Supreme Court of Kosovo by the Resolution Pkl.no.88/2010, rejected as inadmissible the request for protection of legality filed by the Applicants and *inter alia* determined:

“...the request for protection of lawfulness, was presented by an UNAUTHORIZED PERSON, i.e. the subsidiary plaintiffs who enjoy the same rights to which enjoys the public prosecutor, except those which belong Prosecutor as an AUTHORITY OF THE STATE (Article 65 of the CPCK), therefore, and the right to submit the request for protection of lawfulness exclusively belongs to the Public Prosecutor of Kosovo and not the subsidiary plaintiff, and due to this, the request as such is prohibited and rejected, was filed by unauthorized person”.

“To the request for protection of legality of the defendant the Public Prosecutor of Kosovo has responded, with the submission KMLP.II.nr.91/12 dated 12.6.2012, proposing that the request for protection of legality to be dismissed as inadmissible as it has been submitted by an unauthorized person.”

Applicant’s allegations

12. The Applicants request from the Court:

a) To declare their Referral as admissible;

b) To declare invalid and unconstitutional the Resolution of Supreme Court Pkl.No.88/2010 dated 18 June 2012, because it is in contradiction with Article 32 [Right to Legal Remedies] of the Constitution, denying the Applicants the right to legal remedies, respectively the right of using extraordinary legal remedies, request for protection of legality against the Resolution of the Municipal Court in Gjilan KA.no.111/2010 dated 29 November 2011, as well as it is a violation of the Article 54 [Judicial Protection of Rights] of the Constitution, since the Applicants were deprived the right to use extraordinary legal remedies that the Applicants enjoy in capacity of the subsidiary plaintiffs in cases when the Public Prosecutor does not initiate criminal prosecution;

c) To adopt the request for protection of legality as legal and constitutional submitted by the Applicants against the Resolution of the Municipal Court in Gjilan KA.no.111/2010 dated 29 November 2011;

d) The Applicant also noted:

“...pursuant to the Rule 63 (5) of the Rules of Procedure, Supreme Court of Kosovo in Prishtina is obliged to submit information to the Constitutional Court on the measures taken for execution of the Judgment of the Constitutional Court”.

13. Finally, the Applicants allege that pursuant to Article 65.1 of the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK), as subsidiary plaintiffs, enjoy the same rights as the Public Prosecutor to file the request for protection of legality. The Applicants also allege that Article 452.1 of PCPCK determine the Public Prosecutor as an entity for filing the request of protection of legality, but in this case the functions of the Public Prosecutor were transferred *ex lege* to the Applicants, because the Public Prosecutor gave up the criminal prosecution and that also during the procedure of the subsidiary claim, did not initiate criminal prosecution.

Relevant legal provisions

14. Article 65 of PCPCK provides:

“(1) The subsidiary prosecutor shall have the same rights as the public prosecutor except those belonging to the public prosecutor as a public official.”

“(2) In proceedings conducted on the petition of a subsidiary prosecutor, up until the end of the main trial, the public prosecutor has the right to undertake prosecution and to support the charge.”

15. Article 443 paragraph of PCPCK provides:

“(1) The reopening of criminal proceedings may be requested by the parties and defence counsel. After the death of the convicted person, the reopening may be requested by the public prosecutor or by the spouse, the extramarital spouse, a blood relation in a direct line to the first degree, an adoptive parent, an adopted child, a brother, a sister or a foster parent of the convicted person.”

16. Article 452 paragraph 1 of PCPCK provides:

(1) A request for protection of legality may be filed by the Public Prosecutor for Kosovo, the defendant or his or her defence counsel. Upon the death of the defendant, such request may be filed on behalf of the defendant by the persons listed in the final sentence of Article 443, paragraph 1 of the present Code.”

Preliminary assessment of admissibility of the Referral

17. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution, the Law and the Rules of Procedure.

18. Article 113.7 of the Constitution states:

“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.”

19. In this case, the Court notes that the Applicants filed appeals and request for protection of legality at two levels of regular judiciary, respectively in the Municipal Court in Gjilan and in the Criminal Panel of the latter as well as in the Supreme Court of Kosovo, and consequently all legal remedies pursuant to Article 113.7 of the Constitution have been exhausted.
20. Based on the case file of the Referral, the Court notes that the conclusions of the Supreme Court are clear and that there is logical connection between legal basis and given reasoning, which shows that the decision of the Supreme Court is not characterized by unfairness or arbitrariness.
21. In the concrete case, the Court notes that the Supreme Court has taken into account, among the other, the proposal of the Public Prosecutor that the request for protection of legality, filed by the Applicants in capacity of subsidiary plaintiffs, should be rejected as inadmissible, because it was filed by unauthorized persons.
22. The Court reminds the Applicants that respective provisions of PCPCK, in fact allows discretion to the Public Prosecutor and the Supreme Court to conclude as they have concluded in the concrete case.
23. The Court also reminds the Applicants that it has constitutional obligation to respect the principle of separation of powers, independence of the bodies of the state power, guaranteed by the Constitution and the control and balance between them, while acting differently would be in contradiction with the abovementioned principle and consequently unconstitutional.

24. In a similar way, the Court concluded on 12 December 2011 in the Resolution on Inadmissibility in the case KI-92/11 Applicants Muhamet Bucaliu – Constitutional Review of Notification of State Prosecutor KMLC. No. 37/11, dated 2 June 2011.
25. In this respect, the Applicants have not substantiated their allegations, by explaining in what manner and why was committed a violation, or by providing evidence which would point out that any of their rights guaranteed by Constitution was violated.
26. Constitutional Court is not a court of finding facts and in this case wants to note that finding of fair and complete factual situation, is full jurisdiction of regular courts and that its role is only to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, therefore cannot act as a “fourth instance court”,(see *mutatis mutandis*, i.a., *Akdivar against Turkey*, 16 September 1996, R. J. D, 1996-IV, para. 65. Also see the Resolution on Inadmissibility in the case No. KI-86/11 - Applicant Milaim Berisha –Referral for Constitutional Review of the Judgment of the Supreme Court of Kosovo, Rev. no. 20/09, dated 1.3.2011 rendered by Court 5 April 2012).
27. Furthermore, the Referral does not indicate that the Supreme Court acted in arbitrary or unfair manner. It is not the task of the Constitutional Court to replace its assessment of facts with those of regular courts, as a general rule, it is a task of these courts to assess the evidence before them. The task of the Constitutional Court is to verify whether the proceedings in regular courts were fair, in their entirety, including the manner how that evidence was taken, (see *Judgment ECtHR App. No 13071/87 Edwards against United Kingdom*, paragraph 3, dated 10 July 1991).
28. The fact that the Applicants do not agree with the outcome of the case cannot serve them as a right to rise an arguable claim for violation of Articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution (see *mutatis mutandis Judgment ECtHR Appl. no. 5503/02, Meztur Tiszazugi Tarsulat against Hungary*, Judgment dated 26 July 2005).
29. In these circumstances, the Applicants have not substantiated by evidence their allegations and violations of Article 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution, because the presented facts do not indicate in any manner that the regular court of three instances denied the rights, guaranteed by the Constitution.
30. Consequently, the Referral is manifestly ill-founded and should be rejected as inadmissible pursuant to the Rule 36 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, Pursuant to Article 113.7 of the Constitution and Article 20 of the Law and in compliance with the Rule 36 (1) c of the Rules of Procedure, on 7 December 2012, 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; and
- III. This Decision is effective immediately.

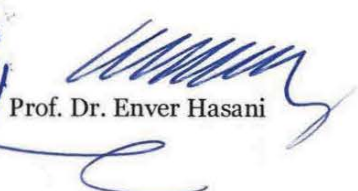
Judge Rapporteur



Arta Rama-Hajrizi



President of the Constitutional Court



Prof. Dr. Enver Hasani