



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

Pristine, 22 January 2013
Ref.No.:RK351/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI85/12 and KI86/12

Adriatik Gashi and Burim Miftari

**Constitutional Review of Judgment of Supreme Court in Pkl.no. 45/12 dated
18.06. 2012, together with request for application of interim measure**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Robert Carolan Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama – Hajrizi, Judge

Applicants

1. Applicants are Mr. Adriatik Gashi and Mr. Burim Miftari from Gjakova, currently serving the sentence in Dubrava prison in Istog, who by power of attorney are represented by Mr. Teki Bokshi, lawyer from Gjakova (hereinafter: the Applicant).

Challenged decision

2. The challenged decision of public authority by which are alleged violations of rights guaranteed by the Constitution of Kosovo is the Judgment of the Supreme Court in Prishtina Pkl.no 45/12 dated 18. 06. 2012, by which was rejected the Applicant's request for protection of legality, which according to personal claim was served on Applicants on 18 September 2012.

Subject matter

3. The subject matter submitted to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) on 24 September 2012 is the constitutional review of the **Judgment of Supreme Court in Prishtina Pkl. no. 45/12 dated 18.06. 2012**, by which the Supreme Court rejected as ungrounded the request of the Applicants Burim Miftari and Adriatik Gashi for protection of legality filed against the judgment of Municipal Court in Gjakova P.no. 258/2002 dated 27.10.2011, and the judgment of the District Court in Peja Ap.no. 9/2012 dated 07.02.2012.

Legal basis

4. Article 113.7 of the Constitution, Articles 22 and 27 of the Law Nr.03/L-121 on Constitutional Court of the Republic of Kosovo, dated 15 January 2009, and the Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Proceedings before the Court

5. On 24 September 2012, the Constitutional Court received by mail the Referral with the request for imposition of interim measure, filed by the lawyer Teki Bokshi, who represents the Applicant Mr. Adriatik Gashi from Gjakova and this Referral was registered in the Court with no. KI 85/12.
6. On the same date, the Constitutional Court received the Referral with the request for imposition of interim measure, filed by the lawyer Teki Bokshi, who represents the Applicant Mr. Burim Miftari from Gjakova and this Referral was registered in the Court with no. KI 86/12.
7. On 13 November 2012, the Constitutional Court sent a letter to the Applicants' representative, by which he requested additional documentation necessary for further processing of the requests.
8. On 05 December 2012, the Court received by mail the additional documentation from the representative of the Applicant when were attached to the Referral, the Judgment of Municipal Court in Gjakova P.nr. 258/2002 dated, 27.10.2011, Appeal of co-

defendant Hajrullah Guta, against Judgment of Municipal Court in Gjakova and the Judgment of District Court in Peja Ap.no. 9/2012 dated 7.02.2012.

9. On 29 November 2012, the President of the Court issued an order urdh. Ki 85/12 by which ordered the joining of referrals Ki 85/12 and Ki86/12 by appointing the judge Kadri Kryeziu as Judge Rapporteur, while by decision, appointed the Review Panel Composed of judges: Robert Carolan, Altay Suroy and Prof.dr. Enver Hasani.
10. On 21 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 facts

11. On 27 October 2011, the Municipal Court in Gjakova, deciding on the criminal matter against the accused Adriatik Gashi, H.G., Burim Miftari and Sh.H., all from Gjakova, because as co-perpetrators they have committed criminal offence of Aggravated Theft, from Article 253 par. 1 item 1 in conjunction with Article 23 of PCCK and for criminal offences, of the attempted aggravated theft, from Article 253 par. 1 item 1 in conjunction with articles 20-23 of PCCK, according to Indictment PP. no. 211/2002 dated 27.06.2002 rendered Judgment P.no. 258/2002, by which found guilty the accused and sentenced them to following imprisonments:

"The accused Adriatik Gashi, to an aggregate punishment of imprisonment for a period of sixteen (16) months, a period which shall take account the time spent in detention from 12.04.2002 and until 09.05.2002.

The accused Burim Miftari, to an aggregate punishment of imprisonment for a period of ten (10) months, a period which shall take account the time spent in detention from 12.04.2002 and until 09.05.2002.

The accused Hajrullah Guta, to an aggregate punishment of imprisonment for a period of eight (8) months, on condition that he will not commit a criminal offence within a period of two (2) years.

The accused Sherif Hoti, to an aggregate punishment of imprisonment for a period of two (2) months, on condition that within a period of one (1) year, he does not commit any other criminal offence."

12. Against this Judgment, the lawyer Teki Bokshi, in capacity of the defence counsel of the accused Mr. H.G, ex-officio filed appeal due to serious violations of the provisions of criminal procedure, erroneous and incomplete determination of factual situation, erroneous application of the criminal law, the decision on criminal sanction, while the accused, now the convict, Mr. Adriatik Gashi and Mr. Burim Miftari have personally filed appeal.
13. On 7 February 2012, the District Court in Peja, deciding upon these appeals, rendered the Judgment Ap.no 9/12, by which rejected the appeal Mr. H.G. as ungrounded, while the appeals of Mr. Adriatik Gashi and Mr. Burim Miftari rejected as out of time.
14. In the reasoning of the decision, the District Court in Peja stated that the Municipal Court in Gjakova in case of Mr. H.G., has determined the factual situation in correct and complete manner and that administration of evidence, including the pictures of the crime scene, where the criminal offences were committed, partial **admission of guilt** of the accused, the minutes of investigation etc. were correctly determined, while the

punitive measures is proportional to the committed criminal offences. The Municipal Court took into account all mitigating circumstances for the accused, especially for the accused Mr. H.G.

15. The District Court had also held that *"The case files show that the accused Adriatik Gashi has been delivered the first instance judgment personally, since from the delivery slip, it may be viewed that he signed personally the delivery on 27.12.2011, while the appeal was only filed on 23.01.2012, which means 12 days after the expiry of legal deadline, while the accused Burim Miftari received the judgment on 23.12.2011, while his appeal was filed on 23.01.2012, also 16 days after the expiry of legal deadline,"* therefore rejected it as out of time.
16. Against this judgment of the convict, Mr. Adriatik Gashi and Mr. Burim Miftari have submitted the request for protection of legality, alleging that in the criminal offences for which they have been convicted, there was a relative and absolute statute of limitation, which in these circumstances makes illegal the criminal prosecution and the pronounced sentence against them.
17. On 18.06.2012, the Supreme Court of Kosovo rendered Judgment Pkl no/45/2012 by which *" Are rejected as unfounded the requests of the convict Adriatik Gashi and Burim Miftari for the protection of the lawfulness, presented against the judgment of the Municipality Court in Gjakovë P.nr 258/2002 dated 27.10.2011, and Judgment of the District Court in Peje Ap.nr 9/2012 dated 07.02.2012."*
18. The Supreme Court reasoned its judgment by complete and correct determination of factual situation by the court of lower instance, while in regard to the relative and absolute statute of limitation, the court held that this allegation of the appellant does not stand due to the fact that the flow of time limits has been interrupted several times by the procedural actions of the court and that *"while for none of the criminal offences the double prescribed period of time by law was not lapsed."*

Applicant's allegations for constitutional violations

19. The Applicant alleges that by the Judgment were violated: Article 21, par. 2., which states that *" The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution "*, Article 31 - [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] Article 53 [Interpretation of Human Rights Provisions], Article 54 [Judicial Protection of Rights]
20. The Applicant also alleges that the appeal courts of the case according to the principle *beneficium cohaesionis (benefit of cohesion)*, should have treated the appeals of Mr. Burim Miftari and Mr. Adriatik Gashi as on time, since they were sentenced by the same judgment and as co-perpetrators of the criminal offences with the convict Mr. H.G., the defence of whom *ex-officio* filed appeal within legal time limit and it was reviewed according to merits.
21. Applicant alleges that the courts of this trial should have applied Article 419 of PCCCK, which provides that *"If upon an appeal the court of second instance finds that the reasons which governed its decision in favour of the accused, and which are not of a purely personal nature, are also to the advantage of a co-accused who has not filed an appeal or has not filed an appeal along the same lines, the court shall proceed ex officio as if such appeal was also filed by the co-accused."*

22. The Applicant further alleges that the Constitutional Court should impose interim measure, ordering the release of the Applicant for further serving of sentence, since, according to him, by this the irreparable damage would be avoided.

Preliminary assessment of admissibility of the Referral and of the request for interim measure

23. 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.

24. Regarding this is referred to 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."

25. The Court also takes into account the Rule 36 of the Rule of Procedures of the Constitutional Court where is stipulated:

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

26. Referring to the Referral of the Applicant and to alleged violations of the constitutional rights, the Constitutional Court states that: the Constitutional Court is not the fact-finding court, and on this occasion it wants to emphasize that the correct and complete determination of factual situation is a full jurisdiction of the regular courts, such as in particular case is the role of the Supreme Court, by rejecting the request for protection of legality of the convicts Mr. Adriatik Gashi and Mr. Burim Miftari, and that its role (the role of the Constitutional Court) is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and, therefore, not act as a "fourth instance court" (see, *mutatis mutandis*, i.a., *Akdivar v. Turkey*, 16 September 1996, R. J. D. 1996-IV, para. 65).

27. Taking into account the above, according to general rule, the Court will not oppose the findings and conclusions that derive from regular court instances such as the implementation of the specific law and of the internal law, assessment of evidence in the process, the fairness of result in a civil dispute or the guilt or not of an accused in a criminal matter.

28. In extraordinary cases, the Court may put into question these findings and conclusions, if they are tainted by a flagrant and evident arbitrariness, in contradiction with justice and fair trial, and which cause violations of the Constitution or the European Convention for Human Rights (hereinafter: ECHR) (*Syssoyeva and others against Lithuania* (de-registration) [DHM], § 89).

29. In this regard, the Constitutional Court notes that whether the courts which have decided regarding the appeals of Mr. Miftari and Mr. Gashi should have applied Article 419 of PCPCK or not, is the matter of the application of the legality and determination of facts regarding the case they have reviewed and these procedural actions have not caused consequences of violations of the rights, guaranteed by the Constitution, which are alleged by the Applicants.

30. If Article 419 of PCPCK, by basing on the legal principle *beneficium cohaesionis* (benefit of cohesion), should have been applied automatically or according to the court assessment, is the matter of the correct application of law and this is the competence of regular courts, furthermore when the law has foreseen that it is the court that: "*finds that the reasons which governed its decision in favour of the accused, and which are not of a purely personal nature, are also to the advantage of a co-accused...*" and in the specific case the District Court, evaluating among the other, mitigating circumstances for the convicts in the case of Mr. H.G. stated that these **circumstances have particularly** been applied (because he was blind and were too personal, so they would not be applied on other convicts and probably would not be to the advantage of the co-accused).
31. Constitutional Court also stresses that it is not the regular court that made impossible "access to justice" and/or it made "denial of legal remedy" to applicants, but it is the unjustifiable delay of the parties in exercising the guaranteed right to legal remedy (appeal within the foreseen deadline) what caused the consequences and in this regard the Constitutional Court does not find that the court in entirety was arbitrary and that at the end would result in violation of the human rights, as laid down in the Constitution or ECHR.

Regarding the interim measure

32. The Constitution of Kosovo is referred to the issue of interim measure in Article 116 [Legal Effect of Decisions] where in item 2 is stipulated: "*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.*"
33. A legal definition on interim measures has also the Law on Constitutional Court (No. 2008/03-L-121), which in Article 27 item 1 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.*"
34. From the constitutional and legal definition of the "legal institution" of interim measure, it is concluded that for its application is necessary the fulfillment of two basic criteria a) possible irreparable damage that would be caused to the Applicant, if the Court does not apply interim measure and b) in case that the application of interim measure would protect public interest.
35. The representative of the Applicant, apart from stating that by interim measure would be avoided the irreparable damage for the Applicants; he did not substantiate by any fact this referral, reasoning the necessity of the imposition of this measure. He did not explain why the damage would be irreparable and why by non-application of the interim measure would be violated public interest.
36. Under these circumstances, the Applicant did not "sufficiently substantiate his allegation" and it cannot be concluded that the referral was grounded, therefore the Court should reject the request for interim measure. Pursuant to Rule 36 paragraph 2, item c and d, the Court finds that it should reject the Referral in entirety as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 27 and 46 of the Law, and Rules 36, 55 and 56 (2) of the Rules of Procedure, on 21 January 2013, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. TO REJECT the request for interim measure;
- III. 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;
- IV. This Decision is effective immediately

Judge Rapporteur

Kadri Kryeziu



President of the Constitutional Court

Prof. Dr. Enver Hasani