



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, 16 December 2013
Ref. No.: RK520/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI88/13

Applicant

Nazmi Mustafi

**Constitutional review of the Decision of the Court of Appeal of Kosovo
K.P./K.V. No-186/2013, of 01 June 2013**

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. Nazmi Mustafi from Prizren.

Challenged decision

2. The Applicant challenges the Decision K.P./K.V. no. 186/2013 of the Court of Appeal of Kosovo, dated of 01 June 2013, rejecting as ungrounded his appeal.

Subject matter

3. The subject matter is the review of constitutionality of the challenged Decision on replacing bail with detention on remand, which allegedly violated the Applicant's right to liberty and security, as guaranteed by Article 29 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution) and Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the European Convention).

Legal basis

4. The Referral is based on Articles 113 (7) of the Constitution, on Articles 22 and 47 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo dated 15 January 2009 (hereinafter, the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 19 June 2013, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
6. On 24 June 2003, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of judges Robert Carolan (Presiding), Altay Suroy and Enver Hasani.
7. On 22 October 2013, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

8. On 2 April 2012, the Applicant was arrested and ordered his detention on remand, which has been reviewed and extended for different times.
9. On 3 December 2012, the main hearing before the District Court in Peja started.
10. On 14 February 2013, conditional release of the Applicant was allowed under the condition of bail and delivery of his travel documents.
11. On 23 May 2013, after the Applicant having been sentenced with the penalty of imprisonment, the District Court in Peja (P.no.346/12) imposed the detention on remand against the Applicant until the Judgment becomes final.

12. The District Court reasoned its decision as follows:

(...) the defendant Nazmi Mustafi is now in a completely different situation. He is punished for the serious criminal offences and he has been imposed with a unique punishment of 5 years imprisonment. He should also pay a hefty fine which could be transformed in imprisonment time if not paid. He is also forbidden to hold public office for a period of 3 years after his release. In the end being that he is punished his employment at the SPRK will now be terminated. The panel considers that all these circumstances combined together give us an image of the defendant now stripped and this on the other hand presents substantial danger of flight.

(...)

The panel must also prove whether alternative measures would not be sufficient to obtain the presence of the defendant in Kosovo until the moment the Judgment becomes final. The panel considers that the new position of the defendant has now changed dramatically thus any other measure but detention on remand would not be appropriate because such measures would provide the opportunity of flight and would be insufficient to obtain the presence of the defendant in Kosovo in order to submit an appeal and eliminate the abovementioned dangers.

13. The Applicant filed an appeal against the Judgment, mainly because “*the decision that imposed the detention on remand against Nazmi MUSTAFIT contains logical inconsistencies and contradictions in its reasoning, and that there are no conditions that show there is danger of flight, on the contrary, there are specific circumstances that oppose that risk and that the previous Ruling on bail is still in force*”.
14. On 1 June 2013, the Court of Appeal of Kosovo (K.P./K.V. no. 186/2013) rejected as ungrounded the Applicant’s appeal.

Applicant’s allegations

15. The Applicant claims that the Decision of the Court of Appeal of Kosovo (K.P./K.V. no. 186/2013) of 01 June 2013, resulted in three violations:

*“Violation of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms,
Violation of the Constitution of the Republic of Kosovo,
Violation of provisions of Articles 274, 275 paragraph 1, Articles 276 and 277 (particularly important violation of paragraph 4), in conjunction with Article 393, paragraph 1, Article 281, paragraph 1 and 2, subparagraph 1, items (i), (ii), (iii), of the Criminal Procedure Code of Kosovo”.*

16. The Applicant specifically argues that

“The Rulings of the Basic Court in Peja and the Appeal Court of Kosovo are legally not grounded without the legal reasoning on the enacting clause, they are compiled based on assumptions, copy of one another, politically motivated, discriminatory, motivated to protect the criminals, with millions

of Euros abused, aiming to prevent the disclosure of truth, of those that I have investigated and prosecuted, and I am a victim of dirty work and failure of justice in Kosovo”.

Assessment of admissibility of the Referral

17. The Applicant claims mainly that Article 5 (Right to liberty and security) of the ECHR and a number of Articles of the Criminal Procedure Code have been violated.

18. First of all, the Court examines whether the Applicant has fulfilled the Referral admissibility requirements which are laid down in the Constitution and further specified in the Law on the Constitutional Court and the Rules of Procedure.

19. In that respect, Article 113 of the Constitution establishes:

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.

20. In addition, Article 49 of the Law 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.

21. In the instant case, the Court notes that the Applicant has sought recourse to protect his rights before the Court of Appeal of Kosovo. The Court also notes that the Judgment of the Court of Appeal is dated 23 May 2013 and the Applicant filed his Referral with the Court on 19 June 2013.

22. Thus, the Court considers that the Applicant is an authorized party, has exhausted all legal remedies provided by law and submitted the Referral within the four months time limit.

23. However, the Court also must take into account Article 48 of the Law which provides:

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.

24. Furthermore, Rule 36 of the Rules of Procedure foresees:

(1) The Court may review referrals only if: (c) The referral is not manifestly ill- founded.

(2) The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

[...], or

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

[...], or

(d) the Applicant does not sufficiently substantiate his claim.

25. The Applicant alleges in general that the decision of the Appeal Court is *legally not grounded (...) compiled based on assumptions, (...), politically motivated (...)*. In fact, the Applicant does not submit an argument on the constitutionality grounds; he only disagrees with the decision of the Appeal Court and refers to a “Violation of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms” and a “Violation of the Constitution of the Republic of Kosovo”.
26. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
27. The Court notes that Court of Appeal rejected as ungrounded the Applicant’s appeal, with the reasoning that follows.

“The court agrees with the finding of the first instance court that the only relevant circumstance for the determination of restrictive measures against the defendant is the danger of flight, whereas the other conditions pursuant to Article 281, paragraph 1, sub-paragraph 2, items ii) and iii) of the CPCCK (reasons to believe that the defendant will obstruct the progress of the criminal proceedings and the risk of repeating the criminal offense) do not further exist since the Prosecutor has finished presenting the evidences.”

“The first instance court correctly gave the main weight to the change of circumstances caused by the conviction of all defendants and expected severe punishments if the Judgment becomes final. With this, the previously confirmed risk has increased considerably.”

“Regarding Nazmi MUSTAFI [the Applicant], in particular his access to sufficient financial resources and his contacts abroad are main factors that present danger of flight. His arguments that he should take care of his sick family members and that he is the only provider for the family were not convincing since in case the imprisonment punishment against him becomes final, he would be separated from his family while serving the sentence. In this situation he would no longer be able to provide for his family either.”

“The fact that he has responded to all the invitations and has participated in all hearing sessions while he was free on bail was taken into consideration to his benefit by the first instance court. However, with the last conviction a new situation has been created that leads to the conclusion that the

motivation of the defendant to escape from justice cannot be sufficiently controlled by bail alone.”

“The allegation that the ruling on bail is still in force is not grounded. It is clear that the new ruling after rendering the Judgment pursuant to Article 393, paragraph 3 in conjunction with Article 281, paragraph 1 of the Provisional Criminal Procedure Code of Kosovo (PCPCK), exceeds and substitutes the previous Ruling on bail.”

(...)

“Considering the danger of flight, the court sees no alternative measure or any combination that would be sufficient to eliminate the danger.”

28. The Court notes that the Court of Appeal “gave the main weight to the change of circumstances caused by the conviction” of the Applicant, considered that supervening circumstance leads to “the conclusion that the motivation of the defendant to escape from justice cannot be sufficiently controlled by bail alone” and that the decision on detention “exceeds and substitutes the previous Ruling on bail”.
29. The Court considers that the justification provided by the Decision of the Court of Appeal, in answering to the allegations made by the Applicant, is clear and well reasoned. In fact, the Court of Appeal fully answered the allegation of the Applicant on that the *imposed detention on remand (...) contains logical inconsistencies and contradictions in its reasoning*, and on that there is no danger of flight.
30. The Court further considers that the Applicant has not substantiated and proved that his supervening conviction does not constitute a new circumstance with relevant weight to change the factual situation under which bail alone is not enough to prevent the risk of flight.
31. Thus, the allegation that the Judgment of the Court of Appeal has infringed his rights and freedoms protected by the Constitution and Article 5 of the ECHR is ungrounded. (See *Vanek v. Slovak Republic*, ECtHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).
32. The Court reminds that the Constitutional Court is not a court of appeal, when considering decisions rendered by regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, *García Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court on Human Rights [ECtHR] 1999-I).
33. Therefore, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness. (See *mutatis mutandis*, *Shub v. Lithuania*, ECtHR Decision as to the Admissibility of Application no_17064/06 of 30 June 2009).
34. In sum, the Referral is manifestly ill-founded and as such it is inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (7) of the Constitution, Article 48 of the Law and Rule 36 (1) and (2) b) and d) of the Rules of Procedure, at the session held on 22 October 2013, by majority

DECIDED

- I. TO REJECT the Referral as Inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Almiro Rodrigues



President of the Constitutional Court



Prof. Dr. Enver Hasani