



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

Pristina, 3 March 2011
Ref. No.: RK 84/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 55/10

Applicant

Hamide Osaj

**Constitutional Review of the Judgment of the Supreme Court of Kosovo,
Pkl.no. 43/2010, dated 4 June 2010**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mrs. Hamide Osaj, residing in Klina, represented by Gafurr Elshani, a practicing lawyer in Pristina.

Challenged court decision

2. The decision challenged by the Applicant is the Judgment of the Supreme Court of Kosovo (hereinafter: the "Supreme Court"), Pkl.no.43/2010, which was served upon the Applicant on 11 June 2010.

Subject matter

3. The Applicant alleges a violation of Article 6, Equality of Arms, of the European Convention on Human Rights and Additional Protocols (hereinafter: the "ECHR") and Articles 24 [Equality before the law], 31 [Right to fair and impartial trial] and 32 [Right to legal remedies] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

4. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Section 54(b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 1 July 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").
6. On 25 August 2010, the Referral was communicated to the Supreme Court.
7. On 26 October 2010, a request for additional documents and clarification was submitted to the Applicant which replied on 22 October 2010.
8. On 4 November 2010, a request for additional documents was submitted to the District Court of Pristina, which, so far, has not submitted them.
9. On 13 December 2010, the Review Panel, consisting of Judge Snezhana Botusharova (Presiding) and President Enver Hasani, and Judge Iliriana Islami, considered the Report of the Judge Rapporteur Robert Carolan and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

10. On 22 December 2008, the Public Prosecutor of the District submitted to the District Court of Pristina, which was received by them on 29 September 2008, an indictment against amongst other the Applicant for committing the criminal act of Article 221 [Unlawful Exercise of Medical Activity] of Provisional Criminal Code of Kosovo (hereinafter: the "PCCK").
11. On 25 March 2010, the District Court of Pristina issued Decision KA.no. 767/08, where it did not confirm the indictment against the Applicant because the criminal offence under Article 221.1 of PCCK is punishable with fine or up to one year of imprisonment. Hence, according to Article 461 Provisional Criminal Procedure Code of Kosovo (hereinafter: the "PCPCK") provides that a summary procedure applies for criminal offences for which the principal punishment is a fine or imprisonment of up to three years. Further, according to Article 462.4 of PCPCK there are no proceedings on the confirmation of the indictment in summary proceedings.

12. The Applicant filed a complaint to the District Court of Pristina on 28 April 2010 against the decision KA.no.767/2008 on the grounds of violation of the law, Article 125 and Article 127.1 of PCPCK by not summoning the Applicant. The confirmation of the indictment was held on 2 March 2010, while the Applicant received the summon on 23 April 2010. According to the Applicant, the summon had been received by the neighbor of the Applicant. However, upon the request of the Court to submit evidence in this respect, the Applicant cannot substantiate this fact.
13. The District Court of Pristina rejected the complaint of the Applicant as inadmissible with the reasoning that "the indictment against the Applicant is not confirmed for the criminal offence of unlawful exercise of medical activity as provided for in Article 221.1 PCCK, since the present criminal offence provides for the imposition of fine or punishment of up to three years imprisonment and this offence deals with the summary procedure" (Decision Ka.no. 767/2008 of 13 May 2010).
14. The Applicant requested for protection of legality to the Supreme Court on the grounds of essential violation of the criminal procedure law and erroneous application of the substantive law.
15. The Supreme Court rejected the request for protection of legality as inadmissible since the request does not concern a final decision nor a final trial which preceded such a decision (Decision PkL.no. 43/2010 of 4 June 2010).

Applicant's allegations

16. The Applicant alleges that the court violated the principle of equality of arms guaranteed by the European Convention on Human Rights, given that court proceedings should be in accordance with the Constitution, applicable law of Kosovo and with international standards.
17. The wrongful interpretation of the PCPCK places the Applicant in an unequal position which is in conflict with the Constitution, under which "all people are equal before the law". Notwithstanding the type of punishment provided for by the law for the criminal offence with which the Applicant is charged, the present criminal offence is related with the criminal offence with which two other defendants are charged with and it can not be separated in any of the phases of the criminal procedure and the confirmation of indictment should be common for all the defendants and the trial should be common to all. In this manner the accused persons will be granted with equal opportunity to defend themselves in all the phases of the criminal procedure.
18. It does not make sense that the defendants who are charged with more serious criminal offences have the chance to prove their innocence and the defendant who is charged with less serious crime has the limited possibility to present their defense.
19. Under the Constitution, in the judicial procedure, "everyone is guaranteed equal protection of the rights in the procedure before the courts, other state bodies and public duty bearers.
20. Further, with regards to the right to legal remedy under the Constitution, "each person has the right to pursue legal remedies against judicial and administrative decisions which affect the rights or interests of that person in the manner prescribed by law".

Assessment of the admissibility of the Referral

21. In order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.
22. The Court wishes to emphasize that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (see, *mutatis mutandis*, ECHR, *Selmouni v. France*, no. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, *mutatis mutandis*, ECHR, *Azinas v. Cyprus*, no. 56679/00, decision of 28 April 2004).
23. This Court applied this same reasoning when it issued a Resolution on Inadmissibility on 27 January 2010 on the grounds of non exhaustion of remedies in Case No. KI-41/09, AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, and in its Decision of 23 March 2010 in Case No. KI. 73/09, Mimoza Kusari-Lila vs. The Central Election Commission.
24. Bearing this in mind it is clear from the documentation submitted by the Applicant that the case is still pending before the regular courts. It follows that the Applicant has not exhausted all legal remedies available to him under applicable law as required for him to be able to pursue a claim to the Court. The Court further emphasizes that there is no final decision to be challenged before this Court.
25. It follows that the Applicant has not exhausted all the legal remedies available to him under applicable law.

FOR THIS REASON

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible.

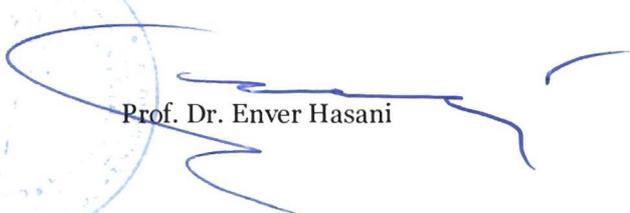
This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur


Robert Carolan

President of the Constitutional Court


Prof. Dr. Enver Hasani