



REPUBLIKA E KOSOVËS
Republika Kosova - Republic of Kosovo
Gjykata Kushtetuese / Ustavni sud / Constitutional Court
Adresa: Perandori Justinian, PN. Prishtinë
T: +381 (0)38 220 104; F: +381 (0)38 220 112; www.gjk-ks.org

Prishtina, 21 June 2010
Ref. No.: RK16/10

RESOLUTION ON INADMISSIBILITY

In

Case No. KI 68/09

Emrush Kastrati

Vs.

Decision of the Supreme Court of Kosovo,
Pkl. No. 120/0, dated 1 September 2009

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

Having issued a Decision on 21 April 2010 refusing a request for interim measures of the Applicant, Emrush Kastrati, the Court unanimously adopts the following **Resolution**:

Introduction

The Applicant

1. The Applicant is Emrush Kastrati, a Judge of the Municipal Court in Malisheva.

The Challenged Decision

2. The Decision challenged by the Applicant is a Decision of the Supreme Court of Kosovo, Pkl. No. 120/08, and dated 1 September 2009.

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Subject Matter

3. On 3 December 2009 the Applicant, Emrush Kastrati, lodged a referral to the Constitutional Court of the Republic of Kosovo requesting Interim Measures against the implementation of the Decision of the Supreme Court of Kosovo Pkl. No. 120/08, dated 1 September 2009 on the basis that the Supreme Court had undermined the independence of the judiciary in reaching its decision.
4. The Applicant pleaded that the Decision violates Article 107.1 of the Constitution of Kosovo which provides for judicial and prosecutorial immunity. Article 107, in full, states as follows:

Article 107 [Immunity]

- 1. Judges, including lay-judges, shall be immune from prosecution, civil lawsuit and dismissal for actions taken, decisions made or opinions expressed that are within the scope of their responsibilities as judges.*
- 2. Judges, including lay-judges, shall not enjoy immunity and may be removed from office if they have committed an intentional violation of the law.*
- 3. When a judge is indicted or arrested, notice must be given to the Kosovo Judicial Council without delay.*

Legal Basis

5. Article. 116.2 and 113.7 of the Constitution of the Republic of Kosovo, Articles 20 and 27 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Sections 52.1 and 54(b) of the Rules of Procedure of the Constitutional Court (the Rules).

Summary of the Proceedings before the Court

6. On 3 December 2009 the Applicant filed a Referral to the Constitutional Court. The President appointed Judge Iliriana Islami as Judge Rapporteur and appointed a Review Panel comprising, Judges Altay Suroy, presiding, Almiro Rodrigues and Gjylieta Mushkolaj. A Decision rejecting Interim Measures was issued by the Court on 21 April 2010 and published on the Court's website on 25 May 2010. The Court deliberated on the admissibility of the Referral on 29 April 2010.

The Facts

7. The Office of the Municipal Public Prosecutor for Prizren brought an indictment against the Applicant, PP. No. 2085/2008 dated 27 August 2008 for the criminal offence, of issuing an unlawful judicial decision, as provided for in Article 346 of the Criminal Code of Kosovo.
8. The Municipal Court of Deçan as the criminal court of first instance, in a Decision KA. No. 14/2008 also dated 27 August 2008, overturned the charges filed by the Public Prosecutor on the grounds that there was not sufficient proof to support a grounded suspicion that the Applicant had committed the criminal offence with which he was charged.

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9. By a Decision KA. no. 14/2008 dated 7 October 2008, a panel of the Municipal Court of Deçan upheld that finding and rejected the Appeal which had been brought against the original decision of the Municipal Court by the Public Prosecutor.
10. On 01 September 2009 the Supreme Court of Kosovo, in its review of request for protection of legality, filed by the Public Prosecutor against that decision, issued a Judgment PKL. nr. 120/08, finding the request for protection of legality grounded, and finding that the disputed Decision issued in favour of the Applicant was not in accordance with a proper interpretation of Articles 304 to 316 of the Criminal Procedure Code of Kosovo.
11. On 21 April 2010 the Constitutional Court of Kosovo issued a Decision refusing to issue interim measures against the decision of the Supreme Court of Kosovo without prejudice to any further decision it would make in relation to admissibility of the Referral of on its merits.

Assessment of the Admissibility of the Referral

12. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this connection, the Court refers to Article 113.7 of the Constitution, which provides: "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."
13. The Court wishes to emphasise 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).
14. This Court applied this same reasoning when it issued a Decision on 27 January 2010 on inadmissibility on the grounds of non exhaustion of remedies in the case of AAB-RIINVEST University L.L.c., Prishtina vs. Government of the Republic of Kosovo, Case No. KI. 41/09 and in the Decision of 23 March 2010 in the case of Mimoza Kusari-Lila vs. The Central Election Commission, Case No. KI 73/09.
15. There is an indictment pending against the Applicant before the Courts of the Republic of Kosovo as set out above. That indictment relates to the conduct of the Applicant in his capacity as a Judge of the Municipal Court of Malisheva. Article 107 of the Constitution of the Republic of Kosovo quoted above specifically provides that Judges shall be immune from prosecution. It is a widely recognised principle that Judges have to enjoy immunity from prosecution for actions taken within the scope of their responsibility in order to ensure that they will be independence of their role. Its purpose is also to ensure that in a democratic society governed by the rule of law that Judges may be fearless in exercising their judicial functions.
16. However judicial immunity is not absolute. Article 107.2 specifically states that Judges shall not enjoy immunity and that they may be removed from office if they have committed an intentional violation of the law. The proper forum for determining whether there has been such a violation, if such amounts to a criminal violation, is

the appropriate court. In this case it is for the criminal courts to make a determination as to his guilt or innocence, always bearing in mind that the Applicant enjoys the guarantee of the presumption of innocence in relation to the indictment brought and that he has a right to a fair trial as provided by Article 6 of the European Convention on Human Rights

17. The Supreme Court has decided that the request for protection of legality filed by the Public Prosecutor was well grounded. In those circumstances the criminal proceedings must proceed. It would be premature for the Constitutional Court to determine the Referral without there being a final determination in the criminal proceedings. The Court must conclude that not all remedies available to the Applicant have been exhausted as the indictment is still with the criminal courts.

FOR THESE REASONS

18. The Court after considering all the facts and the evidence tendered, and having deliberated on the matter on 29 April 2010 concludes that that the Referral is inadmissible because the Applicant's complaint is premature, and the Court therefore 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 on the Constitutional Court.
- III. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Dr. Iliriana Islami

Prof. Dr. Enver Hasani