



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

Prishtina, on 21 February 2019
Ref. No.:RK 1328/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI52/18

Applicant

Zoran Stanišić

Constitutional review of Judgment Pa/1. No. 1160/2017 of the Court of Appeals of 18 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërzhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Zoran Stanišić, with permanent address in Belgrade, Republic of Serbia (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment Pa. No. 1160/2017 of the Court of Appeals of 18 December 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 [Right to a fair trial] and Article 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law) and Rule 32 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).
5. On 31 May 2018, the Court adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 6 April 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 11 April 2018, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Gresa Caka-Nimani.
8. On 16 April 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeals.
9. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues was terminated. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Čukalović was terminated.
10. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.

11. On 22 August 2018, the President of the Court appointed Judge Selvete Gërzhaliu-Krasniqi as Judge Rapporteur.
12. On 21 September 2018, the President of the Court appointed the new Review Panel composed of Judges: Bekim Sejdiu (Presiding) Gresa Caka-Nimani and Bajram Ljatifi.
13. On 15 October 2018, the Applicant submitted to the Court a letter in which he filed complaints against the work of the legislative and executive authorities in Kosovo.
14. On 16 January 2019, 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

15. On 7 July 2011, the Applicant filed a criminal report with the Kosovo Police (hereinafter: Police) and EULEX, on the grounded suspicion that the person S.P., threatened him several times on the phone, whereby allegedly he committed the criminal offense of Threat under Article 161, paragraph 4, of the Criminal Code of Kosovo (hereinafter: CCK).
16. On 29 September 2011, the Applicant was informed by the Police that all the information he had provided, in connection with the threat, was presented to the Municipal Public Prosecutor, which was responsible for examining the grounds of his criminal report.
17. On an unspecified date, the Applicant was informed by the Public Prosecutor that in his case the Prosecutor of the Municipal Prosecution Office in Prishtina as well as the Prosecutor of the EULEX Prosecution will work in his case.
18. On 8 November 2012, by electronic mail, the EULEX Prosecution notified the Applicant about the dismissal of the criminal report against the person S.P., claiming that *“there is no grounded suspicion that the person S.P. committed the criminal offense which he is charged with.”*
19. In his notification, the EULEX Prosecution stated that the Applicant is entitled in the capacity of a *“subsidiary plaintiff”* to proceed with the prosecution of the person S.P.
20. On 16 November 2012, the Applicant, as a *subsidiary plaintiff*, initiated private criminal lawsuit against the Basic Court - General Department - Criminal Division (hereinafter: the Basic Court) against the person S. P.
21. Based on the case file, the Court finds that in the period from 16 November 2012 to 28 June 2017, the Basic Court has scheduled several court hearings, but they have been postponed due to the absence of the respondent and his defense counsel. In this period, also the judges were replaced twice in this case.

22. The Court notes that the Applicant in this period has complained several times to the legislative and executive bodies about the work of the judiciary in Kosovo, and he sent several times the urgencies to the President of the Basic Court requesting that his case is addressed.
23. On 29 June 2017, the Basic Court held a hearing on the lawsuit of the subsidiary plaintiff (the Applicant). At the hearing session of the Basic Court the Applicant participated as a subsidiary plaintiff and the respondent S.P. After reading the indictment, the respondent pleaded not guilty and found before the court that the statute of limitation of the criminal prosecution had occurred.
24. On the same date, the individual judge, taking into account the case file and the legal provision of Article 90, paragraph 1, sub paragraph 5 of the CCK, issued Judgment K. no. 3799/2012 where it found that in this case the absolute statutory limitation of the prosecution of the respondent S.P. was presented. In the reasoning of the decision, the court emphasized:

„Based on the provision of the Article 90, paragraph 1, sub-paragraph 5 of the CCK, the absolute prescription shall take place once there have elapsed three years from the commission of a criminal offence punishable by imprisonment of more than a year.

Pursuant to Article 90 paragraph 1 item 6 of the CCK, the statute of limitation of the offense occurs whenever the time limit of the statutory limitation is exceeded in accordance with Article 90 paragraph 1 item 5 CCK. So, in the present case from the time of the commission of the criminal offence of Threat as per Article 161, para.4 in conjunction with para.2 of CPC, that is 29.06.2011 to 29.06.2017 there have passed more than 6 years. According to the law this time period is long enough for the absolute statutory limitation on criminal prosecution to take place “.

25. On 19 August 2017, the Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court.
26. On 18 December 2017, the Court of Appeals rendered Judgment PA1. No. 1160/2017, which rejected the lawsuit of the subsidiary plaintiff (the Applicant) as ungrounded. In the judgment, the Court of Appeals found that:

„The subsidiary plaintiff in the appeal did not specify the reasons for the appeal, but from the content the court finds that the it is based on essential violations of criminal procedure and criminal law.

According to the assessment of this court, the claims of the subsidiary plaintiff are ungrounded. The Basic Court acted fairly when it rejected the subsidiary lawsuit filed by the subsidiary plaintiff as statute-barred.

From the case file it results that the person S.P. by subsidiary lawsuit is charged with the criminal offense of Threat under Article 161 paragraph 1 in conjunction with paragraph 2 of the CCK, according to the legal

provision of Article 90 paragraph 1 and sub paragraph 5 of CCK it is foreseen that for the criminal offense punishable by an imprisonment of more than one year that the prosecution cannot be commenced when three years have elapsed since the commission of the offense. For the criminal offense of Threat from Article 161, paragraph 4, in conjunction with paragraph 2 of the CCK, a sentence of 3 months to 3 years of imprisonment is foreseen and that according to the subsidiary lawsuit it appears that the above-mentioned criminal offense was committed on 25, 26, 27, 28 and 29 06.2011.“

Applicant's allegations

27. The Applicant alleges that his constitutional rights and freedoms, guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution and Article 6 [Right to a fair trial] and Article 13 (Right to an effective remedy) of the ECHR, have been violated, as the courts did not act in accordance with his subsidiary lawsuit to determine if serious criminal offenses were committed against him and who was responsible for this.
28. The Applicant alleges that first the EULEX Prosecution, and then the local prosecution, refused to prosecute the defendant, whereas he as a plaintiff was instructed to prosecute the responsible person in the capacity of the subsidiary plaintiff. However, the courts finally completed the proceedings due to the absolute prescription of the criminal prosecution, which occurred without his fault.
29. The Applicant further states that by such an instrumentalized action of the court and other state authorities, were violated: a) the right to access to the court, b) the right to a reasoned decision, c) the principle of equality of parties to the proceedings, d) the right to a trial within a reasonable time. In support of his allegations, the Applicant cited several cases of the ECtHR case law and the case law of this Court.
30. The Applicant requests the Court to declare the Referral admissible, to hold that there has been a violation of Articles 31, 32 and 54 of the Constitution and violation of Articles 6.1 and 13 of the ECHR, to annul the decisions of the Basic Court and of the Court of Appeals and to oblige the Basic Public Prosecution to be involved *ex-officio* in the criminal prosecution of the defendant.
31. The Applicant also requests that in the name of several-year material and non-material damage be paid an amount of 84,500 euro.

Admissibility of the Referral

32. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, as further specified by the Law and foreseen by the Rules of Procedure.

33. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

“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.

[...].“

34. Therefore, the Court notes that the Applicant is an authorized party, who challenges an act of the public authority, namely, Judgment PA1. No. 1160/2017 of the Court of Appeals, of 18 December 2017. However, in order for the Court to take into account all the allegations of the Applicant, it must determine whether the Applicant has exhausted all legal remedies provided by law.
35. The Court further assess whether the Applicant has met the admissibility criteria as further specified in the Law and the Rules of Procedure. In this regard, the Court first refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

*Article 48
Accuracy of the Referral*

“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.

*Article 49
Deadlines*

“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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced... .”

36. As to the fulfillment of these criteria, the Court notes that the Applicant explicitly clarified the rights guaranteed by the Constitution and the ECHR, which have allegedly been violated in accordance with Article 48 of the Law and has submitted the Referral within the legal deadline of 4 (four) months specified in Article 49 of the Law.
37. The Court also refers to Rule 39 (1) (b) and (3) (b) of the Rules of Procedure,

Rule 39
[Admissibility Criteria]

- „(1) *The Court may consider a referral as admissible if:*
 (b) all effective remedies [...] have been exhausted
 [...]
- (3) *The Court may also consider a referral inadmissible if any of the following conditions are present:*
 [...]
 (b) the Referral is incompatible ratione materiae with the Constitution;“

38. In this regard, pursuant to Rule 39 (1) (b) and (3) (b) of the Rules of Procedure, the Court must establish whether the Applicant has exhausted all legal remedies and whether the Applicant’s Referral is *ratione materiae* compatible with the Constitution.
39. The Court notes, first of all, that the Applicant refers to the violations of several articles of the Constitution and the ECHR, but the very essence of those allegations of violation derives from the alleged violations of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR. The Applicant also raised the issue regarding material and non-material compensation before the Court.

Allegations of violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR

40. The Court recalls that Article 31 [Right to Fair and Impartial Trial] of the Constitution, in the relevant part of the second paragraph establishes,:

„Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges [...]“.

41. Article 6 (Right to a fair trial), paragraph 1 of the ECHR, in the relevant part, also stipulates:

„In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[...]“.

42. In addition, Article 53 of the Constitution provides:

„Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights“.

43. The Court, first of all, notes that the Applicant on 7 July 2011 filed criminal report before competent institutions against the person S.P. to protect his rights.
44. However, despite the fact that the EULEX Prosecution took into account and considered his allegations of existence of the criminal offense, the Court notes that his criminal report was dismissed.
45. It follows that the competent institutions considered the grounds of the allegations of the existence of the criminal offense, but that in the end have concluded "*that there is no grounded suspicion that the person S.P. has committed the criminal offense which he was charged with [...] but the plaintiff may continue with subsidiary lawsuit against S.P.*".
46. Accordingly, the Applicant filed a subsidiary lawsuit against the third party in a capacity of a subsidiary plaintiff.
47. In this regard, the Court notes that in the present case, the main appealing allegations of the Applicant in the Referral regarding the fair trial relate solely to the criminal proceedings he initiated against the third party, namely S.P., where the Applicant presented himself in the capacity of a subsidiary plaintiff. The Applicant's criminal indictment against the third party was *dismissed by the first instance court and the Court of Appeals, on the grounds that "his subsidiary lawsuit in accordance with the legal provision of Article 90 paragraph 1 subparagraph 5 of the CCK was statute-barred"*.
48. In this regard, the Court refers to the practice of the European Commission on Human Rights (hereinafter: the Commission), according to which *the Convention does not guarantee the right to pursue criminal proceedings against third persons, moreover Article 6 of the ECHR does not apply to proceedings aimed at instituting criminal proceedings against third persons* (see, Decision of Commission *Istvánné RÉKÁSI v. Hungary*, Application no. 31506/96, of 25 November 1996).
49. Therefore, applying the abovementioned principle in the present case, the Court finds that when reading Article 31 of the Constitution, in the light of Article 6, paragraph 1, of the ECHR, it results that the phrase "*as to any criminal charges*", as used in Article 31, must be understood to mean "*as to any criminal charges brought against the Applicant*". As such, the Applicant's claim of a violation of his right to a fair trial cannot come within the scope of the heading "*as to any criminal charges*" contained in Article 31 of the Constitution.
50. In addition, with regard to rights and obligations, the Court recalls the Judgment of the European Court of Human Rights (hereinafter: ECtHR) in case of *Perez v. France* (No. 47287/99, judgment of 12 September 2004), where paragraphs 70 and 71 are emphasized:

„70. The Convention does not confer any right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently: it must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a “good reputation“ [...].”

*71. The Court concludes that a civil-party complaint comes within the scope of Article 6 §1 of the Convention, **except in the cases referred to in the previous paragraph.** [Emphasis added].”*

51. The Court, in addition to the judgment cited *Perez v. France* of ECtHR, also refers to its case law in case KI97/14, *Velibor Jokić*, Resolution on Inadmissibility, concluding that „*the ECHR does not provide a right to have a third party prosecuted or sentenced for a crime. The Constitution also does not confer such a right*“. (see, Resolution on Inadmissibility in case KI97/14, *Velibor Jokić*, 8 December 2015, para. 38).
52. Taking into account that the proceedings complained of by the Applicant do not relate to the determination of any rights and obligations of the Applicant, it follows that the Applicant's allegation of a violation of his right to a fair trial does not fall within the scope of the heading “rights and obligations” contained in Article 31 of the Constitution, and consequently, the Court will not enter further in the analysis of the Applicant's other appealing allegations regarding the alleged violations of the Constitution and ECHR.
53. The Court considers that the Applicant's complaint concerning the criminal proceedings against the third party, in this case S.P. does not fall within the scope of the right to a fair trial under Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR, and therefore, the Applicant's Referral is incompatible *ratione materiae* with the Constitution.

The issue regarding material and non-material compensation

54. The Court cannot fail to notice that the Applicant also raised in the Referral the issue concerning the material and non-material compensation.
55. In this regard, the Court notes that the Basic Court in Judgment K. No. 3799/2012, dealt with the Applicant's property claim, stating that “*he may try to exercise the property claim in a regular civil procedure*”.
56. Having in mind that the Applicant did not specify in the Referral whether, in order to realize his claim, he used the legal remedies available to him, the Court finds that the Applicant has not exhausted all legal remedies foreseen by law.
57. Therefore, this Applicant's allegation is rejected by the Court in accordance with Rule 39 (1) (b) of the Rules of Procedure.
58. In sum, the Court finds that the Applicant's Referral is not in compliance with Rules 39 (1) (b) and (3) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 47 of the Law and Rules 39 (1) (b) and (3) (b) of the Rules of Procedure, on 16 January 2019, unanimously

DECIDES

- I. TO DECLARE the Referral 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;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Selvete Gërxhaliu-Krasniqi

Arta Rama-Hajrizi

