



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

Prishtina, on 6 March 2019
Ref. No.: RK 1332/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI85/18

Applicant

Baki Gashi

Constitutional review of Judgment PML. No. 208/2017 of the Supreme Court of Kosovo, of 29 January 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-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 Baki Gashi, from Podujeva (hereinafter: the Applicant), who is represented by a lawyer Namon Merovci.

Challenged decision

2. The Applicant challenges the constitutionality of Judgment PML. No. 208/2017 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 29 January 2018, which was served on him on 14 February 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment, which allegedly violates the Applicant's rights guaranteed by Articles: 3 [Equality Before the Law], 29 [Right to Liberty and Security], 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 31 May 2018, the Constitutional Court of the Republic of Kosovo (hereinafter: 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 Court

6. On 14 June 2018, the Applicant submitted the Referral to the Court.
7. On 16 August 2018, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha.
8. On 30 August 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 24 October 2018, the Court requested additional information from the Basic Court in Mitrovica regarding the date of service of the challenged Judgment.
10. On 27 November 2018, the Court for the second time requested additional information from the Basic Court in Mitrovica, regarding the date of service of the challenged Judgment.

11. On 12 December 2018, the Basic Court in Mitrovica notified the Court that the challenged Judgment was served on the Applicant on 14 February 2018.
12. On 30 January 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

13. On 24 July 2014, the Basic Prosecution in Mitrovica - Department of Serious Crimes filed an indictment PPI. No. 77/2614, against the Applicant and 5 (five) other accused for the commission of criminal offenses under Article 327, paragraph 2, items 2.1, 2.6 and 2.7, in conjunction with Article 31 of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK).
14. On 30 August 2016, the Basic Court in Mitrovica - Branch in Skenderaj (hereinafter: the Basic Court), by Judgment P. No. 71/2015, found the Applicant guilty of committing the criminal offense under Article 327, paragraph 2, item 2.7, in conjunction with Article 31 of the CCRK. In its Judgment, the Court reasoned: "... based on the legal provisions of Article 361 of the CPC, conscientiously assessed them one by one and in relation to the other evidence and based on such assessment established that the defendants are perpetrators of the criminal offenses for which they are accused".
15. The Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court, P. No. 71/2015, alleging that the Judgment of the Basic Court was rendered due to erroneous and incomplete determination of factual situation and essential violation of the provisions of the substantive and procedural law. Against the abovementioned judgment, the Prosecutor of the Basic Prosecution filed a complaint against the decision on punishment, with the proposal that the Court of Appeals modifies the Judgment and the accused be imposed a more severe effective imprisonment sentence.
16. On 21 March 2017, the Court of Appeals, by Judgment PAL. No. 1428/16, rejected as ungrounded the appeals of the Applicant and the Public Prosecutor, and upheld the Judgment of the Basic Court, reasoning:

"The Court of Appeals assesses the allegations of the defense counsels of the accused regarding this appealed ground as ungrounded since the first instance court examined for complete and correct confirmation of the situation all the pieces of evidence that were proposed and it assessed them pursuant to the legal provisions stipulated under Article 361 of the CPC, (...). That the accused acted as organized criminal group is confirmed by the fact that they acted within a certain time and space from 28 May 2013 until 5 April 2014, the group had six members who acted with the purpose of committing the criminal offense of aggravated theft in nine special cases within a certain territory for financial and material benefit, ... whereas the accused B.G. had the role of transporter of the animals stolen by the house of the injured M.A. (...)"

17. On an unspecified date, the Applicant submitted a request for protection of legality to the Supreme Court, claiming that the lower instance courts committed substantial violations of the procedural and substantive law provisions and erroneously determined the factual situation.
18. On 29 January 2018, the Supreme Court, by decision PML. No. 208/2018 rejected as ungrounded the Applicant's request for protection of legality and upheld the judgments of the first and second instance courts, with the reasoning that the defense counsels of the convicts did not specify their requests for eventual violations of the criminal law.

Applicant's allegations

19. The Applicant alleges that the decisions of the regular courts were rendered in violation of Article 31 of the CPCPK, and as a result of these violations of the law there has been a violation of the Applicant's rights guaranteed by Articles 3, 29, 30 and 31 of the Constitution.
20. The Applicant considers that the regular courts erroneously interpreted Article 31 of the CPCPK, as well as incorrectly determined the factual situation and based their decisions on a single evidence. The Applicant reasons these allegations as follows:

"In the present case, Article 31 of CCRK was violated because in order to consider that the criminal offense was committed in co-perpetration there should be a prior agreement to causing a prohibited consequence and in the present case, both in the pre-trial proceeding and in all stages of the trial, the co-accused have stated that they do not know now the convict Baki Gashi. At the same time, even the injured parties, who have testified as witnesses, have stated that they do not know the convict Baki Gashi either."

21. In addition, the Applicant addressed the Court with the following request: *"...we request that this criminal matter be remanded for retrial and for reconsideration for the convict B.G. and the later be found not guilty. This is, due to the fact that the court decision is based on single evidence and has not been interrelated to any other evidence"*.

Admissibility of the Referral

22. The Court examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution and further specified in the Law, and foreseen in the Rules of Procedure.
23. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

"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*

[...]”.

24. The Court also examines whether the Applicant has fulfilled admissibility requirements as prescribed by Articles: 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which foresee:

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...”

25. Regarding the fulfillment of these criteria, the Court finds that the Applicant filed a referral in the capacity of the authorized party, challenging the act of the public authority, namely Judgment PML. No. 208/2017 of the Supreme Court, after exhausting all legal remedies provided by law. The Applicant also filed a Referral in accordance with the deadline provided for in Article 49 of the Law.
26. However, the Court also examines whether the Applicant has met the admissibility criterion set out in Rule 39 (2) of the Rules of Procedure, which stipulates:

“(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim”.

27. The Court recalls that the Applicant alleges a violation of his rights guaranteed by Article 3 [Equality Before the Law], 29 [Right to Liberty and Security], 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution, which relates to Article 31 of the CCRK, which refers to the commission of the criminal offense “in co-perpetration” and to the fact that the courts based their decisions on the erroneously determined factual situation.
28. In fact, the Court notes that all the Applicant's allegations are based on legality and not constitutionality, because they relate mainly to the determination of factual situation, administration of evidence and the application of the substantive and procedural law. (See: Constitutional Court, Resolution on

Inadmissibility, in Case KI114/17, Applicant *Albert Hadri*, of 22 February 2018, paragraph 31).

29. In that respect, the Court emphasizes that it is not its task to deal with errors of fact or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). The Court may not itself assess the law which have led the regular courts to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of “fourth instance”, which would be to disregard the limits imposed on its jurisdiction.
30. In fact, the role of regular courts is to interpret and apply the relevant rules of procedural and substantive law (see: the ECtHR case *Perlala v. Greece*, paragraph 25 and *Khan v. the United Kingdom*, paragraph 34, and see also cases: KI70/11, Applicants *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011; and KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, para. 41).
31. The role of the Constitutional Court is to ensure the compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as a “fourth instance court” (see: ECtHR case, *Akdivar v. Turkey*, No. 21893/93, judgment of 16 September 1996, paragraph 65, see also: *mutatis mutandis*, Resolution on Inadmissibility of the Constitutional Court, case KI86/11, Applicant *Milaim Berisha*, of 5 April 2012).
32. The Court further notes that the Applicant merely does not agree with the outcome of the proceedings before the regular courts. However, the dissatisfaction of the Applicant with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim of violation of the constitutional rights. (see: *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; see also: Resolution on Inadmissibility of the Constitutional Court in Case KI25/11, Applicant *Shaban Gojnovci*, of 28 May 2012, paragraph 28; see also: case KI56/17, Applicant *Lumturije Murtezaj*, Resolution of Inadmissibility of 18 December 2017, paragraph 42).
33. In addition, the Court notes that the Supreme Court reasoned the Applicant's allegation regarding the fact that the court decisions were based on a single evidence, and reasoned:

“The Supreme Court found that such allegations are ungrounded not only due to the reason that the convict B. Z. and L. H. in the main hearing admitted the guilt for the criminal offenses committed in co-perpetration with this convict, but they described his appearance and the vehicle with which he transported...”

34. The Supreme Court further reasoned:

“On the other hand, by the statements of witness Z. R. – Police Officer in the Police Station in Skenderaj it followed that ... the convicts when making their statements, besides others, stated that this person has a scar in the hand (due to the burn) and based on these statements, the Police Investigation Officers identified the convict and his vehicle”.

35. In this regard, the Court considers that the Applicant's allegations, which he raised before the Court, have been answered by the Supreme Court's reasoning extensively and individually in its decision.
36. The Court reiterates that for a criminal proceeding of a criminal nature it is important whether the accused and his defense counsel had the opportunity to challenge the arguments which are to the detriment of the accused, to question witnesses during the public hearing and to have access to legal remedies against any filed charge, in accordance with the requirements of Articles 30 and 31 of the Constitution, in conjunction with Article 6 of the Convention. In this regard, the Court considers that both the Applicant and his defense counsel had the opportunity to use these possibilities throughout the court proceedings before the regular courts.
37. Therefore, based on above, the Court considers that the Applicant has had ample opportunities to present before the regular courts all allegations of a violation of his rights. Furthermore, the Court considers that his arguments have been duly heard and reviewed by the regular courts. Therefore, the Court considers that the decisions of the regular courts are reasoned and that the proceedings, viewed in their entirety, were not in any way unfair or arbitrary (see case of ECtHR *Shub v. Lithuania*, No. 17064/06, Judgment of 30 June 2009).
38. In conclusion, the Court considers that the Referral, on constitutional basis, is manifestly ill-founded, because the Applicant did not sufficiently prove and substantiate his allegation of violation of the rights guaranteed by the Constitution and the Convention.
39. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and, in accordance with Rule 39 (2) of the Rules of Procedure, it is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, and Rules 39 (2) and 59 (b) of the Rules of Procedure, on 30 January 2019, unanimously

DECIDES

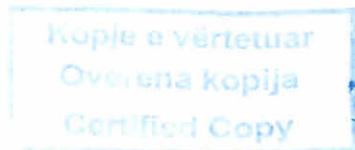
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Radomir Laban

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.