



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

Prishtina, on 17 January 2018
Ref. No.: RK 1184/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI65/17

Applicant

Ilir Beqiri

**Constitutional review of
The Kosovo Judicial Council Notification,
of 8 May 2017**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Cukalovic, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral is submitted by Ilir Beqiri from Ferizaj (hereinafter, the Applicant) represented by Vahide Braha, a lawyer practicing in Prishtina.

Challenged decisions

2. The Applicant challenges the Notification of the Kosovo Judicial Council (hereinafter, the KJC), of 8 May 2017, in connection with Decision GjA. N. 155/17, of the Basic Court in Ferizaj, of 11 April 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged Notification, which allegedly violated the Applicant's rights guaranteed by § 2 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution) taken together with § 1 of Article 6 [Right to Fair Trial] of the European Convention of Human Rights (hereinafter, the ECHR).
4. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter, the Court) *"to impose the interim measure as a pre-trial matter and to suspend commencement of the main trial with the same Panel (...)".*

Legal basis

5. The Referral is based on Articles 113 (7) and 116 (2) of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Articles 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rules 29 and 54 of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules).

Proceedings before the Constitutional Court

6. On 2 June 2017, the Applicant submitted his Referral to the Court.
7. On the same date, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Bekim Sejdiu (presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
8. On 26 July 2017, the Court notified the Applicant about the registration of the Referral and requested him to clarify certain aspects of his Referral. On the same date, a copy of the Referral was sent to the Basic Court in Ferizaj.
9. On 7 August 2017, the Applicant informed the Court that the Basic Court in Ferizaj has suspended the trial of the Applicant until there is a decision of the Court with respect to his referral.
10. On 4 December 2017, 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

11. On 6 April 2015, the Basic Court in Ferizaj (Judgment PKR-690/12) found the Applicant guilty and sentenced him to imprisonment. The Basic Court also

ordered the Applicant to pay to the Ministry of Economy and Finance a certain amount.

12. On an unspecified date, the Applicant filed with the Court of Appeals an appeal against that judgment, alleging essential violation of the criminal procedure, erroneous and incomplete establishment of the factual situation as well erroneous application of substantive law.
13. On 19 October 2015, the Court of Appeals (Judgment PAKR No. 384/2015) annulled the judgment of the Basic Court and remanded the case for a fresh consideration, because the judgment was unclear and incomprehensible in relation to the decisive facts of the case and failed to give an explanation as to how the Applicant abused with the official position.
14. On 26 June 2016, the Basic Court (Judgment PKR 191/15), under the same trial panel composition, found the Applicant guilty because he did not act in compliance with Article 22 (3) of the Law on Public Procurement.
15. On an unspecified date in 2016, the Applicant filed with the Court of Appeals an appeal, for the second time and on the same grounds as in his first appeal.
16. On 4 October 2016, the Court of Appeals (Judgment 478/2016) approved the appeal of the Applicant, annulled the above-stated judgment of the Basic Court, and remanded the case for the second time for a fresh consideration, because of the same reasons as in its first appeal decision.
17. On an unspecified date in 2017, the Applicant, in accordance with Article 39 of the Criminal Procedure Code of the Republic of Kosovo (hereinafter, the CPC), requested from the President Judge of the Basic Court to disqualify the trial panel, which had already tried his case twice. The Applicant asserted his misgivings by adding that that trial panel has taken a biased position against him, has held double standards and has applied selective justice by refusing his submissions.
18. On 5 April 2017, the Applicant, relying on § 1 of Article 108 [Kosovo Judicial Council] of the Constitution, filed with the KJC a request for allocation of his case to another court within Kosovo. The Applicant reiterated his misgivings about the bias, double standards and 'selective justice' of the trial panel of Basic Court.
19. On 11 April 2017, the President Judge of Basic Court (Decision GjA. No. 155/17) rejected as ungrounded the Applicant's request for disqualification of the trial panel, considering that, *"as regards the allegations of bias of the trial panel, there does not exist any evidence or a fact which would make such an allegation reliable, furthermore they can be considered of the level of perception and not based on any fact or evidence"*.
20. On 8 May 2017, the KJC (Notification of 8 May 2017) informed the Applicant that, based on Article 42, item 1.1 and 3 of the CPC, *"the Kosovo Judicial Council has no competence to allocate cases from one to another court and consequently it cannot act pursuant to this request"*.

Applicant's allegations

21. The Applicant claims that the Notification of the KJC has violated his "*right to a fair and impartial trial by ignoring facts and evidence presented*" and related with "*partial actions of a Panel*". The Applicant further claims on the KJC "*ignoring Article 108 of the Constitution*".
22. The Applicant alleges that "*the Judgments rendered by this court [the Basic Court], two times in the row, have been abrogated by the Court of Appeals of Kosovo while all other accused have been acquitted of their charges*".
23. The Applicant further alleges that the Notification of the KJC "*is unlawful as it did not provide any legal reasoning on why presented evidence, mainly pieces of evidence provided as the first and second judgments rendered by this Court were, are obviously partial*".
24. Finally, the Applicant requests the Court "*to conduct the constitutional review and interpretation of Article 108*" of the Constitution.

Admissibility of the Referral

25. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.
26. In this respect, the Court refers to of Article 113 (1 and 7) of the Constitution which 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.*
27. The Court also refers to Article 47 (2) of the Law which provides:

The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.
28. The Court further refers to Rule 36 which foresees:
 - (1) *The Court may consider a referral if:*
 - (...) *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.*
29. In that connection, the Court reiterates that the abovementioned provisions establish the "*exhaustion of all legal remedies*" as a crucial Referral's requirement for admissibility.

30. The rationale for the exhaustion rule is to afford to the regular courts the opportunity to prevent or put right the alleged violations of the Constitution. It is based on the assumption, reflected in Article 32 of the Constitution and 13 of the ECHR, that the Kosovo legal order will provide an effective remedy for violations of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery. (See the Constitutional Court case KI 41/09 *AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo*, Resolution on Inadmissibility of 21 January 2010 and European Court of Human Rights (hereinafter, the ECtHR) case *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999, § 74).
31. In addition, the Court emphasizes that the Applicants are obliged to exhaust permitted legal remedies that are available in theory and in practice at the relevant time, that is to say, that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success. (See ECtHR case *Sejdović v. Italy*, Application no. 56581/00, 1 March 2006, § 46).
32. The Court notes that the challenged Notification of the KJC and the connected Decision (GjA. No. 155/17, of 11 April 2017) of the President Judge of the Basic Court, with respect to the Applicant's allegation about the lack of impartiality of the trial panel cannot be appealed.
33. Moreover, the Applicant's request filed with the KJC for allocation of his case to another court within Kosovo was not legally permitted, as in accordance with Article 42, item 1.1 and 3 of the CPC, "*the Kosovo Judicial Council has no competence to allocate cases from one to another court*".
34. On the other side, the Applicant's request to the President Judge of the Basic Court to disqualify the trial panel was rejected as ungrounded.
35. The Court also recalls that Article 42 (3) of the CPC foresees that "*no appeal shall be permitted against a ruling which accepts a petition for disqualification*" and "*if this ruling was rendered after the indictment was brought, then only by an appeal against the judgment*".
36. The Court considers that the essence of the Applicant's claim relies on the "*partial actions*" of the trial panel of the Basic Court, because its Judgments "*two times in the row, have been abrogated by the Court of Appeals of Kosovo*".
37. In that respect, the Court observes that the proceedings are still ongoing in the Basic Court where it is expected the third judgment to be delivered after the case having been remanded for the second time. Then the ruling on the petition for disqualification and the Applicant's allegation about the lack of impartiality of the trial panel is then permitted.
38. Moreover, the Court notes that Article 398 (2) of the CPC provides that "*the Court of Appeals may direct the Basic Court to assign, based on an objective and transparent case allocation system, a new (...) trial panel if the Court of Appeals determines that the assigned (...) trial panel has consistently failed to apply the law correctly, grossly mischaracterized evidence or the failure to*

reassign the (...) panel would result in a miscarriage of justice or conflict of interest”.

39. The Court recalls that the Applicant requests the Court “*the constitutional review and interpretation of Article 108*” of the Constitution in relation with the Notification of the KJC.
40. The Court considers that such a review and interpretation is without object as the request to the KJC is not legally permitted.
41. Therefore, the Court finds that, with respect to his allegation about the lack of impartiality of the trial panel, the Applicant has not exhausted yet all legal remedies as established by Article 113 (7) of the Constitution, provided by Article 47 (2) of the Law and foreseen by Rule 36 (1) (b) of the Rules of Procedure.

Request for interim measure

42. The Court recalls that the Applicant also requested the Court “*to impose the interim measure as a pre-trial matter and to suspend commencement of the main trial with the same Panel*”.
43. In that respect, the Court refers to Article 27 [Interim Measures] of the Law, which provides:
 1. *The Constitutional Court (...) may temporarily decide upon interim measures (...), if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.*
44. The Court also refers to Rule 55 (4) of the Rules of Procedure which foresees:

Before the Review Panel may recommend that the request for interim measures be granted, it must find that:

 - a) *the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral.*

(...)
If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.
45. The Court, having concluded that the Applicant has not exhausted all legal remedies provided by law, considers that the Applicant has not showed a prima facie case on admissibility of his Referral.
46. Therefore, in accordance with Article 116 (2) of the Constitution, Article 27 (1) of the Law and Rule 55 (4) of the Rules of Procedure, the request for interim measure is rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Articles 27 (1), 47 (2) and 48 of the Law, and Rules 36 (1) b), 55 (4) and 56 (2) of the Rules of Procedure, on 4 December 2017, unanimously:

DECIDES

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

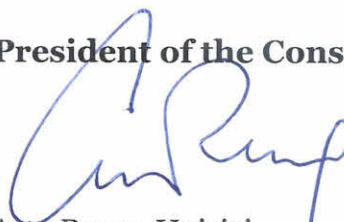
Judge Rapporteur



Almiro Rodrigues



President of the Constitutional Court



Arta Rama-Hajrizi