



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

Prishtina, on 5 February 2018
Ref. No.: RK 1191/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI45/17

Applicant

Nexhat Krasniqi

Constitutional review of
Judgment PML. No. 329/2016 of the Supreme Court of
2 March 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

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

Applicant

1. The Referral was submitted by Nexhat Krasniqi from Prishtina (hereinafter: the Applicant), who is represented by Florent Latifaj, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Judgment PML. No. 329/2016 of the Supreme Court of 2 March 2017, in conjunction with the Judgment of the Court of Appeals PAKR. No. 603/2015 of 20 May 2016 and the Judgment of the Basic Court of Pristina PKR. No. 144/2013 of 21 September 2015.

Subject matter

3. The subject matter is the constitutional review of the Judgment of the Supreme Court, which has allegedly violated the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a Fair Trial) of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 14 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 18 April 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.
7. On 28 April 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 14. November 2017, 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

9. The Applicant was employed in the position of Director of the Procurement Department with the Ministry of Trade and Industry.
10. On 22 July 2005, the Ministry of Trade and Industry announced a tender for the *"Projection and Construction of the Infrastructure of the Industrial Park in Drenas"*.
11. On 07 October 2005, the contract was signed between the Ministry of Trade and Industry and the "Eltoni Company" for the project and construction of

infrastructure of the industrial park in Drenas in the amount of 144.000 Euros / price per unit 69.825,25 Euros (without mentioning the number of units).

12. On 20 July 2006, an annex to the contract was signed between "Eltoni Company" and the Ministry of Trade and Industry, signed by the [Applicant] on behalf of the Ministry, in which it is stated: *"Considering that the parties listed above have made a contract for carrying on works in the project Industrial Park Drenas, (...) Based on the works carried out by the contractor and its request in changing the conditions of payment and upon the approval by the MTI, whereby parties agree to mutually change the condition of payment (...) Have agreed as follows: (...) Article 1 (about changing clauses 17.3 to 17.5), Article 2 (about payments made pursuant "situations") (...) Article 4: The total value of the contract shall be 1.730.000 Euros (...)"*.
13. On 5 November 2012, the Prosecutor's Office in Prishtina filed an indictment against the Applicant for the criminal offense of abusing official position or authority under Article 339 paragraph 3 in conjunction with Article 23 of the Criminal Code of Kosovo (hereinafter: CCK) and the criminal offense of fraud in office during the performance of official duties under Article 341, paragraphs 1 and 3 in conjunction with Article 23 of the CCK.
14. On 21 September 2015, the Basic Court in Prishtina rendered Judgment PKR. No. 144/2013 which found the Applicant guilty of the criminal offenses and sentenced him to an aggregate imprisonment sentence of 26 months.
15. The Basic Court considered that,

"Despite the amount of the initial contract dated 07/10/2005 was changed only with the first annex contract (article 4 of such annex), dated 20/07/2006, one month early, on the 20/06/2006 the [Applicant] had already submitted to the Public Procurement Agency, pursuant to section 34, par. 3 (amongst others), of the Law on Procurement 2003/17, a Request To Use Limited or Negotiated Procedures for additional work stating: "approximate value of contract: 1.700.000 Euros, foreseen value: value of additional works: 14.580 Euros", when at that time (on 20/06/2006) the amount of the contract dated 07/10/2005 (the only contract existing) was 144.000 Euros / price per unit 69.825,25 Euros, not 1.700.000 Euros."
16. The Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court, claiming erroneous determination of factual situation, erroneous interpretation of the legal provisions governing the financial issues of the Procurement Law, as well as the duration of the sentence imposed.
17. On 2 May 2016, the Court of Appeals rendered Judgment PAKR No.603/15, which partially approved the Applicant's appeal regarding the legal qualification of the criminal offense, as well as the duration of the sentence. This reduced the Applicant's sentence of imprisonment from 26 months to 18 months of suspended sentence. In the reasoning of the Judgment, the Court of Appeals stated:

“[...] The Panel has carefully reviewed the arguments presented in the appeal and in the proposal of the Appellate Prosecutor.

The Panel thoroughly examined the factual findings in the challenged judgment and concurs entirely with the findings. The Basic Court in the challenged judgment in detail analyzed the evidence administered during the main trial in relation to the defendant (the Applicant). In the view of the Panel, the first instance court comes to logical conclusions in its assessment of the evidence.

The Court of Appeals finds that there is sufficient evidence to prove beyond reasonable doubt that the defendant-the Applicant has committed the criminal offence of abusing official position or authority, committed in co-perpetration contrary to Article 422 (1) read with Article 31 of CCK...”

18. The Applicant submitted to the Supreme Court a request for protection of legality against the Judgment of the Basic Court PKR. No. 144/2013 of 21 September 2015 and the Judgment of the Court of Appeals PAKR. No. 603/2015 of 20 May 2016, alleging *“substantial violations of the provisions of the criminal procedure and violation of the criminal law.”*
19. On 21 February 2017, the Supreme Court rendered Judgment Pml. No. 329/2016, which rejected the request for protection of the legality of the Applicant as ungrounded. The reasoning of the Judgment reads:

„Regarding the first criminal offense (first case), the Court ascertained that the request for protection of legality of the defense counsel of the convict is mainly related to the allegation that the claim was exceeded because the indictment reads that the criminal offense was committed on purpose so that the convict could have material illegal benefit while he was declared guilty for causing damage ... However, this Court ascertained that the indictment was not exceeded because no important fact was added to it which would modify the indictment to that extent so that the court would adjudicate upon a matter different from the one noted in the indictment

[...]

...In relation to the other criminal offence of the challenged judgment, the Supreme Court found that they were not affected by essential violations of the provisions of the criminal procedure which are stated in the request for protection of legality “

Applicant's allegations

20. The Applicant claims that all regular courts violated his right to a fair trial in determination of the criminal charges against him as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a Fair Trial) of the ECHR.
21. The Applicant considers that the courts violated his rights because they did not accept his request for additional expertise regarding the factual methodology of government procurement procedures in Kosovo. The Applicant argues that the

regular courts all did not properly understand the financial implications of the procurement contracting system as applied in the contract which formed the basis of the criminal charges against him.

22. The Applicant alleges that *“the principle of equality of arms requires that each party be provided with a reasonable opportunity to present its case and evidence and to propose an expertise, under conditions which do not place to a significantly unfavorable position vis-à-vis the opponent's party.”*
23. The Applicant further alleges that the regular courts all did not correctly understand the terms of the contracts which he had signed on behalf of the Ministry of Trade and Industry for the “Industrial Park Drenas”, in particular regarding the overall value of the contract.
24. The Applicant argues that *„the constitutional principle of the basic right regarding the prohibition of arbitrariness in issuing decisions has been violated, because the provided reasoning do not contain confirmed facts and legal provisions and also the logical relationship between them, as confirmed by the first and second instance.*
25. The Applicant requests the Court *“to annul the decisions of the regular courts and to remand the case for reconsideration and retrial to the Basic Court in Prishtina and to correct the constitutional violations of Article 31 of the Constitution and Article 6 of the ECHR.”*

Admissibility of Referral

26. The Court first will examine whether the Referral has fulfilled the admissibility requirements established in the Constitution and as further specified in the Law and foreseen in the Rules of Procedure.
27. 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.”*
28. The Court also refers to Article 49 [Deadlines] of the Law, which provides that,

“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.”
29. The Court notes that the Applicant is an authorized party, the Referral was submitted in accordance with the deadlines prescribed in Article 49 of the Law, and the Applicant has exhausted all legal remedies.

30. However, the Court further refers to Article 48 of the Law [Accuracy of the Referral], which provides:

“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.”

31. The Court further refers to Rule 36 (1) d) and (2) b) of the Rules of Procedure, which foresees:

“(1) The Court may consider a referral if:

[...]

d) the referral is prima facie justified or not manifestly ill-founded.

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

[...]

b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights”.

32. In the present case, the Court recalls that the Applicant alleges a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 of the ECHR because,

“a) during the trial, he did not have the same opportunity to present his case and evidence, because the courts rejected his request for financial expertise, which violated the principle of equality of arms; and

b) there was an arbitrariness in the decision-making of the regular courts because the reasoning given does not contain established facts, legal provisions and a logical relationship between them.”

33. The Court notes that the Applicant repeats before it the same arguments as he had filed in the proceedings before the regular courts, in particular, regarding his request for an expert witness, the evaluation of evidence and the consequent establishment of the factual situation.

34. The Court notes that all three instances of the regular courts dealt with this issue and will elaborate further in the coming paragraphs.

35. The Court besides that recalls its case law which found that,

“it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, Garcia Ruiz v. Spain [GC], no. 30544/96, § 28, European Court on Human Rights [ECHRJ1999-1).

The Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in

their entirety, have been conducted in such a way that the Applicant had a fair trial (see, Constitutional Court Judgment of 23 June 2010, Kosovo Energy Corporation against 49 individual judgments of the Supreme Court of the Republic of Kosovo, paras 66 and 67)." (See Constitutional Court Resolution on Inadmissibility of 18 October 2010, *Karfeta v. Supreme Court*, KI 42/09, paras. 18, 19)."

36. The Court recalls that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution "*human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*".
37. In this respect, the Court reiterates that the European Court of Human Rights (hereinafter: the ECtHR) has established, "*that it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law* (see: ECtHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, [GC], no. 30544/96, para. 28.)"
38. The Court also recalls the consistent case law of the ECtHR which has found that, "*As a general rule, it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce (see the same judgment, p. 15, para. 33, second paragraph in fine). The Court must, however, determine - and in this it agrees with the Commission - whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair as required by Article 6 para. 1 (art. 6-1).*" (see ECtHR Judgment of 6 December 1988, *Barbarà, Messegué and Jabardo v. Spain*, No. 10590/83, para. 68).
39. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of facts allegedly committed by the regular courts when assessing the evidence (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
40. The Court reiterates that it is outside the scope of its jurisdiction to assess the quality of the conclusions reached by the regular courts regarding the evaluation and assessment of evidence, unless those conclusions are manifestly arbitrary or lead to a manifestly arbitrary outcome.
41. In the present case, with regard to the Applicant's allegation of violation of the principle of "equality of arms", the Court considers that according to Article 6 paragraph (3) item (d) of the ECHR, the party is not given the unlimited right to question witnesses or to bring other evidence before the court, but, as a rule, it is the duty of the regular courts to assess whether it is necessary to summon specific witnesses, and whether the statements of the proposed witnesses or the presentation of other proposed evidence and actions would be relevant and sufficient for deciding in a specific case (see: ECtHR partial Decision on Admissibility of 5 July 2005, *Harutyunyan v. Armenia*, , No. 36549/03).
42. In that regard, the Court notes that the Basic Court, in its Judgment PKR. No. 144/2013 reasoned that its decision was reached "*on the basis of a*

conscientious assessment of each piece of evidence individually, and in relation to other evidence, and on the basis of such an assessment, to draw a conclusion on the certainty of the existence of a particular fact”, which, in the opinion of this Court, was followed during the entire procedure.

43. Moreover, the Court notes that the Court of Appeals and the Supreme Court, in their judgments, provided clear and detailed reasoning as to the evidence that the Basic Court accepted and administered, as well as on the issue of evidence and the witnesses which it rejected.
44. The Court considers that the challenged decisions of the regular courts clearly and substantially reasoned that the circumstances for which the Applicant proposed the hearing of a financial expert were not required for the determination of the facts and that, accordingly, the administration of such evidence was unnecessary.
45. The Court also recalls the Applicant’s second allegation, that, “*there was an arbitrariness in the decision-making of the regular courts because the reasoning given does not contain established facts, legal provisions and a logical relationship between them.*”
46. The Court has already noted that the regular courts conducted an extensive and comprehensive procedure in which the evidence presented both by the defense and the prosecution was administered. Furthermore, the regular courts addressed the Applicant’s request for an expert witness and reasoned why they did not consider this additional expertise necessary.
47. Bearing in mind the above, the Court considers that the regular courts gave clear and precise arguments to substantiate all their findings and conclusions. Accordingly, the Court cannot assess the proceedings before the regular courts as arbitrary.
48. In these circumstances, the Court considers that nothing in the case presented by the Applicant indicates that the regular court proceedings were unfair or arbitrary such that the Constitutional Court to reach the conclusion that the very essence of the right to a fair and impartial trial was violated, or that that the Applicant has been deprived of any procedural guarantees which could lead to a violation of that right under Article 31 of the Constitution or Article 6 of the ECHR.
49. The Court considers that it is the Applicant’s obligation to substantiate his constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR. That consideration is in conformity with the jurisprudence of the Court (See Constitutional Court cases No. KI19/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Sylja*, 5 December 2013).
50. In sum, the Court considers that the Applicant has not substantiated his allegations, nor has he submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR.

51. Therefore, the Referral is manifestly ill-founded on a constitutional basis and it is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 47 of the Law and Rule 36 (1) d) and (2) b) of the Rules of Procedure, in its session held on 14 November 2017, unanimously:

DECIDES

- I. TO DECLARE the Referral as 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. TO DECLARE this Decision effective immediately

Judge Rapporteur



Snezhana Botusharova



President of the Constitutional Court



Arta Rama-Hajrizi