



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

Prishtina, on 5 February 2018
Ref. No.: RK 1190/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI86/17

Applicant

Agron Alaj

**Constitutional review of
Judgment Pml. No. 6/2007 of the Supreme Court
of 15 May 2017**

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 and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral was submitted by Agron Alaj from Decan (hereinafter, the Applicant), who is represented by Tahir Rrecaj, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Judgment Pml. No. 6/2007 of the Supreme Court of 15 May 2017, which rejected as ungrounded his request for protection of legality against Judgment No. 351/2016 of the Court of Appeals of Kosovo of 25 October 2016, in connection with Judgment PKR. No. 196/2015 of the Basic Court in Ferizaj of 10 May 2016.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged judgment, which has allegedly violated the Applicant's rights and freedoms guaranteed by § 2 of Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as § 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter, the ECHR), Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights, and violation of the principle *in dubio pro reo*.
4. The Applicant also requests the Court, "*in compliance with Rule 39 of the Rules of Procedure (...), to schedule for the hearing session*".

Legal basis

5. The Referral is based on Article 113 (7) of the Constitution, Article 20 and 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

6. On 27 July 2017, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On 28 July 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Ivan Čukalović (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
8. On 8 August 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 6 December 2017, the Review Panel considered the report of the Judge Rapporteur, and recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. On 17 June 2014, the Prosecutor in Ferizaj (hereinafter, the Prosecutor) filed an indictment [PP. No. 314-2/2012] against the Applicant due to the reasonable suspicion of having committed the criminal offence of organized crime, in

conjunction with criminal offenses of facilitating prostitution and money laundering.

11. On 10 May 2016, the Basic Court in Ferizaj (hereinafter, the Basic Court) [Judgment PKR. No. 196/15] found the Applicant guilty and sentenced him to an aggregate imprisonment sentence of six (6) years, as well as a fine in the amount of 50.000 euro.
12. The Basic Court also decided to confiscate the Applicant's movable and immovable property acquired by the commission of the criminal offenses for which the Applicant was found guilty.
13. The Applicant filed an appeal with the Court of Appeals against that Judgment of the Basic Court on the grounds of *"essential violation of legal provisions of the criminal procedure; erroneous and incomplete determination of factual situation; violation of the criminal law, confiscation of material benefit, as well as the decision on punishment"*.
14. The Prosecutor also filed an appeal with the Court of Appeals against the Judgment of the Basic Court [PKR. No. 196/15] on the grounds of the *"decision on confiscation and incorrect and incomplete determination of the factual situation."*
15. On 25 October 2015, the Court of Appeals [Judgment PAKR. No. 351/2016] rejected both appeals as ungrounded and upheld the Judgment of the Basic Court in its entirety.
16. The Applicant submitted to the Supreme Court a request for protection of legality, claiming a violation of the criminal law, violation of the provisions of the criminal procedure, erroneous and incomplete determination of the factual situation and that the Judgment is not clear and it is contradictory.
17. On 1 May 2017, the Supreme Court [Judgment Pml. No. 6/2017] partially approved the Applicant's request for protection of legality regarding the legal qualification of the criminal offense of money laundering; while it rejected as ungrounded the other allegations.

Applicant's allegations

18. The Applicant claims that the challenged decision violated his rights to a fair and impartial trial and to equality before the law, as guaranteed by the Constitution and other international agreements and instruments.
19. The Applicant alleges a violation of his right to fair trial because the regular courts violated the essential provisions of the Criminal and Procedure Code, by failing to completely determine the facts, not reasoning their decisions in relation with decisive facts, not providing the exact definition of the criminal offenses, basing the judgments on inadmissible evidence and violating the principle *in dubio pro reo*.

20. The Applicant argues that, *“in all stages of the criminal procedure (...), the Applicant was subject to violation of a range of rights guaranteed by CPCRK which directly involve violation of guaranteed rights by the Constitution and other International Instruments on Human Rights. Regular courts have not ever managed to correct such violations during the appeal stage”*.
21. The Applicant alleges a violation of his right to equality before the law, because of *“reading during the main trial of witnesses’ statements given in pre-trial procedure without having consent of the parties”*.
22. The Applicant argues that Article 9 of CPC provides that *“the defendant and the state prosecutor shall have the status of equal parties in criminal proceedings”*.
23. The Applicant requests the Court *“to establish violation of the Applicant’s individual rights guaranteed by Article 24 and 31 of the Constitution of the Republic of Kosovo (...)”* and *“to declare invalid Judgment Pml. No. 6/2017 of the Supreme Court of Kosovo of 15 May 2017, and remand the latter for retrial”*.

Admissibility of Referral

24. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution and as further specified by the Law and foreseen by the Rules of Procedure.
25. 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.”*
26. The Court notes that the Applicant is an authorized party; the Referral was submitted within the time limit prescribed by Article 49 of the Law and the Applicant has exhausted all legal remedies.
27. However, the Court also refers to Article 48 of the Law [Accuracy of the Referral], which foresees:

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.
28. 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“.

29. The Court notes that the Applicant complains that the challenged decision has not respected *“the constitutional standards”* which *“require that arguments of the defense are presented and heard same as those presented by the prosecutor”*; *“guarantee the reasonable opportunity to each party to present their allegations on the case (...) in order that one party is not put in unequal position to another party”*; *“guarantee the exact and equal evaluation of all evidence and facts”*; and *“that the judgment is based on admissible evidence administered during the main trial when parties in the proceedings shall be given the opportunity to oppose them”*.
30. In this regard, the Court further notes that the Applicant's allegations of a violation of his right to fair trial are essentially related to *“violation of a range of rights in all stages of the criminal procedure”*. In sum, the Applicant claims that the proceedings as a whole, including the appeal proceedings, were unfair and arbitrary.
31. The Court considers that the Applicant's allegations are in essence reduced to the claim that his right to a fair trial has been violated.
32. In fact, the right to a fair trial is a general reference to a complex of other rights: namely, the right to the presumption of innocence, the right to a fair and public hearing, the right to adequate time and facilities to prepare the defence, the right to be present at trial, the right to call and examine witnesses, the right to defend oneself, the right to equality before the law and courts, the right to legal counsel, the right to trial by a court, the right to a reasoned decision.
33. In that connection, 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”*.
34. The Court reiterates that, according to the European Court of Human Rights' (hereinafter, the ECtHR) well established case-law, *“it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts”*. (See ECtHR case *Garcia Ruiz v. Spain*, Application no. 30544/96, Judgment of 21 January 1999, § 28).
35. The Court notes that the Applicant had the benefit of adversarial proceedings, which started in the Basic Court and went through the Court of Appeals until the

Supreme Court. At the various stages of those proceedings he was able to submit all the arguments he considered relevant to his case. The Supreme Court reviewed the previous decisions and set out at length the factual and legal reasons for rejecting his allegations as ungrounded. Therefore, the Applicant may not validly claim that his arguments were disregarded, the principle of equality of arms was not respected and the judgment is not reasoned.

36. In fact, the Court notes that the Supreme Court examined the Applicant's ground of appeal on essential violation of the provisions of the criminal procedure, namely the arguments on unacceptable evidence; incomprehensibility, contradiction and lack of reasoning in the judgments; absence of reasons presented in relation with decisive facts; no exact definition of criminal offenses and expiry of deadline to file an indictment.
37. In addition, the Court observes that the Supreme Court also examined the ground on violation of the criminal code, namely the Applicant's arguments on that the incriminating acts were not substantiated with single evidence; the criminal code has been erroneously applied and the decision of the court is arbitrary in relation to the criminal offense of money laundering.
38. The Court considers that the allegations, including on all the evidence and on establishing of facts and legal qualification of the criminal offenses, were thoroughly analyzed one by one and justified in the reasoning of the Judgment of the Supreme Court.
39. The Court recalls that it is beyond its jurisdiction to "*hold in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings, not even when the two are in conflict*". (See ECtHR case *Doorson v. Netherlands*, No. 20524/92, 26 March 1996, § 78).
40. In that respect, the Court reiterates that the complete determination of the factual situation, and the interpretation and application of the law, is within the full jurisdiction of the regular courts, and that the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as "fourth instance court". (See ECtHR case *Akdivar v. Turkey*, No. 21893/93, 16 September 1996, § 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
41. In this respect, the Court recalls that Article 6 of ECHR "*guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law*" and "*as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair*". (See ECtHR cases *Schenk v. Switzerland*, No. 10862/84, 12 July 1988, § 46; and *Teixeira de Castro v. Portugal*, No. 44/1997/828/1034, 9 June 1998, § 34).

42. In addition, the Court notes that the Supreme Court considered that *“the defense counsel of the convict in this legal remedy only repeated the claims that were originally presented in the closing statement, further in the appeal against the first instance judgment and now in the request for protection of legality. The defense counsel refers more to the facts, in the way that they are established and the assessment of the evidence, and in the most part provides interpretation of the legal provisions in relation to inadmissible evidence - witness statements, and then provides its explanations on the elements of the criminal offenses, but provides little explanation what are these specific violations, with the exception of a few allegations, which are stated in his request for protection of legality”*.
43. The Court also considers that the allegations and arguments brought before the Court are related with errors of facts and law allegedly committed not only by the Supreme Court, but also by the Court of Appeals and the Basic Court. The allegations and arguments taken by the Applicants are the same in substance as the ones presented before the Supreme Court. It appears that the Applicant is coming before the Constitutional Court as it would be a “fourth instance” court.
44. The Court considers that the outcome of the regular courts' proceedings is based on an individual and joint assessment of the presented evidence, based on which they determined the facts for the application of the substantive law and the determination of the criminal sanction.
45. The Court also considers that the Applicant has neither showed that the factual and legal conclusions of the regular courts were in any way unfair and arbitrary nor has he substantiated the allegation on that there was *“violation of a range of rights in all stages of the criminal procedure”*.
46. The Court considers that it is the Applicant's obligation to substantiate his constitutional allegations and to prove a violation of his constitutional rights. That consideration is in conformity with the jurisprudence of the Court. (See Constitutional Court case No. KI19/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Sylá*, of 5 December 2013).
47. In this respect, the Court reiterates that requirement of “fairness” as guaranteed by Article 31 of the Constitution, in connection with Article 6 of the European Convention, covers proceedings as a whole; the question whether a person has had a “fair” trial is looked at by cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage. (See ECtHR case *Monnell and Morris v. the United Kingdom*, No. 9562/81; 9818/82, 2 March 1987, §§55-70).
48. The Court considers that the Applicant disagrees with the outcome of his case. However, that disagreement cannot of itself raise an arguable claim for a breach of the Constitution. (See ECtHR case *Mezotur Tiszazugi Tarsulat vs. Hungary*, Application No.5503/02, Judgment of 26 July 2005).

49. In sum, the Court considers that the Applicant has not presented any facts to justify his allegations for a breach of his right to fair and impartial trial; nor has he substantiated those allegations as required by Article 48 of the Law.
50. The Court further considers that it cannot act as a “fourth instance court”.
51. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

Request for a public hearing

52. The Court recalls that the Applicant requested the Court to hold a hearing.
53. In that respect, the Court refers to Article 20 of the Law:
 - 1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
 - 2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files.*
54. The Court observes that no reasons were invoked by the Applicant supporting his request.
55. The Court considers that the documents contained in the Referral are sufficient to decide the case as per wording of Article 20 (2) of the Law. (See, *mutatis mutandis*, Constitutional Court case No. KI34/17, Applicant *Valdete Daka*, Judgment of 12 June 2017, §§ 108-110).
56. Therefore, the Applicant's request to hold an oral hearing is rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (7) of the Constitution, Article 47 of the Law, and Rules 36 (1) (d), (2) (b) and 56 (2) of the Rules of Procedure, in the session held on 06 December 2017, 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; and
- IV. TO DECLARE this Decision effective immediately.

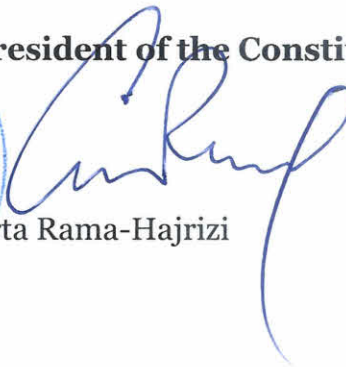
Judge Rapporteur



Almiro Rodrigues



President of the Constitutional Court



Arta Rama-Hajrizi