



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 18 April 2018
Ref. No.: RK 1216/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI134/17

Applicant

Qazim Dajakaj

**Constitutional review of
Judgment Pml. No. 145/2017 of the Supreme Court
of 18 October 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 and
Gresa Caka-Nimani, Judge.

Applicant

1. The Applicant is Qazim Dajakaj from the village Rakinica, Municipality of Skënderaj (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment Pml. No. 145/2017 of the Supreme Court of Kosovo of 18 October 2017 (hereinafter: the Supreme Court) in conjunction with Decision (PAKR No. 289/2016) of the Court of Appeals of Kosovo of 11 January 2017 (hereinafter: the Court of Appeals) and Judgment (PKR. No. 540/2011) of the Basic Court in Gjakova of 12 February 2016 (hereinafter: the Basic Court).

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decisions, which allegedly have violated the Applicant's rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 [Processing Referrals] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 14 November 2017, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Referral of the Applicant submitted through mail service on 8 November 2017.
6. On 16 November 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.
7. On 22 November 2017, the Court notified the Applicant about the registration of the Referral and requested him to submit to the Court the referral form and the copies of the challenged decisions. On the same date, the Court sent a copy of the Referral to the Supreme Court.
8. On 1 December 2017, the Applicant submitted to the Court the documents requested by the Court.
9. On 21 February 2018, 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

10. In January 2011, the Applicant lent to the person B. O. an amount of 10,000 Euro.
11. On 14 January 2011, the Applicant and B.O. concluded a contract that provided that if B.O. fails to repay the above mentioned debt, the cadastral parcel UL-7070S079-00390 CZ Cermjan, Municipality of Gjakova, on the surface area of 50 are (hereinafter: the disputed parcel) would be transferred to the Applicant.
12. On 20 September 2011, the Municipal Public Prosecution in Gjakova (hereinafter: the Municipal Prosecution), by Indictment PP. No. 535/2011 accused the Applicant under the grounded suspicion, that in cooperation with the person M.T. had committed the criminal offense foreseen by Article 270 [Contracting for Disproportionate Profit From Property] in conjunction with Article 23 [Co-perpetration] of the Criminal Code of Kosovo (hereinafter: the CCK), as a result of signing the abovementioned contract.
13. On 12 February 2016, the Basic Court by Judgment (PKR. No. 540/2011) found the Applicant guilty of committing the criminal offense of contracting disproportionate profit in cooperation with person M. T. and sentenced him to imprisonment of 1 (one) year, which will not be executed if the Applicant does not commit a criminal offense within a period of 3 (three) years.
14. The Applicant filed an appeal against Judgment (PKR. No. 540/2011) of the Basic Court, on the grounds of essential violations of criminal procedure provisions, violation of the criminal law, incomplete and erroneous determination of factual situation and decision on the criminal sanction.
15. An appeal was also filed by the Prosecutor of the Basic Prosecution in Gjakova (hereinafter: the Prosecutor of the Basic Prosecution) due to the decision on the criminal sanction.
16. On 11 January 2017, the Court of Appeals by Judgment PAKR No. 289/2016 rejected the appeals of the Prosecutor of the Basic Prosecution and of the Applicant and upheld Judgment (PKR. No. 540/2011) of the Basic Court. With respect to the Applicant, the Court of Appeals, *inter alia*, reasoned that the Applicant had signed a loan contract with person B.O. and taking advantage of his financial difficulty, openly contracted disproportionate benefit of property since the real value of the disputed parcel, according to witnesses, was much higher than the contracted amount of 10,000 euro.
17. The Applicant filed a request for protection of legality with the Supreme Court against Judgment (PKR. No. 540/2011) of the Basic Court and Judgment (PAKR. No. 289/2016), of the Court of Appeals on the grounds of essential violations of the provisions of the criminal procedure and violation of the criminal law, claiming that from the date when the Applicant allegedly committed the criminal offense until the receipt of the Judgment of the Court of Appeals have passed more than 6 (six) years and consequently, the criminal offense is statute barred.

18. On 18 October 2017, the Supreme Court by Judgment (Pml. No. 145/2017) rejected as ungrounded the request for protection of legality of the Applicant against Judgment (PKR. No. 540/2011) of the Basic Court and Judgment (PAKR. No. 289/2016) of the Court of Appeals reasoning, *inter alia*, that the criminal offense was committed on 14 January 2011, and the Court of Appeals rendered its Judgment on 11 January 2017, meaning that from the date of the commission of the criminal offense until the date of the judgment of conviction have passed less than 6 (six) years and the criminal offense has not become statute barred.

Applicant's allegations

19. The Applicant alleges violation of his rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the Convention.
20. The Applicant emphasizes that the Court of Appeals was obliged to acquit him of the charge because *"from 14 January 2011, when the criminal offense has allegedly been committed, until 8 May 2017, when I was served with the Judgment of the Court of Appeals, have passed 6 years"* and as a consequence the statutory limitation period has been reached. The Applicant also alleges that *"the date of service [of the Judgment, 8 May 2017] is relevant [to assess the statutory limitation]"*, as *"the date of 11 January 2017 [when the Judgment was rendered] is manipulated because there is no possibility that the case is delayed from the hearing until the delivery, from 11 January to 8 May"*.
21. In addition, the Applicant alleges that he was discriminated against by the regular courts due to the fact that he is from Drenica, adding that : *"I was convicted without being guilty"* although *"I have entered into a legal contract and that the assessment that the contracted price is disproportionate to the value is not correct as in the village the price of land is 100 to 200 euro and not 2000 euro for one are"* as decided by the courts.
22. Finally, the Applicant requests the Court to declare the Referral admissible, to hold that there has been a violation of the right to equality before the law as well as the right to fair and impartial trial and to declare the Judgment of the Supreme Court invalid and to remand his case for retrial.

Admissibility of the Referral

23. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.
24. 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”.

25. The Court also refers to Article 49 [Deadlines] of the Law, which stipulates:

“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 [...]”.

26. Regarding the foregoing, the Court finds that the Applicant has submitted the Referral as an authorized party, he submitted the Referral within the time limit foreseen by Article 49 of the Law and after exhaustion of all legal remedies provided by law.

27. However, the Court also refers to Article 48 [Accuracy of the Referral] of the Law, which foresees that:

“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. In addition, the Court recalls Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, which provides:

“(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:

[...]

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

29. In this regard, the Court notes that the allegations of the Applicant relate to the way that the regular court applied the CCK and CCPK and can be summarized as follows:

(i) the criminal offense for which he was charged has become statute barred since the date of rendering the judgment is not relevant; and

(ii) the decision on finding the Applicant guilty is ungrounded because the contract concluded between him and the B.O. is lawful since the contracted price is proportional to the value of the disputed parcel.

30. Regarding the first allegation, the Court recalls the reasoning of the Supreme Court in response to the Applicant's allegation, stating, *inter alia*, that “the criminal offense was committed on 14.01.2011, while the Court of Appeals of Kosovo rendered Judgment [...] on 11.01.2017, which means that from the date of the commission of the criminal offense until the date of the judgment

of conviction have passed or 5 (five) years, 11 months and 27 days, therefore there is no absolute statutory limitation of criminal prosecution.“

31. As to the second allegation of the Applicant, the Court recalls that the Court of Appeals reasoned its decision in relation to the allegation that the Applicant had not entered into an unlawful contract since the real value for the disputed parcel was 200 euro per are, reasoning that the Applicant and the person B. O. *“by taking advantage of B.O.'s difficult financial situation. openly contract disproportionate benefit over the given loan by concluding a sale-purchase contract over the [disputed parcel] which value is disproportionate to the loan given [as] based on the evidence of the witnesses the real value of an are of that land is over 2000 €”*.
32. Therefore, the Court notes that following the appeal of the Applicant and the request for protection of legality, the Court of Appeals and the Supreme Court dismissed his allegations of violation of the CCK and the CPCK by fully upholding the Judgment of the Basic Court, respectively of the Court of Appeals. Both instances responded to allegations of violation of CCK and CPCK filed by the Applicant.
33. The Court recalls that the Constitutional Court has no jurisdiction to decide whether an Applicant was guilty of committing a criminal offense or not. It has no jurisdiction to assess whether the factual situation was correctly determined or to assess whether the judges of the regular courts had sufficient evidence to determine the guilt of an applicant. (See Case KI68/17, Applicant: *Fadil Rashiti*, Constitutional Court, Resolution on Inadmissibility of 2 June 2017, para. 50).
34. In this regard, the Court emphasizes that it is not the role of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court or a lower instance court, unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). The Court further reiterates that it is not its role under the Constitution to act as a “fourth instance” court in respect with the decisions taken by the regular courts. It is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law (See *mutatis mutandis*, ECtHR case *Garcia Ruiz v. Spain*, no. 30544/96, of 21 January 1999; see also: case KI70/11, Applicants *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
35. The mere fact that the Applicant is not satisfied with the outcome of his case do not give rise to an arguable claim of a violation of his rights protected by the Constitution. The Constitutional Court can only consider whether the evidence was correctly presented and whether the proceedings viewed in its entirety have been conducted in such a way that the Applicant had a fair trial (see: case *Edwards v. United Kingdom*, No. 13071/87, Report of European Commission of Human Rights of 10 July 1991).
36. In this respect, the Court notes that the reasoning before the regular courts, referring to the Applicant's allegations of violation of criminal law and criminal procedure, is clear and, after reviewing all the proceedings, the Court also finds

that the proceedings before the regular courts were not unfair or arbitrary (see: *mutatis mutandis*, case *Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).

37. Therefore, the Court finds that the Applicant has not substantiated his allegation of a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution.
38. The Court recalls that the Applicant also requests the Court to hold that the regular courts had violated his right to equality before the law guaranteed by Article 24 of the Constitution.
39. In this regard, the Court recalls that the treatment is discriminatory if an individual is treated differently from others in similar positions or situations and whether this change in treatment has no objective and reasonable justification. The Court reiterates that the different treatment must pursue a legitimate aim to be justified and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized (see the ECtHR case, *Marckx v. Belgium*, Application no. 6833/74, Judgment of 13 June 1979, paragraph 33).
40. The Court notes that the Applicant has not submitted any *prima facie* evidence nor has he substantiated the allegation that he was discriminated against in the proceedings before the regular courts.
41. Therefore, in conclusion, the Court considers that the facts presented by the Applicant do not in any way justify the alleged violation of constitutional rights to equality before the law and to fair and impartial invoked by him and that he has not sufficiently substantiated his allegation, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.
42. Accordingly, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and in accordance Rule 36 (1) (d) and (2) (b) of the Rules of Procedure, in the session held on 21 February 2018, 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

Altay Suroy



President of the Constitutional Court

Arta Rama-Hajrizi