



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

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Prishtina, on 3 April 2018  
Ref. No.: RK 1205/18

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI41/17**

Applicants

**Met Hashani, Kastriot Hashani and Lirim Hashani**

**Constitutional review of Judgment Pml. No. 252/2016 of the Supreme  
Court of Kosovo of 02 November 2016**

### **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 Referral was submitted by Met Hashani, Kastriot Hashani and Lirim Hashani from the village Greme, Municipality of Ferizaj (hereinafter: the Applicants), who are represented by Rifat Abdullahu, a lawyer from Ferizaj.

## **Challenged decision**

2. The Applicants challenge Judgment Pml. No. 252/2016 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 2 November 2016. The challenged Judgment of the Supreme Court was served on the Applicant on 22 December 2016.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged decision, which has allegedly violated the Applicants' rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

## **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 13 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 Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.
7. On 27 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 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 regarding the criminal case [P. No. 581/2011]**

9. The Applicants were the injured party in the criminal case [P. No. 581/2011], which was conducted before the District Court.
10. On 16 March 2012, the District Court found guilty and liable by Judgment P. No. 581/2011, the perpetrators of the criminal offenses R.A, F.A and SH.V., and accordingly imposed on them an imprisonment sentence and a fine.



11. The Judgment of the District Court [P. No. 581/2011] was served on the convicts and public district prosecutor. However, it results from the case file that the judgment was not served on the injured party, namely on the Applicants.
12. Against the Judgment [P. No. 581/2011] of the District Court, the appeal was filed by the public district prosecutor.
13. On 8 August 2012, the Supreme Court rendered Judgment [Ap. No. 181/2012], which approved the appeal of the Public District Prosecutor and modified the first instance Judgment in the part concerning the R.A., while in the part concerning the F.A. and SH.A. it remanded to the first-instance court for retrial. The reasoning reads:

*“The Supreme Court of Kosovo deciding upon the appeal filed by the Prosecutor [...], modified the judgment of the first instance in the part concerning the accused R. A., by approving the appeal of the prosecutor and the accused for the criminal offences he was found guilty, and accordingly increased the sentence of R.A., by sentencing him with aggregate imprisonment of 4 years and a fine in the amount of 1000 €, while as regards the juveniles (F.A and SH.V), the case was annulled ex officio and remanded to the first instance court for retrial.”*

14. In the retrial proceeding of F. A and SH.V before the first instance court, the Applicants found out that the Judgment [P. No. 581/2011] of the District Court was not served on them, which is why they requested the District Court to serve the judgment on them. After that, the judgment of the District Court was served on them.

#### **Summary of facts after service of Judgment [P. No. 581/2011] of the District Court on the Applicants**

15. On 20 November 2014, against the Judgment [P. No. 581/2011] of the District Court of 16 March 2012, the Applicants filed an appeal with the Court of Appeals, but only with respect to the sentence imposed on R.A.
16. As grounds of appeal, the Applicants claimed *“Since based on the minutes of the main trial dated 14.03.2012 as well as acknowledgement of receipts of the first instance judgment, it results that the injured party has not been summoned to the main trial, neither did it receive the judgment of the first instance Court, I consider that the request for protection of legality is based on the provisions of Articles 287.para.1 of the CPCRK, 299, para.1 of the CPCRK, 380, para.1 of the CPCRK and Article 381, para.3 of the CPCRK.”*
17. In his appeal, the Applicants propose, *“to the Court of Appeals that the appealed Judgment P.no.581/2011 of 16.03.2012 be modified, so that the punishment imposed on the defendant R. A in duration of 4 years of imprisonment to take as upheld according to the appeal of the injured parties, and a longer imprisonment be imposed on the accused.”*

18. On 17 December 2015, the Court of Appeals rejected [Decision PAKR. No. 251/2015], as moot the appeals of the Applicants against the Judgment of the District Court. The reasoning of the decision reads:

*“Since the judgment has become final, so, there has been a decision rendered in relation to the Prosecutor’s appeal during the appeal procedure and as the imprisonment sentence against the accused was increased, as per the assessment of this court the appeal of the injured parties does not produce a legal effect, and the same effect would have resulted even if the Prosecutor’s appeal would have not been approved in the appeal procedure, therefore, since the appeal is filed against a judgment that has become final which in conformity to the legal provisions may not be modified by appeal, the appeal was treated as moot.”*

19. On an unspecified date, the Applicants proposed to the state prosecutor to file a request for protection of legality with the Supreme Court on the grounds of essential violations of the Law on Contested Procedure.
20. On an unspecified date, the State Prosecutor approved the Applicants’ proposal and filed the request for protection of legality with the Supreme Court against the decision of the Court of Appeals [PAKR. No. 251/2015].
21. The State Prosecutor recommended to the Supreme Court to approve the Applicants’ request for protection of legality, because the Applicants, as injured party, had not been summoned to the main trial. The State Prosecutor considered, *“that the injured party was not summoned and did not take part in the main trial, whilst based on the acknowledgement of receipts which are contained in the case file, there is no evidence that the injured party has received the Judgment of the District Court in Prishtina P.no.581/2011 dated 16.03.2012. Therefore by failing to receive the judgment of the first instance, the injured party was denied its right to file an appeal as foreseen in Article 380, para.1 of the CPCRK, where is stated that ‘Authorized persons may file an appeal against a judgment rendered by the single trial judge or trial panel of the Basic Court within fifteen (15) days of the day the copy of the judgment has been served’.”*
22. On 15 November 2016, the Supreme Court rendered Judgment [Pml. No. 252/2016], rejecting the request for protection of legality of the State Prosecutor as ungrounded.

### **Applicant’s allegations**

23. The Applicants allege that the regular courts determined a guilt and convicted the perpetrators in the absence of the Applicants as injured party, because they had not been served with the judgment of the District Court, and therefore, could not attend the final hearing.



24. The Applicants allege that their rights as guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution have been violated, because they were not given the opportunity to participate in the trial where the perpetrators were convicted and sentenced.
25. The Applicants allege that: *“The first instance court held the main trial on 14.03.2012 in absence of the injured parties and their representatives by power of attorney, despite its obligation pursuant to Article 321 of the CPC to summon to the main trial the injured parties and their legal representative, hence the injured party did not take part in the main trial, and thus was denied the right guaranteed by the Constitution, and foreseen in Article 31 of the Constitution of the Republic of Kosovo.”*
26. The Applicants also state that: *“the parties were notified about the first instance judgment of the Basic Court in Ferizaj when they were summoned to take part in the repeated proceedings concerning the juveniles F.A. and SH. V. Therefore, on the occasion of this procedure held at the Basic Court in Ferizaj they were served with the first instance court judgment – District Court in Prishtina, against which judgment an appeal was filed with the Court of Appeals in Prishtina. Therefore, to the injured party, which had the right to appeal pursuant to Article 399, para.3 of the CPC, its right to appeal was violated – the legal remedy guaranteed by the Constitution of the Republic of Kosovo.”*
27. The Applicants further allege *“that without the legal basis the Court of Appeals rejected the appeal of the injured parties as moot, but also the Supreme Court without legal basis rejects the request for protection of legality of the state prosecutor.”*
28. The Applicants request the Court to find a violation of Articles 31 and 32 of the Constitution, to annul the judgment of the Supreme Court and the judgment of the Court of Appeals, and to order the Court of Appeals to decide in substance on the Applicant’s grounds of appeal.

### **Assessment of the admissibility of Referral**

29. 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.
30. 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."*

31. The Court also refers to Article 49 [Deadlines] of the Law which provides:

*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 [...].*

32. The Court notes that the Applicants are authorized parties; the Referral was submitted in accordance with the deadlines prescribed in Article 49 of the Law, and the Applicants have exhausted all legal remedies.

33. However, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides 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."*

34. The Court further refers to Rules 36 (1) d) and (2) d) of the Rules of Procedure, which foresee:

*"(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 Applicant does not sufficiently substantiate his claim. "*

35. In the present case, the Court notes that there are two sets of court proceedings which the Applicants conducted before the regular courts and that they differ with respect to their subject matter.

36. The first set of proceedings is the criminal proceeding which was conducted before the District Court, in which the Applicants were an injured party [P. No. 581/2011] of 16 March 2012. This procedure was finalized in one part on 8 August 2012 by the Judgment of the Supreme Court [Ap. No. 181/2012]. This judgment subsequently became final.

37. The Court also notes that the second set of the proceedings was initiated on 20 November 2014, when the Applicants filed an appeal with the Court of Appeals against the Judgment of the District Court [P. No. 581/2011] of 16 March 2012.



38. This group of proceedings was completed on 2 November 2016 by the Judgment of the Supreme Court regarding the request for protection of legality [Pml. No. 252/2016].
39. The Court recalls that the Applicants consider that it is precisely in this second set of proceedings that the regular courts, by rejecting their appeal against the first instance judgment [P. No. 581/2011] of the District Court, have erroneously interpreted the legal provisions of the Criminal Procedure Code of Kosovo (hereinafter: CPCK) and thereby violated their rights and freedoms guaranteed by the Constitution. The Applicants allege violation of Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution.
40. The Court notes that, in substance, the Applicants complain that they had not been summoned to the main trial at which the perpetrators were found guilty, and, therefore, as injured party, the Applicants had been denied a fair hearing on their claims. Furthermore, the Applicants claim that the Supreme Court and the Court of Appeals denied their right to a legal remedy by rejecting their appeals and their request for protection of legality.
41. In this regard, the Court recalls that the European Court on 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, mutatis mutandis, Garcia Ruiz v. Spain [GC], No. 30544/96, § 28, European Court of Human Rights [ECtHR] 1999-I).”*
42. The Court also reiterates that the complete determination of factual situation is within the full jurisdiction of the regular courts and that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Court cannot act as a *“fourth instance court”*. (see: ECtHR case *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65; see also, *mutatis mutandis*, Constitutional Court: case KI86/11, Applicant *Milaim Berisha*, of 5 April 2012).
43. In the present case, the Court notes that the Court of Appeals and the Supreme Court in their judgments concluded that the Judgment of the District Court [P. No. 581/2011] on the conviction and sentence of the perpetrators became final prior to the filing of an appeal against it by the Applicants. The Court notes that in its judgment [PAKR. No. 251/2015] of 17 December 2016, the Court of Appeals found that the appeal against the final judgment was moot. The reasoning, the Court of Appeals reads: *„According to the provision of Article 4 of the CPCK- principle “ne bis idem”- No one can be prosecuted and punished for a criminal offence, if he or she has been acquitted or convicted of it by a final decision of a court, or if the indictment against him or her was dismissed by a final decision of a court, whilst, according to para.2 of the same Article a final decision of a court may be reversed through extraordinary legal remedies only in favor of the convicted person.”*

44. In addition, the Court notes that the Supreme Court also dealt with the allegations of the Applicants concerning the erroneous application of the law. The Supreme Court stated that in reasoning of its Judgment *"in this situation the authorized representative of the injured party should have addressed the court with a request to have the final clause of the judgment removed in order to have the judgment served, for thereupon being able to exercise the legal remedy and not as it was the case with the representative of the injured party who initiated a request for protection of legality by the state prosecutor."*
45. The Court notes that the state prosecutor according to the proposal of the Applicants filed a request for protection of legality with the Supreme Court against the decision of the Court of Appeals, referring also to the Judgment of the District Court.
46. However, the Court notes that the Supreme Court found that, in accordance with the relevant legal provisions, the Applicants had legal remedies at their disposal the legal remedies which could be submitted before the regular courts regarding the annulment of the judgment of the District Court.
47. In this regard, the Court notes that the Supreme Court found that the Applicants did not submit an appropriate request to the Supreme Court, as well as to the Court of Appeals, but they filed the request for protection of legality, namely the appeal against a final judgment, which is not in accordance with the relevant legal provisions.
48. Bearing in mind the above, as well as the circumstances of the case, the Court does not see any arbitrariness in the application of the substantive law in the reasoning of the challenged decisions of the regular courts. It also cannot find elements that would indicate the irregularity or arbitrariness in rendering the challenged decisions to the detriment of the Applicants.
49. In these circumstances, the Court considers that the Applicants did not prove that the proceedings before the regular court were unfair or arbitrary such that the Constitutional Court could be satisfied that their rights guaranteed by the Constitution have been violated.
50. The Court considers that it is the Applicants' obligation to substantiate their 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 Syl*a, 5 December 2014).
51. However, the Court finds that the Applicants have neither substantiated their allegations, nor have they demonstrated how their constitutional rights have been violated.



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

### **FOR THESE REASONS**

The Constitutional Court, in accordance with Article 113.1 and 7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (d) 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; and
- IV. This Decision is effective immediately;

**Judge Rapporteur**

Selvetë Gërxhaliu-Krasniqi



**President of the Constitutional Court**

Arta Rama-Hajrizi