



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE

УСТАВНИ СУД

CONSTITUTIONAL COURT

Prishtina, on 3 April 2018

Ref. No.: RK 1202/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI. 50/17

Applicant

Ismail Hasani

Constitutional review of Judgment Pml. No. 265/2016 of the Supreme Court of Kosovo, of 22 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 Ismail Hasani from village Smira, the Municipality of Viti (hereinafter: the Applicant), who is represented by Rifat Abdullahi, a lawyer from Ferizaj.

Challenged decision

2. The challenged decision is Judgment Pml. No. 265/2016, of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 22 November 2016, which rejected the Applicant's request for protection of legality filed against the Judgment of the Court of Appeals (PA1. No. 1164/15 of 09 June 2016), in conjunction with the Judgment of the Basic Court in Gjilan (Judgment P. No. 434/14 of 18 July 2015).
3. The challenged Judgment was served on the Applicant on 22 December 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly violates the rights of the Applicant guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) and Article 2 (Right of appeal in criminal matters) and Article 4 (Right not to be tried or punished twice), of Protocol 7 of the European Convention of Human Rights (hereinafter: the ECHR).

Legal basis

5. 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 of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 18 April 2017, the Applicant submitted through mail service the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 24 April 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 (judges).
8. 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 of Kosovo.
9. On 9 November 2017, the Applicant submitted additional documents to the Court.
10. 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

11. On 18 June 2015, the Basic Court in Gjilan - Branch in Viti (Judgment P No. 434/14) found the Applicant guilty of the criminal offense of false report or charge and sentenced him with a fine. The reasoning reads:

"[...] the defendant made a false report causing initiation of criminal proceedings due to the criminal offense prosecuted ex officio [...] during the investigation it was established that the defendant intentionally made a false statement even though he knew that the officials [...] did not commit this criminal offense".

12. The Applicant filed appeal with the Court of Appeals against the Judgment of the Basic Court.
13. On 9 July 2016, the Court of Appeals (Judgment PA 1 No. 1164/15) rejected as ungrounded the appeal of the Applicant and upheld the Judgment of the Basic Court.
14. The Applicant filed a request for protection of legality with the Supreme Court against the Judgments of the Court of Appeals and of the Basic Court.
15. On 22 November 2016, the Supreme Court of Kosovo (Judgment PML No. 265/2016) rejected as ungrounded the request for protection of legality against the Judgments of the Basic Court and the Court of Appeals.

Applicant's allegations

16. The Applicant alleges violation of the right to fair and impartial trial, right of appeal in criminal matters and the right not to be tried or punished twice for the same criminal offense.
17. The Applicant considers that: *"The first instance court failed to conduct a fair and impartial trial, in the contrary during its review of this criminal matter it was biased since by its decision seriously impaired the claimant, despite the fact that during the criminal proceedings the criminal liability of the accused was not determined".*
18. The Applicant alleges that *"regardless the capacity of the person involved in the criminal proceedings, the justice should prevail, but even the higher instance courts, unfortunately upheld the Judgment of the first instance court. By finding guilty a person of actions which do not present a criminal offence and for which the criminal liability was not confirmed, this can have a negative impact on the success of the claimant in the contested procedure, this was exactly the purpose why the defendant filed a criminal report against the now Applicant."*
19. The Applicant requests the Court that the Referral: *"be declared admissible,[...], to hold that there has been a violation of Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 and Articles 2 and 4 of Protocol 7 of the European Convention of Human Rights,*

[...], annuls Judgment Pml. No. 265/2016 of the Supreme Court of Kosovo, Judgment PA1. No. 1164/15 of the Court of Appeals and Judgment P. No. 434/14 of the Basic Court in Gjilan – Branch in Viti and remand the case to the first instance court for retrial.“

Admissibility of Referral

20. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, foreseen in the Law and further specified the Rules of Procedure.

21. 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.”

22. The Court also refers to Article 49 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”.

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

“(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“.

24. In the present case, the Court notes that the Applicant is an authorized party to file a referral, he has exhausted all legal remedies in accordance with Article 113.7 of the Constitution and submitted the referral within the legal deadline of 4 (four) months as provided by Article 49 of the Law.

25. However, the Court also refers to Article 48 of the Law [Accuracy of the Referral], 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.

26. The Court notes that the Applicant has accurately clarify the rights which allegedly have been violated, as well as the specific act of the public authority.
27. With regard to the applicability of Rule 36 (1) (d) and (2) (b), the Court considers that the essence of the Applicant's appeal is that the regular courts did not conduct the proceedings in a fair and impartial manner and in this way have found the Applicant guilty of an offense that does not constitute a criminal offense.
28. As regards these Applicant's allegations, the Court notes that the Supreme Court (Judgment Pml. No. 265/2016) rejected the request for protection of legality against the judgments of the Basic Court and the Court of Appeals.
29. The Supreme Court concluded that “ [...] *The request for protection of legality states that a violation of the criminal law has occurred to the detriment of the defendant, since his actions do not constitute a criminal offense. This was the reason why the defendant did not inform any individual, but he already demanded a payment of an old-age pension and did not provide any evidence of the criminal offense for which he initiated the criminal proceedings. However, this court finds that, pursuant to the provision of Article 390 para. 1 of the CCRK “Whoever falsely reports to an official person charged with the duty to investigate or prosecute that a particular person has committed a criminal offense prosecuted ex officio, while knowing that such person is not the perpetrator, shall be punished [...].”*
30. The Court considers that the challenged Judgment of the Supreme Court took into account all the allegations filed in the request for protection of legality, all the allegations were explained in detail, and it was reasoned why the request was rejected as ungrounded. The explanations and reasoning presented are not the result of unfair and impartial procedures or arbitrary application of procedural and substantive law.
31. The Court further considers that the Court of Appeals explained in detail and responded to the Applicant's appeal, providing a clear explanation for his allegations of essential violation of the provisions of the Criminal Code, erroneous and incomplete determination of factual situation and the decision on punishment.
32. In addition, the Court notes that the Applicant's allegations that he was found guilty of an offence that does not constitute the criminal offense are incorrect, as the conclusion of the judgment of the Basic Court in Gjilan - Branch in Viti states that “*The Court by examining the evidence one by one and jointly, came to the conclusion that the accused Ismajl Hasani from Ferizaj, residing in “Vllezrit Gervalla” street no. 203, has committed the criminal offense of False report or charge, under Article 390 paragraph 2 in conjunction with paragraph 1 of the CCK, which was corroborated by the statements of the witness D. A., who described the case in a convincing way, explaining how the accused filed a case before the Gjilan Police Officers in the Regional Unit for commercial crimes (RIUECC) and the statement of the accused proves that he reported the case with the police in Viti and Ferizaj*”.

33. The Court notes that the regular courts assessed the facts, interpreted and applied the provisions of the procedural and substantive law in relation to the Applicant's request. Their conclusions were made after a detailed consideration of all the arguments presented by the Applicant and the injured parties.
34. The Court further notes that the Applicant repeated before the Court the same arguments he had raised in the proceedings before the regular courts, in particular with regard to the determination of the guilt, the factual situation and legality of the decisions of the regular courts.
35. The Court emphasizes that it is not the role of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law (See: *mutatis mutandis*, European Court of Human Rights (hereinafter: ECtHR) , case *Garcia Ruiz v. Spain*, no. 30544/96, of 21 January 1999, para. 28).
36. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Court cannot act as "*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).
37. In other words, the complete determination of factual situation and correct application of the law is the full jurisdiction of the regular courts (matter of legality).
38. The mere fact that the Applicant is not satisfied with the outcome of the proceedings in his case do not give rise to an arguable claim of a violation of the rights protected by the Constitution.
39. The Constitutional Court can only consider whether the evidence was presented properly and whether the proceedings viewed in its entirety have been conducted in such a way that the Applicant had a fair trial (see: *inter alia*, *Edwards v. United Kingdom*, No. 13071/87, Report of European Commission of Human Rights of 10 July 1991).
40. In this regard, the Court considers that the Applicant has not substantiated his allegations that the relevant proceedings have been in any way unfair or arbitrary and that the challenged decision violated the Applicant's fundamental rights and freedoms guaranteed by the Constitution and the ECHR (see: *mutatis mutandis*: ECtHR, Decision of 30 June 2009, *Shub vs. Lithuania*, No. 17064/06,).
41. The Court further considers that the Applicant did not specify the facts indicating that in the proceedings before the regular courts there has been in any way a violation of his rights to fair and impartial trial, the right to appeal in

criminal matters and the right not to be tried or punished twice for the same criminal offense guaranteed by the Constitution and the Convention.

42. In sum, the Court concludes that the Applicant has not substantiated his allegations, nor has he submitted any *prima facie* evidence indicating the violation of this rights guaranteed by the Constitution and ECtHR.
43. Therefore, the Applicant's 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.

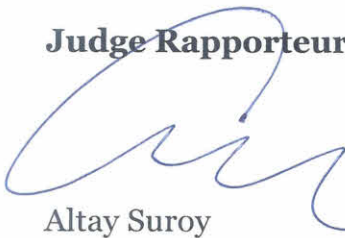
FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 48 of the Law and 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; and
- IV. This Decision is effective immediately.

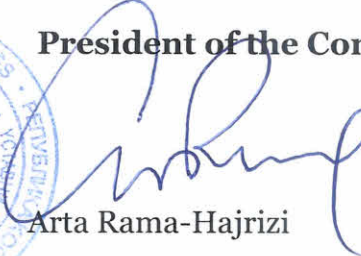
Judge Rapporteur



Altay Suroy



President of the Constitutional Court



Arta Rama-Hajrizi