



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

Prishtina, on 29 May 2018
Ref. No.: RK 1238/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI125/17

Applicant

Ilir Rexhepi

**Constitutional review of Judgment Pml. No. 6/2007 of the Supreme
Court of 15 May 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 Referral was submitted by Ilir Rexhepi from Ferizaj (hereinafter: the Applicant), who is represented by Vesel Jashari, a lawyer from Ferizaj.

Challenged decision

2. The Applicant challenges Judgment. Pml No. 6/2007 of the Supreme Court of 15 May 2017, which rejected as ungrounded the request for protection of legality against Judgment No. 351/2016 of the Court of Appeals of Kosovo, of 25 October 2016, in conjunction with Judgment PAKR. No. 196/2015 of the Basic Court in Ferizaj, of 10 May 2016.
3. The challenged Judgment Pml. No. 6/2007 of the Supreme Court was served on the Applicant on 21 June 2017.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged judgment, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 24.2 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 [Right to a fair trial] and Article 14 [Prohibition of discrimination] of the European Convention on Human Rights (hereinafter: the ECHR) and Article 10 of the Universal Declaration of Human Rights.

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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 19 October 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 23 October 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.
8. On 16 November 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 20 April 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. The Applicant was the owner of a property located in the municipality of Ferizaj that operated as a hotel. The Applicant rented out this property to

several people. Following a criminal investigation, the property was found to be in use for prostitution.

11. On 17 June 2014, the Prosecutor in Ferizaj (hereinafter: the Prosecutor) filed an indictment [PP. No. 314-2/2012] against the Applicant due to a reasonable suspicion that he committed the criminal offenses of Organized Crime as per article 274, paragraph 3, of the Criminal Code of Kosovo (hereinafter: CCK), in conjunction with the criminal offence of Facilitating Prostitution as per article 201, para.3 of the CCK, and Money Laundering as per article 32, para.2, sub-para. 2.4 of the Law on the Prevention of Money Laundering and Terrorist Financing (Law no. 03-L-196).
12. On 10 May 2016, by Judgment PKR. No. 196/15, the Basic Court in Ferizaj (hereinafter: the Basic Court) found the Applicant guilty of facilitating prostitution and money laundering, and imposed on him an aggregate sentence of imprisonment of 3 (three) years and 6 (six) months, as well as a fine in the amount of 20,000 euro. By the same Judgment, the Basic Court, acquitted the Applicant of the criminal offense of organized crime under Article 274, paragraph 3, of the CCK.
13. The Basic Court, after finding the Applicant guilty of the criminal offense of facilitating prostitution and money laundering, also decided to confiscate the Applicant's movable and immovable property, which had been used as the location where the criminal offences took place.
14. The Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court on the grounds of "*essential violation of provisions of the criminal procedure; erroneous and incomplete determination of factual situation; violation of the criminal law and confiscation of material profit*".
15. 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 the incorrect and incomplete determination of the factual situation*".
16. On 25 October 2015, by Judgment PAKR No. 351/2016 the Court of Appeals [] rejected both appeals as ungrounded and upheld the Judgment of the Basic Court in its entirety. The reasoning of the judgment, *inter alia*, reads:

"The Court of Appeals of Kosovo has carefully considered the appeals of the Special Prosecutor's Office of the Republic of Kosovo and of the defense counsels of the accused, as well as the case file and assessed that the appeals were ungrounded. The first instance judgment is clear and concrete, the court gave reasons for the decisive facts, assessed the accuracy of the contradictory evidence, gave reasons for not accepting the concrete proposal of the parties, as well as the reasons on which it was based when resolving this legal matter. The judgment is based on admissible evidence, and the reasons for the decisive facts explained by the first instance court, are accepted as such also by this court."

17. The Applicant submitted to the Supreme Court a request for protection of legality, alleging a violation of the Criminal Code, violation of the provisions of the criminal procedure, erroneous and incomplete determination of the factual situation, and that the judgment is unclear and contradictory.
18. On 15 May 2017, the Supreme Court [Judgment Pml. No. 6/2017] rejected the request for protection of legality as ungrounded. The reasoning of the Judgment, *inter alia*, reads:

“The Supreme Court of Kosovo considers as ungrounded the abovementioned allegations based on the fact that the first instance judgment is clear and concrete, is not inconsistent with itself and there is no inconsistency between the enacting clause and the reasoning [...] Both courts gave full reasons regarding all allegations of the defense counsels [...] ... The assessment of evidence, and especially those contradictory, was done in full compliance with the provision of Article 370, para. 7 of the PCKK, which in this section gave full reasons confirmed by the second instance court [...] ... this court considers that the abovementioned allegations do not call into question the determined factual situation and the application of the criminal law, since none of the single evidence calls into question the criminal liability of convicts for the offenses for which they were found guilty and convicted.”

Applicant's allegations

19. The Applicant alleges that the challenged decisions violated his rights and freedoms guaranteed by Article 24.2 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], and Article 46 [Protection of Property] guaranteed by the Constitution and other international agreements and instruments.
20. The Applicant alleges a violation of the right guaranteed by Article 31 [Right to Fair and Impartial Trial], because the regular courts violated essential provisions of the Criminal Code and the Criminal Procedure Code because they failed to fully consider the facts, did not reason their decisions in relation to decisive facts, did not provide an accurate definition of the criminal offenses and based their judgments on inadmissible evidence.
21. The Applicant argues that *“in all stages of the criminal proceedings (...) a series of rights guaranteed by the CPCK were violated to the Applicant which directly involve a violation of the rights guaranteed by the Constitution and other international instruments for human rights. The regular courts have never corrected such violations during the appeal proceedings”*.
22. In addition, the Applicant alleges that violations of Article 24.2 [Equality Before the Law] arose because the courts did not give him the opportunity to put questions to witnesses, thereby unfairly putting him in a disadvantageous position vis-à-vis the prosecutor.

23. The Applicant also alleges that the judgments of the courts relating to the confiscation of his property were unlawful, thereby violating Article 46 [Protection of Property] of the Constitution.
24. The Applicant requests the Court to find *“that his rights guaranteed by Articles 24, 31 and 46 of the Constitution, Article 6 of the ECHR, Article 10 of the Universal Declaration, [were violated] in the proceedings before the Basic Court in Ferizaj, the Court of Appeals of Kosovo and the Supreme Court of Kosovo. Accordingly, the Court should annul Judgment Pml. No. 6/2017 of the Supreme Court of Kosovo of 15.05.2017, and to remand the matter for retrial to the Supreme Court of Kosovo.”*

Admissibility of Referral

25. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law, and as further specified in the Rules of Procedure.
26. 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.”*
27. The Court further examines whether the Applicant fulfilled the admissibility requirements as prescribed in the Law. In that regard, the Court refers to Article 49 [Deadlines] of the Law, which establishes:

„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...”.
28. In this regard, the Court considers that the Applicant is an authorized party, that he exhausted all legal remedies and filed a Referral within the prescribed deadline.
29. However, the Court also refers to Article 48 [Accuracy of the Referral] of the Law, which states:

“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”.
30. In addition, the Court takes into account Rule 36 [Admissibility Criteria] (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“.

i) Applicant's allegation of a violation of Article 31 [Right to a Fair and Impartial Trial]

31. The Court notes that the Applicant reasons the alleged violation of Article 31 of the Constitution with the stand that the challenged decision did not respect the “*constitutional standards*” that “*require that the arguments of defense must be presented and heard just like those of the prosecutor*”; “*which guarantee that each party must be given reasonable opportunity to make allegations on the issue (...) under such conditions that the party is not placed in an unequal position vis-a-vis another party*”; “*which guarantee an accurate and equal examination of all evidence and facts*;; and “*that the judgment is based only on the admissible evidence administered at the main trial, in which the parties will be given the opportunity to challenge evidence*“.
32. In this respect, the Court further notes that the Applicant’s allegations of violation of a right to a fair trial essentially refer to “*violations of a set of rights at all stages of the criminal proceedings*”. In sum, the Applicant alleges that the proceedings in their entirety, including the appeal proceedings, were unfair and arbitrary.
33. The Court considers that the Applicant's allegations, in essence, can be reduced to the allegation that his right to a fair trial has been violated.
34. In this regard, 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*.“
35. The Court reiterates that, in accordance with the well-established case-law of the European Court of Human Rights (hereinafter: ECtHR), “*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, although Article 6 of the Convention guarantees the right to a fair trial, it does not prescribe any rules on the admissibility of evidence or the way in which it is to be assessed, which is mainly the issue of regulation by national law and national courts*” (see: ECtHR, *Garcia Ruiz v. Spain*, application No. 30544/96, Judgment of 21 January 1999, paragraph 28).

36. The Court notes that the Applicant benefitted from three separate judicial instances, and that at the various stages of the proceedings the Applicant was able to submit all the arguments he considered relevant to his case.
37. The Supreme Court considered previous decisions and confirmed in details the factual and legal reasons for rejecting his allegations as ungrounded. Accordingly, the Applicant cannot properly allege that his arguments have been disregarded, that the principle of equality of arms was not respected and that the judgment of the Supreme Court is not reasoned.
38. In fact, the Court notes that the Supreme Court examined each of the Applicant's grounds of appeal separately and distinctly, namely, the arguments concerning inadmissible evidence; lack of legal certainty, contradictory decisions and lack of reasoning in the judgments; for the absence of reasons presented in relation to decisive facts; that there is no accurate definition of criminal offenses and the expiry of the time limit for the indictment.
39. In addition, the Court notes that the Supreme Court assessed the allegations regarding the violations of the Criminal Code, that is, the arguments of the Applicant that the acts of which he was accused are not substantiated by individual evidence, that the criminal law was erroneously applied and that the court's decision was arbitrary in relation to the criminal offense of Money Laundering.
40. The Court considers that the allegations, including all evidence and the determination of facts and the legal qualification of the criminal offenses, were thoroughly analyzed and explained in detail in the reasoning of the judgment of the Supreme Court.
41. In this respect, the Court reiterates that the complete determination and the interpretation and application of laws 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 Constitutional Court cannot act as a "*fourth instance court*: (see: ECtHR case, *Akdivar v. Turkey*, No. 21893/93, of 16 September 1996, paragraph 65, see also: *mutatis mutandis* Constitutional Court: case KI86/11, Applicant: *Milaim Berisha*, of 5 April 2012).
42. In this regard, the Court recalls that Article 6 of the 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 role of the Court under the Constitution is not to issue a ruling on whether the witness statements were properly accepted as evidence, but to determine whether the proceedings as a whole, including the way in which the 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, paragraph 34).
43. In addition, the Court notes that the Supreme Court held that "*the defense counsel of the convict and only in this legal remedy only repeated the*

allegations originally presented in the closing statement, then in the appeal against the first instance judgment and now in the request for the protection of legality. The defense counsel refers more to the facts, in the way they are established and the assessment of the evidence, and in the majority part provides interpretations of the legal provisions in relation to the inadmissible evidence - witness statements, and then provides his explanations on the elements of the criminal offenses, but provides little explanation what are specific violations, with the exception of a few allegations, which are specified in his request for protection of legality”.

44. The Court also considers that the allegations and arguments presented before the Court are related to the errors of fact 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 Applicant are essentially the same as those before the Supreme Court. It appears that the Applicant addresses the Constitutional Court as it were the court of “fourth instance”.
45. The Court considers that the outcome of the regular courts' proceedings is based on an individual and joint assessment of the administered evidence, based on which they have established the facts for the application of substantive law and for the imposition of criminal sanctions.
46. The Court also considers that the Applicant did not show that the factual and legal conclusions of the regular courts were in any way unfair and arbitrary, nor did he substantiated the allegation that *“there was a violation of a group of rights at all stages of the criminal proceedings”*.
47. The Court states that the Applicant must substantiate his constitutional allegations and to prove his violation of his constitutional rights. This assessment is in line with the Court's jurisdiction (see Constitutional Court Case No. KI19/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Syl*a, of 5 December 2013).
48. Therefore, the Court finds that the Applicant's allegation of a violation of Article 31 [Right to a Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to fair trial) of the ECHR is manifestly ill-founded on a constitutional basis in accordance with Rule 36, paragraph1 (d) and 2 (b) of the Rules.

ii) Applicant's allegation of violation of Article 24.2 [Equality Before the Law]

49. In this regard, the Court notes that the Applicant alleges a violation of Article 24.2 of the Constitution in connection with alleged violations of the right to a fair and impartial trial, *“because the courts did not allow him to put questions to the witnesses, thereby discriminating him.”*
50. Furthermore, by examining the challenged judgments, the Court notes that the Applicant's allegations were contrary to the facts contained in the challenged judgments, namely that the defense of the Applicant had an active role in the examination of all the prosecution and defense witnesses during the trial.

51. In relation to these allegations, the Court notes that, discrimination exists only if a person or group of persons who are in the same situation are treated differently and there is no objective and reasonable justification for such a treatment (see ECtHR judgment, *Karlheinz Schmidt v. Germany*, Judgment of 18 July 1994, Series A No. 291-B, paragraph 2).
52. Bearing in mind the preliminary conclusion - that the Applicant's right to fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR has not been violated, the Court cannot find in the challenged judgments anything that would indicate that the Applicant in the proceedings before the regular courts was discriminated against on any ground.
53. Therefore, the Applicant's allegation of a violation of his right as guaranteed by Article 24 [Equality Before the Law] of the Constitution is manifestly ill-founded on a constitutional basis in accordance with Rule 36, paragraph 1 (d) and 2 (b) of the Rules of Procedure.

iii) Applicant's allegation of violation of Article 46 [Protection of Property] of the Constitution.

54. The Court notes that the Applicant also alleges a violation of Article 46 [Protection of Property] of the Constitution by the fact that the courts confiscated the Applicant's property that had been used as a hotel where the criminal activities took place. The Applicant alleges that the regular courts failed to prove the connection between the criminal offence and the Applicant's property.
55. The Court recalls Article 46 [Protection of Property] of the Constitution, which provides that,

"1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.

[...]"

56. In the present case, the Court notes that the Applicant's property was confiscated in criminal proceedings as a result of which the Applicant was convicted of a criminal offense and was sentenced to a term of imprisonment.

57. Furthermore, the Court notes that the confiscation of property was based on Article 283 paragraph 2, sub-para.2, item 2.2, of the of the Criminal Procedure Code No. 04/L-123. This Article stipulates that,

“Article 283 Proof Required to Forfeit Property Used in Criminal Offence,

1. Before the court can order a final order of criminal forfeiture for a building, immovable property, movable property or asset listed in the indictment, the indictment shall allege and the state prosecutor shall prove at the main trial that the building, immovable property, movable property or asset was used in the criminal offence.

2. For the purpose of this Article, a building, immovable property, movable property or asset was used in the criminal offence if:

[...]

2.2. the building, immovable property, movable property or asset provided shelter that was necessary to perform an act in furtherance of the criminal offence.”

58. Therefore, the Court finds that the confiscation of the Applicant’s property was based on law.
59. In addition, it remains for the Court to examine whether the confiscation of the Applicant’s property was made in the “*public interest*” and in accordance with the principle of “*proportionality*”.
60. The Court considers that the prosecution and punishment of crime is by its very nature in the public interest. Furthermore, the confiscation of assets used in the commission of crimes stems from this same public interest to ensure a safe and secure environment for all.
61. Therefore, the Court concludes that the confiscation of the Applicant’s property was in the public interest.
62. In the present case, the Court notes that the Applicant maintained throughout the criminal proceedings that he was not aware that his property was being used for criminal purposes. However, the Court notes that the Basic Court in its Judgment rejected this argument, stating that, “*[...] it is undisputable that this building was built with lawful money earned by the defendant and this was not even a subject of review in this criminal case, but nevertheless it was not challenged with a single piece of evidence that precisely in this facility the activity of prostitution was provided.*”
63. Therefore, the Court considers that, based on the law and the findings of the regular courts, in the circumstances of the present case, the confiscation of the Applicant’s property was proportionate to protecting the public interest in the prosecution and punishment of crime.
64. Accordingly, the Court finds that there has been no violation of the Applicant’s right to the protection of property under Article 46 of the Constitution.

65. Therefore, the Applicant's allegation of a violation of his right as guaranteed by Article 46 [Protection of Property] of the Constitution, is manifestly ill-founded on a constitutional basis in accordance with Rule 36, paragraph 1 (d) and 2 (b) of the Rules.

Conclusion

66. In sum, the Court considers that the Applicant has not substantiated his allegations of violations of either his right to a fair and impartial trial, his right to equality before the law, or his right to the protection of property, as guaranteed by Articles 24, 31 and 46 of the Constitution, in conjunction with Article 6 of the ECHR.
67. Therefore, the Referral as a whole is manifestly ill-founded on a 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 113.7 of the Constitution, Article 47 of the Law and Rules 36 (1) (d), (2) (b) of the Rules of Procedure, in the session held on 20 April 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

Selvetë Gërxhaliu-Krasniqi

President of the Constitutional Court

Arta Rama-Hajrizi

