



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE

УСТАВНИ СУД

CONSTITUTIONAL COURT

Prishtina, on 28 May 2018

Ref. No.: RK 1234/18

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI98/17**

Applicant

**Sabit Veseli**

**Constitutional review of Judgment PML. No. 61/17 of the Supreme Court  
of Kosovo of 20 April 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 Sabit Veseli, residing in Gjilan (hereinafter: the Applicant), who is represented by lawyer Halit Azemi.

## **Challenged decision**

2. The Applicant challenges Judgment [PML. No. 61/17] of 20 April 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), which upheld Judgment [PAKr. No. 703/16] of 27 January 2016 of the Court of Appeals and Judgment [PKR. No. 232/16] of 23 November 2016 of the Basic Court in Gjilan.
3. The challenged Judgment was served on the Applicant on 5 May 2017.

## **Subject matter**

4. The subject matter is the constitutional review of the challenged Judgment, which allegedly violated the Applicant's right guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

## **Legal basis**

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests], Article 48 [Accuracy of the Referral] and Article 49 [Deadlines] of Law No. 03/L-121 (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

## **Proceedings before the Constitutional Court**

6. On 18 August 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 22 August 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
8. On 12 September 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 19 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. On 13 September 2016, the Applicant was detained by Kosovo Police officers, who during the search, found a narcotic substance in his vehicle. The narcotic substance was seized and the Applicant was arrested.
11. On 27 September 2016, the Basic Prosecution in Gjilan – the Serious Crimes Department (hereinafter: Basic Prosecution Office in Gjilan) filed an Indictment against the Applicant, based on the grounded suspicion of



committing the criminal offense provided for in paragraph 2 in conjunction with paragraph 5 of Article 273 (Unauthorised purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues) of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK).

12. On 23 November 2016, the Basic Court in Gjilan, through Judgment [PKR. No. 232/16] found the Applicant guilty and sentenced him to an effective imprisonment of four (4) years and a fine of 2000 (two thousand) €, for the commission of the criminal offense under paragraph 2 of Article 273 of the CCRK. The Court also decided to extend the detention until the decision becomes final, but not longer than the sentence imposed.
13. The Judgment of the Basic Court was based on the guilty plea by the Applicant, based on which the Court rendered a Decision on the guilty plea.
14. On 26 November 2016, the Applicant filed an appeal with the Court of Appeals against the Judgment [PKR. No. 232/16] of the Basic Court in Gjilan, alleging substantial violation of the provisions of the criminal procedure, violation of the criminal law, and erroneous and incomplete determination of the factual situation, proposing that the appealed Judgment be annulled, remanding the case for retrial, or that the appealed Judgment be modified in favor of the convicted, namely the Applicant, by imposing a more lenient punishment.
15. The essence of the Applicant's appeal was based on the alleged violation of the right to defense during the guilty plea procedure and the non-consideration by the Court of the objections and the request of the defense that the criminal offense be re-qualified based on Article 275 (Unauthorized possession of narcotic drugs, psychotropic substances or analogues) of the CCRK, and not based on paragraph 2 of Article 273 (Unauthorised purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues) of CCRK.
16. On 15 December 2016, the Basic Prosecution in Gjilan, also filed an appeal against the Judgment [PKR. No. 232/16] of the Basic Court in Gjilan, pertaining to the decision on the criminal sanction, proposing that the appealed Judgment be modified and the convicted, namely the Applicant, be sentenced to a more severe punishment by imprisonment.
17. On 27 January 2017, the Court of Appeals by Judgment [PAKr. No. 703/16], rejected as ungrounded the appeals of Applicant and of the Prosecution, upholding the Judgment [PKR. No. 232/16] of the Basic Court in Gjilan.
18. On 24 February 2017, the Applicant filed a request for protection of legality with the Supreme Court against the Judgment [PAKr. No. 703/16] of the Court of Appeals, alleging violation of the criminal law and essential violations of the provisions of the criminal procedure. The Applicant continued to challenge the legality of the Judgment of the Court of Appeals, claiming again essential violation of the criminal procedure because, according to him, the Applicant's right to defense was violated during the guilty plea procedure, based on which the Applicant was found guilty.

19. On 20 April 2017, the Supreme Court, by the Judgment [PML. No. 61/17], rejected the Applicant's request for protection of legality and upheld the Judgment [PAKr. No. 703/16] of 27 January 2017 of the Court of Appeals and the Judgment [PKR. No. 232/16] of 23 November 2016 of the Basic Court in Gjilan.

### **Applicant's allegations**

20. The Applicant alleges that by the challenged Judgment the Supreme Court violated his rights guaranteed by Article 31 of the Constitution.
21. Specifically, the Applicant alleges that the challenged Judgment was rendered in violation of the provisions of the criminal procedure stipulated in paragraph 2 of Article 384 of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCRK) in conjunction with Articles 326 and 248 of the same Code, regulating the guilty plea procedure at the main trial and the initial hearing, respectively.
22. The Applicant, furthermore, alleges that the Court did not take into account the opinion of the defense and its objections regarding the qualification of the criminal offense. In this regard, the Applicant alleges that the guilty plea was made only in the case of qualification of the criminal offense based on Article 275 (Unauthorized possession of narcotic drugs, psychotropic substances or analogues) of CCRK, and not based on Article 273 (Unauthorised purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues) of CCRK, as reflected in the Decision of the Basic Court on the guilty plea.
23. The Applicant states that *"he did not understand the relevance and consequences of guilty plea because he is a laic person and allegedly he was under medical therapy; thus, the right to defense was violated"*, and in addition, pertaining to the qualification of the criminal offence, he emphasizes that *"the accused admits his actions but does not admit the criminal offense he is accused of"*.
24. Finally, the Applicant requests from the Court to declare invalid the Judgment [PML. No. 61/17] of 20 April 2017 of the Supreme Court and to remand his case for retrial.

### **Admissibility of Referral**

25. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and foreseen 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 that:

*"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 also examines whether the Applicant met the admissibility criteria as further specified in the Law. In this regard, the Court refers to Article 47 [Individual Requests] and 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which foresee:

Article 47  
[Individual Requests]

*“1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*

*2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.”*

Article 48  
[Accuracy of Referral]

*“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.”*

Article 49  
[Deadlines]

*“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. Regarding the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely Judgment [PML. no. 61/17] of 20 April 2017 of the Supreme Court, after he exhausted all legal remedies provided by law. In this regard, the Applicant's Referral is in compliance with the criteria set out in paragraphs 1 and 7 of Article 113 of the Constitution and Article 47 of the Law. The Applicant has also specified the rights and freedoms, which allegedly have been violated in accordance with Article 48 of the Law, and submitted the Referral within the deadlines foreseen in Article 49 of the Law.
29. In addition, the Court also examines whether the Applicant has met the admissibility requirements established in Rule 36 [Admissibility Criteria] of the Rules of Procedure. Rule 36 (1) of the Rules of Procedure defines the criteria based on which the Court may consider the Referral, including the

requirement that the Referral is not manifestly ill-founded. Specifically, Rule 36 stipulates that:

*“(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, or*

*[...]*

*(d) the Applicant does not sufficiently substantiate his claim”.*

30. The Court initially recalls that the Applicant alleges that the challenged Judgment violated the rights guaranteed by Article 31 of the Constitution, because the regular courts did not take into account the opinion of the defense regarding the guilty plea by the accused, namely the Applicant.
31. Specifically, the Applicant alleges that the challenged Judgment was rendered in violation of the provisions of the criminal procedure provided by paragraph 2 of Article 384 of the CPCRK in conjunction with Articles 326 and 248 of the same Code, which regulate the procedure of the guilty plea at the main trial and at the initial hearing, respectively. The Applicant, in addition, claims that the courts did not take into account the defense's opinion and his objections during guilty plea procedure pertaining to the the qualification of the criminal offense.
32. In this regard, the Court considers that the Applicant built his case on grounds of legality, namely on the erroneous application and interpretation of the CCRK and CPCRK. The Court recalls that these allegations pertain to the field of legality and as such, do not fall within the jurisdiction of the Court, and, therefore, in principle, cannot be examined by the Court. (See Case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, 18 December 2017, paragraph 35).
33. The Court further notes that the Applicant's allegations, as such, are attributed to violations of the provisions of the procedural law, namely paragraph 2 of Article 384 in conjunction with paragraph 2 of Article 248 and paragraph 2 of Article 326 of the CPCRK, pertaining to the guilty plea at the initial hearing and main trial by the defendant, namely the accused, and the discretion of the judge of the case or the presiding judge of the trial panel, to seek the opinion of the State Prosecutor, the defense counsel and the injured party.



34. The Court notes that “guilty plea during the initial hearing” regulated by Article 248 of the CPCRK and “guilty plea by the defendant at the trial” regulated by Article 326 of the CPCRK, enable, but do not oblige, the single judge or the presiding judge of the trial panel, to take the opinion of the State Prosecutor, the defense counsel and the injured parties. The interpretation and application of these provisions in the Applicant's case was reasoned in detail in the relevant Judgments of the Basic Court, the Court of Appeals and the Supreme Court.

35. In this regard, the Basic Court, in its Judgment [PKR. No. 232/2016], among others, stated:

*“Following the hearing of parties and the accused defense counsel, the trial panel rendered a ruling on guilty plea as it came to conclusion that the accused understood the nature and consequences of guilty plea; that guilty plea was done on voluntarily bases by the accused following sufficient consultations with his defense counsel – the lawyer Halit Azemi; that the guilty plea is based on facts of the case contained in the indictment and the latter does not contain any clear legal violation of factual errors. The trial panel confirmed that the accused Sabit Veseli pleaded guilty for commission of the criminal offence also and during his examination by Kosovo Police officers and by the prosecutor of Basic Prosecution Office in Gjilan.”*

36. The Court of Appeals, in its Judgment [PAKr. No. 703/2016], among others, emphasized:

*“However, according to assessment of the Court of Appeals, the appealing allegations stated above do not stand because; the first instance court has correctly applied provisions of Article 326 of CPCRK regarding guilty plea and in this specific case, based on case files, it appears that during the main trial and in presence of his defense counsel Halit Azemi, the accused, after sufficient consultations with him, pleaded guilty on all counts of the indictment and the trial panel agreed on this; also, the accused did not have any objection regarding guilty plea on all counts of the indictment; therefore, the first instance court has correctly applied provisions of Article 326 in conjunction with Article 248 of CPCRK and rendered a lawful judgment based on plea agreement.”*

37. Finally, the Supreme Court, in its Judgment [Pml. No. 61/2017], in addressing allegations for violation of the procedure and the right to defense during guilty plea procedure, among others, reasoned:

*“In such a situation, allegation made on violation of the convict's right to the defense, that he is laic, ill and did not understand the relevance and consequences of guilty plea, are not grounded. In contrary, as stated above, the convict not only stated the opposite, but he also added that he is not ill and the guilty plea was done after sufficient consultations with his defense counsel. Furthermore, the convict's defense counsel did not oppose the guilty plea but he has challenged the legal qualification of the criminal offence. Finally, the first instance court has assessed the statement of the*



*state prosecutor on guilty plea and the objection of the convict's defense counsel on the legal qualification of the criminal offence and in this regard, during the main trial, it has rendered a ruling; therefore, the allegations made that these were ignored and not taken into consideration are ungrounded. Consequently, these allegations on existence of substantial violations of provisions of the criminal procedure are not grounded."*

38. In addition, the Court notes that the Applicant's allegations pertaining to the erroneous qualification of the criminal offense for which the Applicant was found guilty, were also taken into account and addressed by the regular courts.
39. In this regard, the Court of Appeals in its Judgment [PAKr. No. 703/2016], among others, reasoned:

*"Also, the appealing allegations of the accused defense counsel that in this specific case we are dealing with elements of criminal offence provided in Article 275, paragraph 1 of CCK cannot stand because; based on evidence and other case files in this criminal matter is not only about possession of narcotic substances, as alleged by the defense counsel, but it is about incriminatory actions that contain elements of the criminal offence provided in Article 273, paragraph 2 of CCK because; based on the fact that from accused was confiscated the narcotic substance, taking into consideration the place where it was hidden, the quantity of narcotic substance especially the manner how it was divided into parts in special plastic bags – i.e. prepared also for sale, then, without any doubt, it is about the criminal offence of unauthorized purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues provided in Article 273, paragraph 2 of Criminal Code of the Republic of Kosovo. Therefore, the first instance court has correctly concluded when it has found guilty the accused for criminal offences described in details in enacting clause of the appealed judgment."*

40. While, the Supreme Court, in its Judgment [Pml. No. 61/2017], among others, reasoned:

*"According to the Supreme Court, such an allegation formulated in this manner is inconsistent and ungrounded because; the essential elements of the criminal offence which the convict was found guilty of, differ from criminal offences provided in Article 275 of CCK. In the first case, among other, is incriminated unauthorized transport of narcotics with purpose to distribute, sale, and provision on sale; whereas in the second case, the criminal offence is committed by unauthorized possession of the narcotic (excluding other actions and without intention to distribute, sale of provide it for sale). In this specific case, such an allegation is ungrounded because it was not substantiated; because the convict has pleaded guilty on that description of incriminatory actions stated in the indictment; the guilty plea was not challenged; it was granted by the court complying with respective legal provisions and decisions of the first and second instances on legal qualification of criminal offence, are correct. Therefore, the allegations of violation of criminal code was not also approved."*



41. Based on this elaboration, the Court considers that the regular courts have in details reasoned and specifically addressed all the Applicant's allegations pertaining to the essential violations of the CCRK and the CPRK.
42. In addition, the Court considers that both, the Applicant and his defense counsel, have been able to challenge the unfavorable arguments throughout the court proceedings and to use them in their favor before the regular courts, as required by the guarantees enriched in Article 31 of the Constitution.
43. In this respect, the Court considers that the Applicant did not substantiate that the proceedings before the Supreme Court or other regular courts were unfair or arbitrary, or that his fundamental rights and freedoms protected by the Constitution and the European Convention on Human Rights (hereinafter: the ECHR) were violated through the alleged incorrect application and interpretation of the abovementioned provisions of the CCRK and CPRK. The Court reiterates that the manner through which certain provisions of the CCRK and CPRK are applied and interpreted into a concrete criminal case, is a matter of legality. The Applicant failed to substantiate any constitutional matter with his arguments presented before this Court. (See: case KI56/7, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 36; Case KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility of 8 August 2016, paragraph 44; and also see KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants *Arben Gjokaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku and Sami Lushtaku*, Resolution on Inadmissibility of 15 November 2016, paragraph 62).
44. The Court reiterates that it is not its role to deal with errors of facts 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). It cannot itself assess that law that lead a regular court to issue one decision instead of another. If it was different the Court would act as "fourth instance court", which would result in exceeding the limitations provided for its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See: *mutatis mutandis*, the European Court of Human Rights, case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, paragraph 28).
45. The Court further notes that the Applicant does not agree with the outcome of the proceedings before the regular courts, namely with the fact that the sentence imposed against him has not been further mitigated and that will be executed as such. However, the dissatisfaction of the Applicant with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim for the violation of the right to fair and impartial trial. (see, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, paragraph 21, ECtHR, Judgment of 26 July 2005; see also case KI56/17, Applicant *Lumturije Murtezaj*, Resolution of Inadmissibility of 18 December 2017, paragraph 42).

46. As a result, the Court considers that the Applicant has not substantiated the allegations that the relevant proceedings were in any way unfair or arbitrary, and that the challenged Decision violated the rights and freedoms guaranteed by the Constitution and the ECHR. (See *mutatis mutandis*, *Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).
47. Therefore, the Court finds that the Applicant's Referral does not meet the admissibility requirements established in the Rules of Procedure, because the Referral is manifestly ill-founded on constitutional basis, considering that the presented facts do not in any way justify the allegation of a violation of the constitutional rights and that the Applicant does not sufficiently substantiate his allegation of constitutional violation.
48. In sum, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and, in accordance with Rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure, is to be declared inadmissible.

### **FOR THESE REASONS**

The Constitutional Court of Kosovo, in accordance with Article 113.7 of the Constitution, Article 20 and 48 of the Law and Rules 36 (1) (d) and 2 (b) and (d), and 56 (2) of the Rules of Procedure, in the session held on 19 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; and
- IV. This Decision is effective immediately.

**Judge Rapporteur**

  
Gresa Caka-Nimani



**President of the Constitutional Court**

  
Arta Rama-Hajrizi